WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: DIVISION ENVIRONMENTAL PROTECTION OFFICE OF WASTE MANAGEMENT TITLE NUMBER: 33

RULE TYPE: Legislative ; CITE AUTHORITY 22-18-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 20

TITLE OF RULE BEING AMENDED: Hazardous Waste Management Rule

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

DATE OF PUBLIC HEARING: July 22, 1999 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: Division Environmental Protection
Office Waste Management
1356 Hansford Street
Charleston, WV 25305

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: WVDEP - Office ~~Waste Management~~
1356 Hansford Street
~~Charleston, WV~~ 25305
ATTN: CARROLL CATHER

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

12.10 w/o Fed Reg
22.30 with Fed Reg

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Carrie Chambers
Authorized Signature

Executive Office
10 McJunkin Road
Nitro, West Virginia 25143-2506
Telephone: 304-759-0515
Fax: 304-759-0526

West Virginia Bureau of Environment

Cecil H. Underwood
Governor

Michael P. Miano
Commissioner

June 14, 1999

Ms. Judy Cooper
Director, Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

RE: 33CSR20 - "HAZARDOUS WASTE MANAGEMENT RULE"

Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced rule with your Office as "Notice of Public Hearing/Comment Period."

If you should have questions or require additional information, please contact Carrie Chambers in my office at 759-0515. Your cooperation in this regard is very much appreciated.

Sincerely yours,

Michael P. Miano
Commissioner

MPM:cc

Attachment

cc: Cap Smith
Carroll Cather
Carrie Chambers

BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: Hazardous Waste Management

A. AUTHORITY: **WV Code §22-18-6**

B. SUMMARY OF RULE:

The proposed amendment to this rule is being submitted in order to adopt additional federal regulations by reference, and to assume hazardous waste delisting responsibilities in §33-20-2. In addition, the Office of Waste Management has proposed to adopt and incorporate by reference two important Federal Register Documents containing federal regulations finalized after July 1, 1998 (§33-20-2.) Those federal regulations are intended to streamline and facilitate environmental clean ups and are known as the HWIR-media rule and the Closure, Post-Closure rule. (See attachments.) The HWIR media rule includes the concepts of remedial action plans and waste piles, the latter is mentioned in Table 1, Permit Application fees schedule of 33 CSR 20. Rule 1.10 has been added to allow the referenced Office of Air Quality rules regarding hazardous waste to chronologically correspond with this rule.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

In May of 1986, the West Virginia Division of Natural Resources (DNR) received authorization from the United States Environmental Protection Agency (EPA) to implement the base program Subtitle C of the Federal Resource Conservation and Recovery Act (RCRA) of 1976, as amended. Subtitle C of RCRA establishes the hazardous waste management program on a national level. Inclusive of the program is the ability of each State to obtain the authority to implement the program in lieu of the EPA.

This proposed amendment to this rule adopts additional federal regulations by reference and clarifies the current rule which will satisfy federal requirements of consistency and equivalent stringency to allow authorization of the federal program to the state and ensure that significant federal funds are allotted to the West Virginia program each year. As mentioned in Section B, the two additional rules seek to ease the burden on the regulated community by streamlining clean up processes but also allow the State to assume a lead role regarding oversight of clean ups of contaminated sights. The expansion of the fee in Table 1 serves only to offset the person-hours consumed by the agency in review of the clean-up proposals related to the two new rules.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

W.Va. Code Section §22-1-3 in conjunction with W.Va. Code Section §22-1-3a requires, in part, the Director of the Division of Environmental Protection, to determine if a new or amended environmental provision should be the same in substance as a counterpart federal regulation. If the new rule should be the same in substance, as the counterpart federal regulation, then the Director shall incorporate by reference, to the greatest extent possible, the federal counterpart rule. If the Director determines the rule should not be the same in substance as the federal counterpart rule, then the Director shall file a statement setting forth the difference between the proposed rule and the counterpart federal regulation. W.Va. Code Section §22-1-3a requires the Director to conduct the "stringency" determination and provide specific reasons for deviation of the proposed state rule from the federal counterpart regulation.

The proposed amendment to the rule will adopt additional federal counterpart regulations by reference.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c), the Director has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

This rule was reviewed and discussed at the DEP Advisory Council meeting on June 10, 1999. There were no suggested amendments to the rule at that time. Minutes of that meeting are attached.

MINUTES

ENVIRONMENTAL PROTECTION ADVISORY COUNCIL

June 10, 1999, Director's Conference Room, Nitro

The sixteenth meeting of the DEP Advisory Council was held Thursday, June 10, 1999, in the Director's Conference Room located in Nitro. Chairman Mike Miano called the meeting to order at 10:00 a.m.

ATTENDING:

Advisory Council Members:

Mike Miano, Chairman
Jacqueline Hallinan
William Raney
Rick Roberts
William Samples

Environmental Protection:

Bill Adams
Andy Gallagher
Tony Grbac
Randy Huffman
Mike Johnson
Mike Lewis
Robert Keatley
Pam Nixon
Rocky Parsons
Cap Smith
Charlie Sturey
Barbara Taylor
Karen Watson
Mike Zeto

1) Review and Approval of March 22, 1999 Minutes. Chairman Miano called the meeting to order at 10:00 a.m. The first item on the agenda was approval of the minutes of the March 22 Advisory Council; they were approved as written.

2) Discussion of Proposed Rule Amendments - 2000 Legislative Session. In accordance with WV Code §22-1-1(c), and DEP's new rule-making procedure that was implemented by Director Miano in September 1998 to involve the Advisory Council in DEP's rule-making process as early as possible to enable the Council to review, comment, and make recommendations to the Director on DEP's proposed legislative rule changes before they are filed for public hearing, the following proposed rules were brought to the Council's attention.

Chairman Miano said he would like to begin by saying he hoped all Council members had received their draft rules by E-mail without any complications and they were able to review them before the meeting. He informed the Council that due to the large number of rules being proposed for the 2000 Legislative Session, DEP's program offices would review them with the

Council as thoroughly as possible, in the allotted time frame, and try to answer any questions or concerns the Council may have.

The following Office of Air Quality's proposed rule amendments were discussed by Karen Watson, OAQ, with assistance from Richard Keatley, also from the OAQ office:

- **45CSR1 - "TO PREVENT AND CONTROL AIR POLLUTION FROM COAL REFUSE DISPOSAL AREAS"**
- **45CSR2 - "TO PREVENT AND CONTROL PARTICULATE AIR POLLUTION FROM COMBUSTION OF FUEL IN INDIRECT HEAT EXCHANGERS"**
- **45CSR3 - "TO PREVENT AND CONTROL AIR POLLUTION FROM THE OPERATION OF HOT MIX ASPHALT PLANTS"**
- **45CSR4 - "TO PREVENT AND CONTROL THE DISCHARGE OF AIR POLLUTANTS INTO THE OPEN AIR WHICH CAUSES OR CONTRIBUTES TO AN OBJECTIONABLE ODOR OR ODORS"**
- **45CSR5 - "TO PREVENT AND CONTROL AIR POLLUTION FROM THE OPERATION OF COAL PREPARATION PLANTS, COAL HANDLING OPERATIONS AND COAL REFUSE DISPOSAL AREAS"**
- **45CSR6 - "TO PREVENT AND CONTROL AIR POLLUTION FROM COMBUSTION OF REFUSE"**
- **45CSR7 - "TO PREVENT AND CONTROL PARTICULATE MATTER AIR POLLUTION FROM MANUFACTURING PROCESSES AND ASSOCIATED OPERATIONS"**
- **45CSR10 - "TO PREVENT AND CONTROL AIR POLLUTION FROM THE EMISSION OF SULFUR OXIDES"**
- **45CSR12 - "AMBIENT AIR QUALITY STANDARD FOR NITROGEN DIOXIDE"**
- **45CSR16 - "STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES PURSUANT TO 40 CFR PART 60"**
- **45CSR17 - "TO PREVENT AND CONTROL PARTICULATE MATTER AIR POLLUTION FROM MATERIALS HANDLING, PREPARATION, STORAGE AND OTHER SOURCES OF FUGITIVE PARTICULATE MATTER"**
- **45CSR18 - "TO PREVENT AND CONTROL PARTICULATE AIR POLLUTION FROM DIRECT MEAT-FIRING DEVICES"**
- **45CSR23 - "TO PREVENT AND CONTROL EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS"**
- **45CSR25 - "TO PREVENT AND CONTROL AIR POLLUTION FROM HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES"**
- **45CSR33 - "ACID RAIN PROVISIONS AND PERMITS"**
- **45CSR34 - "EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS PURSUANT TO 40 CFR PART 63"**

Karen began by bringing the Council up to date on the status of two OAQ rules that were filed during the last session (or late in the session). 45CSR8 revised the ambient air quality for sulfur oxides and particulate matter, and 45CSR9 pertained to ambient air quality standards for carbon monoxide and ozone. The DC Circuit Court of Appeals has ordered EPA to show how they arrived at the new standards - EPA may go back to the previous standards. Karen also apprised the Council on the N_{ox} State Implementation Plan. The Circuit Court stayed the implementation of that rule and there are no plans to develop any other amendments in the

immediate future. 45CSR28, which is the emissions trading rule that was filed late in the 1999 Session, was not taken up by the Legislature, but plans are to put the rule on the July agenda of the Interim Legislative Committee.

Karen explained the reason for the unusually large number of DEP rules that are being filed for the next Legislative Session. She informed the Council that several of the rules were outdated and were amended for consistency and streamlining, and are a result of months of on-going meetings with stakeholders -- involving both the regulated community and citizens. A particulate matter and sulfur oxide work group was also involved. Those rule amendments as a result of the stakeholders process include: 45CSR1 (which is being repealed and replaced with language in 45CSR5), 45CSR2, 3, 4, 5, 6, 7, 10, 12, 17, and 18 (which is being repealed since the rule is no longer deemed necessary). The amendments to the remainder of the rules, 45CSR16, 23, 25, 33, and 34 were necessary to adopt by reference definitions, clarifications, technical amendments, etc., recently adopted by US EPA.

After several minutes of discussion, the Advisory Council recommended to the Director that the following amendments be made to the OAQ rules:

Mr. Samples pointed out that 45CSR2 and 45CSR7 contain different definitions for the term "opacity." The agency responded that this discrepancy was inadvertent and the language should be as it is in 45CSR2. The agency agreed to revise 45CSR7, subsection 2.23, accordingly.

Mr. Larry Harris was unable to attend the meeting; however, he expressed the following comments on 45CSR10 and 45CSR33 by e-mail. He stated that the State's rules should be more stringent than the federal counterpart regulations, since the State's streams are being adversely impacted. The agency responded that, at this point in time, it does not possess sufficient evidence to make the written finding that is required by WV Code §22-2-3a before promulgating a rule which is more stringent than a counterpart federal regulation.

Cap Smith and Mike Zeto discussed the following Office of Waste Management proposed rule amendments:

- **33CSR2 - "Sewage Sludge Management Rule"**
- **33CSR20 - "Hazardous Waste Management Rule"**

Mike Zeto briefed the Council on the proposed amendments to 33CSR2. He stated that in 1996 the Legislature mandated DEP to perform a study on soil limitations for sewage sludge land application sites. These amendments (as a result of the study) were to be proposed by June 30, 1999. Other amendments to the rule include specifying the analytical method used for soil analysis, placing conditions on variances from the soil limits for land application sites, providing an incentive for municipalities to produce higher quality compost products, and adjusting the sewage sludge limits for four metals. Mr. Zeto told the Council these amendments are being proposed to update other related areas of the rule in an attempt to provide better management of sewage sludge within the state.

Cap Smith discussed 33CSR20 with the Council. He informed the Council that amendments are proposed in section 2 of the rule that will allow the Office of Waste Management to delist hazardous wastes, which has previously been handled by EPA. The other significant amendments that are being proposed by adoption of the Federal Register pertain to revision standards for owners and operators of closed and closing hazardous waste management facilities, post closure permit requirements, and the closure process. These amendments are referenced throughout the rule and will hopefully expedite site cleanup while maintaining environmental protection.

There were several minutes of discussion on OWM's proposed rule amendments; however, no recommendations were made to the Director concerning the amendments.

Mike Lewis, Office of Oil and Gas, discussed the following new proposed rule:

- **35CSR7 - "Well Operations - Within and Around Gas Storage Reservoirs"**

Mike informed the Council that 35CSR7 is a proposed "new" rule for the O&G Office. The rule is needed to provide protection of the environment, the public, and the state's natural gas resources. It is the intent of the proposed rule to accomplish this by addressing certain operating procedures that oil and gas and gas storage operators are to use when drilling into or through a gas storage reservoir or the gas storage reservoir protective area. In order to assure absence of leaking gas, the proposed rule requires gas storage operators to conduct monitoring and inspections of gas storage wells.

There were no questions or discussion by the Council on this proposed rule.

The following proposed rules were discussed by the Office of Mining and Reclamation:

- **38CSR2 - "Surface Mining and Reclamation Rule"**
- **38CSR2A - "Rules for Mining and Restoration for Sandstone, Limestone, and Sand"**
- **38CSR2B - "RULES FOR MINING AND RECLAMATION OF MINERALS OTHER THAN COAL"**

Ed Griffith, Office of Surface Mining, discussed the proposed amendments to the Surface Mining and Reclamation Rule. Ed told the Council that there are only minor amendments being proposed to this year's rule. The proposed definition of "woodlands" in subsection 2.136 relates to the utilization of commercial woodlands in Approximate Original Contour variance areas. This change is being proposed in order for the state to meet the federal policy that is expected to change in July 1999. The proposed amendment to change the bonding requirements of mining operations that request variances from contemporaneous reclamation to the maximum amount per acre bond ($5,000 per acre) is found in subdivision 14.15.f. All other amendments are being proposed in order to meet the requirements of the Office of Surface Mining's program amendments.

Rocky Parsons, OMR's Philippi Office, next addressed OMR's proposed rules 38CSR2A and 2B. Rocky explained to the Council members that 38CSR2B has been in place since 1983 and regulates all minerals other than coal. However, in accordance with the requirement that separate rules for limestone, sandstone, and sand are to be promulgated, DEP is proposing

38CSR2A which will regulate only those minerals - 38CSR2B will regulate all minerals other than limestone, sandstone, sand, and coal. Both proposed rules will regulate roads, blasting, drainage control, methods of operation, excess spoil disposal, revegetation, mapping, transfer of permits, permit renewals, revisions and incidental boundary revisions. 38CSR2A will provide provisions for restoration and 38CSR2B will include provisions for reclamation. Rocky gave the Council a brief history on the roadblocks the agency has encountered in the past several years in their attempt to amend the quarry statute. He said since the agency has been unsuccessful in that approach, it has become necessary to try to accomplish this through rule making. He informed the Council of a public meeting held the previous week to discuss the two proposed rules. He said the meeting was well attended and he believes the rules were well received by everyone in attendance.

The three OMR proposed rules were discussed by the Council members. Bill Raney said that although Rocky stated that the quarry rules have been well received by industry and the citizens, he is concerned about whether there has been enough time for the review of the proposed rules after they were drafted. He believes there would be a smoother transition into the rule making process, i.e., the public hearing/comment period, etc., if there had been more involvement from outside DEP during the drafting of the rules.

Mr. Larry Harris commented by e-mail 38CSR2A and 2B. His question is whether the siltation measures include silt fences where runoff might enter streams. He said it is not apparent what best management practices are for this situation, and he wonders if it needs to be spelled out. He knows of some operations in quarries where streams muddy after rainfalls, such as the Elkins and Waco quarries near Snowshoe, and he feels this is harming the streams. Do the new rules address this?

Rocky Parsons responded by saying that design criteria for drainage control structures is found in the technical handbook. Silt fences are not adequate for sediment control. The drainage system must be designed to hold .125 ac/ft of sediment for each acre of disturbed land. All runoff must pass through a drainage control structure. There is a provision for less sediment control (1/2 factor) for certain circumstances as approved by the Director. Effluent limits as established in the NPDES permit must be met.

Tony Grbac, Office of Surface Mining, addressed the following rule:

199CSR1 - "SURFACE MINING BLASTING RULE"

Tony began by briefing the Council on the history of the Surface Mining Blasting Rule. This rule is being proposed to comply with SB681 - passed during the last session. This bill created the Office of Explosives and Blasting and the Office of Coalfield Community Development, which is under the West Virginia Development Office. The proposed rule will regulate blasting laws and rules associated with all surface-mining operations. All duties currently performed by OMR related to blasting, and all rules which now regulate blasting (38CSR2C) will be transferred to this new office. Besides regulating blasting on all surface mining operations, it will also implement and oversee pre-blast survey processes; maintain and operate a system to receive and address questions, concerns and complaints relating to mining

operations; determine the qualifications for individuals and firms performing pre-blast surveys; establish the education, training, examination and certification of blasters; administer a claims process for property damage caused by blasting; and conduct a study of blasting and make recommendations regarding any appropriate rule or code changes.

Tony explained that the revenue generated by the proposed fee in 199CSR1 (one-half cent times the number of pounds of explosive material used ruing the preceding month for any purpose on the surface mining operations) would fund both the offices, as required by SB681. After one year of collection, both offices are to report to the Legislature as to whether the revenue collected is sufficient to operate both offices.

After several minutes of discussion between DEP and the Council members, Bill Raney expressed his concern in filing the rule for public hearing in the specified time frame. Mr. Raney asked if anyone outside DEP has been involved in drafting the rule. OMR answered by saying the rule was drafted by several staff within OMR. Mr. Raney replied that he believes there will be serious concerns with this rule once industry has had an opportunity to review it. He believes the rule drafting process definitely needs input from firms and individuals outside DEP, and he thinks the process will go smoother once everyone has had the opportunity to address their concerns. Mr. Raney recommended that the Director withhold this rule from the list of rules DEP proposes to file for public hearing/comment period in the coming week to give all interested parties a chance to participate in drafting the rule.

After discussion of this recommendation, Chairman Miano said he believes the best approach would be to continue with the filing of the proposed rule for public hearing, start the rule in the normal process and time frame, and in the meantime he would commit to putting together a work group of interested parties to discuss the rule. If DEP feels that more time is needed once the group begins their work on the rule, he will consider the possibility of either extending the comment period or filing for another public hearing. He said he will also decide in the near future whether DEP will file the rule as an "Emergency Rule" since HB 681 will become effective on June 11.

Council members also pointed out a typographical error in subdivision 3.9.a.3. of the rule relating to cross-references that will be corrected by DEP.

Barb Taylor and Mike Johnson, Office of Water Resources, briefed Council on the following rules:

- **47CSR57A - "Groundwater Protection Standards at Steam Electric Generating Facilities"**
- **47CSR26 - "Water Pollution Control Permit Fee Schedule"**
- **47CSR31 - "State Water Pollution Control Revolving Fund Program Rule"**

Barb described the proposed "new" rule relating to Groundwater Protection Standards at Steam Electric Generating Facilities. She noted that the rule is a result of a Notice of Intent filed on October 24, 1994, by the West Virginia Steam Electric Generation Industry, with the Director of DEP, in accordance with 47CSR57 to apply for a class variance for all West Virginia power stations and associated disposal sites. At that time, DEP provided AEP and AP with the

opportunity to conduct a four-year study to gather the necessary data to support their variance request. The objectives were met by assembling and reviewing data, estimating potential impacts to receptors, and performing an economic assessment impact analysis to the industry, commercial enterprises, and citizens at large if compliance with the Groundwater Protection Act were required without benefit of the variances. After review of the four-year study, the Director determined that granting this request for a variance at these locations would not pose adverse effects to human health or the environment. There are no human or environmental sensitive receptors between the coal storage areas or as ponds; therefore, it is unlikely there will be adverse affects. Barb gave each member a copy of the four-year study on which the Director made his determination.

Chairman Miano told Council that DEP is definitely willing to look at such cases where extensive research and study have been done by the regulated community to back up their findings before granting such variances, and believes DEP will see more studies like this in the future.

Barb next apprised the members on the proposed amendments of the Water Pollution Control Permit Fee Schedule. She stated that amendments are being proposed as a result of HB 2684, passed March 11, 1999, and effective ninety days from passage. The Director is required to implement an emergency rule to implement the fee schedule authorized by the amendments by July 1, 1999. This rule was filed as an "Emergency Rule" on June 7, 1999.

Mike Johnson, Office of Water Resources' Construction Assistance Office, briefed the Council on 47CSR31 - the Water Pollution Control Revolving Fund Program rule. The amendments to this rule are being proposed to allow the State Revolving Fund low interest terms to be extended from 20 years to 30 years for communities that qualify as "disadvantaged." There is only one other state in the country to receive such approval from EPA. Mike informed the Council that he was only recently made aware of this extension by EPA to extend the low interest loans from 20 to 30 years while attending a meeting out of state. This rule was filed as an "Emergency Rule" on May 24, 1999.

Council members unanimously agreed that Mike Johnson should be commended for gathering this information and proposing the amendment to the rule that will enable disadvantaged communities to immediately take steps toward constructing watershed projects that will provide affordable monthly sewer rates.

Open Discussion:

Chairman Miano and Council members expressed their compliments to the program offices for all their hard work, especially with the stakeholders process -- it is obvious a lot of hard work has gone into the process in order to make their efforts more productive.

Bill Raney asked a question relating to the "More or Less" Stringency statement that appears on the front of some DEP rules, but not on others, and voiced his concern if DEP is paying close attention to this, or if the same statement is appearing with all proposed rules. Carrie Chambers from the Director's Office explained that statement was once required to be included in the "General" section of each rule; however, it is now placed in the briefing document that is attached to each rule, and required by the Secretary of State's Office and the

Legislative Rule-Making Review Committee, before it is filed. She went on to explain that with the rush to get draft copies of the rules to Council members as soon as possible, some of the Briefing Documents had not been completed, but would be attached to all DEP rules before they are filed for public hearing. Chairman Miano went on to say it is his belief that all program offices are carefully scrutinizing each rule before that decision is made.

Chairman Miano thanked Council for taking time from their busy schedules to review the extensive list of DEP's proposed rules. He informed the Council that the minutes would be left open for comment until Wednesday, June 16, at which time the minutes will be attached to the rules and filed with the Secretary of State's Office and the Legislative Rule-Making Review Committee for notice of public hearing/comment period.

Before adjourning the meeting, the Council informed Chairman Miano that they would prefer beginning future meetings at 10:00 a.m., instead of the usual time of 1:00 p.m. The meeting was then adjourned at 3:30 p.m.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 33, Series 20, Hazardous Waste Management

Type of Rule: XX **Legislative** _____ **Interpretive** _____ **Procedural**

Agency Division of Environmental Protection

Address Office of Waste Management

1356 Hansford Street

Charleston, WV 25301-1401

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1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$Unknown	$ 0	$ 0	$ 0	$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

This amendment will adopt by reference additional federal regulations and will add clarifying language to the existing Hazardous Waste Permit Program section (33-20-11). These amendments are projected to require additional operating expenses above the current level; however, the impact of this increase is not known since the agency has no way to predict the participation of industry regarding these streamlining regulatory provisions.

3. Objectives of these rules:

The objective of this rule is to stay in compliance with federal guidelines when implementing the State program. The consistency achieved in these revisions assures the State of maintaining its authorization status and, in turn, the continued receipt of federal funds that are vitally needed to implement the program.

Rule Title: Title 33, Series 20 Hazardous Waste Management

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Unknown...not anticipated to be appreciable.

B. Economic Impact on Political Subdivisions; Specific Industries, Specific groups of Citizens.

Permitted facilities should overall realize a slight economic benefit due to the reduced regulatory burden brought about by streamlining of site clean ups.

C. Economic Impact on Citizens/Public at Large.

N/A

Date:

Signature of Agency Head or Authorized Representative

B. F. Smith, P.E.
Chief
Office of Waste Management

TITLE 33
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF WASTE MANAGEMENT

SERIES 20
HAZARDOUS WASTE MANAGEMENT RULE

§ 33-20-1. SCOPE AND AUTHORITY.

1.1. Scope and Purpose. -- The purpose of this rule is to provide for the regulation of the generation, treatment, storage, and disposal of hazardous waste to the extent necessary for the protection of the public health and safety and the environment.

1.2. Authority. -- This rule is promulgated pursuant to the West Virginia Hazardous Waste Management Act, W. Va. Code, § 22-18-1, et seq.

1.3. Filing Date. -- ~~May 4, 1999~~

1.4. Effective Date. -- ~~July 1, 1999~~

1.5. Amendment of Former Rule. -- This rule amends the Hazardous Waste Management rule, 33 CSR 20, in effect prior to the date this rule becomes effective.

1.6. Incorporation by Reference. -- Whenever either federal statutes or regulations or state statutes or rules are incorporated by reference into this rule, the reference is to that statute or regulation in effect on July 1, 199~~7~~8, unless otherwise noted in the text of this rule. This incorporation by reference is not intended to replace or abrogate federal authorities granted the Resource Conservation and Recovery Act of 1976.

1.6.a. In applying the federal requirements incorporated by reference throughout this rule, the following exceptions or substitutions apply, unless the context clearly requires otherwise or the referenced rule cannot be delegated to the state:

1.6.a.1. "Office of waste management, West Virginia division of environmental protection" shall be substituted for "environmental protection agency."

1.6.a.2. "Chief of the office of waste management, West Virginia division of environmental protection" shall be substituted for "administrator," "regional administrator," and "director." In

those sections that are not adopted by reference or that are not delegable to the state, "administrator", "regional administrator", and "director" shall have the meaning defined in 40 CFR § 260.10.

1.6.a.3. Whenever the regulations require publication in the "Federal Register" compliance shall be accomplished by publication in the "West Virginia Register," a part of the "State Register" created pursuant to the provisions of W. Va. Code, § 29A-2-2 for those areas applicable and delegable to the state.

1.6.a.4. Whenever in the federal regulation reference is made to the Resource Conservation and Recovery Act of 1976 § 3010, as amended (42 U.S.C. § 6930), the reference should be to section 4 of this rule. The notification requirements of the Resource Conservation and Recovery Act of 1976 §§ 3010 remain in effect and will be satisfied by compliance with section 4 of this rule.

1.7. Cross Reference. -- Whenever a reference is cited in a provision incorporated by reference which cross reference was not incorporated by reference, the provisions of the applicable state law and rules, if any, control to the extent of any conflict or inconsistency. Where state rules are present and there is a question, the state rules govern. Where there are no state regulations present, federal regulations govern. For example, cross reference to 40 CFR part 264 subpart O -- Incinerators, which was not incorporated by reference, would need to be referenced to the applicable West Virginia division of environmental protection, office of air quality rule, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities."

1.8. Inconsistencies with the West Virginia Code. -- In the event a provision of the code of federal regulations incorporated by reference herein includes a section which is inconsistent with the West Virginia Code, the West Virginia Code controls to the extent federal law does not preempt the state law. In the event a provision of the code of federal regulations incorporated by reference herein is beyond the scope of authority granted the division of environmental protection pursuant to statute, or is in excess of the statutory authority, such provision shall be and remain effective only to the extent authorized by the West Virginia Code.

1.9. Provisions Applied Prospectively. -- The provisions of this rule are to be applied prospectively. All orders, determinations, demonstrations, rules, permits, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted, approved or allowed to become effective by the chief, and which are in effect on the date this rule becomes effective, shall continue in effect according to their terms unless modified, suspended or revoked in accordance with the law.

1.10. This rule references the provisions of West Virginia division of environmental protection, office of air quality rule, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities" effective on July 1, 2000. If the West Virginia legislature fails to authorize 45 CSR 25 during the regular session 2000, then the provisions of the rule referenced in this rule are the provisions of 45 CSR 25 effective on July 1, 1999.

§ 33-20-2. HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL.

2.1. 40 CFR Part 260. -- The provisions of 40 CFR part 260 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

2.1.a. The definitions of terms used in this rule shall have the meaning ascribed to them in 40 CFR parts 260, 261, 262, 263, 264, 265, 266, 267, 268, 270, 273 and 279 with the exceptions, modifications and additions set forth in this section.

2.1.a.1. "Full regulation" means those rules applicable to generators of greater than one thousand (1000) kilograms of non-acutely hazardous waste in a calendar month and/or who treat, store or dispose of hazardous waste at their facility.

2.1.a.2. "Mercury containing lamp" means an electric lamp in which mercury is purposely introduced by the manufacturer for the operation of the lamp. Mercury containing lamps commonly include fluorescent lamps.

2.1.a.3. "Universal Waste" means any of the following hazardous wastes that are managed under the universal waste requirements of 40 CFR part 273:

~~(1)~~ 2.1.a.3.A. Batteries as described in 40 CFR § 273.2;

~~(2)~~ 2.1.a.3.B. Pesticides as described in 40 CFR § 273.3; and

~~(3)~~ 2.1.a.3.C. Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

2.1.a.4. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule titled "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

2.1.a.5. The provisions of Federal Register document dated October 22, 1998 (Volume 63, Number 204) on pages 56709-56735: the final rule titled "Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-closure Permit Requirements; Closure Process" are hereby adopted and incorporated by reference.

2.2. 40 CFR § 260.2. -- The provisions of 40 CFR § 260.2 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provisions of W. Va. Code, §22-18-12.

2.3. 40 CFR §§ 260.21(d) ~~and 260.23~~. -- The provisions of 40 CFR § 260.21(d) ~~and 40 CFR § 260.23~~ are excepted from incorporation by reference.

2.4. Petitions for Waste Exclusions.

2.4.a. ~~Persons desiring to exclude a waste at a particular generating facility from the lists set forth in 40 CFR part 261 may petition the chief for such an exclusion after having received approval from the administrator of the environmental protection agency. The petition shall include:~~

Any person seeking to exclude a waste at a particular generating facility from 40 C.F.R. § 261.3 or 40 C.F.R. part 261, subpart D, as incorporated by this rule, may petition the chief for such an exclusion following the procedures established in 40 C.F.R. § 260.20 and 40 C.F.R. § 260.22.

Note: The division of environmental protection intends to utilize EPA guidance in evaluating delisting petitions.

~~**2.4.a.1.** A copy of the petition submitted to the administrator of the environmental protection agency pursuant to 40 CFR § 260.22, including all demonstration information;~~

~~**2.4.a.2.** A copy of the administrator's approval granting the exclusion pursuant to 40 CFR § 260.20(d); and~~

~~**2.4.a.3.** Any other additional information which may be required for the chief to evaluate the petition.~~

~~**2.4.b.** Within one hundred and twenty (120) days of the filing of the petition the chief shall decide whether to approve or to deny the petition and so advise the petitioner. Where a decision to deny a petition is made, the chief shall notify the petitioner of such action in writing, setting forth the reasons therefor.~~

2.4.b. An initial non-refundable fee of $1,000.00 must accompany all petitions submitted under this rule. The petitioner must execute an agreement with the chief providing for the recovery of all reasonable costs incurred by the division of environmental protection attributable to the review and investigation of the petition in excess of the initial fee submitted with the petition.

2.4.b.1. Recoverable costs shall be determined by the number of hours worked under the agreement by the primary division of environmental protection employee multiplied by 2.5 times the hourly rate of such employee and then adding direct expenses incurred by such employee. Costs related to independent contractors retained by the division of environmental protection to assist in the review and investigation of petitions shall be included as direct expenses.

2.4.b.2. Within thirty (30) calendar days of receiving a petition under this section, the division of environmental protection shall send the petitioner an itemized list of estimated costs it expects to incur as a result of reviewing and investigating the petition. Such list shall include anticipated outside contractor costs.

2.4.b.3. If, upon review of the itemized list of estimated costs submitted by the division of environmental protection, the petitioner determines not to continue the petition process, the petitioner may submit a certified letter to the chief withdrawing the petition. If such letter is submitted within ten (10) days of the date of receipt of the division of environmental protection's list of estimated costs, the petitioner shall not be liable for any costs incurred in excess of the initial application fee.

~~**2.4.c.** The chief shall not deny a petition to exclude a waste at a particular facility that has been approved by the administrator unless scientifically supportable reasons for such denial are advanced which had not been presented to the administrator.~~

2.4.c. Where the administrator of the EPA has granted a petition to exclude hazardous waste from 40 C.F.R. § 261.3 or 40 C.F.R. part 261, subpart D, pursuant to 40 C.F.R.§ 260.22, the chief shall accept such a determination and amend this rule accordingly, provided:

2.4.c.1. Petitioner submits a copy of the petition submitted to the administrator, including all demonstrative information and a copy of the administrator's approval granting the exclusion pursuant to 40 C.F.R. § 260.20(e); and

2.4.c.2. No scientifically supportable reasons for denying the petition are advanced which had not been presented to the administrator.

2.5. Petitions to amend the regulations to include additional wastes as universal wastes.

2.5.a. Persons desiring to include a waste as a universal waste may petition the chief for such an inclusion after having received approval from the administrator of the environmental protection agency. The petition shall include:

2.5.a.1. A copy of the petition submitted to the administrator of the environmental protection agency pursuant to 40 CFR § 260.23, including all demonstration information;

2.5.a.2. A copy of the administrator's approval granting the ~~exclusion pursuant to~~ petition under 40 CFR § 260.23 and CFR § 260.20 and 40 CFR part 273; and

2.5.a.3. Any other additional information which may be required for the chief to evaluate the petition.

2.5.b. Within one hundred and twenty (120) days of the filing of the petition the chief shall decide whether to approve or to deny the petition and so advise the petitioner. Where a decision to deny a petition is made, the chief shall notify the petitioner of such action in writing, setting forth the reasons therefor.

2.5.c. The chief shall not deny a petition to include a waste as a universal waste that has been approved by the administrator unless scientifically supportable reasons for such denial are advanced which had not been presented to the administrator.

2.5.d. Any person may petition the chief to include a waste as a universal waste as follows:

2.5.d.1. Submit a petition to the chief demonstrating that the regulation under the universal waste regulations of 40 CFR part 273 is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the hazardous waste program. The petition should also include information required by 40 CFR § 260.20(b), and include as many of the factors listed in 40 CFR § 273.81 as are appropriate for the waste or category of waste addressed in the petition.

2.5.d.2. The chief will grant or deny a petition using the factors listed in 40 CFR § 273.81. The decision will be based on the weight of evidence showing that regulation under 40 CFR part

273 is appropriate for the waste or category of waste, will improve management practices for the waste or category of waste, and will improve implementation of the hazardous waste program.

2.5.d.3. The decision of the chief shall be in writing and state the reasons to either grant or deny the petition. Any petitioner aggrieved by the decision of the chief may appeal the decision to the environmental quality board in accordance with the provisions of W.Va. Code § 22-18-20.

§ 33-20-3. IDENTIFICATION AND LISTING OF HAZARDOUS WASTE.

3.1. 40 CFR Part 261. -- The provisions of 40 CFR part 261 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

3.1.a. In order for a mixture of a waste and one or more hazardous wastes identified in 40 CFR ~~§§~~ 261.3(a)(2)(iv) to be exempt from the definition of hazardous waste, the owner or operator must comply with the following:

3.1.a.1. Provide a certification in writing to the chief that groundwater monitoring complying with either 40 CFR part 265, subpart F or which is approved by the chief, is or will be in place at the wastewater treatment facility identified in 40 CFR § 261.3(a)(2)(iv). A time schedule for the installation of such groundwater monitoring must be included. This requirement does not apply to wastewater treatment units or containers.

3.1.a.2. Before claiming an exemption, the owner or operator of each wastewater treatment facility receiving mixtures of wastes under 40 CFR § 261.3(a)(2)(iv) shall notify the chief of the receipt of such wastes on a form prescribed by the chief.

3.1.a.3. Annually submit to the chief a list of hazardous wastes that are expected to be present in the mixture to be exempted.

3.2. The provisions of 40 CFR § 261.5 (f)(3)(iv) and(v) and 40 CFR §261.5(g)(3)(iv) and (v) are excepted from incorporation by reference. Conditionally exempt small quantity generators shall notify the chief of their hazardous waste activity in accordance with ~~S~~section 4 of this rule.

3.3. The provisions of 40 CFR § 261.9 are amended by revising 40 CFR § 261.9(c)to read as follows:

(C) Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

~~3.4 West Virginia recognizes the decision by the U.S. Court of Appeals for the District of Columbia Circuit which vacated several carbamate listings, {Dithiocarbamate Task Force v. Environmental Protection Agency, 98 F.3d 1394 (D.C. Cir. 1996)}. The following waste listings are excluded from the incorporation by reference of 40 CFR 261.~~

3.4. In addition to adoption and incorporation by reference of 40 CFR part 261 effective on July 1, 1998:

~~**3.4.a.** In 40 CFR § 261.3(a)(2)(iv)(F) and (G), K156 and K157 are excluded to the extent that they encompass 3-iodo-2-propynol n-butylcarbamate (IPBC).~~

3.4.a. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule titled "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

~~**3.4.b.** In 40 CFR § 261.32, K160 is excluded and K156, K157 and K158 are excluded to the extent that they encompass 3-iodo-2-propynol n-butylcarbamate (IPBC).~~

3.4.b. The provisions of Federal Register document dated October 22, 1998 (Volume 63, Number 204) on pages 56709-56735: the final rule titled "Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-closure Permit Requirements; Closure Process" are hereby adopted and incorporated by reference.

~~**3.4.c.** In 40 CFR § 261.33(f), the following wastes are excluded: U277, U365, U366, U375, U376, U377, U378, U379, U381, U382, U383, U384, U385, U386, U390, U391, U392, U393, U396, U400, U401, U402, U403 and U407.~~

~~**3.4.d.** In 40 CFR 261, Appendix VII, the basis for listing K160 is excluded, and the basis for listing K156, K157 and K158 is excluded to the extent that they encompass 3-iodo-2-propynol n-butylcarbamate (IPBC).~~

~~**3.5.** The provisions of 40 CFR §§261.1, 261.2, 261.4 and 261.8 regarding the recycling of certain scrap metals and shredded circuit boards as amended and finalized in 62 Federal Register 25998 (May 12, 1997) and 63 Federal Register 28555 (May 26, 1998) are hereby incorporated by reference.~~

~~**3.6.** The provisions of 40 CFR 261.4 and 261.38 regarding the exclusion of comparable fuels from being considered a solid waste as amended and finalized in 63 Federal Register 33781 (June 19, 1998) are hereby incorporated by reference.~~

§ 33-20-4. NOTIFICATION OF HAZARDOUS WASTE ACTIVITY REGULATIONS.

4.1. Applicability. Any person that engages in a hazardous waste activity in the State of West Virginia shall notify the chief of these activities when such activity begins, unless such activities are exempted from the requirements of this rule.

4.1.a. Any person as described in subsection 4.1 of this rule that has notified the EPA or is subject to the requirements to notify EPA as specified in volume 45, number 39 of the Federal Register, dated February 26, 1980, pages 12746 through 12754, is subject to the provision of section 4 of this rule.

4.1.b. The purpose of section 4 of this rule is to provide a means for the State of West Virginia to utilize the information provided by all who complied with the notification requirements of EPA as described in subdivision 4.1.a. of this rule or all who initiated hazardous waste activities subsequent to the requirements of EPA as referenced above in subdivision 4.1.a of this rule to notify the chief of their hazardous waste activities.

4.1.c In addition to the notification requirements specified in this section, the chief shall require notification of hazardous waste activities, as applicable, pursuant to the following:

4.1.c.1. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule called "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

4.2. Notification. Any person that notified EPA of hazardous waste activities as referenced above in subsection 4.1 of this rule shall provide a copy of that notification to the chief.

4.2.a. Any person involved in hazardous waste activities that did not comply with the notification requirements of EPA, as referenced above in subsection 4.1 of ~~the rules~~ this rule, but is subject to those requirements shall notify the chief in writing of his hazardous waste activities within thirty (30) days of the effective date of this rule. Notification may be accomplished by the use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.b. Any person exempted from the federal notification requirements as specified in 40 CFR §§ 261.6(b) and 261.5, but subject to West Virginia notification requirements, shall notify the chief in writing of his hazardous waste activities on the date of initiation of such activities. Notification may be accomplished

by use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.c. One notification form is required for each generator.

4.2.d. A notification form is required for each storage, treatment, disposal, or other facility. However, if one facility site includes more than one storage, treatment, or disposal activity, only one notification form for the entire facility site is required.

4.2.e. Generators that store, treat, or dispose of hazardous waste on-site shall file a notification form for generation activities as well as storage, treatment, and disposal activities, unless such activities are exempted from the requirements of this rule.

4.2.f. New generators and those initiating activities subsequent to the EPA notification period referenced in subdivision 4.1.a. of this rule shall comply with the EPA identification number requirements and shall provide a copy of their application for an EPA identification number to the administrator.

§ 33-20-5. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE.

5.1. 40 CFR Part 262. -- The provisions of 40 CFR part 262 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

5.2. 40 CFR §262.10(g). -- The provisions of 40 CFR § 262.10.(g) shall be excepted from incorporation.

5.2.a. A person who generates a hazardous waste as defined by 40 CFR part 261 is subject to the compliance requirements and penalties prescribed in W. Va. Code, §22-18-1 et seq. if he or she does not comply with the requirements of this rule. This rule in no way abrogates the enforcement authority of the Resource Conservation and Recovery Act of 1976 § 3008.

5.2.b. All references to 40 CFR § 262.10(g) shall be deemed references to subsection 5.2 <u>of this rule</u> and the subdivisions herein, as appropriate.

5.3. 40 CFR Part 262, Subpart E. -- The provisions of 40 CFR part 262, subpart E -- Exports of Hazardous Waste are hereby adopted and incorporated by reference. The substitution of terms in ~~S~~<u>s</u>ubdivision 1.6.a. <u>of this rule</u> does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of subpart E shall file with the chief copies of all documentation, manifests, exception reports, annual reports or records, inter alia, submitted

to EPA, the administrator or the regional administrator as required by and within the time frames set forth in subpart E.

5.4. 40 CFR Part 262, Subpart ~~F~~ H. -- The provisions of 40 CFR part 262, subpart H -- Transfrontier Shipments of Hazardous Waste for Recovery within the OECD are hereby adopted and incorporated by reference. The substitution of terms in ~~S~~subdivision 1.6.a. of this rule does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of subpart H shall file with the chief copies of all documentation, manifests, exception reports, annual reports or records, inter alia, submitted to EPA, the administrator or the regional administrator as required by and within the time frames set forth in subpart H.

5.5. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule titled "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

§ 33-20-6. STANDARDS APPLICABLE TO TRANSPORTERS OF HAZARDOUS WASTE.

6.1. 40 CFR Part 263. -- The provisions of 40 CFR part 263 are hereby adopted and incorporated by reference insofar as said regulations relate to the transportation of hazardous waste by air and water.

6.2. Note. -- The use of railroads for the transportation of hazardous waste is regulated by the West Virginia public service commission rules, "Rules and Regulations Governing the Transportation of Hazardous Waste by Rail", 150 CSR 11. The use of the state highways for the transportation of hazardous waste is regulated under the West Virginia division of highways, "Transportation of Hazardous Wastes Upon the Roads and Highways", 157 CSR 7.

§ 33-20-7. STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES.

7.1. 45 CSR 25, office of air quality, -- The standards in ~~S~~section 7 of this rule apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste except as otherwise provided by law. In addition to the standards in section 7 of this rule, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities", apply to management facilities which may emit hazardous waste or the constituents thereof to the atmosphere including incineration facilities except as otherwise provided by

law. For purposes of section 7 of this rule, the following persons are considered to be incinerating hazardous waste:

7.1.a. Owners or operators of hazardous waste incinerators; and

7.1.b. Owners or operators of boilers or industrial furnaces used to destroy wastes.

7.2. 40 CFR Part 264. -- The provisions of 40 CFR part 264 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

7.3. 40 CFR § 264.1 -- The provisions of 40 CFR § 264.1(g)(11)(iii) are amended to read as follows:

(iii) Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

7.4. Required Receipt of Identical Notification. -- The provisions of 40 CFR ~~section~~ §§ 264.12(a)(1) and (2) are retained by the environmental protection agency; however, the chief of the office of waste management must receive identical notification.

7.5. Releases from Solid Waste Management Unit. -- The provisions of 40 CFR part 264, subpart F -- Releases from solid waste management units are incorporated by reference with the following modifications, exceptions and additions.

7.5.a. For purposes of 40 CFR § 264.92, reference to the "regional administrator" shall be to the "environmental quality board." The environmental quality board establishes groundwater protection standards pursuant to the authority granted the board in W. Va. Code, § 22-12-4.

7.5.b. For purposes of 40 CFR § 264.94 and subparagraphs thereof, the environmental quality board rule on groundwater protection standards, 46 CSR 12 and the subparagraphs therein, shall apply as required pursuant to the authority granted the environmental quality board in W. Va. Code, § 22-12-4.

7.5.c. The provisions of 40 CFR § 264.99(g) are incorporated by reference with the following modifications:

7.5.c.1. The chief will specify in the facility permit the frequencies for collecting samples required under 40 CFR § 264.99(g). This frequency shall not be less than once every five years.

7.6. Financial Requirement. -- The provisions of 40 CFR part 264, subpart H -- Financial Requirements are adopted and incorporated by reference with the following modifications:

7.6.a. The provisions of 40 CFR §§ 264.149 and 264.150 are excepted from incorporation by reference.

7.7. Provisions Relating to Incinerators. -- The provisions of 40 CFR §§ 264.341, 264.342, 264.343, 264.344, 264.345 and 264.347 relating to incinerators are excepted from incorporation by reference. Consult the rules of the ~~air quality board~~ office of air quality regarding emissions from incinerators.

7.7.a. Consult the office of air quality, 45 CSR 25, "To Prevent and Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities."

7.8. 40 CFR Part 264, Subparts AA, BB, CC. -- The provisions of 40 CFR part 264, subparts AA, BB, and CC are excepted from incorporation by reference. Consult the rules of the office of air quality regarding air emissions.

7.9. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule titled "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

7.10. The provisions of Federal Register document dated October 22, 1998 (Volume 63, Number 204) on pages 56709-56735: the final rule titled "Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-closure Permit Requirements; Closure Process" are hereby adopted and incorporated by reference.

§ 33-20-8. INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES.

8.1. 40 CFR Part 265. -- The provisions of 40 CFR part 265 are adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

8.2. 40 CFR § 265.1 -- The provisions of 40 CFR § 265.1(c)(14)(iii) are amended to read as follows:

(iii) Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

8.3. 40 CFR §§ 265.12(a), 265.149 and 265.150. -- The provisions of 40 CFR §§ 265.12(a)(1) and (2), 265.149, and 265.150 are

excepted from incorporation by reference. The chief of the office of waste management must receive identical notification.

8.4. 40 CFR §§265.345, 265.347, 265.352. -- The provisions of 40 CFR §§ 265.341, 265.345, 265.347 and 265.352 relating to incinerators are excepted from incorporation by reference. Consult the rules of the office of air quality regarding emissions from incinerators.

8.5. Thermal Treatment. -- The provisions of 40 CFR part 265, subpart P -- Thermal Treatment are incorporated by reference except for the provisions of 40 CFR § 265.375 and 40 CFR § 265.383 which are excepted from incorporation by reference. Consult the rules of the office of air quality regarding emissions from thermal treatment units.

8.6. 40 CFR Part 265 Subparts AA, BB, CC. -- The provisions of 40 CFR part 265, subparts AA, BB, and CC are excepted from incorporation by reference. Consult the rules of the office of air quality regarding air emission standards for process vents and air emissions standards for equipment leaks, and air emission standards for tanks, surface impoundments and containers.

8.7. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule titled "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

8.8. The provisions of Federal Register document dated October 22, 1998 (Volume 63, Number 204) on pages 56709-56735: the final rule titled "Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-closure Permit Requirements; Closure Process" are hereby adopted and incorporated by reference.

§ 33-20-9. STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES.

~~**9.1. 40 CFR Part 266.**~~ -- The provisions of 40 CFR part 266 are hereby adopted and incorporated by reference. Consult the rules of the office of air quality regarding Subpart H of this part.

§ 33-20-10. LAND DISPOSAL RESTRICTIONS.

10.1. 40 CFR Part 268. -- The provisions of 40 CFR part 268 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

10.2. 40 CFR § 268.1 -- The provisions of 40 CFR § 268.1(f)(3) are amended to read as follows:

(3) Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

10.3. 40 CFR §§ 268.5, 268.6, 268.10 - .13, 268.42(b) and 268.44. -- The provisions of 40 CFR §§ 268.5, 268.6, 268.10, 268.11, 268.12, 268.13, ~~and~~ 268.42(b) and 268.44 are excepted from incorporation by reference.

10.4. Definition of Administrator in 40 CFR Part 268.40(b). The term "administrator" in 40 CFR ~~part~~ § 268.40(b) shall retain its meaning as defined in 40 CFR § 260.10.

~~**10.5.** The provisions of federal register, volume 62, number 33, February 19,1997, page 7502 (et seq) "land disposal restrictions - corrections of tables, treatment standards for hazardous waste and universal treatment standards" are hereby incorporated by reference.~~

10.5. The provisions of Federal Register document dated November 30, 1998 (Volume 63, Number 229) on pages 65873-65947: the final rule titled "Hazardous Remediation Waste Management Requirements" (HWIR-media) are hereby adopted and incorporated by reference.

~~**10.6.** The provisions of 40 CFR §§268.1, 268.4, 268.7 and 268.9 regarding Land Disposal Restrictions amended and finalized in 62 Federal Register 25998 (May 12, 1997) and 63 Federal Register 28555 (May 26, 1998) are hereby incorporated by reference.~~

§ 33-20-11. THE HAZARDOUS WASTE PERMIT PROGRAM.

11.1. 40 CFR Part 270. -- The provisions of the 40 CFR part 270 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

11.2. 40 CFR §270.1. -- The provisions of 40 CFR §270.1(c)(2)(viii)(C) are amended to read as follows:

(c) Thermostats and mercury containing lamps as described in 40 CFR §273.4.

11.3. 40 CFR § 270.2 Definitions.

11.3.a. Definition of "RCRA permit". -- For purposes of this section, the term "RCRA permit" means "West Virginia hazardous waste management permit". The following additional requirements shall apply to obtain a hazardous waste management permit in West Virginia. All references in 40 CFR part 270 to 40 CFR part 124 shall be deemed to be references to the applicable provisions of subsections 11.5. through 11.18 of this rule. To the extent of any

inconsistency with 40 CFR part 270, the specific provisions contained herein shall control.

11.4. Application Fees.

11.4.a. Any person who applies for a permit for the construction or operation of a hazardous waste management facility, or both, shall submit as part of said application a money order or cashier's check payable to "The Hazardous Waste Management Fund" of the state treasury. Persons required to obtain a permit-by-rule pursuant to these regulations are not required to pay a permit application fee.

11.4.b. Such fee shall be determined by the schedule set forth in table 1 of this rule. If the cumulative total of application fees imposed under this section equals or exceeds fifty thousand dollars ($50,000) then the person required to pay the fees may, at the person's option, elect to submit the fee payments in installments over a three year period. The installments submitted to the division of environmental protection may not be less frequent than annually and the amount submitted annually may not be less than one-third of the total amount due.

11.4.c. The chief reserves the right to promulgate rules establishing a permit renewal fee at a later date.

11.5. Pre-application Public Meeting and Notice

11.5.a. Applicability. The requirements of this subsection ~~section 11.5.~~ shall apply to West Virginia hazardous waste management Part B permit applications seeking initial permits for hazardous waste management units. The requirements of this section shall also apply to West Virginia hazardous waste management Part B permit applications seeking renewal of permits for such units, where the renewal application is proposing a significant change in facility operations. For the purposes of this section, a "significant change" is any change that would qualify as a Class 3 permit modification (See 40 CFR §270.42 for a description of permit modifications). The requirements of this section do not apply to permit modifications under 40 CFR §270.42 or to applications that are submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

11.5.b. Prior to the submission of a West Virginia hazardous waste management Part B permit application for a facility, the applicant must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall

post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

11.5.c. The applicant shall submit a summary of the meeting, along with the list of attendees and their addresses developed under subsection 11.5.b. of this section, and copies of any written comments or materials submitted at the meeting, to the permitting agency as a part of the part B application, in accordance with 40 CFR §270.14(b).

11.5.d. The applicant must provide public notice of the pre-application meeting at least thirty (30) days prior to the meeting. The applicant must maintain, and provide to the permitting agency upon request, documentation of the notice.

11.5.d.1. The applicant shall provide public notice in all of the following forms:

11.5.d.1.A. A newspaper advertisement. The applicant shall publish a notice, fulfilling the requirements in ~~subsection~~ paragraph 11.5.d.2. of this section, in a newspaper of general circulation in the county or equivalent jurisdiction that hosts the proposed location of the facility. In addition, the chief shall instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, where the chief determines that such publication is necessary to inform the affected public. The notice must be published as a display advertisement.

11.5.d.1.B. A visible and accessible sign. The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in ~~subsection~~ paragraph 11.5.d.2. of this section. If the applicant places the sign on the facility property, then the sign must be large enough to be readable from the nearest point where the public would pass by the site.

11.5.d.1.C. A broadcast media announcement. The applicant shall broadcast a notice, fulfilling the requirements in subsection 11.5.d.2. of this section, at least once on at least one local radio station or television station. The applicant may employ another medium with prior approval of the chief.

11.5.d.1.D. A notice to the permitting agency. The applicant shall send a copy of the newspaper notice to the permitting agency and the chief shall forward copies to the appropriate units of State and local government having jurisdiction over the area where the facility is, or is proposed to be, located; and to each state agency having any authority under ~~S~~state law with respect to the construction or operation of the facility.

11.5.d.2. The notices required under ~~subsection~~ paragraph 11.5.d.1. of this section must include:

11.5.d.2.A. The date, time, and location of the meeting;

11.5.d.2.B. A brief description of the purpose of the meeting;

11.5.d.2.C. A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location;

11.5.d.2.D. A statement encouraging people to contact the facility at least seventy-two (72) hours before the meeting if they need special access to participate in the meeting; and

11.5.d.2.E. The name, address, and telephone number of a contact person for the applicant.

11.6 Public Notice Requirements at the Application Stage.

11.6.a. Applicability. The requirements of this ~~section 11.6.~~ subsection shall apply to all West Virginia hazardous waste management Part B permit applications seeking initial permits for hazardous waste management units. The requirements of this section shall also apply to hazardous waste management Part B permit applications seeking renewal of permits for such units upon the expiration of the existing permit. The requirements of this section do not apply to permit modifications under 40 CFR § 270.42 or permit applications submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

11.6.b. Notification. The chief shall provide public notice as required in ~~this section~~ subsection 11.6. of this rule when a Part B permit application has been submitted. The chief shall provide public notice to:

11.6.b.1. The applicant;

11.6.b.2. All persons on a mailing list developed under subparagraph 11.12.d.1.D. of this rule; and

11.6.b.3. The appropriate units of state and local government having jurisdiction over the area where the facility is proposed to be located; and to each state agency having any authority under ~~S~~state law with respect to the construction or operation of the facility, that a part B permit application has been submitted to the chief and is available for review.

11.6.b.4. Any person otherwise entitled to receive notice under ~~subsection~~ subdivision 11.6.b. of this rule may waive the right to receive notice for any classes and categories of permits.

11.6.c. The notice shall be published within a reasonable period of time after the application is received by the chief. The notice must include:

11.6.c.1. The name and telephone number of the applicant's contact person;

11.6.c.2. The name and telephone number of the permitting agency's contact office, and a mailing address to which information, opinions, and inquiries may be directed throughout the permit review process;

11.6.c.3. An address to which people can write in order to be put on the facility mailing list;

11.6.c.4. The location where copies of the permit application and any supporting documents can be viewed and copied;

11.6.c.5. A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location on the front page of the notice; and

11.6.c.6. The date that the application was submitted.

11.6.d. Concurrent with the notice required under ~~section~~ subdivision 11.6.b. of this section, the chief must place the permit application and any supporting documents in a location accessible to the public in the vicinity of the facility or at the permitting agency's office.

11.7. Information Repository.

11.7.a. Applicability. The requirements of this section apply to all applications seeking West Virginia hazardous waste management permits for hazardous waste management units.

11.7.b. The chief may assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the chief shall consider a variety of factors, including: the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. If the chief determines, at any time after submittal of a permit application, that there is a need for a repository, then the chief shall notify the facility that it must establish and maintain an information repository.

11.7.c. The information repository shall contain all documents, reports, data, and information deemed necessary by the chief to fulfill the purposes for which the repository is established. The chief shall have the discretion to limit the contents of the repository.

11.7.d. The information repository shall be located and maintained at a site chosen by the facility. If the chief finds the site unsuitable for the purposes and persons for which it was established, due to problems with the location, hours of availability, access, or other relevant considerations, then the chief shall specify a more appropriate site.

11.7.e. The chief shall specify requirements for informing the public about the information repository. At a minimum, the chief shall require the facility to provide a written notice about the information repository to all individuals on the facility mailing list.

11.7.f. The facility owner/operator shall be responsible for maintaining and updating the repository with appropriate information throughout a time period specified by the chief. The chief may close the repository at his or her discretion, based on the factors in subdivision 11.7.b. of this section.

11.8. Application for a Permit.

11.8.a. Any person who requires a permit under this rule shall complete, sign, and submit to the chief an application for each permit required under this rule. Applications are not required for hazardous waste permits by rule pursuant to 40 CFR § 270.60. The chief shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. Permit applications must comply with the signature and certification requirements of 40 CFR § 270.11.

11.8.b. The chief shall review for completeness every application. Each application submitted by a new hazardous waste management, should be reviewed for completeness by the chief within 30 days of its receipt. Each application submitted by an existing hazardous waste management facility (both Part A and Part B of the application), should be reviewed for completeness within 60 days of receipt. Upon completing the review, the chief shall notify the applicant in writing whether the application is complete. If the application is incomplete, the chief shall list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the chief shall specify in the notice of deficiency a date for submitting the necessary information. The chief shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the chief may request additional

information from the applicant but only when necessary to clarify, modify or supplement previously submitted material. Request for such additional information will not render an application incomplete.

11.8.c. If the applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provisions of WV Code §22-18-1 et seq.

11.8.d. If the chief decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date shall be scheduled.

11.8.e. The effective date of an application is the date on which the chief notifies the applicant that the application is complete as provided for in subdivision 11.8.b. of this section.

11.8.f. For each application the chief shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule shall specify target dates by which the chief intends to:

11.8.f.1. Prepare a draft permit;

11.8.f.2. Give public notice;

11.8.f.3. Complete the public comment period, including any public hearing; and

11.8.f.4. Issue a final permit.

11.9. Modification, Revocation and Reissuance, or Termination of Permits

11.9.a. Permits may be modified, revoked and reissued, or terminated either at the request of an interested person (including the permittee) or upon the chief's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in 40 CFR §§ 270.41 or 270.43. All requests shall be in writing and shall contain facts or reasons supporting the request.

11.9.b. If the chief decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the chief may be appealed to the ~~E~~environmental ~~Q~~quality ~~B~~board in accordance with section 15 of this rule.

11.9.b.1. If the chief tentatively decides to modify or revoke and reissue a permit under 40 CFR §§270.41 or 270.42 (c), he or she shall prepare a draft permit under section 11.10. incorporating the proposed changes. The chief may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of a revoked and reissued permit, the chief shall require the submission of a new application.

11.9.b.2. In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

11.9.b.3. "Classes 1 and 2 Modifications" as defined in 40 CFR §§270.42 (a) and (b) are not subject to the requirements of this section.

11.9.c. If the chief tentatively decides to terminate a permit under 40 CFR § 270.43, he or she shall issue a Notice of Intent to Terminate. A Notice of Intent to Terminate is a type of draft permit which follows the same procedures as any draft permit prepared under ~~section~~ subsection 11.10. of this rule.

~~**11.9.d.** The provisions of 40 CFR § 270.42(j) and 40 CFR 270.72(b)(8) regarding permit modification for hazardous combustion units for technology changes needed to meet standards under 40 CFR Part 63 Subpart EEE as amended and finalized in 63 Federal Register 33781 (June 19, 1998). Consult the rules of the office of air quality.~~

11.10. Draft Permits.

11.10.a. Once an application is complete, the chief shall tentatively decide whether to prepare a draft permit or to deny the application.

11.10.b. If the chief tentatively decides to deny the permit application, he or she shall issue a Notice of Intent to Deny. A Notice of Intent to Deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under this section. If the chief's final decision is that the tentative decision to deny the permit application was incorrect, he or she shall withdraw the Notice of Intent to Deny and proceed to prepare a draft permit.

11.10.c. If the chief tentatively decides to issue a permit, he or she shall prepare a draft permit that contains the following information:

11.10.c.1. All conditions under 40 CFR §§270.30 and 270.32;

11.10.c.2. All compliance schedules under 40 CFR § 270.33;

11.10.c.3. All monitoring requirements under 40 CFR §270.31; and,

11.10.c.4. Standards for treatment, storage, and/or disposal and other permit conditions under 40 CFR §270.30.

11.10.d. All draft permits prepared by the chief under this section shall be accompanied by a fact sheet and shall be based on the administrative record, publicly noticed and made available for public comment.

11.11. Fact Sheet

11.11.a. A fact sheet shall be prepared for every draft permit for a hazardous waste management facility, which the chief finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, and methodological and policy questions considered in preparing the draft permit. The chief shall send the fact sheet to the applicant and, on request, to any other person.

11.11.b. The fact sheet shall include when applicable:

11.11.b.1. A brief description of the type of facility or activity which is the subject of the draft permit;

11.11.b.2. The type and quantity of waste, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged;

11.11.b.3. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record;

11.11.b.4. Reasons why any requested variances or alternatives to required standards do or do not appear justified;

11.11.b.5. A description for reaching a final decision on a draft permit including:

11.11.b.5.A. The beginning and the ending dates of the comment period and the address where comments will be received;

11.11.b.5.B. Procedures for requesting a hearing and the nature of that hearing; and

11.11.b.5.C. Any other procedures by which the public may participate in the final decision.

11.11.b.6. Name and telephone number of a person to contact for additional information.

11.12. Public Notice of Permit Actions and Public Comment Period

11.12.a. Scope. The chief shall give public notice if the following actions have occurred:

11.12.a.1. A draft permit has been prepared; and

11.12.a.2. A hearing has been scheduled.

11.12.b. No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under ~~section~~ subsection 11.9. of this rule. Written notice of that denial shall be given to the requester and to the permittee.

11.12.c. Timing. Public notice of the preparation of a draft permit (including a Notice of Intent to Deny a Permit Application) required under ~~section~~ subdivision 11.12.a. of this rule shall allow at least forty-five (45) days for public comment. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

11.12.d. Public notice of activities described in ~~section~~ subdivision 11.12.a. of this section shall be given by the following methods:

11.12.d.1. By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits)~~:~~:

11.12.d.1.A. The applicant;

11.12.d.1.B. Any other agency which the chief knows has issued or is required to issue a RCRA, UIC, PSD (or other permit under the Clean Air Act or West Virginia Code §22-5-1 et. seq.,

NPDES, 33 U.S.C. §1344, or sludge management permit for the same facility or activity;

11.12.d.1.C. Federal and state agencies with jurisdiction over fish, shell fish and wildlife resources and over coastal zones management plans, the advisory council on historic preservation, and the state historic preservation office, as applicable~~.~~;

11.12.d.1.D. Persons on a mailing list developed by:

11.12.d.1.D.~~i~~1. Including those who request in writing to be on the list;

11.12.d.1.D.~~ii~~ 2. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

~~(c)~~**11.12.d.1.D.~~iii~~ 3.** Notifying the public of the opportunity to be put on the mailing list through periodic public in the public press and in such publications as regional and state funded newsletters, environmental bulletins, or state law journals. (The chief may update the mailing lists from time to time by requesting written indications of continued interest from those listed. The chief may delete from the lists the name of any person who fails to respond to such request.)

11.12.d.1.E. To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and

11.12.d.1.F. To each state agency having any authority under state law with respect to the construction or operation of such facility.

11.12.d.2. Publication of a notice in a daily or weekly major local newspaper of general circulation and broadcast over local radio stations~~.~~;

11.12.d.3. In a manner constituting legal notice to the public under state laws; and

11.12.d.4. Any other method reasonably calculated to give actual notice of the action in question to the person potentially effected by it, including press releases or any other forum or medium to elicit public participation.

11.12.e. All public notices issued under this section shall contain the following minimum information:

11.12.e.1. Name and address of the office processing the permit action for which notice is being given;

11.12.e.2. Name and address of the permittee or the permit applicant and, if different, of the facility or activity regulated by the permit;~~.~~

11.12.e.3. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit;

11.12.e.4. Name, address and telephone number of a person from who interested persons may obtain further information, including copies of the draft permit, fact sheet and the application; and

11.12.e.5. A brief description of the comment procedures required by ~~sections~~ subsections 11.13. and 11.14. of this rule and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final decision~~.~~;

11.12.e.6. The location of the administrative record, the times that which the record will be open for public inspection; and

11.12.e.7. Any additional information considered necessary or proper.

11.12.f. Public notices for hearings. In addition to the general public notice described in ~~section~~ subdivision 11.12.e. of this section, the public notice of a hearing shall contain the following information:

11.12.f.1. Reference to the date of previous public notices relating to the permit;

~~**11.12.f.1.A.**~~11.12.f.2. Date, time, and place of the hearing; and

~~**11.12.f.1.B.**~~11.12.f.3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures~~;~~.

11.12.g. In addition to the general public notice described in ~~section~~ subdivision 11.12.e. of this section, all persons identified in ~~section~~ subparagraphs 11.12.d.1.A, 11.12.d.1.B, and 11.12.d.1.C of this section shall be mailed a copy of the fact sheet, the permit application and the draft permit, as applicable.

11.13. Public Comments and Requests for Public Hearings.

During the public comment period provided under ~~section~~ subsection 11.12. of this rule, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in ~~section~~ subsection 11.17 of this rule.

11.14. Public Hearings.

11.14.a. The chief shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit.

11.14.b. The chief may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.

11.14.c. The chief shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within forty-five (45) days of public notice under ~~section~~ subdivision 11.12.c. of this rule; whenever possible the chief shall schedule a hearing under this section at a location in convenient to the nearest population center to the proposed facility.

11.14.d. Public notice of the hearing shall be given as specified in ~~section~~ subsection 11.12. of this rule.

11.14.e. Whenever a public hearing will be held the chief shall designate a presiding officer for the hearings who shall be responsible for its scheduling and orderly conduct.

11.14.f. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under ~~section~~ subsection 11.12. of this rule shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

11.14.g. A tape recording or written transcript of the hearing shall be made available to the public.

11.15. Reopening of the Public Comment Period.

11.15.a. If any data, information, or arguments submitted during the public comment period appear to raise substantial new

questions concerning a permit, the chief may take one or more of the following actions:

11.15.a.1. Prepare a new draft permit, appropriately modified, under ~~Section~~ subsection 11.10. of this rule.

11.15.a.2. Prepare a revised fact sheet under ~~Section~~ subsection 11.11. of this rule and reopen the comment period.

11.15.a.3. Reopen or extend the comment period under ~~S~~section 11.12. of this rule to give interested persons an opportunity to comment on the information or arguments submitted.

11.15.b. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under ~~Section~~ subsection 11.12. of this rule shall define the scope of the reopening.

11.15.c. Public notice of any of the above actions shall be issued under ~~section~~ subsection 11.12 of this rule.

11.16. Issuance and Effective Date of Permit.

11.16.a. After the close of the public comment period on a draft permit the chief shall issue a final permit decision. The chief shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice shall include reference to the procedures for appealing a decision on the permit. For purposes of this section the final permit decision means a final decision to issue, deny, modify, or revoke and reissue, or terminate a permit.

11.16.b. A final permit decision shall become effective thirty (30) days after the service of Notice of Decision unless:

11.16.b.1. A later effective date is specified in the decision; or

11.16.b.2. Review is requested or evidentiary hearing is requested; or

11.16.b.3. No comments requested change in the draft permit, in which case the permit shall become effective immediately upon issuance.

11.17. Response to Comments.

11.17.a. At the time that any final permit decision is issued, the chief shall issue a response to comments. This response shall:

11.17.a.1. Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

11.17.a.2. Briefly describe and respond to all significant comments on the draft permit or the permit application raised during the public comment period, or during any hearing.

11.17.b. The response to comments shall be available to the public.

11.18. Administrative Record.

11.18.a. The provisions of a draft permit prepared under subsection 11.10. of this rule shall be based on the administrative records consisting of:

11.18.a.1. The application and any supporting data furnished by the applicant;

11.18.a.2. The draft permit or notice of intent to deny the application or to terminate the permit;

11.18.a.3. The fact sheet;

11.18.a.4. All documents cited in the fact sheet; and

11.18.a.5. Other documents contained in the supporting file for the draft permit.

11.18.b. The chief shall base final permit decisions on the administrative record consisting of:

11.18.b.1. Administrative record for the draft permit;

11.18.b.2. All comments received during the public comment period provided under subsection 11.12. of this rule (including any extension or reopening under subsection 11.15. of this rule);

11.18.b.3. The tape or transcript of any hearing(s) held under subsection 11.14. of this rule;

11.18.b.4. Any written material submitted at such hearing;

11.18.b.5. The response to comments required by subsection 11.17. of this rule which identified and supports any change made in the draft permit and any new material placed in the record under that subsection;

11.18.b.6. Other documents contained in the supporting file for the permit;

11.18.b.7. An addendendum to the fact sheet if needed; and

11.18.b.8. The final permit.

11.18.c. The administrative record shall be complete on the date the final permit is issued.

11.18.d. Material readily available at the issuing agency office or published material that is generally available, and that is included in the administrative record under subdivisions 11.18.a. and 11.18.b. of this rule, need not be physically included with the rest of the record as long as it is specifically referred to in the fact sheet or in the addendum to the fact sheet.

11.19. Public Access to Information.

11.19.a. Any records, reports, or information and any permit, permit applications, and related documentation within the chief's possession shall be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the chief that such records, reports, permit documentation, or information, or any part hereof would, if made public, divulge methods or processes or activities entitled to protection as trade secrets, the chief shall consider, treat, and protect such records as confidential.

11.19.b. It shall be the responsibility of the person claiming any information as confidential under the provisions of this subsection to clearly mark each page containing such information with the word "CONFIDENTIAL" and to submit an affidavit setting forth the reasons that said person believes that such information is entitled to protection.

11.19.c. Any document submitted to the chief which contains information for which claim of confidential information is made shall be submitted in a sealed envelope marked "CONFIDENTIAL" and addressed to the chief. The document shall be submitted in two (2) separate parts. The first part shall contain all information which is not deemed by the person preparing the report as confidential and shall include appropriate cross-references to the second part which contains data, words, phrases, paragraphs, or pages and appropriate affidavits containing or relating to information which is claimed to be confidential.

11.19.d. No information shall be protected as confidential information by the chief unless it is submitted in accordance with the provisions of subdivision 11.19.c. of this rule and no information which is submitted in accordance with the provision of subdivision 11.19.c. of this rule shall be afforded protection as confidential information unless the chief finds that such

protection is necessary to protect trade secrets. The person who submits information claimed to be confidential shall receive written notice from the chief as to whether the information has been accepted as confidential or not.

11.19.e. All information which meets the tests of subdivision 11.19.d. of this rule shall be marked with the term "ACCEPTED" and shall be protected as confidential information. If said person fails to satisfactorily demonstrate to the chief that such information in the form presented to him meets the criteria of subdivision 11.19.d. of this rule, the chief shall mark the information "REJECTED" and promptly returned such information to the person submitting such information. The chief shall retain a copy of such information for reference.

11.19.f. Nothing contained herein shall be construed so as to restrict the release of relevant confidential information during situations declared to be emergencies by the chief or his designee.

11.19.g. Nothing in subsection 11.19. of this rule may be construed as limiting the disclosure of information by the division to any officer, employee, or authorized representative of the ~~S~~state or federal government concerned with effecting the purposes of this subsection.

11.19.h. Persons interested in obtaining information pursuant to this subsection should submit a request in accordance with the environmental quality board rule 46 CSR 8.

11.20. The provisions of Federal Register document dated October 22, 1998 (Volume 63, Number 204) on pages 56709-56735; the final rule titled "Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-closure Permit Requirements; Closure Process" are hereby adopted and incorporated by reference.

~~**11.20.**~~

11.21. 40 CFR §270.12. The provisions of 40 CFR §270.12 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provision of W. Va. Code, §22-18-12 and subsection 11.19. of this rule.

~~**11.21.**~~

11.22. 40 CFR §270.24. The provisions of 40 CFR §270.24 are excepted from incorporation by reference. Consult the rules of the office of air quality regarding emissions form process vents.

~~**11.22.**~~

11.23. 40 CFR §§270.60(b) and 270.64. The provision of 40 CFR §§270.60(b) and 270.64 are excepted from incorporation by reference. Consult the rules of the office of water resources and

the environmental quality board regarding the requirements for underground injection wells.

§ 33-20-12. DEED AND LEASE DISCLOSURE; NOTICE IN DEED TO PROPERTY.

12.1. Recording Requirement. -- The owner of the property on which a hazardous waste management facility is located must record, in accordance with state law, a notation on the deed or lease to the facility property -- or on some other instrument that is normally examined during title search -- that will in perpetuity notify any potential purchaser of the property that:

12.1.a. The land has been used to manage hazardous wastes; and

12.1.b. Its use is restricted under 40 CFR § 264.117(c).

12.2. Upon actual transfer of property which contains hazardous wastes that have been stored, treated, or disposed of, the previous owner shall notify the chief in writing of such transfer.

12.3. Other Requirements. -- Nothing contained in this section of this rule shall relieve any person from complying with the requirements on deed and lease disclosures set forth in W. Va. Code, § 22-18-21.

§ 33-20-13. UNIVERSAL WASTE RULE.

13.1. 40 CFR Part 273. -- The provisions of 40 CFR part 273 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

13.2. In addition to pesticides, batteries, and thermostats covered by 40 CFR part 273, mercury containing lamps, commonly known as fluorescent light bulbs, are also covered under part 273

13.3. 40 CFR § 273.1 -- The provisions of 40 CFR § 273.1(a)(3) are amended to read as follows:

(3) Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

13.4. 40 CFR § 273.4 -- Applicability - mercury thermostats and mercury containing lamps -- The provisions of 40 CFR § 273.4 are amended by adding thereto a new subdivision designated subdivision (d) to read as follows:

(d) Whenever the phrase "mercury thermostats" or "thermostats" is used in 40 CFR part 273, the phrase is to be read to include mercury containing lamps except where such language refers to mercury containing ampules. Mercury containing lamps shall be

managed as universal waste to the same extent as mercury thermostats if the mercury containing lamp is a hazardous waste because it exhibits one or more of the characteristics identified in 40 CFR part 261, subpart C. Mercury containing lamps must be handled to prevent breakage, leakage or spillage of the hazardous constituents. In the event that the hazardous constituents are released, the handler must manage the material in accordance with all applicable universal waste remediation procedures and determine whether or not it is subject to the requirements of 40 CFR ~~P~~ parts 260 through 272.

13.5. 40 CFR § 273.6 -- Definitions -- The provisions of 40 CFR § 273.6 are amended to read as follows:

13.5.a. "Mercury containing lamp" means an electric lamp in which mercury is purposely introduced by the manufacturer for the operation of the lamp. Mercury containing lamps commonly include fluorescent lamps.

13.5.b. "Universal Waste" means any of the following hazardous wastes that are managed under the universal waste requirements of 40 CFR part 273:

~~(1)~~13.5.b.1. Batteries as described in 40 CFR § 273.2;

~~(2)~~13.5.b.2. Pesticides as described in 40 CFR § 273.3; and

~~(3)~~13.5.b.3. Thermostats and mercury containing lamps as described in 40 CFR § 273.4.

13.6. 40 CFR §§ 273.20, 273.40, 273.56 -- The provisions of 40 CFR §§ 273.20, 273.40, and 273.56 relating to ~~E~~exports are hereby adopted and incorporated by reference. The substitution of terms in ~~S~~subdivision 1.6.a. of this rule does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of 40 CFR part 273 shall file with the chief copies of all documentation, manifests, exception reports, annual reports or records, inter alia, submitted to EPA, the administrator or the regional administrator as required by ~~part~~ 40 CFR part 273.

13.7. 40 CFR § 273.70 -- The provisions of 40 CFR § 273.70 Imports are ~~excepted from~~ hereby adopted and incorporated~~ion~~ by reference. ~~to the extent jurisdiction is limited to West Virginia.~~ Persons managing universal waste that is imported to West Virginia are subject to the requirements of this rule.

13.8. 40 CFR §§ 273.80 and 273.81 -- The provisions of 40 CFR §§ 273.80 and 273.81 are excepted from incorporation by reference.

Consult the provisions of subdivision 2.5.d of this rule to petition to include a waste as a universal waste.

§ 33-20-14. STANDARDS FOR THE MANAGEMENT OF USED OIL.

14.1. 40 CFR Part 279. -- The provisions of 40 CFR part 279 are hereby adopted and incorporated by reference with the exception contained in this section. Consult the rules of the office of air quality regarding the burning of used oil. Notwithstanding the effective date of this rule, the provisions of 40 CFR part 279 effective on July 1, 1995 are hereby adopted and incorporated by reference.

14.2. 40 CFR § 279.82(b). -- The term EPA at 40 CFR § 279.82(b) shall have the meaning of United States environmental protection agency.

~~**14.3. Effective Date of Section 14.** -- Notwithstanding the effective date of this rule, the effective date of the provisions of this section shall be July 1, 1995.~~

§ 33-20-15. APPEAL RIGHTS.~~**15.1.**~~ Any person aggrieved or adversely affected by the failure or refusal of the director to act within a reasonable time on an application for a permit or by the issuance or denial of or by the terms and conditions of a permit granted by the director under the provisions of this rule, may appeal to the environmental quality board in accordance with the provisions of ~~article 1, chapter twenty-two-b (§22B-1-1 et seq.) of the West Virginia Code~~ W. Va. Code §22B-1-1 et seq.

TABLE 1
PERMIT APPLICATION FEE SCHEDULE

STORAGE

EPA CODE ACTIVITY	FEE	FEE
S01 Container	<100 tons capacity $2,500.00	≥100 tons capacity $3,750.00
S02 Tank	<100 tons capacity $2,500.00	≥100 tons capacity $3,750.00
S04 Surface Impoundment	<1,000 tons capacity $10,000.00	≥1,000 tons capacity $12,500.00
S05 Drip Pad	$2,500.00	
S03 Waste Pile	<100 tons capacity $5,000.00	≥100 tons capacity $7,500.00
S06 Waste Pile (Containment Bldg.)	<100 tons capacity $5,000.00	≥100 tons capacity $7,500.00
S99 HWIR Staging Pile	<100 tons capacity $5,000.00	>100 tons capacity $7,500.00

DISPOSAL

EPA CODE ACTIVITY	FEE	FEE
D80 Landfill	<1,000 tons/year $15,000.00	≥1,000 tons/year $25,000.00
D81 Land Application	<1,000 tons/year $15,000.00	≥1,000 tons/year $25,000.00
D83 Surface Impoundment	<1,000 tons/year $15,000.00	≥1,000 tons/year $25,000.00

TABLE 1
PERMIT APPLICATION FEE SCHEDULE
(CONTINUED)

TREATMENT

EPA CODE ACTIVITY	FEE	FEE
T01 Tank	<100 tons capacity $2,500.00	≥100 tons capacity $3,750.00
T02 Surface Impoundment	<1,000 tons/year $10,000.00	≥1,000 tons/year $12,500.00
T03 Incinerator	<1,000 tons/year $5,000.00	≥1,000 tons/year $7,500.00
T80 thru T93 Boiler/Industrial Furnace	<1,000 tons/year $5,000.00	≥1,000 tons/year $7,500.00
T04 Other	$5,000.00	$7,500.00
T-94 Containment Bldg. Treatment	$5,000.00	$7,500.00

EMERGENCY PERMITS

EPA CODE ACTIVITY	FEE
State and Federal	Nil
Others	$500.00

TABLE 1
PERMIT APPLICATION FEE SCHEDULE
(CONTINUED)

MISCELLANEOUS

EPA CODE ACTIVITY	FEE
Permit Modification under 40 CFR, 270.42 (Class I)	$ 500.00
Permit Modification under 40 CFR, 270.42 (Class II and III)	$ 1,250.00
Modification under 40 CFR, 270.41	$ 2,500.00
Post-Closure Care Permit	$15,000.00
Closure Plans	$ 1,500.00

Thursday
October 22, 1998

Part II

Environmental Protection Agency

40 CFR Parts 264, 265, 270, and 271
Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities: Post-Closure Permit Requirement and Closure Process; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264, 265, 270, and 271

[FRL–6178–7]

RIN 2050–AD55

Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-Closure Permit Requirement; Closure Process

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending the regulations under the Resource Conservation and Recovery Act (RCRA) in two areas. First, the Agency is modifying the requirement for a post-closure permit, to allow EPA and the authorized States to use a variety of authorities to impose requirements on non-permitted land disposal units requiring post-closure care. As a result of this rule, regulators have the flexibility to use alternate mechanisms under a variety of authorities to address these requirements, based on the particular needs at the facility.

Second, for all facilities, the Agency is amending the regulations governing closure of land-based units that have released hazardous constituents, to allow certain units to be addressed through the corrective action program. As a result of this rule, EPA and the authorized States will have discretion to use corrective action requirements, rather than closure requirements, to address the regulated units. This flexibility will reduce the potential for confusion and inefficiency created by the application of two different regulatory requirements.

Finally, the Agency is specifying the Part B information submission requirements for facilities that receive post-closure permits.

DATES: This rule is effective October 22, 1998.

ADDRESSES: Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The Docket Identification Number is F–98–PCPF–FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling (703) 603–9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page. The index and some supporting materials are available electronically. See the Supplementary Information section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC metropolitan area, call (703) 412–9810 or TDD (703) 412–3323.

For more detailed information on specific aspects of this rulemaking, contact Barbara Foster, Office of Solid Waste, Mail Code 5303W, U.S. Environmental Protection Agency, 401 M St. SW, Washington DC 20460, (703–308–7057), foster.barbara@epamail.epa.gov

SUPPLEMENTARY INFORMATION: The index and the following supporting materials are available on the Internet: Economic Assessment. Follow these instructions to access the information electronically:

WWW: http://www.epa.gov/epaoswer/osw/hazwaste.htm#closure
FTP: ftp.epa.gov
Login: anonymous
Password:
foster.barbara@epamail.epa.gov
Files are located in /pub/epaoswer

Preamble Outline

I. Authority

These regulations are promulgated 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 Information

A. Overview of RCRA Permit Authorities

Section 3004 of the Resource Conservation Recovery Act (RCRA) requires the Administrator of EPA to

develop regulations applicable to owners and operators of hazardous waste treatment, storage, or disposal facilities, as necessary to protect human health and the environment. Section 3005 requires the EPA Administrator to promulgate regulations requiring each person owning or operating a treatment, storage, or disposal facility to have a permit, and to establish requirements for permit applications. Recognizing that the Agency would require a period of time to issue permits to all facilities, Congress provided, under section 3005(e) of RCRA, that qualifying owners and operators could obtain "interim status" and be treated as having been issued permits until EPA takes final administrative action on their permit applications. The privilege of continuing hazardous waste management operations during interim status carries with it the responsibility of complying with appropriate portions of the section 3004 standards.

EPA has issued numerous regulations to implement RCRA requirements for hazardous waste management facilities. These include the standards of 40 CFR Part 264 (which apply to hazardous waste management units at facilities that have been issued RCRA permits), Part 265 (which apply to hazardous waste management units at interim status facilities), and Part 270 (which provide standards for permit issuance).

1. Closure and Post-Closure Care

The closure regulations at 40 CFR Parts 264 and 265 Subpart G require owners and operators of hazardous waste management units to close these units in a manner that is protective of human health and the environment and that minimizes the post-closure releases to the environment. These regulations also establish procedures for closure: they require owners and operators to submit closure plans to the Agency for their hazardous waste management units, and they require Agency approval of those closure plans.

In addition, Parts 264 and 265 establish specific requirements for closure of different types of units. Under Parts 264 and 265 Subpart N, owners and operators of landfills are required to cover the unit with an impermeable cap designed to minimize infiltration of liquid into the unit; then owners or operators must conduct post-closure care (including maintenance of the cap and groundwater monitoring). Under Subparts K and L of Parts 264 and 265, owners and operators of surface impoundments and waste piles must either remove or decontaminate all hazardous waste and constituents from the unit, or leave waste in place, install a final cover over the unit, and conduct post-closure care. Closure of land treatment facilities must be conducted in accordance with closure and post-closure care procedures of §§ 264.280 and 265.280. As part of the closure plan approval process, the Agency has the authority to require owners and operators to remove some or all of the waste from any type of unit at the time of closure, if doing so is necessary for the closure to meet the performance standard of § 264.111 or § 265.111.

Under Subparts I and J of Parts 264 and 265, owners and operators of non-land based units (e.g., tanks and containers) are required to remove or decontaminate all soils, structures, and equipment at closure. Owners and operators of tanks who are unable to do so must close the unit as a landfill and conduct post-closure care (see, for example, § 265.197(b)).

Where post-closure care is required, owners and operators must comply with the requirements of §§ 264.117–120 or §§ 265.117–120. These provisions establish a post-closure plan approval process, similar to the closure plan approval process, and requirements for maintenance of the RCRA cap during the post-closure care period. Facilities also must comply with the groundwater requirements of Part 264 or Part 265 Subpart F during the same period.

2. Subpart F

The requirements of Parts 264 and 265, Subpart F apply to "regulated units," defined in § 264.90(a)(2) as any landfill, surface impoundment, waste pile, or land treatment unit that received hazardous waste after July 26, 1982 or that certified closure after July 26, 1983. While the standards of Parts 264 and 265, Subparts G (closure and post-closure care) and H (financial assurance) are equivalent for permitted and interim status facilities, Part 265 groundwater monitoring requirements for interim status land disposal units are less comprehensive than those established under the Part 264, Subpart F standards for permitted facilities. Whereas Part 265 sets minimum standards for the installation of detection monitoring wells (e.g., one upgradient and three downgradient wells), Part 264 establishes broader standards for establishing a more comprehensive monitoring system to ensure early detection of any releases of hazardous constituents. The specific details of the system are worked out through the permitting process. Consequently, compliance with Part 264 standards usually results in a more extensive network of monitoring wells. Similarly, Part 265 specifies a limited set of indicator parameters that must be monitored, while Part 264 establishes a more comprehensive approach under which the owner or operator is required to design a monitoring program around site-specific indicator parameters. As a result, monitoring systems designed in accordance with Part 264 standards are specifically tailored to the constituents of concern at each individual site. Additionally, Part 264 compliance monitoring standards are more comprehensive than Part 265 standards both in terms of monitoring frequency and the range of constituents that must be monitored. Finally, the Part 264, Subpart F regulations provide for corrective action for releases to groundwater whereas the Part 265, Subpart F regulations do not.

B. Overview of HSWA Corrective Action Authorities

In the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA, Congress expanded EPA's authority to address releases from all solid waste management units (SWMUs) at hazardous waste management facilities. Section 3004(u) of HSWA required that any permit issued under section 3005(c) of RCRA to a treatment, storage, or disposal facility after November 8, 1984, address corrective action for releases of hazardous wastes or hazardous constituents from any SWMU at the facility. Section 3004(v) authorized EPA to require corrective action beyond the facility boundary where appropriate. Section 3008(h) provided EPA with authority to issue administrative orders or bring court action to require corrective action or other measures, as appropriate, when there is or has been a release of hazardous waste or, (under EPA's interpretation) of hazardous constituents from a facility authorized to operate under section 3005(e).

In a December 16, 1985 memorandum entitled *Interpretation of Section 3008(h) of the Solid Waste Disposal Act*, EPA interpreted section 3008(h) to apply not only to facilities that met the requirement for obtaining interim status, but also to facilities that were subject to but did not fully comply with the requirements for interim status, as well as to facilities that lost interim status pursuant to 40 CFR Part 124 or sections 3005(c) or 3005(e)(2) of RCRA. Later, in an August 10, 1989 memorandum entitled *Coordination of Corrective Action Through Permits and Orders* (OSWER Directive 9502.1989(04)), EPA clarified that interpretation by stating that a section 3008(h) order cannot be issued to a facility after final disposition of the permit application.

In practice, the corrective action process is highly site-specific, and involves direct oversight by the reviewing Agency. Unlike the closure process, which provides two options (closure with waste in place and closure by complete removal and decontamination), the corrective action process provides considerable flexibility to the Agency to decide on remedies that reflect the conditions and the complexities of each facility. For example, depending on the site-specific circumstances, remedies may attain media cleanup standards through various combinations of removal, treatment, engineering, and institutional controls.

EPA has codified corrective action requirements at §§ 264.101, 264.552, and 264.553, and currently implements these requirements through the permitting process. EPA also implements corrective action by issuing corrective action orders under section 3008(h) of RCRA. In addition, to facilitate the corrective action process, EPA proposed more extensive corrective action regulations on July 27, 1990, under a new Part 264 Subpart S (*see* 55 FR 30798). The July 27, 1990 Subpart S proposal set forth EPA's interpretation of the statutory requirements at that time. Later, EPA promulgated several sections of that proposal related to temporary units, corrective action management units, and the definition of "facility" (*see* 58 FR 8658, February 16, 1993).

On May 1, 1996, the Agency issued a **Federal Register** notice (61 FR 19432) defining the goals of the corrective action program, and providing guidance on its implementation. The notice also announced the Agency's Corrective Action Initiative and soliciting comment on issues related to the corrective action program. This initiative is a reevaluation effort to identify and implement improvements to the corrective action program, and to focus that program more clearly on environmental results. The notice specified five goals of the Corrective Action Initiative: (1) to create a consistent, holistic approach to cleanup at RCRA facilities; (2) to establish protective, practical cleanup expectations; (3) to shift more of the responsibilities for achieving cleanup goals to the regulated community; (4) to focus on opportunities to streamline and reduce costs; and (5) to enhance opportunities for timely, meaningful public participation.

C. Overview of Proposed Rule

1. Elements of the Proposal That Are Promulgated in This Final Rule

a. Post-closure care under alternatives to permits. The regulations promulgated in this rule were proposed by the Agency on November 8, 1994 (see Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-Closure Permit Requirement; Closure Process; State Corrective Action Authority (59 FR 55778)). That proposal was designed to give EPA and the authorized States greater flexibility in remediating RCRA facilities by modifying the regulations in several areas.

First, EPA proposed to allow EPA and authorized States to use a variety of legal authorities when addressing facilities that require post-closure care. Under the proposal, the Agency would continue to impose the same substantive groundwater, post-closure care, and corrective action requirements as it would under a permit, and would provide for adequate public participation.

The Agency proposed this change to provide regulators the necessary flexibility to use the best regulatory approach in addressing these sites. Prior to today's rule, section 270.1 required owners and operators of landfills, waste piles, surface impoundments, or land treatment units that received waste after July 26, 1982, or that ceased the receipt of wastes prior to July 26, 1982, but did not certify closure until after January 26, 1983, to obtain post-closure permits (unless they demonstrated that they met the § 270.1 requirements for closure by removal).

In the case of operating land disposal facilities, the RCRA permit, when first issued, incorporates the closure plan and applicable post-closure provisions. These post-closure conditions become effective after the facility ceases to manage hazardous waste and the closure plan has been implemented. The permit, when issued, also requires compliance with Part 264 Subpart F groundwater monitoring standards. Permits issued after November, 1984 also would impose the facility-wide corrective action requirements of RCRA section 3004(u), if necessary.

For interim status facilities that close without obtaining an operating permit, the requirement for a post-closure permit (typically issued after completion of closure) performed an important regulatory function. First, to secure a permit, the facility had to meet the permit application requirements of Part 270, which require extensive information on the hydrogeologic characteristics of the site and extent of any groundwater contamination. Second, once the post-closure permit was issued, the facility became subject to the standards of Part 264 rather than Part 265, most significantly to the site-specific groundwater monitoring requirements of Part 264 Subpart F. Third, the post-closure permit imposed facility-wide corrective action to satisfy the requirements of section 3004(u). Finally, the public involvement procedures of the permitting process assure that the public is informed of and has an opportunity to comment on permit conditions.

The requirement for post-closure permits was promulgated in 1982. At the time, the Agency believed that permits would be the most effective means to develop site-specific groundwater monitoring programs tailored to individual waste management facilities (see 47 FR 32366, July 26, 1982). Since that time, the Agency and the authorized States have issued hundreds of permits to closed and closing interim status facilities. In the course of issuing these permits, EPA and the States have encountered many facilities where post-closure permit issuance proved difficult or, in some cases, impossible. Generally, the Regions and States have encountered two major difficulties when issuing post-closure permits. First, some facilities chose to close, or are forced to close, because they cannot comply with Part 265 standards—particularly, groundwater monitoring and financial assurance. If a facility cannot meet these requirements, EPA cannot issue a permit to it because section 3005(c) of RCRA requires facilities to be in compliance with applicable requirements at the time of permit issuance. Second, owners or operators often have little incentive to seek a post-closure permit. Without a strong incentive on the part of the facility owner or operator to provide a complete application, the permitting process can be significantly protracted.

To address environmental risk at facilities such as those described above, Regions and States have frequently utilized legal authorities other than permits. Use of enforcement actions enables the Agency to place these facilities on a schedule of compliance for meeting financial assurance and/or groundwater monitoring requirements over a period of time. And, even where enforcement actions cannot bring about full regulatory compliance (e.g., where the owner or operator cannot secure financial assurance), they enable the

Agency to prescribe actions to address the most significant environmental risks at the facility. For example, EPA has often issued corrective action orders under the authority of section 3008(h) to address releases from regulated units and/or other SWMUs at these facilities. In other cases, Federal or State Superfund authorities have been used to address cleanup at sites. However, prior to this rule, EPA or the State was still required to issue a post-closure permit even where the environmental risks associated with the facility were addressed through other authorities.

EPA is promulgating, with minor revisions, those provisions of the November 8, 1994 proposal that remove the requirement to issue post-closure permits at each facility, and allow post-closure care requirements to be imposed using either permits or approved alternate authorities. Those provisions are promulgated in this rule in §§ 265.121, 270.1(c), and 271.16, and are discussed in sections III.A. and III.B. below.

b. Remediation requirements for land-based units with releases to the environment. The November 8, 1994 proposal also solicited comment on several issues related to the regulatory distinction between regulated units and SWMUs.

In 1982, when the regulatory structure for closure was established, the Agency had little experience with closure of RCRA regulated units. Since 1982, the Agency and authorized States have approved hundreds of closure plans, and overseen the closure activities taking place under those plans. It has become evident that closure of these units is frequently more complex than EPA envisioned in 1982. In many cases, particularly with unlined land-based units, the unit has released hazardous waste and constituents into the surrounding soils and groundwater. In some cases, the unit may be located near SWMUs or areas of concern that also have released hazardous constituents to the environment. As a result, the cleanup of similar releases may be subject to two different sets of standards and two different sets of procedures. EPA is concerned that this dual regulatory structure may unnecessarily impede cleanups.

In the November 8, 1994 proposal, the Agency addressed this issue by requesting comment on giving discretion to the Agency or the authorized State to impose requirements developed for corrective action in lieu of the requirements of Subparts F (groundwater), G (closure and post-closure), and H (financial assurance) at certain regulated units. After reviewing the comments, which largely supported the concept, EPA has decided to promulgate provisions providing that discretion for certain regulated units, both permitted and interim status, that appear to have released to the environment, if SWMUs also appear to have contributed to the same release. Those provisions are promulgated in this rule in §§ 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d), and 265.140(d), and are discussed in sections III.A. and III.C. below.

c. Post-closure permit information submission requirements. In the November 8, 1994 rule, EPA proposed to add a new § 270.27 to identify that subset of the Part B application information that must be submitted for post-closure permits. Under that provision, an owner or operator seeking a post-closure permit would have to submit only that information specifically required for post-closure permits under that section, unless otherwise directed by the Regional Administrator. Under the proposal, the information required under § 270.27 would be submitted upon request by the Regional Administrator.

Proposed § 270.27 is promulgated in § 270.28 of this final rule.

2. Elements of the Proposal That Are not Promulgated in This Final Rule

a. State equivalent—corrective action enforcement authority for interim status facilities. The November 8, 1994 proposal also would have required States to adopt enforcement authority equivalent to section 3008(h) corrective action authority as part of their authorized program. Though many commenters supported this portion of the proposal, many State commenters strongly objected to it for several reasons.

Although EPA has the authority to require authorized States to have adequate enforcement programs, the Agency, after considering public comment, has decided not to proceed at this time with the requirement that States adopt section 3008(h)-equivalent authority as part of their authorized enforcement program. EPA believes the States raised significant issues that would need to be resolved prior to promulgation. This is not a final decision on this issue—the Agency may determine at a future date to adopt such a requirement.

EPA notes that States seeking authorization to issue enforceable documents in lieu of post-closure permits will need to submit their alternative legal authorities to EPA for review. As part of that review, EPA will determine whether the State authorities are broad enough to impose facility-wide corrective action at interim status facilities. Submission of these alternative authorities will be required only for States seeking authorization for this rule. It will not be required of all States.

b. Timeframes for closure. The November 8, 1994 proposal requested comment on whether the Agency should make modifications to the closure process, in particular, to the timeframes for closure. The Agency recognized that the current timeframes may, in some cases, not be adequate where the closure is really a cleanup activity, rather than the more straightforward capping or waste removal activities contemplated in 1982.

Though public comment generally agreed that the closure timeframes are not adequate, the Agency is not promulgating this provision of the November 8, 1994 proposal at this time. EPA, however, is promulgating a rule that will allow overseeing agencies to replace closure requirements—including closure timeframes—with requirements developed under corrective action, at some facilities. EPA expects that these revisions will allow site-specific flexibility for timeframes for some of the complex closures, thereby providing, in part, the relief intended by the proposal.

III. Section-by-Section Analysis and Response to Comment

A. Overview of Final Rule

1. Post-Closure Care Under Alternatives to Permits

This final rule creates an optional, new procedural mechanism for imposing requirements on units or facilities that closed without obtaining a permit. It ensures that these units have to meet the same substantive requirements that apply to units receiving post-closure permits.

The post-closure requirements for permitted facilities in Part 264 are more extensive than the analogous Part 265 interim status requirements in three areas: (1) the requirements for submission of information under Part 270; (2) Part 264 Subpart F requirements for groundwater management and corrective action for releases to groundwater; and (3) facility-wide corrective action requirements for releases from SWMUs under § 264.101. To impose equivalent requirements at interim status facilities, EPA or an authorized State must issue an enforceable document that performs many of the functions of a permit. Thus, the enforceable document must impose: (1) the requirements of new

§ 265.121(a)(1), which imposes information requirements that are relevant to closed facilities needing permits only for post-closure care; (2) the requirements of new § 265.121(a)(3), which applies Part 264 groundwater standards to the regulated unit; and (3) the requirements of new § 265.121(a)(2), which imposes facility-wide corrective action consistent with § 264.101.

The remaining requirements that apply during the post-closure care period relate to the maintenance of the closed unit and financial responsibility. The permitting and interim status standards for these requirements are virtually identical. Consequently, these requirements need not be addressed in the enforceable alternative to the permit—rather, the relevant portions of Part 265 Subparts G and H will continue to apply. Post-closure care requirements will normally continue to be set out in the facility's approved closure plan. Financial responsibility requirements are self-implementing. (Of course, EPA or an authorized State may chose to incorporate the Part 265 requirements for post-closure care and financial responsibility into an enforceable document, if they wish.)

The new, non-permit mechanisms provide opportunities for public participation, which differ somewhat from those set out in the permit issuance and modification procedures of Parts 124 and 270. EPA's new requirements reflect the Agency's efforts to provide as much public participation as possible, but also reflect the Agency's awareness that most of the alternate mechanisms used to address corrective action will be enforcement orders.

The current procedures for issuing post-closure permits first provide an opportunity for public comment at the time the permit is issued. This typically means that the public is able to comment on the plan for investigating suspected releases at the facility. Permit modification procedures then provide opportunities to comment at the time the permit authority selects a remedy for the facility. They also provide an opportunity to comment when the permit authority concludes that corrective action is complete. Under the Federal rules used by EPA, opportunities to file administrative appeals are available after each of these steps. (EPA, however, does not require States to provide for administrative appeals of permits).

The new public participation requirements for enforceable documents are codified at § 265.121(b). They require the overseeing agency to provide public notice and an opportunity to comment: (1) when the Agency becomes involved in a remediation at the facility as a regulatory or enforcement matter; (2) on the proposed remedy and the assumptions upon which the remedy is based; and (3) prior to making the final decision that remedial action is complete at the facility. They do not require either EPA or the States to provide opportunities for administrative appeals. EPA recognizes that, at least at the Federal level, this changes the opportunities for public involvement in the requirements that will govern closed hazardous waste facilities. EPA believes these requirements equal, and in some respect exceed, the current permitting requirements for public participation. On the other hand, the new requirements do not require an opportunity for administrative appeal. While this approach to a certain extent lessens the public's opportunity to challenge a decision, EPA believes that rights to administrative appeals (which can be exercised by a regulated facility as well as the public) are inappropriate in an enforcement context.

The final rule defines "enforceable document" at § 270.1(c)(7). Generally, Federal orders under section 3008(h) of RCRA and section 106 of CERCLA will fall within this definition and be eligible, as well as State orders issued under authorities reviewed and approved by EPA. Fund-financed actions under section 104 of CERCLA also will be eligible. Closure and post-closure plans, and State enforcement authorities analogous to RCRA section 3008(a) enforcement authority also will be appropriate mechanisms.

Table 1 summarizes these requirements.

TABLE 1.—ENFORCEABLE DOCUMENTS IN LIEU OF POST-CLOSURE PERMITS

Subject	Regulations for permits	Regulations for enforceable documents
Facility Information	§ 270.28	§ 270.28 (*see* § 265.121)
Groundwater Protection	Part 264, Subpart F*	Part 264, Subpart F (*see* § 265.121)*
Corrective Action	§ 264.101	§ 264.101 (*see* § 265.121)
Public Participation	Parts 124 and 270	§ 265.121
Financial Responsibility	Part 264, Subpart H*	Part 265, Subpart H*
Post-Closure Care of Regulated Unit	Part 264, Subpart G*	Part 265, Subpart G*

* For certain land-based units suspected of contributing to releases to the environment, these requirements may be replaced by site-specific requirements developed under corrective action. *See* new §§ 264.90(f), 264,110(c), 264.140(d), 265.90(f), 265.110(d), and 265.140(d) of this final rule.

2. Remediation Requirements for Land-Based Units With Releases to the Environment

The second portion of this final rule provides flexibility to regulators in another area of the RCRA regulations. As described above, two different sets of RCRA requirements arguably apply to a single release if both regulated units and SWMUs have contributed to the release. This rule provides flexibility to harmonize the two sets of requirements by substituting corrective action requirements for requirements for regulated units set out in Part 264 (for permitted facilities) or Part 265 (for interim status facilities). These optional, new provisions are available to regulators at a broad range of RCRA facilities, including, but not limited to, those covered by the change to post-closure permitting described above.

This portion of the rule provides EPA and authorized States with discretion to prescribe alternative groundwater monitoring, closure and post-closure, and financial responsibility standards at both operating and closed facilities, where EPA (or a State) finds that a release of hazardous waste or hazardous constituents has occurred, and both a regulated unit and one or more SWMUs

(or areas of concern [1]) are likely to have contributed to the release.

For permitted facilities, the alternative standards will be issued in the permit (or issued in an enforceable document (as defined in § 270.1(c)(7))), which is referenced in the permit). EPA and authorized States may develop the cleanup requirements for the regulated unit and SWMUs under non-permit authorities, such as CERCLA or a State superfund statute, but they must incorporate them into the permit, or incorporate them into an enforceable document, which is referenced in the permit.

For interim status facilities, EPA or States authorized to implement this portion of this final rule must impose alternative closure, groundwater monitoring, and/or financial responsibility standards for interim status facilities in an enforceable document. "Enforceable documents" for this rule include RCRA section 3008(h) orders, actions under sections 104 or 106 of CERCLA, or State actions under authorities reviewed and approved by EPA as described below. If EPA or an authorized State issues alternative closure standards, the facility's closure plan and/or post-closure plan must be amended to set forth the alternative provisions, or to reference the enforceable document that sets forth those provision.

3. Post-Closure Part B Permit Information Submission Requirements

To ensure substantive equivalency of authorities used in lieu of post-closure permits, this final rule requires owners and operators to submit the same information specifically required for post-closure permits, upon request by the Agency, when an alternative authority is used in lieu of a post-closure permit. Section 265.121(a)(1) requires owners and operators obtaining enforceable documents in lieu of post-closure permits to submit the information required in § 270.28.

Section 270.28,[2] which is promulgated in this final rule, establishes information submission requirements for post-closure permits. As is discussed in detail in section III.D. of this preamble, § 270.28 specifies information that the Regional Administrator will request to issue a post-closure permit, and requires owners and operators to submit that information. It includes information the Agency believes will be important for all post-closure permits, that is, groundwater characterization and monitoring data, information related to long-term care of the regulated unit and monitoring systems, and information on SWMUs and possible releases. In addition, recognizing that additional information may be needed on a site-specific basis, § 270.28 also allows the Regional Administrator to require any of the Part B information specified in §§ 270.17, 270.18, 270.20, and 270.21. Section 265.121(a)(1) adopts this approach for alternative mechanisms as well.

B. Post-Closure Care Under Alternatives to Permits

1. Use of Alternative Mechanisms To Address Post-Closure Care (§ 270.1(c))

a. Detailed discussion of final rule. Section 270.1(c), amended by this rule, requires owners and operators closing unpermitted regulated units with waste in place either to: (1) obtain a post-closure permit, or (2) comply with the alternative post-closure requirements of § 270.1(c)(7). Prior to this rule, owners and operators of regulated units requiring post-closure care had to obtain permits for the post-closure period. This rule, by allowing another alternative to post-closure permitting, provides regulators with flexibility to address the post-closure period at RCRA facilities using a variety of legal authorities, including enforcement mechanisms.

Facilities that close with waste in place, without obtaining a permit, and then use non-permit mechanisms in lieu of a permit to address post-closure responsibilities, will have to meet three important requirements that apply to facilities that receive permits: (1) the more extensive groundwater monitoring required under Part 264, as they apply to regulated units; (2) certain requirements for information about the facility found in Part 270 that enable the overseeing agency to implement the Part 264 monitoring requirements; and (3) facility-wide corrective action for SWMUs as required under § 264.101. These requirements are set out in new § 265.121, which applies to interim status facilities requiring post-closure care.

EPA and States authorized for this rule must impose these requirements in enforceable documents, as defined in § 270.1(c)(7) of this rule, if they are being issued in lieu of permits. Federal enforcement orders issued under sections 3008(a) and 3008(h) qualify as enforceable documents. Post-closure plans issued by EPA under § 265.118, which are enforceable under section 3008(a), also will qualify. Orders issued under section 106 of CERCLA will also be eligible, as will decision documents describing response actions under CERCLA section 104. Although response actions under section 104 are often carried out by EPA using monies from the Superfund, rather than by responsible parties under orders, it is reasonable to rely on them because EPA is responsible for carrying out the cleanup work. EPA does not intend this rule to revise the existing policy to defer from listing on Superfund's National Priorities List (NPL) those facilities that are subject to RCRA corrective action. However, since the policy permits the listing of some RCRA facilities on the NPL (such as bankrupt or recalcitrant facilities), some of the facilities subject to this rule may also be eligible for cleanup under CERCLA section 104, and EPA (or an authorized State) may wish to rely on the CERCLA action to discharge the facility's cleanup responsibilities.

States obtaining authorization for this rule will be able to use enforceable cleanup orders similar to EPA's section 3008(h) orders, as well as State superfund authorities. EPA has not yet formally reviewed these State cleanup authorities, so it will require States that wish to use them to submit them for review as part of the State authorization process. EPA will determine whether they provide: (1) the substantive requirement of adequate authority to compel cleanup of all releases from SWMUs within a facility's boundary, as needed to protect human health and the environment (*see* new § 265.121(a)(2)), and (2) procedural requirements to ensure compliance (i.e., adequate penalty and injunctive authority to address failures to comply)(*see* new § 271.16(e)). EPA does not anticipate that plans for truly "voluntary" cleanups will meet the enforceability requirement, although it is willing to look at mechanisms called "voluntary" plans or agreements to determine whether the State has adequate authority to compel compliance. (EPA emphasizes that this rule does not preclude the use of State "voluntary" authorities to address cleanup at RCRA facilities and, indeed, EPA encourages their use under the appropriate circumstances. Nor does it affect the ability of EPA Regions to enter into memoranda of agreement or other mechanisms promoting the use of State voluntary programs at RCRA facilities, where appropriate. This rule only

[1] Area of concern means any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration (*see* final RCRA section 3008(h) Model Consent Order, December 15, 1993).

[2] This provision was promulgated as § 270.72.

addresses the question of whether the State uses these authorities to satisfy the post-closure permit obligation.)

EPA expects that, in some cases, the overseeing agency or agencies will choose to use more than one mechanism to ensure that the substantive post-closure requirements in new § 265.121 are imposed. For example, if EPA were addressing a facility with releases at SWMUs and a regulated unit with no release, it could issue a section 3008(h) order to address the releases from the SWMUs. EPA, however, might decide that such an order would not be the most effective means of imposing long-term groundwater monitoring requirements for the non-leaking regulated unit. The new requirements could be imposed on the regulated unit in a revised interim status post-closure plan. Alternatively, EPA could issue a section 3008(a) order to enforce the new requirements (codified in this rule at § 265.121). Sometimes, multiple agencies may be involved. For example, a State that does not have a cleanup order authority could revise an interim status post-closure plan (or issue a State enforcement order analogous to section 3008(a)) to address a regulated unit, and rely on an EPA section 3008(h) order to address any releases from SWMUs.

Facilities subject to the new § 265.121 will remain subject to all other applicable interim status requirements, including requirements for financial assurance. These remaining interim status requirements are virtually identical to permit requirements, so there is no need to address them in the new alternatives to post-closure permits. These interim status requirements will continue to be enforceable under section 3008(a) and analogous State authorities.

Facilities subject to the new § 265.121 also will remain subject to section 3008(h) authority unless or until EPA or the authorized State issues a final disposition of a permit application under § 270.73, thereby terminating interim status at the facility. It should be noted that in a **Federal Register** notice dated May 1, 1996 (61 FR 19432, at 19453–4) EPA erroneously stated that facilities at which the regulated units clean closed under interim status no longer have interim status. EPA corrects that statement in this rule and restates the Agency's longstanding position that interim status is terminated only by a final disposition of a permit application, or by the methods outlined in § 270.73, which do not include clean closure. The May 1, 1996, **Federal Register** notice correctly stated that section 3008(h) continues to apply at clean closed facilities where there has been no final disposition of a permit application. Similarly, section 3008(h) continues to apply at facilities addressed through an approved alternate authority until final disposition of a permit application under § 270.73. Issuance of an alternate mechanism does not terminate interim status authorities.

b. Response to comment. Commenters on the proposed rule largely supported the provisions that would remove the permit requirement. Many commenters agreed with the Agency that the rule allows flexibility to regulators, yet maintains protection of human health and the environment.

Some commenters objected that the Agency should have the authority to issue an order or a permit, but should not be able to issue an order, and later to issue a permit to the facility. EPA disagrees. The Agency currently has the authority to issue a permit after the facility is addressed through an alternate authority, such as an enforcement order. This rule does not modify the Agency's authority to issue permits in this situation. Rather, it takes away the permitting obligation in cases where the facility is addressed through an alternate mechanism, by making the permit one of several options to address the facility. EPA believes this approach makes sense, and allows EPA to chose the best available mechanism, while retaining authority to use whatever authority is necessary to protect human health and the environment. EPA notes, however, that it is not likely to issue a permit to impose requirements that a facility has already satisfied under an alternate, enforceable document. Rather, it would limit a permit to requirements that, for some reason, had not been fully satisfied.

Several commenters expressed concern over discussion in the preamble of the November 8, 1994 proposal related to uncooperative facilities. The preamble explained that where the owner or operator is financially incapable of meeting the threshold requirements for permit issuance, such as compliance with the financial assurance requirements, or where the owner or operator may be uncooperative and an enforcement action is necessary, the post-closure permit is likely not the best mechanism to use. The preamble further explained that a post-closure permit will generally be the preferable mechanism for cooperative facilities capable of meeting financial assurance requirements.

Several commenters interpreted this discussion to limit the use of alternate mechanisms to uncooperative facilities not in compliance with applicable financial assurance and groundwater requirements. Commenters objected that facilities should not be rewarded for non-compliance, and that the proposal was making the post-closure care process more burdensome for compliant facilities. Other commenters thought the Agency was proposing to exempt non-compliant facilities from certain requirements.

The Agency did not intend to limit the use of alternate authorities to facilities not in compliance with applicable RCRA requirements. EPA only identified these facilities as examples of where an enforcement mechanism was more appropriate than a permit. Furthermore, EPA does not consider the imposition of alternative enforcement authorities to be a "reward," since such authorities might often include stipulated penalties and, in any case, would impose the same substantive standards as a permit. EPA will retain section 3008(a) authority to enforce against closed interim status facilities that have failed to meet Part 265 financial assurance requirements. As to groundwater monitoring, this rule will substitute the stricter Part 264 requirements for the original Part 265 requirements. EPA will retain authority to use section 3008(a) to enforce past violations of the Part 265 monitoring requirements and to assure that the facility complies with Part 264 requirements once they are put in place by a revised interim status post-closure plan (or other enforceable mechanism). The rule will also require facility-wide corrective action as required under permits. More important, EPA notes that the new authority to use alternatives to post-closure permits is not limited to facilities that are out of compliance with Part 265 requirements. All facilities that have closed (or that, in the future, will close) with waste in place without obtaining a permit are eligible.

Many commenters objected that this preamble discussion appeared to remove the interim status groundwater and financial assurance requirements at facilities not in compliance with the regulations. However, the Agency did not eliminate interim status financial assurance requirements. Facilities addressed through alternate mechanisms remain subject to the financial assurance requirements of Part 265 Subpart H. They become subject to the more prescriptive groundwater requirements of Part 264 Subpart F. Rather than waive requirements at non-compliant facilities, as commenters believe, this rule continues to require compliance with upgraded requirements.

Some commenters believed that the choice of mechanism should be left to the facility, or that the options should

be discussed at length to achieve consensus. These commenters believed that an otherwise reluctant owner or operator is more likely to commit resources to meet agency goals if regulatory alternatives and consequences are clearly discussed and understood up-front.

Other commenters believed that the regulations should specify when an alternative authority would be used in lieu of a permit, and remove some of the Agency's discretion.

EPA did not take either approach suggested by these commenters. EPA agrees with commenters that the owner or operator generally should be involved in discussions related to the selection of mechanisms. This is particularly true of cooperative facilities in compliance with applicable requirements and eligible for post-closure permits. EPA intends to take into consideration the preference of facility owners and operators in deciding how to address these facilities, and it encourages authorized States to do so as well. However, EPA believes that it is important to provide the Agency and authorized States flexibility to consider all factors when deciding what authority to use to address a site. These factors will include conditions at the site, the availability of alternate State authorities, availability of resources, preference of the owner or operator and the local public, and the compliance status of the owner or operator. The Agency believes that by attempting to establish criteria in this rule, it would unnecessarily limit the flexibility to make the decision that best ensures protection of human health and the environment at each site.

Some commenters believed the owner or operator should have opportunity to challenge the Agency's or authorized State's choice of mechanism. EPA disagrees, and believes that the choice of mechanism to use to address a facility is an inherently governmental decision that should not be subject to challenge. EPA believes this approach is consistent with longstanding policy on enforcement discretion, and is vital to an effective enforcement program.

This rule limits the use of alternate mechanisms to facilities that have not received permits. Some commenters believed that the Agency should modify the rule to allow permits to be converted to orders and allow owners or operators of permitted facilities to address the post-closure period through another mechanism.

EPA has not adopted the commenter's suggestion, as this rulemaking deals only with alternative mechanisms for closed facilities that have not yet received post-closure permits. It should be noted that existing §§ 264.117(a)(2)(i) and 265.117(a)(2)(i) address commenters' concern to some extent by allowing the Agency to shorten the post-closure period upon a determination that the shortened period is protective of human health and the environment.

Another commenter suggested that EPA should be allowed to use alternative authorities at closed facilities, needing post-closure permits, that have submitted a Part B permit application. The Agency agrees that it should not be precluded from using alternative mechanisms at these facilities so long as it has not issued a Part B permit.

Some commenters objected to the provisions of the rule that would remove the requirement that EPA use the post-closure permit as the vehicle to impose Part 264 requirements for post-closure care. One commenter believed that the Agency should use enforcement orders to overcome the obstacles to permitting it described (such as non-compliance with financial assurance requirements). This commenter believed that post-closure permitting is protracted because EPA has not used its enforcement authority to move facilities through the permitting process, and has not made issuing post-closure permits a priority.

EPA disagrees with this commenter. There are many facilities in the RCRA universe that are not able to meet the financial assurance requirements of Subpart H. While EPA can take enforcement actions against these facilities to bring them into compliance to the extent possible, there are some facilities that never will be able to meet those requirements, despite an enforcement order. As was explained above, EPA will not be able to issue permits to such facilities. Further, the Agency believes that the flexibility provided by this rule is important, not only to address non-compliant facilities, but to allow regulators to use the most appropriate authority available to them at all facilities. This choice may be based on many factors, including the specific conditions at the facility, availability of approved alternate State cleanup authorities, and recalcitrance of the facility. Thus, while the Agency agrees with the commenter that it is important to take enforcement actions against facilities to bring them into compliance whenever possible, and that enforcement authorities should be used to expedite the permitting process, it does not agree that post-closure permits should or can be issued to all facilities. Further, EPA is more interested in obtaining environmental results than in the choice of mechanism used, and in eliminating redundant processes.

Other commenters believed that the Agency remains subject to the permit deadline for land disposal facilities in RCRA section 3005(c)(2)(A)(i). Those commenters believed that revisions to the rules that reduce the existence of or scope of this mandatory duty to issue post-closure permits in a timely manner violate section 3005(c) of RCRA, and that Congress enacted the permit deadlines based upon the rules then in effect.

EPA agrees that section 3005(c) of RCRA required the Administrator to issue or deny a final permit for each applicant for a land disposal permit by November, 1988. EPA also agrees that, so long as its regulations require it to issue post-closure permits to land disposal facilities, those post-closure permits are subject to the statutory deadline. EPA, however, does not agree that section 3005(c) deprives it of authority to determine whether post-closure permits are necessary or desirable means of imposing post-closure care requirements. Section 3005(c) imposes a deadline for permitting, but does not define the scope of the permitting requirement.

In 1982, when EPA promulgated the post-closure permit requirement, it had discretion under the statute to choose a procedural mechanism for imposing post-closure care requirements on facilities that closed while in interim status. It selected permits rather than interim status closure plans or other alternatives. The fact that Congress enacted a deadline for issuing permits to land disposal facilities in 1984 did not change that discretion. Nothing in the statute or the legislative history of the section 3005(c) indicates that Congress was aware of or concerned about EPA's use of permits to impose post-closure care requirements at facilities closing under interim status. The legislative history of other portions of the 1984 amendments suggests that Congress was concerned that EPA's 1984 regulations for land disposal facilities imposed more stringent requirements for groundwater monitoring and closure on permitted facilities than on interim status facilities. EPA, however, has eliminated this discrepancy, amending the rules for closure on March 19, 1987 (*see* 52 FR 8704), and the rules for groundwater monitoring today.

Essentially, this commenter argues that Congress "ratified" EPA's 1982 post-closure permit rule, making it part of the statute so that EPA could no longer revisit it. EPA does not agree with this interpretation of section 3005(c). Nothing in the statute or the

legislative history suggests that Congress wanted to prohibit EPA from revising this part—or, indeed, any part—of the rules defining the scope of the permit requirement. The same is true for the requirement for public participation in permitting set out in section 7004(b)(1) of RCRA. There is no evidence that Congress intended the public participation requirements to create a statutory duty to issue post-closure permits.

EPA acknowledges that it could deny post-closure permits for all of the land disposal facilities that obtain enforceable documents in lieu of post-closure permits. Permit denials would satisfy the requirement of section 3005(c) to issue or deny final permits. EPA, however, does not believe that Congress intended it to impose a deadline on the denial of permits for facilities no longer obligated to have them. The Agency believes it is simply not reasonable to interpret the statute to require EPA to spend scarce resources on actions with so little environmental significance.

Other commenters questioned whether issuance of an alternate mechanism would terminate interim status. This rule does not modify the requirements to terminate interim status, which are outlined in § 270.73. Thus, facilities that have units that closed with waste in place under interim status, and do not receive a post-closure permit as a result of this rule, will remain in interim status until there is final disposition of a permit application (in the case of these closed facilities, a permit denial) under § 270.73(a). EPA recognizes that owners and operators may want to terminate interim status when all RCRA activities are complete at a facility to bring finality to those activities, and that this is an important issue not only to facilities subject to post-closure requirements, but to all facilities that closed without obtaining a RCRA permit. EPA plans to issue guidance related to denial of permit applications for purposes of terminating interim status at closed facilities that have completed all RCRA activities, including facility-wide corrective action.

The Agency agrees that some integration of the closure and facility-wide corrective action requirements is warranted. The Agency has taken steps in this final rule to address the situation where two units are involved in the same remedy and there is potential for the two sets of requirements to conflict.

Other commenters raised concerns that the rule would affect EPA's current policy of using only one authority—CERCLA or RCRA—at a site. Another commenter conditioned support for the proposal on EPA clarifying that it does not intend to modify its current Superfund policy that defers remediation activities to RCRA corrective action authority. On June 10, 1986, EPA published a final policy that allowed the Agency to defer listing RCRA-related sites on Superfund's National Priorities List (*see* 51 FR 21054). This commenter is concerned that if the Agency adopts the rule as proposed, which would allow use of Superfund orders as an alternative mechanism for RCRA post-closure permits, then the Agency would begin to deviate from that policy. The commenter believes that the reasons for deferral to RCRA authority cited in the deferral policy are still valid.

This rule does not modify the Agency's current policies related to the applicability of CERCLA and RCRA at hazardous waste sites. For example, the rule does not affect CERCLA listing policy. The Agency expects that RCRA facilities will, generally, continue to be handled under RCRA, rather than CERCLA. Rather, the result of this rule is that once the Agency decides to address a site under CERCLA authority, EPA is no longer required to issue a post-closure permit at the site, as long as the CERCLA cleanup has the same scope as a corrective action cleanup would have.

2. Requirements for Alternative Mechanisms

Under the provisions of this rule that remove the requirement for post-closure permits, regulated units that do not obtain a post-closure permit generally will remain subject to the requirements for interim status units throughout the post-closure care period. However, because the interim status post-closure care requirements are in some respects less stringent than post-closure permit requirements, the Agency is promulgating § 265.121. This section recognizes the difference in substantive requirements applicable to permitted and interim status post-closure units, and assures that this rule will not result in less stringent requirements at units addressed through alternate mechanisms.

Specifically, § 265.121 requires owners and operators of regulated units addressed through an alternate mechanism to comply with the groundwater requirements of Part 264 Subpart F (with respect to that unit), to submit information required under Part 270, and to address facility-wide corrective action. EPA will review State order authorities to ensure that they are capable of imposing these requirements before authorizing States to use them.

a. Part B Information Submission Requirements (§ 265.121(a)(1)). i. *Overview.* To ensure substantive equivalency of authorities used in lieu of post-closure permits, this rule requires owners and operators to submit the Part 270 information specifically required for post-closure permits, upon request by the Agency, when an enforceable document is issued in lieu of a post-closure permit. The information submission requirements for post-closure permits are promulgated in this final rule in § 270.28, and are discussed in detail in section III.D. of this preamble. Section 270.28 specifies information the Agency believes will be important for all post-closure permits, and, in turn, for all enforceable documents issued in lieu of post-closure permits, that is, groundwater characterization and monitoring data, information related to long-term care of the regulated unit and monitoring systems, and information on SWMUs and possible releases.

In addition, recognizing that additional information may be needed on a site-specific basis, § 270.28 also allows the Regional Administrator to require any of the Part B information specified in §§ 270.17, 270.18, 270.20, and 270.21. Section 265.121(a)(1) adopts this approach for enforceable documents issued in lieu of post-closure permits as well.

ii. *Response to Comment.* One commenter asked EPA to state explicitly in the rule that facilities pursuing the alternative approach would not be required to submit the information required in § 265.121(a)(1) any earlier than they would otherwise be required to submit a Part B application. EPA agrees with the commenter that the information would not be required earlier in the case of an alternate authority than it would be in the case of a permit. In the case of post-closure permits, the Agency typically calls in Part B information when it is ready to begin working on the permit application. This has become the Agency's practice because the Agency recognizes that, if information is submitted earlier, it can become outdated and have to be replaced when it is time to work on the permit. The Agency is extending this practice to instances where a non-permit mechanism is used to address post-closure care. As in the case of the post-closure permit, the information required by § 265.121(a)(1) for non-permitted facilities need not be submitted to the Agency until the Agency requests it.

b. Subpart F Groundwater Monitoring and Corrective Action Program (§§ 265.121(c)(3) and 264.90—264.100). i. *Overview.* This rule requires owners and operators of facilities with regulated units addressed through a non-permit mechanism under § 270.1(c)(7) to meet the requirements of Part 264, Subpart F. Section 265.118(c)(4) requires that the post-closure plan include provisions that implement the Part 264 Subpart F requirements.[3] This approach is designed to ensure equivalent protection of human health and the environment at all facilities, regardless of which legal authority used to address post-closure care. Commenters generally supported this approach, and the Agency is promulgating this provision as proposed.

ii. *Response to Comment.* Though many commenters supported the proposed provision, others argued that it was an illegal expansion of the Agency's statutory authority. EPA disagrees. The statute does not limit EPA's ability to impose more stringent groundwater monitoring requirements on interim status facilities. EPA developed the current regulations based on the premise that facilities would remain in interim status only temporarily and ultimately would receive permits and become subject to the requirements of Part 264 for groundwater. As a result of this rule, however, some facilities that closed while still under interim status standards will not receive a permit. EPA believes it is within the Agency's statutory authority to modify the regulations and assure that those facilities ultimately comply with the more stringent requirements of Part 264, whether a permit is issued or an alternate authority is used to address post-closure care.

One commenter conditioned support for the proposal on EPA removing Part 264 groundwater requirements for regulated units, and requiring instead that they have a groundwater monitoring and response program that is necessary to protect human health and the environment.

In the second part of this rule, EPA is providing discretion to waive Part 264 groundwater monitoring only in cases where corrective action will provide opportunities for oversight by the implementing Agency. In other cases, the Agency continues to believe that it needs the detailed requirements of Part 264, with interaction with the overseeing agency, to ensure protection of human health and the environment. In proposing to modify the requirement for post-closure permits, the Agency did not intend to remove or modify the groundwater requirements applicable to regulated units under post-closure permits—only to allow regulators to use a variety of mechanisms to impose those requirements. Thus, EPA believes that commenter's request extends to issues that are outside the scope of this rulemaking.

c. *Facility-Wide Corrective Action (§ 265.121(a)(2)).* i. *Overview.* This rule requires that authorities used at post-closure facilities as alternatives to post-closure permits impose corrective action requirements consistent with the statute and § 264.101 of the regulations. The rule does not specify the authorities that EPA or a State could use to impose corrective action as an alternative to a post-closure permit—only that the authority must be consistent with RCRA corrective action requirements. Certainly, RCRA section 3008(h) orders are appropriate, but EPA has not limited alternative authorities to this section. State enforcement authorities analogous to section 3008(h) or State cleanup or superfund authorities also would be appropriate, if they were used consistently with the requirements of § 265.121 (*see* requirements for State authorization in section IV.D.1. of this preamble).

In requiring facility-wide corrective action consistent with RCRA section 3004(u) and (v) provisions, EPA does not intend to require that cleanup programs relying on alternative authorities use the procedures of EPA's Subpart S proposal (which the Agency significantly revised in its May, 1996 ANPR) or permit requirements. Rather, the authorities must be broad enough to meet the performance standards of § 264.101. For example, compliance with the National Contingency Plan (NCP) procedures for remedy selection would satisfy these proposed requirements. EPA wishes to emphasize, however, that an alternative approach to corrective action at a facility, used in lieu of a permit, must include a facility-wide assessment, must address releases of hazardous wastes or constituents to all media from all SWMUs within the facility boundary (as well as off-site releases to the extent required under section 3004(v)—as necessary to protect human health and the environment), and must be protective of human health and the environment. Anything less than that, in EPA's view, would not meet the basic requirements of RCRA sections 3004(u) and (v) or § 264.101. EPA believes that this proposed approach is appropriate because it provides reasonable flexibility for regulatory agencies using available authorities to address environmental problems at RCRA sites.

ii. *Response to Comment.* Commenters generally supported this provision, and many commenters agreed that the Agency should not require corrective action procedures identical to those in EPA's Subpart S proposal.

Some commenters objected to the principle that corrective action be consistent with the Subpart S proposal. These commenters believe that because the Subpart S requirements and procedures are not final, it is legally indefensible to base a rule on them. Another commenter believed that until Subpart S regulations are codified and adopted, corrective action clean-up standards should meet the RCRA closure performance standard.

EPA agrees that alternative authorities used to address corrective action should be consistent with promulgated standards and with the statute. EPA did not intend this rule to require compliance with portions of the Subpart S proposal that have not yet been made final. Rather, this rule requires that the authorities must be consistent with promulgated § 264.101. It should be noted that authorities consistent with § 264.101 include provisions originally proposed under Subpart S, that is, provisions allowing designation and use of corrective action management units (§ 264.552) and temporary units (§ 264.553).

3. Public Involvement (§ 265.121(b))

a. Overview. The public involvement provisions proposed in the November 8, 1994 rule are modified in this final rule. In the November 8, 1994 rule, the Agency proposed to require a minimum level of mandatory public participation for all facilities where alternate authorities were used in lieu of post-closure permits. Proposed § 262.121(b) would have established the following requirements at the point of remedy selection: (1) public notification of the proposed remedy through a local newspaper; (2) opportunity for public comment (at least 30 days); (3) availability of a transcript of the public meeting; (4) availability of a written summary of significant comments and information submitted, and the EPA or State response; and, (5) if the remedy is significantly revised during the public participation process, a written summary of significant changes or opportunity to comment on a revised remedy selection. The Agency proposed an exception to these requirements in

[3] Note that §§ 264.90(f) and 265.90(f) of this rule amend the requirements of Subpart F to allow the Regional Administrator to replace Subpart F requirements at regulated units with requirements developed through a corrective action process, in some cases (see section III.B. of this preamble).

§ 265.121(b)(2), whereby if a delay in the implementation of the remedy would adversely affect human health or the environment, EPA could delay the implementation of the public involvement requirements.

This final rule requires the Regional Administrator to assure that a meaningful opportunity for public involvement occurs, which includes, at a minimum, public notice and opportunity for comment, at three key stages—when EPA or the authorized State agency first becomes involved in the cleanup process as a regulatory or enforcement matter, when EPA or the authorized State Agency is ready to approve a remedy for the site (this opportunity must include a chance to comment on the assumptions on which the remedy is based), and when EPA or the authorized State is ready to decide that remedial action is complete at a facility. The rule does not limit public involvement to these stages of cleanup; rather, it encourages early, open, and continuous involvement of the public when alternate authorities are used at a facility in lieu of post-closure permits, similar to the public involvement provided by the permitting process. In addition to notifying the public at these three key stages, EPA believes meaningful public involvement includes regular updating of the community on the progress made cleaning up the facility.

Additionally, it is the Agency's expectation that owners and operators conducting cleanups prior to the Agency's or authorized State's involvement will involve the public in decisions throughout the remediation process. Owners and operators should provide notice and opportunity to comment prior to selecting a remedy if they wish to later rely on that remedy as part of an enforceable document issued in lieu of a post-closure permit. The Agency took this approach based on several considerations.

First, it is EPA's policy to encourage public involvement early and often in the permitting process, in its remediation programs, as well as in other Agency actions. EPA wanted this rule to be consistent with that policy.

Second, EPA recognized that the post-closure permit process assures opportunity for public involvement at the time of permit issuance, and through the permit modification procedures. EPA wanted this rule to provide similar opportunities when an alternate authority is used to address a facility.

Third, EPA recognized that existing State and Federal authorities provide for public involvement through widely varying processes. EPA wanted to provide sufficient procedural flexibility to minimize the likelihood that States would have to modify the public involvement provisions of their existing cleanup programs to qualify for authorization, yet EPA wanted to assure, at the same time, that those programs provided for meaningful public participation at key stages of the remediation process.

Fourth, EPA recognizes that many cleanup activities have taken place prior to promulgation of this rule and others will take place prior to the adoption of the State's program for this rule through Federal, State, and facility-initiated actions, and EPA recognizes that those cleanups may or may not have involved the public in the way specified in the final rule. In cases where the cleanup began prior to the effective date of the rule, EPA did not want to require post-closure permits to be issued simply because the early stages of public involvement procedures of this rule were not met.

Finally, EPA recognized that in some cases, where delay in a cleanup might have an impact on human health and the environment, public involvement may not be possible prior to implementation of the remedy. EPA did not want to delay cleanup in those cases, but wanted to assure that the public was involved in the process as promptly as possible after the emergency was addressed. EPA wanted this rule to allow cleanups to take place immediately in these cases, but assure that public involvement would follow at the earliest opportunity. As explained below, the final rule authorizes EPA or the authorized State to modify public involvement requirements in those circumstances.

This rule encourages early public involvement by requiring public involvement (which at a minimum includes public notice and opportunity for comment) as soon as the authorized regulatory agency becomes involved in the cleanup process as a regulatory or enforcement matter (unless this might lead to a delay in the cleanup that would adversely affect human health and the environment). In most cases, the Agency anticipates, this will be very early in the process, prior to remedy selection—certainly before any Agency-prescribed remedies occur (except in cases of emergency). For example, the affected community should be notified and given an opportunity to comment prior to the initiation of any activity to assess contamination or prior to the implementation of any interim measure. By requiring early public notice of activities at a site, the Agency intends this rule to encourage involvement of the public throughout the cleanup process.

EPA proposed to require public involvement during the remedy selection process. EPA is retaining this requirement in the final rule. EPA has, however, made the requirement more specific by requiring public notice and comment on both the proposed remedy and the assumptions upon which it is based, including site characterization and land use.

The Agency understands "remedy selection" as a term of art in the RCRA corrective action or in the Superfund process, where the regulatory agency either selects or approves a remedy proposed by the owner or operator. In some cases an owner or operator may implement an action that could be considered a "remedy" prior to the Agency or State's involvement or oversight. The owner or operator should provide notice and opportunity to comment on the prospective remedy and its underlying assumptions, otherwise, any enforceable document developed later may not be eligible to substitute for a post-closure permit. In those cases, the owner or operator may have to follow the permit process to obtain a post-closure permit or to obtain a permit denial (if no further action is necessary).

This rule also requires public involvement to assure that notice and opportunity to comment take place prior to the Agency or authorized State deciding that remedial action is complete at a facility. When additional corrective action is no longer needed, the Agency could terminate an enforcement order or terminate interim status at the facility through the permit denial process in Part 124. Either process would ensure full opportunity for public participation, including permit appeal provisions. The rule, however, would allow alternative mechanisms, as long as the Agency or the authorized State provided public notice of its actions, and opportunity to comment prior to making the final decision that remedial action is complete at the facility.

This rule also requires that all public involvement be meaningful. Meaningful public participation is achieved when all impacted and affected parties have ample time to participate in the facility cleanup decisions. In many cases meaningful public involvement will require careful planning and more than notice and opportunity for comment. In some cases, meaningful public notice may require bilingual notifications or publication of legal notices in city or community newspapers (or other media, such as radio, church organizations and

community newsletters). EPA recommends that parties responsible for involving the public provide information at all key milestones in the remediation process, and site fact sheets. Existing forums of community communication such as regular community meetings and electronic bulletin boards can be used to provide regular progress reports on the facility cleanup. Additionally, EPA recommends that parties responsible for involving the public update the community regularly on the progress made cleaning up the facility.

Often, the level of public involvement will depend on the significance of the action—for example, the Agency may simply notify the public of a decision to remove a small quantity of waste, but higher levels of involvement would be called for at remedy selection in a major remedial action, or when a decision is made that may impose significant restrictions on land use. For these reasons, EPA believes that public involvement should be tailored to the needs at the site, and has provided flexibility in this rule.

EPA has long recognized that the level of public involvement should be determined by the significance of the action taking place. For example, in a final rule dated May 24, 1993 (*see* 58 FR 29886), EPA promulgated regulations to govern modification of permits. Those regulations established different levels of public involvement depending on the significance of the permit modification. Class 1 modifications require minimal public involvement—the permittee must send a notice of the permit modification to all persons on the facility mailing list, and to the appropriate units of State and local government. Persons may request review of the permit modifications. Class 3 modifications, on the other hand, require far more extensive involvement of the public—publication in a local newspaper, a public meeting, and a public comment period. To assist owners and operators in implementing the rule, in Appendix 1 to § 270.42, EPA classified different activities as class 1, 2, or 3 modifications, based on the significance of the action.

EPA also issued guidance on public involvement which complements the approach in this rule (*see* the RCRA Public Participation Manual, September, 1996, EPA 530–R–96–007). This manual provides guidance on addressing public participation in the permit process, including permitting and enforcement remedial action activities. It emphasizes the importance of cooperation and communication, and highlights the public's role in providing valuable input. It stresses the importance of early and meaningful involvement of the public in Agency activities, and of open access to information. In addition to the manual, EPA fully endorses The Model Plan for Public Participation, developed by the Public Participation and Accountability Subcommittee of the National Environmental Justice Advisory Council (a Federal Advisory Council to the U.S. Environmental Protection Agency). The Model Plan encourages public participation in all aspects of environmental decisionmaking. It emphasizes that communities, including all types of stakeholders, and regulatory agencies should be seen as equal partners in any dialogue on environmental justice issues. The model also recognizes the importance of maintaining honesty and integrity in the process by clearly articulating goals, expectations and limitations. EPA encourages regulators and owners and operators implementing the provisions of this final rule to refer to these guidances.

It should be noted that the Agency proposed in § 265.121(b)(2) to allow the Regional Administrator to delay or waive the public participation requirements upon a determination that even a short delay in the implementation of the remedy would adversely affect human health or the environment. EPA believes this flexibility is important to assure protection of human health and the environment, and has promulgated that provision, with minor revisions, in this final rule.

It also should be noted that the Agency proposed a § 265.121(b)(3), which would have allowed EPA to address a facility using an approved alternate authority where cleanup activities were conducted prior to the effective date of this rule, but the public involvement procedures of this rule were not met. That provision would have required the Agency to conduct public involvement before considering the facility fully addressed under § 270.1(c)(7)(ii). The Agency has retained this provision.

b. Response to Comment. EPA received a variety of comments on the public involvement provisions of this rule. Some commenters believed the Agency had not gone far enough to assure public participation when alternate authorities are used in lieu of permits; others agreed with the Agency's approach; and others believed the public participation provisions of the proposal were too stringent. EPA considered those comments in developing the public involvement provisions of this final rule. Those comments are discussed below.

i. *The proposed rule did not preserve public involvement procedures when an alternate mechanism is used.* Many commenters believed that, despite statements in the preamble to the contrary, the Agency had not gone far enough in the proposed rule to preserve the public involvement procedures when alternate authorities are used in lieu of post-closure permits. These commenters believed that if the Agency allows alternate authorities to replace post-closure permits, it should assure that the public involvement procedures of the alternate authority are equivalent to that of a permit. These commenters believed that the proposal failed to do so in several respects.

First, these commenters noted that public participation was required by the proposal only at the time of remedy selection. Commenters pointed out that remedy selection occurs at a later stage of the remedial action process, following the development of schedules of compliance, and the preparation and evaluation of plans, reports, and remedial investigations. They pointed out that many decisions have already been made by the point of remedy selection, and that earlier public involvement allows more meaningful opportunity to affect those decisions. Commenters noted that when remedial action is implemented through a permit, these steps are subject to public participation requirements, through either permit issuance or permit modification procedures.

EPA agrees with the concerns raised by these commenters and that the public should be included in the decisionmaking process as early as possible. EPA agrees that early public participation provides the community a more meaningful role in the process.

To address these concerns, this rule requires public involvement to begin when the authorized agency first becomes involved in the cleanup process as a regulatory or enforcement matter. The Agency anticipates that, in most cases, this will be very early in the cleanup process, prior to proposed remedy selection.

Second, several commenters objected that no rights of appeal are provided or guaranteed when an alternative mechanism is used in lieu of a permit, even though such rights are provided in the permitting process. These commenters believed that these appeal rights must be preserved as part of the final rule for alternative mechanisms to be as protective as the post-closure permit. These commenters pointed out that under existing procedures, a hearing is available under Part 124 procedures to challenge a permit, while

EPA hearing procedures established for the respondent only under section 3008(h), Part 24 are less formal and comprehensive. Also, no pre-enforcement review is available for CERCLA 106 orders. These commenters believe that an alternate authority used in lieu of a post-closure permit should be reviewable under Part 124.

EPA recognizes that this rule does not guarantee pre-enforcement review of remedies implemented through alternate authorities. However, neither RCRA nor the Administrative Procedure Act require EPA to provide opportunities for the public to obtain judicial review of enforcement orders. For example, no such review is required under section 3008(h). Further, EPA believes that the ability to require prompt cleanup is important to assuring protection of human health and the environment. The new rule will make it easier to require cleanup at facilities where permit issuance would have been difficult or impossible. Thus, on balance, the rule promotes environmental protection. Finally, issuance of these alternatives orders does not terminate interim status. To terminate interim status, the Agency must make a final permit determination under the procedures of Part 124, and that decision, like a decision to issue a permit, is reviewable. Members of the public who believe that additional cleanup is required to meet the requirements of § 264.101 can raise that issue at that time.

One commenter objected that the proposal is at odds with Executive Order 12898, which instructs EPA to ensure greater public participation by minority and low-income populations at hazardous waste sites. This commenter expressed concern that the rule as proposed would further isolate vulnerable populations from the decisionmaking process.

EPA disagrees with commenter that the effect of this rule will be to isolate minority and low-income populations from the decisionmaking process. EPA has promulgated requirements in this final rule that assure meaningful involvement of the public in cleanups at post-closure facilities regardless of the mechanism used. These requirements will apply to all post-closure facilities, and will benefit all populations, including minority and low-income. In addition, EPA emphasizes that it will implement the rule in full compliance with Executive Order 12898. Other commenters pointed out that Part 124 requires a 45-day public comment period, while the proposal required only 30 days. Some commenters believed that the procedures associated with alternative post-closure mechanisms should follow the public participation procedures associated with permit issuance to make sure coverage is adequate and consistent. One commenter suggested that the rule specify a minimum comment period, and allow a longer period, at the Regional Administrator's discretion. Another commenter believed that since EPA has not demonstrated that public involvement procedures are hindering cleanups, there is no justification for lesser procedures.

EPA disagrees with the commenters that minimum comment period times or specific procedures are necessary, and did not establish detailed procedural requirements for public involvement in this final rule. However, EPA does expect the public to be given an opportunity to get involved early in the process and ample time to participate in the facility cleanup decisions. EPA took this approach because it recognizes that many different approaches to public participation have proved successful, and it did not wish to restrict existing State or Federal programs unnecessarily. The approach in this rule allows States to implement their own established procedures—as long as they provide for public notice and comment at the key stages in the process required by this rule.

ii. *The public involvement procedures of the proposed rule were adequate.* Other commenters believed that the level of public participation proposed by the Agency was adequate, and would provide an effective mechanism for adequately informing the public with regard to proposed remedies, and allowing public comment and public involvement in the remedy selection process.

Other commenters who generally agreed with the Agency's approach, requested some modifications in the final rule. One such commenter supported the requirement for public participation during the remedy selection process, but believed that the rule should also include a requirement for a brief description of the scope of the contamination to be remediated, if any, and a requirement for the placement of supporting documents in a local information repository. Another commenter believed that the rule must explicitly require that public access to information submitted for alternative mechanisms should be provided as if the information were contained in the Part B permit application.

EPA agrees that this type of information should be made available to the public, and anticipates that it will, where appropriate. However, as discussed above, the Agency is not prescribing detailed procedural requirements for public involvement in this final rule. The Agency intends this rule to provide meaningful public involvement while, at the same time, provide maximum flexibility to States to implement their cleanup programs. The Agency recognizes that, clearly, public involvement cannot be meaningful if there is not adequate access to information and, therefore, the Agency encourages regulators and owners or operators to make information regarding the site available to the public. At the same time, the Agency does not want to prescribe in detail in this final rule when and how the regulatory agency should provide information to the public. By requiring meaningful involvement of the public, the Agency believes that this final rule addresses commenter's concerns by requiring meaningful public involvement, which includes adequate access to information, and that detailed regulations prescribing access to specific information are not necessary.

One commenter agreed with the provision of the proposal that would allow EPA to waive public involvement procedures where immediate action is necessary to protect human health or the environment, but believed that public involvement should not be waived for long-term actions. EPA agrees with this commenter and the rule reflects this approach. In proposing the waiver provision of § 265.121(b), EPA intended to allow regulatory agencies to delay public involvement and get cleanup underway immediately, where necessary to protect human health and the environment, but not to remove the requirement for public participation. In response to this comment, EPA has modified the regulatory language of § 265.121(b) in this final rule to clarify the Agency's intent.

iii. *The public involvement procedures of the proposed rule were too stringent.* A third group of commenters believed that the public involvement requirements of the proposal were too stringent, and did not provide enough flexibility to the States. For example, one commenter stated that the proposed public participation requirements for alternative mechanisms were excessive, unnecessary, and inconsistent with existing public participation requirements. Another stated that there is no need for public participation for remedial action orders and closure plan approval to be equivalent to the requirements of Part 124 and Part 270, and that alternate, less stringent procedures would suffice.

EPA believes that public involvement is important in all agency actions, including enforcement orders. Consequently, EPA is requiring public participation at three key stages.

Some commenters believed that EPA should defer to State programs for public involvement as long as they provide basic due process and reasonable public input. These commenters believed that States should have reasonable flexibility to make site-specific determinations regarding the level of public participation that is appropriate at a site, and to adopt public involvement procedures that meet the needs of their own State. They believed that the benefits of public comment are preserved by requiring the States to provide public notice, and that specific differences in process are of differences of degree, and not substance.

EPA agrees that many States have developed cleanup programs with appropriate public involvement, and has tried to balance the need to ensure adequate public participation against requirements that constrain States. EPA believes the approach in the final rule strikes an appropriate balance. EPA, for example, allows States to decide how much notice must be given, and how long comment periods must last.

Some commenters believed that the proposal would expand the current requirements for public involvement. According to these commenters, when post-closure permits are modified to incorporate a proposed remedy, the current requirements for permit modification require publication in a newspaper for seven days, a public hearing, and a 60-day public comment period, regardless of how the action is changed based on public comment. The proposal would require much more at remedy selection, thus would be more expansive than the existing regulations. To maintain consistency, commenters believed the rule should mirror the public involvement procedures of § 270.41.

EPA acknowledges the commenter's concern, and believes that it has addressed them by leaving the details of the notification process and the length of the comment period to the discretion of the overseeing agency.

Some commenters did not agree that public involvement procedures should apply to actions taken under section 3008(h), because public comment on an enforcement proceeding would be inappropriate and would unnecessarily complicate and confuse the process, while increasing costs and delaying the process. One commenter pointed out that the public currently has no assurance it will have opportunity to participate in the remedial action process when remedial action is implemented through an enforcement order, as the Agency's enforcement programs have discretion to limit public participation, yet there is no evidence that the lack of public participation in enforcement orders has been detrimental to the process.

EPA disagrees with this commenter that public involvement unnecessarily complicates and confuses the cleanup process—in fact, the Agency believes that the public is an important contributor to the cleanup process. It helps ensure that remediation does, in fact, protect human health and the environment, and that remedies are based upon reasonable assumptions, including assumptions of future land use. EPA is committed to public involvement in its oversight of cleanup decisions, and the Agency's policy is to provide for meaningful public notice and comment with every section 3008(h) order. The requirements promulgated in this final rule are consistent with current EPA guidance on section 3008(h) orders.

Another commenter believed that EPA should recognize the wide array of actions that may occur, from small to significant, and the increasing tendency to accomplish remedial action through a series of interim measures, rather than a single major action. This commenter believed that the Agency should tailor public participation measures to ensure participation during significant actions without slowing the conduct of the program by requiring extensive administrative procedures for each and every small action that may be taken. The commenter believed that the public participation measures should be flexible enough to ensure adequate public involvement and avoid serving as yet another brake on the system.

EPA believes that the approach to public involvement in this final rule addresses this commenter's concern. The rule requires public involvement when the Agency becomes involved in a remediation at the facility as a regulatory or enforcement matter; on the proposed preferred remedy and the assumptions upon which the remedy is based, in particular those related to land use and site characterization; and prior to making the final decision that remedial action is complete at the facility. EPA expects that these requirements will be applied flexibly, and it does not expect "extensive administrative procedures for each and every action." For example, in some cases, public comment might be provided on a general strategy, which included interim measures as well as specific final cleanup standards. In other cases, the public might prefer monthly or quarterly updates to activity-by-activity notice. The point is that the public must have early involvement and must have an opportunity to comment before the regulatory agency commits itself to a final remedy or decides final remedial action is complete at the facility. Within this framework, EPA believes the regulatory agency has opportunity to structure a reasonable approach based on the needs at the site. At the same time, the public is put on notice early in the process that activities are taking place.

4. Enforceable Documents Issued Prior to the Effective Date of This Rule (§ 265.121(b)(3))

a. Overview. It is likely that, prior to final promulgation of this rule EPA and authorized States will have required site assessments or cleanup under a variety of authorities, other than post-closure permits, at facilities currently subject to post-closure permit requirements. Most of these actions, if taken after promulgation, would have satisfied the requirements of this rule. EPA proposed and is taking final action to provide a means to give credit to such prior cleanup actions by soliciting public comment on the activities conducted before the effective date of the rule.

Under § 265.121(b)(3), EPA must provide an opportunity for public comment if the enforceable document imposing those remedies is intended to be used in lieu of a permit. Depending on public comment, EPA may impose additional requirements either by amending the existing order, issuing a new order, modifying the post-closure plan, or requiring a post-closure permit.

b. Response to Comment. Several commenters objected to this provision of the rule.

According to one commenter, the proposed approach, if designed to provide finality to owners or operators, was a good idea in that it could provide them with early assurance that they would not have to repeat closure, post-closure, cleanup or investigations at a later date. However, this commenter strongly opposed this provision to the extent that it contemplates any such *post hoc* adequacy determinations would be the impetus to reinvestigate and/or require additional remedial actions with respect to prior closure/post-closure activities. In addition, the commenter believed that when an owner or operator receives an adequacy determination under proposed § 265.121(c) for prior closure/post-closure activities under an alternative legal authority, these activities should

be expressly recognized as adequate in any subsequently-issued permit to assure the finality of any prior closure/post-closure determinations.

Another commenter opposed any effort to retroactively apply new, more restrictive standards (for public involvement or selection of remedies) to past remedial actions, and to approved closures. According to the commenter, actions undertaken in good faith by the owner or operator with Agency approval should be done with reasonable assurance that they will be considered completed. The commenter believed that uncertainty would discourage remedial actions.

Another commenter believed that this provision is beyond EPA's statutory authority. This commenter believed that EPA cannot conveniently ignore agreements entered into by it or States that were presumably within their authority. This issuance of a new regulation does not allow EPA to void binding agreements. Owners that have encouraged the Agency to use an order or consent agreement to oversee remedial action could be required to implement different remedial actions simply because EPA promulgates a new regulation. The commenter believed that this provision would impose more onerous requirements for responsible owners and operators of facilities that are currently implementing remedial action.

Another commenter suggested that before reopening an action, EPA should be required to demonstrate that the cleanup was not protective of human health and the environment. Another commenter expressed concern that any action undertaken in the past would be unlikely to meet current regulatory requirements, yet was likely taken by a cooperative facility aggressive in fulfilling its regulatory obligations at the time. According to the commenter, to reevaluate these facilities without any indication of potential environmental harm would create a costly administrative burden to both the Agency and the owner or operator, without any benefit to human health and the environment.

EPA agrees with the commenters that expressed concern about any uncertainty that might arise for owners and operators due to this provision. However, EPA disagrees that this is the effect of this provision. This provision does not impose new requirements on owners and operators retroactively, since owners and operators were subject to RCRA permit requirements (including section 3004(u)) prior to this rule. Instead, § 265.121(e) would extend the benefits of this rule to post-closure activities or cleanups conducted under enforceable documents issued before the rule was in effect even where these documents had not included public involvement. (Where the public had already had an opportunity to comment on the mechanism, there would be no need to invoke this provision.) EPA does not intend this provision to result in duplicative regulatory action, or to allow reopening of decisions that had already been made. Instead, it would simply ensure the public's opportunity to comment on a mechanism being used in lieu of a permit, if the public had not had an opportunity up to that point.

EPA can understand the commenter's concerns about re-opening past cleanups. EPA and authorized States certainly do not expect to re-open acceptable remedies where they are already underway. EPA believes that, in most situations, the public would have been involved in the remedy selection. In cases where the public was involved, the Agency does not intend this provision to provide an opportunity to revisit issues that already were raised and addressed. Rather, the provision is designed to make this final rule available to facilities that may have begun cleanup prior to the effective date, while, at the same time, assuring that the public has had opportunity to raise issues prior to the Agency's final decision that corrective action is not needed or is no longer need at the site. Even under the current corrective action process, remedies undertaken before the permit is issued are typically incorporated into the permit through the permit procedures. Owners and operators of closed interim status facilities or non-RCRA State programs currently may conduct cleanups outside the post-closure permit process. When EPA or a State issues a post-closure permit, it must determine that any prior cleanup meets the requirements of RCRA section 3004(u). If it does not—that is, if the cleanup is not protective of human health and the environment, or there are significant areas it does not address—EPA or the State may impose permit requirements requiring additional remediation work. Citizens may also raise the same issues in comment periods on draft post-closure permits and in challenges to permits that are issued. Thus, facilities face these issues regardless of whether or not EPA allows older cleanups to be recognized under this new alternative to post-closure permits.

In any case, EPA expects owners and operators conducting cleanups without involving EPA to involve the public at an early stage. EPA strongly discourages owners and operators from waiting until the end of the process to involve the public. If concerns are raised by the public regarding the actions taken under the alternative mechanism, EPA may require additional action through an order or permit. Therefore, EPA is promulgating § 265.121(b)(3).

C. Remediation Requirements for Land-Based Units With Releases to the Environment

1. Overview

In the 1994 notice, EPA requested comment on the possibility of allowing the Regional Administrator to establish groundwater monitoring, closure and post-closure, and financial assurance requirements on a site-specific basis at regulated units addressed through the corrective action process (*see* 59 FR 55778 at 55787–88). EPA specifically requested comment on this prospect for regulated units clustered with non-regulated units, all of which were releasing hazardous constituents to the environment, because of the concern that two different regulatory regimes would apply—for example, the regulated units could be subject to the detailed requirements of Part 264 (which were developed as a preventive requirement), while the non-regulated units could be subject to the more flexible remedial requirements for corrective action under § 264.101 and associated guidance.

EPA is promulgating in this notice final rules that will provide flexibility where a regulated unit is situated among SWMUs (or areas of concern), a release has occurred, and both the regulated unit and one or more SWMUs (or areas of concern) are suspected of contributing to the release. The final rule described in this section allows EPA and the authorized States to replace the regulatory requirements of Subparts F, G, and H at certain regulated units with alternative requirements developed under a remediation authority. This portion of the rule is designed to eliminate some of the problems Regions and States have encountered where two sets of requirements apply at a cleanup site—requirements for closure at the regulated unit, and corrective action requirements at the SWMUs. It applies to both permitted and interim status units. It also applies to both operating and closed facilities. Further, it can be used at closed facilities using alternative authorities in lieu of post-closure permits.

The closure process in Parts 264 and 265 was promulgated in 1982, before the Agency had much experience with closure of RCRA units. Since that time,

EPA has learned that, when a unit has released hazardous waste or constituents into surrounding soils and groundwater, closure is not simply a matter of capping the unit, or removing the waste, but instead may require a significant undertaking to clean up contaminated soil and groundwater. The procedures established in the closure regulations were not designed to address the complexity and variety of issues involved in remediation. Most remediation processes, on the other hand, were designed to allow site-specific remedy selection, because of the complexity of and variation among sites.

Similarly, the groundwater monitoring requirements designed for regulated units do not provide sufficient flexibility for complex cleanups. The requirement to place wells at the downgradient edge of a regulated unit often would not make sense if there are SWMUs further downgradient. Also, the Part 264 regulations contain specific requirements for the selection of cleanup levels for hazardous constituents released to groundwater, and do not provide for considerations of technical practicability, which are critical in a remediation context. Corrective action and other remediation authorities provide more flexible (yet protective) regimes for selecting cleanup levels.

Financial responsibility for closure or post-closure care may also work at cross purposes with financial responsibility for corrective action. It makes sense to allow a facility with funds set aside for closure of a regulated unit to spend those funds on a broader corrective action, when the regulated unit is being addressed in that corrective action.

This portion of this rule revises the requirements of Parts 264 and 265 Subparts F, G, and H, by adding new §§ 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d), and 265.140(d). Those provisions allow EPA to address environmental needs at certain closing regulated units with more flexible, but protective, site-specific requirements developed through a remediation process. EPA is providing flexibility where a Regional Administrator (or State Director) finds that a regulated unit is situated among SWMUs (or areas of concern), a release has occurred, and the regulated unit and one or more of the SWMUs (or areas of concern) are likely to have contributed to the release.

To provide greater flexibility for the cleanup of regulated units in this situation, EPA is giving the Regional Administrator (or State Director) discretion to replace the requirements for closure, groundwater monitoring, and financial responsibility set out in Parts 264 and 265 with standards tailored specifically for the cleanup. For closure, the new "generalized" standard is protecting human health and the environment by meeting the closure performance standard in either § 264.111(a) and (b) or § 265.111(a) and (b). For groundwater monitoring and financial responsibility, the new standard is protection of human health and the environment. The Regional Administrator can use these new standards to integrate the cleanup requirements for the regulated unit into the requirements for the SWMUs developed under remediation authorities. In addition, to reduce duplicative administrative processes, EPA is not requiring that the alternative requirements be incorporated into the permit, closure plan, and/or post-closure plan in all cases. In the case of permitted facilities, alternative requirements for a regulated unit might be included in the permit where related SWMUs were being addressed under RCRA section 3004(u), the permitting corrective action authority. EPA, however, wants the Regional Administrator to be able to use other authorities to develop the requirements for regulated units and related SWMUs, such as RCRA section 3008(h), CERCLA, and approved State remediation authorities. This rule, therefore, allows the Regional Administrator (or an authorized State) to determine that there is no need to impose the unit-specific requirements of Part 264 or Part 265 because alternative requirements developed under an approved remediation authority will protect human health and the environment. The requirements for the regulated unit and the SWMUs developed under that authority can be set out in the permit or in an approved closure plan and/or post-closure plan, or can be set out in another enforceable document (as defined in § 270.1(c)(7)), and referenced in the permit or approved closure plan and/or post-closure plan.

For permitted facilities, EPA is modifying the requirements for content of the closure plan and closure plan modification by adding new § 264.112(b)(8) and (c)(2)(iv), and post-closure plan content and post-closure plan modification at § 264.118(b)(4) and (d)(2)(iv) to require owners and operators to incorporate the alternative requirements into the closure plan and/or post-closure plan, or to incorporate into those plans a reference to the enforceable document (or permit section) that sets forth those requirements. To do so, the owner or operator would use the existing procedures for closure plan and post-closure plan approval and modification in Part 264, and for permit modifications in Part 270. EPA expects that any such decision would be a "class 3" modification.

For interim status facilities, EPA is similarly adding new §§ 265.112(b)(8) and (c)(2)(iv) and 265.118 (c)(5) and (d)(1)(iv)to require owners and operators to incorporate alternative requirements into the closure plan and/or post-closure plan, or to incorporate into those plans a reference to the enforceable document that sets forth those requirements. To do so, the owner or operator would use the existing procedures for closure plan and post-closure plan approval and modification in Part 265.

Members of the public may also utilize current procedures to challenge either the specifics of how EPA is addressing a regulated unit as part of corrective action (for example, if the corrective action is imposed through a RCRA permit), or the decision by EPA or the State to address the regulated unit under alternative requirements set out in an enforceable document. Under EPA's federal rules, members of the public may file administrative appeals for permits; they may challenge closure or post-closure plans in court.

The Regional Administrator (or State Director) may use existing procedures for modifying permits or closure plans to revisit corrective action requirements for regulated units set out in permits or to revisit cleanups under alternative enforceable documents. EPA's rules allow permits, closure plans, and post-closure plans to be modified when significant new information arises after the issuance of the plan or permit. Some developments during remediation may justify use of this authority. For example, if a non-RCRA agency in charge of an alternate authority selected a very different remedy which, in the RCRA authority's judgement, would not adequately protect human health and the environment, the RCRA authority might consider this to be new information warranting reconsideration of the decision to defer existing RCRA requirements for regulated units.

Because the concept of deferring closure, groundwater monitoring, and financial responsibility requirements is new, EPA is limiting the range of authorities that can be used to craft alternate requirements. First, a Regional Administrator (or State Director) may defer regulated unit requirements in favor of requirements crafted under corrective action for permits under RCRA section 3004(u) and corrective

action orders for interim status facilities under RCRA section 3008(h). The Regional Administrator (or State Director) may also defer to requirements established in actions under CERCLA section 104 and 106. EPA is familiar with the scope of these legal authorities and the enforcement mechanisms that accompany them. Any Regional Administrator (or State Director) wishing to defer to regulated unit requirements developed under these authorities need only consider whether the requirements will, in fact, protect human health and the environment.

EPA also wants State Directors to be able to defer to State remedial authorities outside of RCRA. EPA, however, is less familiar with these authorities and their enforcement mechanisms. EPA, therefore, is requiring any State that wishes to use a non-RCRA authority to craft alternative regulatory requirements to submit that authority to EPA for review in the State authorization process. EPA will review the scope of the legal authority. It will determine for example, whether the authority can provide for cleanup of releases from a regulated unit to all media, as required under §§ 264.111(b) and 265.111(b). EPA will also review the State's mechanisms for enforcing the alternative requirements. Where a State will not be incorporating the new regulated unit requirements directly into a permit or closure plan enforceable under RCRA, EPA needs to have some assurance that it will be able to enforce them, if necessary. EPA is, in this notice, amending the existing requirements for enforcement of State programs in § 271.16 to add a new requirement regarding the enforceability of these new, alternative regulated unit requirements. Recognizing that effective enforcement mechanisms may vary greatly from State to State, EPA is promulgating a general standard, rather than a list of specific enforcement requirements.

This rule also allows the Agency to transfer the financial assurance requirements of Part 264 or Part 265 Subpart H to the corrective action process, when the regulated unit is addressed through corrective action. This provision does not allow the Agency to waive the requirements for financial assurance at a regulated unit. Owners and operators of regulated units remain subject to the requirement to provide financial assurance to address cleanup at the unit—however, this rule allows EPA or the authorized States to develop site-specific financial assurance requirements for corrective action at the unit, and transfer funds set aside under Subpart H for closure, post-closure, and third-party liability requirements to address corrective action. This provision may be invoked by EPA or by a State authorized for this rule only in cases where the alternative cleanup authority requires financial assurance for the corrective action.

In addition to the financial assurance requirements for closure and post-closure care, Parts 264 and 265 Subpart H require owners and operators to provide assurances that they can pay claims for damages to third-parties arising from accidental occurrences at the facility. The Agency, however, typically has not required third-party liability coverage as part of financial assurance for corrective action. (The general third-party funds required by Parts 264 and 265 would, of course, apply to accidents involving hazardous waste management occurring during corrective action.) This rule allows the Regional Administrators and authorized States to release funded third-party liability assurances, or to relieve owners and operators from the obligation to provide third-party liability assurance, where all regulated units at the facility are being addressed under §§ 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d) or 265.140(d). EPA expects this action would be warranted under limited circumstances—for example, it might be warranted where all regulated units at the facility are being addressed through corrective action, and the Regional Administrator finds that it is necessary to use the third-party liability funds to pay for the cleanup. It should be noted that where a facility is subject to third-party liability requirements because of regulated units other than those being addressed under §§ 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d) or 265.140(d), the facility remains subject to the requirement for third-party liability coverage.

2. Response to Comment

In the preamble of the proposed rule (*see* 59 FR 55778 at 55787 and 55688), EPA requested comment on the need for provisions allowing regulated units to be addressed through a remediation process. The Agency described a situation where a collection of adjacent SWMUs and a regulated unit are releasing hazardous constituents to the environment. Prior to this rule, EPA would have been required to impose the requirements of Part 264 or Part 265 for financial assurance, closure, and groundwater monitoring and remediation of the regulated unit, and to select remedies for the SWMUs through the RCRA corrective action process. This situation was inconsistent with a major objective of EPA's Subpart S initiative discussed above, that is, to create a consistent, holistic approach to cleanup at RCRA facilities.

Many commenters supported the approach described by EPA in the preamble to the proposal. Commenters on the proposed rule agreed with EPA that regulated units and non-regulated SWMUs are often indistinguishable in terms of risk, and most supported integration of the closure and corrective action programs.

Many commenters had encountered situations similar to those described by the Agency, and believed that the closure process prevented the best remedy at those sites. Several commenters agreed that it is often difficult to identify the source of contamination, particularly when many SWMUs are located near each other. Commenters cited situations where the boundaries of regulated units and non-regulated units overlap, or where contaminant plumes have commingled as situations where the regulatory distinction between regulated and non-regulated SWMUs is particularly troublesome.

Some commenters believed that the corrective action process, which was specifically designed to address remediation, rather than the closure process, which has preventative goals, should be used to address all units at a facility.

EPA does not believe that the closure process is inappropriate for all regulated units with releases. However, it does believe that it does not make sense to have two separate remedial processes working to clean up a single release, so it is providing relief where a regulated unit and one or more SWMUs appear to have contributed to the same release. EPA believes the Regional Administrator should be able to choose, on a case-by-case basis, whether to apply the current Part 264 and 265 requirements to the SWMUs or the more flexible remediation requirements to the regulated unit. This final rule provides the Regional Administrator with the discretion needed to make this choice.

Several commenters mentioned that having two regulatory programs for RCRA units is complicated by State authorization issues—some States are authorized for the base RCRA program, thus are responsible for closure, but are not authorized for corrective action. In these States, two agencies are responsible for reviewing plans, and making decisions. Another commenter's regulatory agency has taken the position that any detectable levels of organics left in soil or groundwater during closure will require capping and post-closure

monitoring of the unit, whereas the corrective action program uses risk-based cleanup standards. Thus, there is potential for different areas of a facility to be cleaned up to different sets of standards, even if the areas are adjacent to each other, and exposure patterns are identical. Commenters believed that a single, uniform set of cleanup standards should be established for all units regardless of the time the waste or contaminant was placed in the unit, and regardless of the regulatory program that has jurisdiction.

EPA cannot eliminate all of the complexities caused by the State authorization requirements. However, States that are authorized for the base program will be able to request authorization for this rule. They may request authority to address regulated units as part of corrective action. EPA also notes that there is no Federal requirement that facilities cap any detectable levels of organics left in soil or groundwater during closure.

Other commenters raised concerns about EPA's proposal that closure and cleanup standards be integrated. Some commenters expressed concern that the Agency's proposal might be an attempt to extend the closure requirements to non-regulated units, rather than to address all SWMUs through the corrective action process. Some commenters said that they have had to close non-regulated units as regulated units because they could not identify the source of contamination at a site. These commenters believe that the corrective action process, not closure requirements, should be the applicable requirements at SWMUs requiring remediation.

The Agency agrees that regulated unit standards were not designed for SWMUs subject to corrective action. The Agency intends this rule to provide Regional Administrators and State Directors with discretion to choose whether to apply current Part 264 and 265 standards to regulated units closed as part of a broader corrective action, or to address them through cleanup requirements. This rule is not intended as a way to bring SWMUs under Part 264 or Part 265 unit-specific standards.

A few commenters supported retaining the distinction between regulated units and other SWMUs. One commenter believed the Agency should retain the closure process at all regulated units because the regulatory timeframes of that process result in a quicker remedy selection than the open-ended corrective action process. This commenter feared that removing closure requirements at regulated units would delay cleanups. Another commenter objected that site-specific determinations delay any process because they are an open door to extended negotiations, disputes, and litigation, and allow inconsistent decisions. This commenter believed that the closure regulations provide consistent requirements.

The Agency agrees with the commenter that the closure requirements, including the timeframes incorporated in the closure process, are generally appropriate where a release has not occurred. EPA, however, does not agree that these procedures are well-suited to remediation of environmental releases. EPA believes that, where a regulated unit is located among SWMUs (or areas of concern), and releases have or are likely to have occurred, applying two sets of regulatory requirements can slow, rather than hasten the cleanup. Thus, in this final rule, EPA is allowing regulators discretion to apply alternate requirements to the closing regulated unit developed under a remediation authority.

Another commenter suggested retaining the closure requirements if the regulated unit is a landfill, because, according to commenter, landfills typically are large and isolated. The commenter also suggested the closure requirements be retained in situations where routine monitoring is necessary, or in situations where waste in the regulated unit is very hazardous. This commenter suggested that the closure standards be retained where the units contain similar wastes, but were used at different times, and where there are multiple adjacent sources of contamination with overlapping parameters of concern.

This rule retains the closure requirements for isolated units. This final rule allows the Regional Administrator to replace the requirements of Subparts F, G, and H with alternative requirements developed for corrective action only where a regulated unit is situated among SWMUs (or areas of concern), a release has occurred, and both the regulated unit and one or more SWMUs (or areas of concern) are likely to have contributed to the release.

EPA disagrees that the type of waste involved or the need for monitoring should determine which set of regulatory requirements must be used to address the unit, or that routine monitoring can be imposed only through the closure process. EPA believes that remediation processes can be used to provide protective cleanups for all types of wastes, and can be used to impose sufficient groundwater monitoring requirements.

Another commenter suggested that the timeframes for initiating corrective action (§ 264.99(h)(2)) and other administrative and reporting requirements of Part 264 Subpart F be retained in all cases. However, EPA disagrees with this commenter and has chosen to allow greater flexibility provided by alternate remedial authorities for regulated units surrounded by SWMUs that are both suspected to have released to the environment.

One commenter conditioned its approval of this change on due process rights of owner or operator being maintained. EPA believes the existing rights available to an owner or operator in federal enforcement actions appropriately address due process rights and this rule does not modify these rights.

Some commenters asked for clarification of how integration of closure and corrective action would work administratively. EPA has provided this information in the preamble discussion above.

Another commenter stated that the proposal contradicted itself by first claiming that protections imposed through alternative mechanisms would be equivalent to those of a post-closure permit, and then proposing that closure standards be developed on a site-specific basis under the corrective action process. The commenter requested EPA to clarify its intention in this regard, and to ensure that the regulatory requirements were truly the same for closure and post-closure activities conducted with or without a permit.

In response to this comment, EPA clarifies that it intends for the closure of regulated units to be subject to consistent substantive standards, regardless of whether that closure is addressed under a permit or under an alternate authority. EPA believes the requirements of § 265.121 make this point clearly. The commenter's concern derives from EPA's proposal (and decision in this final rule) to amend the closure standards to allow the integration of closure and corrective action at certain specified closed or closing units. These new standards apply equally to all eligible regulated units, regardless of whether they are subject to permits or interim status. Thus, while EPA has amended the closure standards as they apply to certain regulated units, it has retained a consistent approach to closure under the permit process and under alternate authorities. To the extent that the commenter is objecting to EPA's decision to allow use of alternative, site-

specific requirements in lieu of the generic requirements of Subparts F, G, and H, EPA, as explained above, believes that the need to coordinate the cleanup of "mingled" releases outweighs any perceived benefits of the more specific requirements for regulated units.

In the preamble of the proposed rule, the Agency described a second remedial situation where the closure standards might not be appropriate—where waste has been removed from a unit but contaminated soils remain, and the remedy that might best prevent future releases from the unit would be precluded by the requirement for a RCRA cap.

Many commenters agreed with the Agency that the requirement for a RCRA cap may impede remedies. Several commenters agreed that the closure regulations do not consider remediation as an alternative to capping the unit, yet many currently available remedial technologies are more protective to human health and the environment in the long term than is capping, and that the Agency should provide flexibility to pursue such options in the closure of regulated units. Many commenters also agreed that required RCRA caps are very expensive and often provide little additional environmental protection where most waste has been removed from the unit.

However, the Agency is not proceeding with revisions to the closure requirements that would modify the requirement for a RCRA cap (or other closure, groundwater, or financial assurance requirements) beyond the situations outlined in §§ 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d), and 265.140(d). Thus, the unit described by commenters could be addressed under corrective action procedures only if it was situated among SWMUs or areas of concern, and was part of a broader corrective action. EPA was not prepared, at the time this rule was made final, to make a final decision on this issue. EPA will consider additional action in this area if, in implementing this final rule, the Agency identifies further opportunities for integrating closure and corrective action.

D. Post-Closure Permit Part B Information Submission Requirements (§ 270.28)

1. Overview

EPA is promulgating § 270.28, which establishes information submission requirements for post-closure permits. Prior to this rule, the information submission requirements of Part 270 did not distinguish between operating permits and post-closure permits, and facilities seeking post-closure permits were generally expected to provide EPA, as part of their Part B permit applications, the facility-level information specified in § 270.14 as well as relevant unit-specific information required in §§ 270.16, 270.17, 270.18, 270.20, and 270.21.

However, EPA recognized that certain of the Part 270 information requirements are important to ensuring proper post-closure care, while others are generally less relevant to post-closure. The Agency believes the most important information for setting long-term post-closure conditions are groundwater characterization and monitoring data, long-term care of the regulated unit and monitoring systems (e.g., inspections and systems maintenance), and information on SWMUs and possible releases. Therefore, EPA is adding a new § 270.28 to identify that subset of the Part B application information that must be submitted for post-closure permits.

As a result of this provision, an owner or operator seeking a post-closure permit must submit only that information specifically required for such permits under newly added § 270.28, unless otherwise specified by the Regional Administrator. The specific items required in post-closure permit applications are:

—A general description of the facility;
—A description of security procedures and equipment;
—A copy of the general inspection schedule;
—Justification for any request for waiver of preparedness and prevention requirements;
—Facility location information;
—A copy of the post-closure plan;
—Documentation that required post-closure notices have been filed;
—The post-closure cost estimate for the facility;
—Proof of financial assurance;
—A topographic map; and
—Information regarding protection of groundwater (e.g., monitoring data, groundwater monitoring system design, site characterization information)
—Information regarding SWMUs at the facility.

In many cases, this information will be sufficient for the permitting agency to develop a draft permit. However, since RCRA permits are site-specific, EPA believes it is important that the Regional Administrator have the ability to specify additional information needs on a case-by-case basis. Accordingly, to ensure availability of any information needed to address post-closure care at surface impoundments (§ 270.17), waste piles (§ 270.18), land treatment facilities (§ 270.20) and landfills (§ 270.21), § 270.28 of this rule authorizes the Regional Administrator to require any of the Part B information specified in these sections in addition to that already required for post-closure permits at these types of units. This approach enables the Regional Administrator to require additional information as needed, but does not otherwise compel the owner or operator to submit information that is irrelevant to post-closure care determinations.

2. Response to Comment

Commenters generally supported the provisions of the proposed rule related to information submission requirements, and EPA is promulgating the provisions as proposed. Some commenters suggested that additional information be required by § 270.28 (e.g., one commenter suggested the Agency require the chemical and physical analysis of § 270.14(b)(2), and the training plan information required by § 270.14(b)(12)). However, after considering these comments, EPA is promulgating the proposed requirements because the Agency believes they will provide the Agency with the information it needs to address post-closure care in most instances. The information suggested by commenter is not, in the Agency's experience, routinely needed for post-closure permits. For example, § 270.14(b)(2), suggested by commenter, requires a chemical and physical analysis of waste to be handled at the facility—but, in the case of post-closure permits, the regulated unit is closed, and will not be handling wastes. Similarly, § 270.14(b)(12) requires the owner or operator to train persons who will be operating the facility—but, in the case of a post-closure permit, the facility will not be operating.

If for some reason this information is needed by the Agency, this rule does not preclude the Agency from requiring it. As was discussed above, this rule provides the Agency authority to obtain additional information on a case-by-case basis, as needed, but, for most situations, requires only the minimum information necessary for all post-closure situations. This approach, the Agency believes, provides sufficient information to the overseeing agency to ensure adequate post-closure care, while minimizing the information submission requirements for all owners and operators. However, as a result of this final rule, EPA will request information

for post-closure permit applications beyond the information specified in § 270.28 only when necessary on a case-by-case basis.

IV. State Authorization

A. Authorization of State Programs

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 state authorization).

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of the Federal program. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in a State where the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obligated to enact equivalent authority within specified timeframes. 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, the new requirements and prohibitions of HSWA take effect in authorized States at the same time they take effect in unauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including issuance of permits, until the State is granted authorization to do so. While States must still adopt more stringent HSWA-related provisions as State law to retain final authorization, the HSWA requirements apply in authorized States in the interim. In general, § 271.21(e)(2) requires States that have final authorization to modify their programs to reflect Federal program changes and to subsequently submit the modifications to EPA for approval. It should be noted, however, that authorized States are only required to modify their programs when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. For those Federal program changes that are not more stringent or reduce the scope of the Federal program, States are not required to modify their programs (*see* § 271.1(i)). Section 3009 of RCRA allows States to impose standards more stringent than those in the Federal program.

B. Enforcement Authorities

Since 1980, certification of adequate enforcement authority has been a condition of State authorization. EPA's authority to use its own enforcement authorities, however, does not terminate when it authorizes a State's enforcement program. Following authorization, EPA retains the enforcement authorities of sections 3008, 7003, and 3013 of RCRA, although authorized States have primary enforcement responsibility.

C. Effect of this Rule on State Authorizations

This rule promulgates revisions to the post-closure requirements under HSWA and non-HSWA authorities. The requirements in §§ 264.90(e), 265.110(c), 265.118(c)(4), 265.121 (except for paragraph 265.121(a)(2)), 270.1, 270.14(a), and 270.28, which remove the post-closure permit requirement and allow the use of alternate mechanisms, are promulgated under non-HSWA authority. Thus, those requirements are immediately effective only in States that do not have final authorization for the base RCRA program, and are not applicable in authorized States unless and until the State revises its program to adopt equivalent requirements. These new standards are not more stringent than current requirements and, therefore, States are not required to adopt them.

Sections 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d), 265.140(d), and 271.16(e), which allow the Agency to address closing regulated units through the corrective action program, are promulgated under HSWA authority. Except for § 271.16(e) these provisions provide additional options to regulators, and, therefore, are not more stringent than the current base RCRA program requiring closure of all regulated units. Authorized States are required to modify their programs only if the new Federal provisions are more stringent.

Further, because these HSWA provisions in this rule are not more stringent, they are immediately effective only in those States not authorized for the base RCRA program. In States authorized for the RCRA base program, these HSWA provisions cannot be enforced until and unless the State adopts them. Once a State adopts these provisions, they can be implemented by EPA before the State is authorized for the regulation change because they are promulgated pursuant to HSWA authority, and are thus immediately effective in the State.

D. Review of State Program Applications

1. Post-Closure Care Under Alternatives to Permits

Sections 264.90(e), 265.110(c), 265.118(c)(4), 265.121, and 270.1 of this final rule remove the requirement for post-closure permits, and allow EPA and the authorized States to address facilities needing post-closure care using alternate authorities. All States seeking authorization for the above provisions of this rule must submit an application that includes regulations at least as stringent as these provisions, as well as the information required under § 271.21. In all States, this information will include copies of State statutes and regulations demonstrating that the State program includes the provisions promulgated in this rule in the sections listed above. EPA will review this information to determine that the State has adopted provisions to assure that authorities used in lieu of post-closure permits are as stringent as the Federal program.

In addition, States must submit an application that includes copies of the statutes and regulations the State plans to use in lieu of the section 3004(u) provisions of a post-closure permit to address corrective action at interim status facilities. For example, many States authorized for corrective action have cleanup authorities, which they apply at interim status facilities. EPA will review those statutes and regulations to determine whether the alternate authority is sufficient to impose requirements consistent with § 264.101. At a minimum, that authority must be sufficiently broad to allow the authorized authority to: (1) require facility-wide assessments; (2) address all releases of hazardous wastes or constituents to all media from all SWMUs within the facility boundary as well as off-site releases to the extent required under section 3004(v) (to the extent that releases pose a threat to human health and the environment); and (3) impose remedies that are protective of human health and the environment. This review by EPA will assure that actions taken at closed facilities under an alternate authority are as protective as those that would be taken under a post-closure permit. In addition, EPA is promulgating in this final rule a revision to § 271.16 to ensure that these alternate authorities are adequately enforceable. EPA will review the State's authority to determine whether it includes the authority to sue in court, and to assess penalties.

2. Remediation Requirements for Land-Based Units With Releases to the Environment

Sections 264.90(f), 264.110(c), 264.140(d), 265.90(f), 265.110(d), and 265.140(d) of this rule allow EPA or the authorized State to replace requirements of Part 264 or 265 Subpart F and G with analogous requirements developed through the corrective action process. When regulated units are addressed through the corrective action process, these provisions allow the Agency to transfer financial assurance requirements to corrective action as well. Sections 264.112(b) and (c), 264.118(b) and (d), 265.112(b) and (c), and 265.118(c) and (d) contain procedures for owners and operators to implement this flexibility.

To obtain authorization for §§ 264.90(f), 264.110(c), and 264.140(d), which apply at permitted facilities, States must be authorized for section 3004(u) or submit an application that includes copies of the statutes and regulations the State plans to use to develop a remedy at regulated units. To obtain authorization for §§ 265.90(f), 265.110(d), and 265.140(d), which apply at interim status facilities, States must submit an application that includes copies of the statutes and regulations the State plans to use to develop a remedy at regulated units. As in the case of alternate authorities submitted for approval to be used in lieu of post-closure permits, authorities to be used to implement §§ 265.90(f), 265.110(d), and 265.140(d) must impose corrective action consistent with § 264.101, and must be sufficiently broad to impose minimum requirements. They must allow the regulatory authority to: (1) include facility-wide assessments; (2) address all releases of hazardous wastes or constituents to all media from all SWMUs within the facility boundary as well as off-site releases to the extent required under section 3004(v) (to the extent necessary to protect human health and the environment); and (3) be protective of human health and the environment. Further, they must include authority to sue in court, and to assess penalties, consistent with § 271.16. For § 265.90(f), the authority must allow the State to require financial assurance.

3. Post-Closure Permit Part B Information Submission Requirements

Section 270.28, which specifies information that must be submitted for post-closure permits, is promulgated under non-HSWA authority and is not more stringent than the current RCRA program. Therefore, § 270.28 does not become effective in an authorized State until and unless the State obtains authorization for that provision. Further, authorized States are not required to modify their programs to adopt § 270.28.

V. Effective Date

This final rule is effective immediately. Section 3010(b)(1) of RCRA allows EPA to promulgate an immediately effective rule where the Administrator finds that the regulated community does not need additional time to come into compliance with the rule. Similarly, the Administrative Procedures Act (APA) provides for an immediate effective date for rules that relieve a restriction (*see* 5 U.S.C. 553(d)(1)).

This rule does not impose any requirements on the regulated community; rather, the rule provides flexibility in the 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.

VI. Regulatory Assessments

A. Executive Order 12866

Under Executive Order 12866, which was published in the **Federal Register** on October 4, 1993 (*see* 58 FR 51735), the Agency must determine whether a regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Under the terms of Executive Order 12866, OMB has notified EPA that it considers this a "significant regulatory action" on the basis of (4) within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record for this rulemaking (*see* Docket # F-94-PCPP-FFFFF).

This final rule establishes two main changes to the procedures required for closure and post-closure care. First, it allows EPA and the authorized States the option of either issuing post-closure permits or using alternative mechanisms for ensuring the proper management and care of facilities after their closure. Second, it amends the regulations governing closure of regulated units to allow, under certain circumstances, the regulatory agency to address regulated units through Federal or State cleanup programs, instead of applying Part 264 and 265 standards for closure.

The first provision benefits the regulated community by providing a potential avoidance of the permit process for post-closure, as well as eliminating duplication of effort in cases, where EPA and the States have already issued enforcement orders to ensure expeditious action by facility operators. The cost savings for this change are estimated to be a total of $507,000, and are discussed in further detail in the Economic Impact Analysis background document, which has been placed in the docket. The second gives EPA and States discretion to replace regulatory requirements applying to closed regulated units with site-specific requirements developed through cleanup authorities. It does not affect any authority EPA and authorized States have to impose the closure requirements. Further, the requirements for corrective action are not more stringent than those required for closure under Parts 264 and 265. Consequently, no cost assessment was prepared for the second main provision of the rule.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), at the time the Agency publishes a proposed or final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis that describes the effect of the rule on small entities. However, no regulatory flexibility analysis is required if the Administrator certifies that the rule will not have significant adverse impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains EPA's determination.

The first portion of this final rule would provide regulatory relief by expanding the options available to address post-closure care so that a permit would not be required in every case. No new requirements would be imposed on owners and operators in addition to those already in effect. The Agency estimates a cost savings of $500,000 as a result of this portion of the rule. Additional details related to this cost savings are included in the Economic Impact Analysis, which can be found in the docket. The second part of the final rule makes available more flexible standards regarding closure, groundwater monitoring, and financial assurance for some facilities. It also imposes no new requirements. Therefore, pursuant to 5 U.S.C. 601b, I certify that this regulation will not have significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by local, and tribal governments, in the aggregate, or by private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or the private sector in any one year. Neither portion of this rule is more stringent than the current Federal program, therefore, States are not required to adopt them (see section V of this preamble). In addition, this rule imposes no new requirements on owners and operators, but, rather, allows flexibility to regulators to implement requirements already in place. As stated above, EPA estimates a cost savings of $500,000 for the provisions of the final rule. EPA also has concluded that this rule will not significantly or uniquely affect small governments. Small governments will not be responsible for implementing the rule. Although they may be owners or operators of facilities regulated by the rule, the rule does not impose any new requirements.

D. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0009 (EPA ICR Number 1573.05).

EPA believes the changes to the information collection do not constitute a substantive or material modification. The recordkeeping and reporting requirements of this rule would replace or reduce similar requirements already promulgated and covered under the existing Information Collection Request (ICR). There is no net increase in recordkeeping and reporting requirements. As a result, the reporting, notification, or recordkeeping (information) provisions of this rule will not need to be submitted for approval to the Office of Management and Budget (OMB) under section 3504(b) of the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq..

The current ICR expires on December 31, 1999. During the ICR renewal process, EPA will prepare an ICR document with an estimate of the burden reduction resulting from the decreased reporting provisions of this rule, and will publish in the **Federal Register** a Notice announcing the availability of that ICR and soliciting public comments.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (*see* 62 FR 19885, April 23, 1997) applies to any rule that EPA determines: (1) is "economically significant" as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to E.O. 13045 because this is not an "economically significant" regulatory action as defined by E.O. 12866. In addition, the rule does not involve decisions based on environmental health or safety risks.

F. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act, the Agency is directed to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications,

test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

EPA is not promulgating technical standards as part of today's final rule. Thus, the Agency has not considered the use of voluntary consensus standards in developing this rule.

C. Executive Order 12898: Environmental Justice

Under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," as well as through EPA's April 1995, "Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report," and National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities. To address this goal, EPA considered the impacts of this final rule on low-income populations and minority populations and concluded that this final rule will potentially advance environmental justice causes. The process for public involvement set forth in this final rule encourages all potentially affected segments of the population to participate in public hearings and/or to provide comment on health and environmental concerns that may arise pursuant to a proposed Agency action under the rule. EPA believes that public involvement should include regular updating of the community on the progress made cleaning up the facility. Public participation should provide all impacted and affected parties ample time to participate in the facility cleanup decisions. In many cases, public involvement should include bilingual notifications or publication of legal notices in community newspapers.

H. Executive Order 12875: Enhancing Intergovernmental Partnerships

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

This rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. It provides more flexibility for States and tribes to implement already-existing requirements. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

I. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This rule does not significantly or uniquely affect the communities of Indian tribal governments. In addition, this rule imposes no new requirements on owners and operators, but, rather, allows flexibility to regulators to implement requirements already in place. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

J. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in this **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C 804(2).

VII. Brownfields

In February 1995, EPA announced its Brownfields Action Agenda, launching the first Federal effort of its kind designed to empower States, Tribes, communities, and other parties to safely cleanup, reuse, and return brownfields to productive use. To broaden the mandate of the original agenda, in 1997 EPA initiated the Brownfields National Partnership Agenda, involving nearly twenty other Federal agencies in brownfields cleanup and reuse. Since the 1995 announcement, EPA has funded brownfields pilots, reduced barriers to cleanup and redevelopment by clarifying environmental liability issues, developed partnerships with interested stakeholders, and stressed the importance of environmental workforce training. In implementing the Agenda, EPA, to date, has focused primarily on issues associated with CERCLA. Representatives from cities, industries, and other stakeholders, however, have recently begun emphasizing the importance of looking beyond CERCLA and addressing issues at brownfield sites in a more comprehensive manner.

This final rule furthers the Administration's brownfields work by

removing barriers posed by RCRA regulations. Modifying the post-closure permit requirement and allowing the use of an alternative authority to clean up regulated and solid waste management units, expedites the clean up of RCRA facilities and makes such property available for reuse.

List of Subjects

40 CFR Part 264

Environmental protection, Hazardous waste, Closure, Corrective action, Post-closure, Permitting.

40 CFR Part 265

Hazardous waste, Closure, Corrective action, Post-closure, Permitting.

40 CFR Part 270

Hazardous waste, Post-closure, Permitting.

40 CFR Part 271

State authorization, Enforcement authority.

Dated: October 15, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, Chapter 1 Title 40 of the Code of Federal Regulations is amended as follows:

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

2. Section 264.90 is amended by adding new paragraphs (e) and (f) to read as follows:

§ 264.90 Applicability.

* * * * *

(e) The regulations of this subpart apply to all owners and operators subject to the requirements of 40 CFR 270.1(c)(7), when the Agency issues either a post-closure permit or an enforceable document (as defined in 40 CFR 270.1(c)(7)) at the facility. When the Agency issues an enforceable document, references in this subpart to "in the permit" mean "in the enforceable document."

(f) The Regional Administrator may replace all or part of the requirements of §§ 264.91 through 264.100 applying to a regulated unit with alternative requirements for groundwater monitoring and corrective action for releases to groundwater set out in the permit (or in an enforceable document) (as defined in 40 CFR 270.1(c)(7)) where the Regional Administrator determines that:

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

(2) It is not necessary to apply the groundwater monitoring and corrective action requirements of §§ 264.91 through 264.100 because alternative requirements will protect human health and the environment.

3. Section 264.110 is amended by adding a new paragraph (c) to read as follows:

§ 264.110 Applicability.

* * * * *

(c) The Regional Administrator may replace all or part of the requirements of this subpart (and the unit-specific standards referenced in § 264.111(c) applying to a regulated unit), with alternative requirements set out in a permit or in an enforceable document (as defined in 40 CFR 270.1(c)(7)), where the Regional Administrator determines that:

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

(2) It is not necessary to apply the closure requirements of this subpart (and those referenced herein) because the alternative requirements will protect human health and the environment and will satisfy the closure performance standard of § 264.111 (a) and (b).

4. Section 264.112 is amended by adding new paragraphs (b)(8) and (c)(2)(iv) to read as follows:

§ 264.112 Closure plan; amendment of plan.

* * * * *

(b) * * *

(8) For facilities where the Regional Administrator has applied alternative requirements at a regulated unit under §§ 264.90(f), 264.110(d), and/or § 264.140(d), either the alternative requirements applying to the regulated unit, or a reference to the enforceable document containing those alternative requirements.

(c) * * *

(2) * * *

(iv) the owner or operator requests the Regional Administrator to apply alternative requirements to a regulated unit under §§ 264.90(f), 264.110(c), and/or § 264.140(d).

* * * * *

5. Section 264.118 is amended by adding new paragraphs (b)(4) and (d)(2)(iv) to read as follows:

* * * * *

§ 264.118 Post-closure plan; amendment of plan.

(b) * * *

(4) For facilities where the Regional Administrator has applied alternative requirements at a regulated unit under §§ 264.90(f), 264.110(c), and/or §§ 264.140(d), either the alternative requirements that apply to the regulated unit, or a reference to the enforceable document containing those requirements.

* * * * *

(d) * * *

(2) * * *

(iv) The owner or operator requests the Regional Administrator to apply alternative requirements to a regulated unit under §§ 264.90(f), 264.110(c), and/or § 264.140(d).

* * * * *

6. Section 264.140 is amended by adding a new paragraph (d) to read as follows:

§ 264.140 Applicability.

* * * * *

(d) The Regional Administrator may replace all or part of the requirements of this subpart applying to a regulated unit with alternative requirements for financial assurance set out in the permit or in an enforceable document (as defined in 40 CFR 270.1(c)(7)), where the Regional Administrator:

(1) Prescribes alternative requirements for the regulated unit under § 264.90(f) and/or § 264.110(d); and

(2) Determines that it is not necessary to apply the requirements of this subpart because the alternative financial assurance requirements will protect human health and the environment.

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: 42 U.S.C. 6905, 6906, 6912, 6922, 6923, 6924, 6925, 6935, 6936, and 6937.

2. Section 265.90 is amended by adding new paragraph (f) to read as follows:

§ 265.90 Applicability.

* * * * *

(f) The Regional Administrator may replace all or part of the requirements of this subpart applying to a regulated unit (as defined in 40 CFR 264.90), with alternative requirements developed for groundwater monitoring set out in an approved closure or post-closure plan or in an enforceable document (as defined in 40 CFR 270.1(c)(7)), where the Regional Administrator determines that:

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

(2) It is not necessary to apply the requirements of this subpart because the alternative requirements will protect human health and the environment. The alternative standards for the regulated unit must meet the requirements of 40 CFR 264.101(a).

3. Section 265.110 is amended by adding new paragraphs (c) and (d) to read as follows:

§ 265.110 Applicability.

* * * * *

(c) Section 265.121 applies to owners and operators of units that are subject to the requirements of 40 CFR 270.1(c)(7) and are regulated under an enforceable document (as defined in 40 CFR 270.1(c)(7)).

(d) The Regional Administrator may replace all or part of the requirements of this subpart (and the unit-specific standards in § 265.111(c)) applying to a regulated unit (as defined in 40 CFR 264.90), with alternative requirements for closure set out in an approved closure or post-closure plan, or in an enforceable document (as defined in 40 CFR 270.1(c)(7)), where the Regional Administrator determines that:

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

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

4. Section 265.112 is amended by adding new paragraphs (b)(8) and (c)(1)(iv) to read as follows:

§ 265.112 Closure plan; amendment of plan.

* * * * *

(b) * * *

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

(c) * * *

(1) * * *

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

* * * * *

5. § 265.118 is amended by adding new paragraphs (c) (4) and (5), and (d)(1)(iii) to read as follows:

§ 265.118 Post-closure plan; amendment of plan.

* * * * *

(c) * * *

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

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

(d) * * *

(1) * * *

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

* * * * *

5. A new § 265.121 is added to Subpart G to read as follows:

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

(a) Owners and operators who are subject to the requirement to obtain a post-closure permit under 40 CFR 270.1(c), but who obtain enforceable documents in lieu of post-closure permits, as provided under 40 CFR 270.1(c)(7), must comply with the following requirements:

(1) The requirements to submit information about the facility in 40 CFR 270.28;

(2) The requirements for facility-wide corrective action in § 264.101 of this chapter;

(3) The requirements of 40 CFR 264.91 through 264.100.

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

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

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

(iii) At the time of a proposed decision that remedial action is complete at the facility. These requirements must be met before the Regional Administrator may consider that the facility has met the requirements of 40 CFR 270.1(c)(7), unless the facility qualifies for a modification to these public involvement procedures under paragraph (b)(2) or (3) of this section.

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

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

6. Section 265.140 is amended by adding a new paragraph (d) to read as follows:

§ 265.140 Applicability.

* * * * *

(d) The Regional Administrator may replace all or part of the requirements of this subpart applying to a regulated unit with alternative requirements for financial assurance set out in the permit or in an enforceable document (as

defined in 40 CFR 270.1(c)(7)), where the Regional Administrator:

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

(2) Determines that it is not necessary to apply the requirements of this subpart because the alternative financial assurance requirements will protect human health and the environment.

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. Section 270.1 is amended by revising paragraph (c) introductory text and adding a new paragraph (c)(7) 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," and "disposal" of any "hazardous waste" as identified or listed in 40 CFR part 261. The terms "treatment," "storage," "disposal," and "hazardous waste" are 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 received waste after July 26, 1982, or that certified closure (according to § 265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section. If a post-closure permit is required, the permit must address applicable 40 CFR 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 facility or unit does not affect the requirement to obtain a post-closure permit under this section.

* * * * *

(7) *Enforceable documents for post-closure care.* At the discretion of the Regional Administrator, an owner or operator may obtain, in lieu of a post-closure permit, an enforceable document imposing the requirements of 40 CFR 265.121. "Enforceable document" means an order, a plan, or other document issued by EPA or by an authorized State under an authority that meets the requirements of 40 CFR 271.16(e) including, but not limited to, a corrective action order issued by EPA under section 3008(h), a CERCLA remedial action, or a closure or post-closure plan.

3. Section 270.14 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 270.14 Contents of part B: General requirements.

(a) * * * For post-closure permits, only the information specified in § 270.28 is required in Part B of the permit application.

* * * * *

4. A new § 270.28 is added to Subpart B to read as follows:

§ 270.28 Part B information requirements for post-closure permits.

For post-closure permits, the owner or operator is required to submit only the information specified in §§ 270.14(b)(1), (4), (5), (6), (11), (13), (14), (16), (18) and (19), (c), and (d), unless the Regional Administrator determines that additional information from §§ 270.14, 270.16, 270.17, 270.18, 270.20, or 270.21 is necessary. The owner or operator is required to submit the same information when an alternative authority is used in lieu of a post-closure permit as provided in § 270.1(c)(7).

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

1. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a) and 6926.

2. Section 271.16 is amended by adding a new paragraph (e) to read as follows:

§ 271.16 Requirements for enforcement authority.

* * * * *

(e) Any State authority used to issue an enforceable document either in lieu of a post-closure permit as provided in 40 CFR 270.1(c)(7), or as a source of alternative requirements for regulated units, as provided under 40 CFR 264.90(f), 264.110(c), 264.140(d), 265.90(d), 265.110(d), and 265.140(d), shall have available the following remedies:

(1) Authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of the requirements of such documents, as well as authority to compel compliance with requirements for corrective action or other emergency response measures deemed necessary to protect human health and the environment; and

(2) Authority to access or sue to recover in court civil penalties, including fines, for violations of requirements in such documents.

[FR Doc. 98–28221 Filed 10–19–98; 10:16 am]

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federal register

Monday
November 30, 1998

Part III

Environmental Protection Agency

40 CFR Part 260, et al.
Hazardous Remediation Waste Management Requirements (HWIR-Media); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 264, 265, 268, 270 and 271

[FRL–6186–6]

RIN 2050–AE22

Hazardous Remediation Waste Management Requirements (HWIR-media)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: As part of President Clinton's March 1994 environmental regulatory reform initiative, the United States Environmental Protection Agency (EPA) is issuing new requirements for Resource Conservation and Recovery Act (RCRA) hazardous remediation wastes treated, stored or disposed of during cleanup actions. These new requirements make five major changes: First, they make permits for treating, storing and disposing of remediation wastes faster and easier to obtain; second, they provide that obtaining these permits will not subject the owner and/or operator to facility-wide corrective action; third, they create a new kind of unit called a "staging pile" that allows more flexibility in storing remediation waste during cleanup; fourth, they exclude dredged materials from RCRA Subtitle C if they are managed under an appropriate permit under the Marine Protection, Research and Sanctuaries Act or the Clean Water Act; and fifth, they make it faster and easier for States to receive authorization when they update their RCRA programs to incorporate revisions to the Federal RCRA regulations.

DATES: These final regulations are effective on June 1, 1999.

ADDRESSES: Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The Docket Identification Number is F–98-MHWF-FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling (703) 603–9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page. The index and some supporting materials are available electronically. See the **SUPPLEMENTARY INFORMATION** section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412–9810 or TDD (703) 412–3323.

For more detailed information on specific aspects of this rulemaking, contact Michael Fitzpatrick, Office of Solid Waste 5303W, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (703) 308–8411, fitzpatrick.mike@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: The index and supporting materials are available on the Internet. Follow these instructions to access the information electronically:

WWW: http://www.epa.gov/epaoswer/hazwaste/id/hwirmdia.htm

Outline

The information presented in this preamble is organized as follows:

I. Overview Information

A. Why do This Rule and Preamble Read so Differently From Other Regulations?

Today's regulatory language and accompanying preamble are written in a "readable regulations" format. The authors tried to use active rather than passive voice, plain language, a question-and-answer format, the pronouns "we" for EPA and "you" for the owner/operator (in the regulatory text), and other techniques to make it easier for readers to find and understand the information in today's rule and preamble.

This new format is part of the Agency's ongoing efforts at regulatory reinvention, and may be unfamiliar to readers as it looks very different from the existing regulatory text of the Parts affected by today's rule. However, the Agency believes that this new format will increase readers' abilities to understand the regulations, which should then increase compliance, make enforcement easier, and foster better relationships between EPA and the regulated community.

All of the requirements found in today's final regulations, including those set forth in table format, constitute binding, enforceable legal requirements. The plain language format used in today's final regulations may appear different from other rules, but it establishes binding, enforceable legal requirements just as those in the existing regulations.

B. What Law Authorizes This Rule?

These regulations are finalized under the authority of sections 2002(a), 3001, 3004, 3005, 3006, 3007 and 7004 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6912(a), 6921, 6924, 6925, 6926, 6927 and 6974.

II. Background Information

A. What Problems Does Today's Rule Address?

Currently, hazardous wastes managed during cleanup are generally subject to the same RCRA Subtitle C requirements as newly generated hazardous wastes. Often those Subtitle C requirements are not appropriate for the cleanup scenario, as described below.

1. Response-oriented Programs Have Different Objectives and Incentives Than Prevention-oriented Programs

Since 1980, EPA has developed a comprehensive regulatory framework under Subtitle C of RCRA for identifying, generating, transporting, treating, storing and disposing of hazardous wastes. The RCRA program is generally considered prevention-rather than response-oriented. The regulations center around two broad objectives: to *prevent* releases of hazardous wastes and constituents through a comprehensive and conservative set of management requirements (commonly referred to as "cradle-to-grave management"); and to *minimize* the generation and *maximize* the legitimate reuse and recycling of hazardous wastes. However, in the remediation programs, EPA wants to develop a regulatory regime that encourages people to cleanup contaminated areas thereby generating potentially large volumes of hazardous waste.

The RCRA regulations constitute minimum national standards for managing hazardous wastes. With limited exceptions, they apply equally to all hazardous wastes, regardless of where or how generated, and to all hazardous waste management facilities, regardless of how much government oversight any given facility receives. To ensure an adequate level of protection nationally, the RCRA regulations have been conservatively designed to ensure proper management of hazardous wastes over a range of waste types, environmental conditions, management scenarios, and operational contingencies. This causes remediation activities to be subject to conservative, and often inappropriate requirements. For example, all waste piles must have a leachate collection and removal system under § 264.251(a)(2). This is appropriate when highly concentrated wastes will be stored in a pile for an extended time, but may not be necessary for less-concentrated wastes, or shorter-term activities, or cleanup actions when the level of oversight is high. However, to account for any activities that may take place nationally, EPA wrote the regulations conservatively to require all waste piles to comply with these requirements, even when they will contain less-concentrated waste for a short time. Nationally applicable requirements must be written in this manner to provide protective requirements for the highest risk activities that the regulations allow.

As opposed to requirements designed for on-going waste management, remediation activities often involve less-concentrated wastes, one-time activities, and shorter-term activities. Remediation activities are also conducted under close EPA or State oversight. However, the current regulations do not allow EPA or the State to modify the requirements for piles, or many other Subtitle C requirements, to make them more appropriate for the specific circumstances of the remediation taking place.

In administering current RCRA regulations for hazardous waste generated during cleanup, EPA and States have recognized fundamental differences in both incentives and objectives for prevention- and response-oriented programs. In prevention-oriented programs, the regulations require taking appropriate precautions against causing contamination before an activity takes place, such as the regulations that require liners and leachate collection systems. Also, because the regulations provide an incentive to minimize waste production, from the beginning, the activity is planned and managed to carefully control the appropriate factors such as amount of waste produced, concentrations, and handling practices to prevent unacceptable situations such as releases. However, in administering remedial programs such as Superfund and the RCRA Corrective Action program, EPA and the States already face an unacceptable situation (contaminated sites) that must be remedied. Response-oriented programs must address already existing problems. Response-oriented programs cannot predetermine the location of the contamination, but must respond where contamination has already occurred, which may be close to sensitive ecosystems or populated areas. Response-oriented programs cannot control the volumes or concentrations of remediation wastes, but must manage what wastes have already been released into the environment in varying volumes, concentrations and matrices. Often the site-specific situations facing response-oriented programs make waste management difficult, such as complex matrices and combinations of constituents of concern, or concerns over on-site treatment or disposal units to manage the wastes that must be cleaned up.

In a prevention-oriented system, if the community objected to building new on-site units, the facility could decide not to engage in business practices that would generate the waste that would need to be managed. In the response-oriented situation, however, the facility (or the regulatory agency) must deal with existing contamination, and must find an acceptable response.

Also, remedial actions generally receive intensive government oversight, and remedial decisions are made by a State or Federal Agency only after they thoroughly investigate site-specific

conditions. In contrast, prevention-oriented hazardous waste regulations are generally implemented independently by facility owner/operators through complying with national regulatory requirements.

2. LDRs, MTRs, and Permitting Raise Problems When Applied to Remediation Wastes

In the HWIR-media proposed rule, EPA identified the application of three RCRA requirements to remediation wastes as the biggest problems to address: Land Disposal Restrictions (LDRs), Minimum Technological Requirements (MTRs), and permitting.

The LDRs (which appear in 40 CFR part 268) generally prohibit land disposal (or "placement" in land-based units) of hazardous wastes until the wastes have met the applicable treatment standards. Often this placement is appropriate and desirable when managing remediation wastes to excavate them from their current locations, and temporarily store the wastes before on-site treatment, or to excavate the wastes and accumulate enough volume to ship off-site cost effectively. By not allowing temporary storage and accumulation in land-based units, the LDRs can be a strong disincentive to excavating and managing remediation waste. The staging pile provisions of today's final rule address this issue by allowing temporary storage and accumulation of remediation wastes in a staging pile without being subject to LDR.

Another example of the problems with LDRs in the cleanup scenario is that contaminated media are often physically quite different from as-generated process wastes. Contaminated soils often contain complex mixtures of multiple contaminants and are highly variable in their composition, handling, and treatability characteristics. For this reason, treating contaminated soils can be particularly complex, involving one or sometimes a series of custom-designed treatment systems. It can be very difficult to treat contaminated soils to the LDR treatment levels. The parts of the HWIR-media proposal that addressed this issue have been finalized in the LDR Phase IV rule (63 FR 28556 (May 26, 1998)).

The MTR requirements were designed as preventative standards for wastes generated through industrial processes. They were not designed for the remedial context. For example, under 40 CFR Subpart F, surface impoundments, waste piles, and land treatment units or landfills must have specific detection, compliance monitoring programs, and corrective action programs for potential groundwater contamination from the unit. These are appropriate preventative requirements for units managing process wastes. However, many cleanup actions involve short-term placement of remediation wastes into a waste pile, and all of these requirements may not be necessary. The staging piles provisions of today's rule address this issue by allowing the Director to determine appropriate design criteria for the staging pile based on the site-specific circumstances such as the concentration of the wastes to be placed in the unit and the length of time the unit will operate. EPA also explained in the preamble to the CAMU rule additional reasons why LDR and MTR requirements can be counterproductive when managing remediation waste as opposed to as-generated process wastes. To read about these additional reasons, see 58 FR 8658 (8659–8661) (February 16, 1993).

Finally, another area creating roadblocks is permitting. The time-consuming process for obtaining a RCRA permit can delay cleanups, thereby delaying the environmental and public health benefits of cleaning up a contaminated site. For example, the traditional RCRA permitting process requires the facility owner/operator to submit a great deal of information on activities at the facility to EPA or the State, and the permit must include terms and conditions to protect against any improper waste management practices over the long-term active life of an operating facility. Because of the large volume of information submitted, these permits are huge documents and approval often takes several years. However, in the remedial scenario, cleanup activities are generally a one-time project; once the cleanup is completed and the remediation waste is properly treated and disposed, then the activities are completed. Also, these activities are limited to addressing the contamination at the site, and therefore are often more limited in scope than the operating practices of a facility that is engaged in on-going waste treatment, storage and disposal. To overcome the limitations discussed above from traditional RCRA permits, the new Remedial Action Plans (RAPs) requirements in today's rule streamline the process for receiving a permit for treating, storing and disposing of remediation wastes, and require the facility owner/operator to submit significantly less information than for a traditional RCRA permit. However, the information submitted for a RAP application and RAP terms and conditions must be sufficient to ensure proper waste management of the remediation wastes involved during the life of the cleanup activities.

Furthermore, a facility seeking a traditional RCRA permit to manage remediation wastes on-site must investigate and cleanup their entire facility (facility-wide corrective action). This requirement can deter potential cleanups from happening at all. For instance, facility owners and operators may wish to clean up a small portion of their facility for any number of reasons, such as to avoid future liability, to free the property for sale or other uses, or because they simply wish to restore the environmental health of their property. However, they may not be willing to take on the burden of investigating and cleaning up their entire facility, when it is only a small portion they wish to voluntarily clean up, and they may be reluctant to conduct the cleanup under the RCRA corrective action program. Therefore, to encourage cleanups, under today's final rule, facilities that need a RCRA permit only to treat, store, or dispose of remediation wastes (remediation-only facilities) are not subject to the facility-wide corrective action requirement.

B. How Has EPA Tried to Solve These Problems in the Past?

EPA has tried to solve these problems in the past through a series of regulations and policies; for example;

- The "Area of Contamination" (AOC) policy;
- The "contained-in" policy; and
- The regulations for Corrective Action Management Units (CAMUs), and temporary units.[1]

All of these regulations and policies help alleviate some of the problems facing cleanups, but none have completely solved these problems. (See the October 1997 report by the United States General Accounting Office, "Remediation Waste Requirements Can Increase the Time and Cost of Cleanups."[2])

The AOC policy allows important flexibility for activities done within a contiguous contaminated area. For example, hazardous remediation wastes may be consolidated or treated *in situ*

[1] 61 FR 18780, 18782 (April 29, 1996), memorandum from Michael Shapiro, Director, Office of Solid Waste, Stephen D. Luftig, Director, Office of Emergency and Remedial Response, and Jerry Clifford, Director, Office of Site Remediation Enforcement, EPA to RCRA Branch Chiefs and CERCLA Regional Managers, (March 13, 1996); 55 FR 8666, 8758–8760 (March 8, 1990); and 58 FR 8658 (February 16, 1993).

[2] Hazardous Waste: Remediation Waste Requirements Can Increase the Time and Cost of Cleanups, U.S. General Accounting Office, GAO/RCED–98–4, October 1997.

within an AOC without triggering the LDRs or MTRs. However, the AOC policy does not address the permitting issues today's rule is addressing, nor does it address LDR and MTR for wastes removed from an AOC, or treated *ex situ*.

The contained-in policy defines when some contaminated media can be considered to no longer "contain" hazardous waste. When EPA or an authorized State determines that media do not "contain" hazardous waste, RCRA does not generally pose a barrier to remediation because permitting requirements, LDRs (generally), and MTRs do not apply to media that do not contain hazardous waste. However, the contained-in policy is limited to media only, and does not provide any flexibility for other remediation wastes, nor does it provide needed flexibility for highly concentrated media.

The CAMU and temporary unit rules provide much-needed flexibility for unit-specific standards at cleanup sites. CAMUs and temporary units are not subject to LDRs or MTRs. The requirements for these units are set on a site-specific basis, depending on site-specific factors such as the types of wastes being managed (for example, concentrations, volumes, other characteristics) and the period of time the unit will operate. However, CAMUs and temporary units do not address any of the permitting issues that cause problems for remediation wastes.

Because each of these regulations or policies is limited in solving the problems inherent to managing hazardous remediation waste under the RCRA Subtitle C system, EPA felt it was necessary to propose additional solutions.

C. How Did the Proposed Rule Attempt to Solve These Problems?

EPA recognized a continuing need for further reforms than the regulations and policies discussed above had provided, and yet knew that these reforms would be controversial. In 1993, EPA convened a committee under the Federal Advisory Committee Act (FACA) to provide recommendations to EPA on how to make these reforms. The FACA Committee included representatives from environmental groups, regulated industry, the waste management industry, States, and EPA. The FACA Committee met numerous times between January 1993 and September 1994. EPA based the options in the April 29, 1996 HWIR-media proposal on the recommendations and discussions of the FACA Committee.

EPA presented several options for reforms in the HWIR-media proposal. EPA presented two comprehensive options (the Bright Line and the Unitary Approach), and requested comment on sub-options and issues within those comprehensive options.

1. The "Bright Line" Approach for Contaminated Media

The first comprehensive option, which formed the basis for the proposed rule, was the "Bright Line" option. The Bright Line option would have been limited to "contaminated media" only. Contaminated media was defined to include soils, groundwater, and sediments, but not debris, nor other remediation wastes such as sludges. The Bright Line option got its name from a "line" dividing more highly contaminated media from less contaminated media. That Bright Line was a set of constituent-specific concentrations based on the risks from those constituents. Media found to contain constituents above these concentrations would have remained subject to Subtitle C management requirements (however, the proposal requested comment on some potential modifications to those requirements), and media containing constituents below the concentrations would have been eligible for a determination that it no longer "contained" hazardous waste, thereby generally removing it from Subtitle C jurisdiction.

The determinations of which media were and were not subject to Subtitle C requirements were to be documented in a Remediation Management Plan (RMP) approved by EPA or an authorized State. The RMP would have been an enforceable document that would also have included any requirements for managing media below the Bright Line, and would have served as a RCRA Subtitle C permit for treatment, storage or disposal of media above the Bright Line. The RMP process would have been more streamlined than that required for RCRA permits obtained under the current regulations, and also, at remediation-only facilities, would not have required 3004(u) and (v) facility-wide corrective action, as is required for all RCRA permits before today's rule.

2. Other Options Within the "Bright Line" Approach

Other requirements that EPA proposed to modify were LDR treatment standards for soils that remained subject to Subtitle C requirements, standards applicable to on-site storage and/or treatment of cleanup wastes during the life of the cleanup, and State authorization requirements. New treatment standards would have applied to soils that remained subject to LDRs under the Bright Line approach. EPA also proposed a new unit called a "remediation pile." Remediation piles could have been used temporarily without triggering LDRs and MTRs, for the on-site treatment or storage of remediation wastes subject to Subtitle C. States picking up any revisions to their RCRA programs (the proposal was not limited to the revisions to remediation waste management programs) could have followed new streamlined authorization procedures. Also, EPA proposed to withdraw the CAMU regulations if the final HWIR-media rule would sufficiently replace the flexibility currently available under the CAMU rule.

Finally, EPA proposed excluding dredged materials from Subtitle C if they were managed under permits issued under the Clean Water Act (CWA) or Marine Protection Research and Sanctuaries Act (MPRSA).

3. The "Unitary" Approach—An Alternative to the "Bright Line"

As an alternative to the Bright Line approach, EPA requested comment on the "Unitary Approach." The Unitary Approach excluded all remediation wastes (irrespective of the concentration of hazardous constituents in the waste and including non-media remediation wastes) managed under a Remedial Action Plan (RAP) (which was very similar to a RMP) from Subtitle C management requirements and made them subject to site-specific requirements in the RAP.

Again, EPA requested comment on the two main comprehensive options, the Bright Line and the Unitary Approach, and on all the sub-issues, such as the proposed elimination of CAMUs, and the new requirements for remediation piles, LDR, RMPs and RAPs, dredged materials, and State authorization.

D. What General Comments did EPA Receive About the Two Major Proposed Options?

Some commenters supported the Bright Line option and thought it was appropriate to distinguish between highly contaminated media and media that were less contaminated, and to regulate them differently.

However, most commenters on the Bright Line option believed that the Bright Line would be too difficult to implement, and therefore should not be finalized. There were several elements of the Bright Line option that commenters were concerned about implementing. One concern was sampling to determine whether media was above or below the Bright Line.

Concentrations of contaminants in environmental media typically are not heterogeneous, and it is difficult to make assumptions about the concentrations of large areas of contamination without taking many samples.

Another concern was how to differentiate between media, debris, and other remediation wastes, such as sludges. Commenters stated that often these different types of remediation waste are all found at the same site and they will all need to be managed, and it would be unduly complicated to have to separate the different types of remediation wastes and manage them separately under separate regulatory requirements.

Also, commenters were concerned about the methodology that EPA used to determine the Bright Line levels themselves. EPA received many specific comments on the proposed Bright Line constituent specific numbers, as well as the choice of which constituents were assigned Bright Line numbers.

With regard to the Unitary Approach, many industry and State commenters supported the Unitary Approach, saying that the flexibility would greatly streamline cleanups and allow more appropriate decisions for managing remediation waste. These commenters emphasized that flexibility was needed so that States could develop cleanup programs with oversight and public participation requirements specific to the concerns, needs, and resources of individual States, and felt that the Unitary Approach most closely addressed those concerns. However, some commenters were concerned that the lack of any national requirements was too open-ended and would not guarantee protectiveness. Commenters were also concerned about the resources required for States and Regions to make site-specific determinations of the appropriate management requirements for remediation wastes at each different site.

Finally, commenters had many specific comments on the elements of these options such as RAPs and RMPs, remediation piles, LDRs, etc. Major comments and EPA's responses are summarized under those more specific sections of this preamble, and all comments are answered specifically in the "response to comments" document for today's rule.

E. What did EPA Decide to do After Considering Those Comments?

EPA has decided to promulgate only selected elements of the HWIR-media proposal in today's rule, rather than go forward with a more comprehensive approach as proposed. EPA plans to complement the elements finalized today by leaving the CAMU regulations in place, rather than withdrawing these regulations as proposed.

Although EPA conducted a lengthy outreach process before developing the HWIR-media proposal and made every effort to balance the concerns and interests of various stakeholder groups, public comment on the proposal makes it clear that stakeholders fundamentally disagree on many remediation waste management issues.

EPA agreed with commenters' concerns that the Bright Line approach would be too difficult to implement, and that a Bright Line that would satisfy commenters who wanted the Bright Line levels to consist of very conservative levels would not sufficiently reform the system to remove the existing barriers to efficient, protective remediation waste management. EPA has concluded that pursuing broader regulatory reform would be a time- and resource-intensive process that would most likely result in a rule that would provoke additional years of litigation and associated uncertainty. This uncertainty would be detrimental to the program and have a negative effect on ongoing and future cleanups. Based on these conclusions, the Agency has decided not to finalize either the Bright Line or the Unitary Approach, and recognizes that a purely regulatory response will not solve all of the remediation waste management issues that HWIR-media was designed to solve.

While EPA believes the elements finalized today along with the retention of the CAMU rule, will improve remediation waste management and expedite cleanups, the Agency is also convinced that additional reform is needed to expedite the cleanup program, especially to provide greater flexibility for non-media remediation wastes like remedial sludges, address certain statutory permitting provisions, and more appropriate treatment requirements for remediation wastes (for example, treatment that focuses on "principal threats" rather than all underlying hazardous constituents). Therefore, the Agency continues to support appropriate, targeted legislation to address application of RCRA Subtitle C land disposal restrictions, minimum technological and permitting requirements to remediation waste and will continue to participate in discussions on potential legislation. If legislation is not forthcoming, the Agency may reexamine its approach to remediation waste regulation and may take additional administrative action.

The elements finalized in today's rule are:

- Streamlined permitting for treating, storing and disposing of remediation wastes generated at cleanup sites that, among other things, eliminates the requirement for facility-wide corrective action at remediation-only facilities;
- A variation on the proposed remediation piles, called staging piles, modified in response to public comments;
- A RCRA exclusion for dredged materials managed under Clean Water Act (CWA) or Marine Protection Research and Sanctuaries Act (MPRSA) permits; and
- Streamlined procedures for State authorization.

EPA also finalized, in a separate document (63 FR 28604 (May 26, 1998)), the LDR treatment standards specific to hazardous contaminated soil that were proposed in the HWIR-media proposal. EPA is deferring action on the Treatability Sample Exclusion Rule, that EPA requested comments on expanding in the HWIR-media proposal at 61 FR 18817.

EPA will withdraw all other portions of the proposal, such as the proposal under the Bright Line option to distinguish between lower- and higher-risk contaminated media and give regulatory agencies the flexibility to exempt lower-risk contaminated media from RCRA requirements, and the portion of the proposal that proposed to withdraw the CAMU rule.

Existing areas of flexibility for managing remediation waste, such as the contained-in and AOC policies, and site-specific land disposal restrictions treatability variances, continue to be available.

III. Definitions Used in this Rule (§ 260.10)

Some terms defined in today's rule may be difficult to understand when discussed out of context of the rest of the rule; therefore, readers may wish to read the preamble sections on RAPs and staging piles before reading this section on definitions. To discuss related terms together in this preamble, discussion of the definitions is not in alphabetical order (which is how the terms appear in the rule language). The section discusses:

- First the revised definition of "corrective action management unit" or "CAMU," then
- The definition of "remediation waste," then
- "Remediation waste management site" and "facility," then
- "Staging pile," then finally,
- "Miscellaneous unit."

A. Corrective Action Management Unit (CAMU)—Changes to the Existing Definition, and Changes to the CAMU and Temporary Unit Regulations at §§ 264.552(a) and 264.553(a)

1. Definition of CAMU

In today's final rule, the Agency has revised the definition of CAMU, as well as the CAMU and temporary unit regulations themselves. This revision clarifies the Agency's interpretation of these provisions and accommodates EPA's new interpretation, promulgated today, that remediation-only facilities are not subject to the facility-wide corrective action requirement under RCRA section 3004(u). (See discussion under the definition of remediation waste management site below.) Specifically, the Agency has added to both the CAMU definition (§ 260.10) and §§ 264.552 and 264.553 language providing that CAMUs and temporary units are not limited to facilities subject to RCRA sections 3004(u) or 3008(h), but may also be approved at other cleanup facilities, as well.[3]

The revised definition in today's rule reads as follows:

Corrective action management unit (CAMU) means an area within a facility that is used only for managing remediation wastes for implementing corrective action or cleanup at the facility.

EPA is amending the definition of CAMU by deleting the parts of the definition that referred to corrective action authorities under § 264.101 and RCRA section 3008(h). This change will accommodate RAPs and permits for the management of remediation waste as defined in today's rule that are not subject to § 264.101 or RCRA section 3008(h). Also, the reference in this definition (as well as in the definition of remediation waste) to actions taken "for the purpose of implementing corrective action requirements under § 264.101 and RCRA section 3008(h)" implied that EPA intended to restrict CAMU to these authorities. In fact, EPA did not intend to restrict the CAMU (or the temporary unit) to wastes generated solely through specific RCRA regulatory mechanisms, or to cleanup wastes generated solely at RCRA treatment, storage or disposal facilities.

For example, EPA anticipated that CAMUs or temporary units might be used as applicable or relevant and appropriate requirements (ARARs) for the remediation of many CERCLA sites, especially where CERCLA remediation involves management of RCRA hazardous wastes. EPA tied its definition of CAMUs and remediation waste to RCRA Federal authorities applicable to TSD's (that is, 40 CFR 264.101 and RCRA section 3008(h)) because the Agency developed the CAMU and temporary unit rules within that context—that is, they were developed as Federal rules to implement corrective action at facilities subject to RCRA sections 3004(u) or 3008(h). Yet, EPA also expected that the CAMU would be appropriate as ARARs at Superfund sites; at the Regional Administrator's discretion for purposes of remediation under RCRA section 7003 (even if not at a Subtitle C facility); and under State authorities analogous to section 7003 or CERCLA (which provide a waiver from otherwise applicable State RCRA requirements).[4]

The revised definition of CAMU makes it clear that the CAMU is also available under RAPs and other permits for remediation-only facilities that under the new interpretation in today's rule are not subject to 40 CFR 264.101 or RCRA section 3008(h).

Without this change, the current definitions of CAMU and remediation waste might be interpreted to preclude the use of CAMUs and temporary units at remediation-only facilities operating under RAPs. Yet these facilities are clearly among the type of facilities for which CAMUs and temporary units would be beneficial—that is, facilities at which remediation should be expedited and encouraged.

For this reason, EPA has removed the section of the CAMU definition (and also parallel provisions in the definition of remediation waste) that appeared to limit CAMUs (and temporary units) to facilities subject to § 264.101 or section 3008(h). This change should eliminate any confusion over the scope of CAMUs and remediation waste, and it is consistent with the central purpose of today's rule—expediting cleanup at sites overseen by Federal and State cleanup authorities, whether these sites are within the corrective action universe, or whether they are "remediation-only" or "remediation waste management sites" where RCRA hazardous waste is being managed.

Without this change, the Agency's new interpretation that remediation waste management sites are not subject to section 3004(u) corrective action requirements, which is intended to stimulate cleanups, would have had the unintended effect of eliminating the availability of two of the waste management options, CAMUs and temporary units, that were designed for the same purposes.

2. §§ 264.552 and 264.553

The removal of the language referencing activities performed under § 264.101 or RCRA 3008(h) from the definition of CAMU does not change the scope of CAMUs. EPA simply removed the language discussing authorities from the definition, and added it to the regulatory language for CAMUs and temporary units at §§ 264.552 and 264.553. EPA also added specific language clarifying that CAMUs and temporary units may be approved at permitted facilities that, under today's rule, are not subject to § 264.101. EPA believes these provisions are more appropriate in the regulatory text of the CAMU and temporary unit requirements instead of in the definitions because they identify the mechanisms by which CAMUs and temporary units are approved, rather than define the scope of the unit itself. By including these authorities in the text of §§ 264.552 and 264.553, EPA is clarifying that CAMUs and temporary units are intended to implement corrective action consistent with the requirements in § 264.101 and 3008(h) requirements, as well as cleanup under today's RAPs, which do not require compliance with § 264.101. The mechanisms for approval of CAMUs and temporary units will be the permit and order procedures, and the RAP procedures. Of course, Federal and State authorities with permit waiver provisions may also use CAMUs, as discussed above and in the preamble to the CAMU rule at 58 FR 8658 (p. 8679) (February 16, 1993).

EPA is also adding language to §§ 264.552 and 264.553, and has included language in the new § 264.554 created in today's rule, to specify that CAMUs, temporary units, and staging piles may only be used within the contiguous property under the control of the owner/operator where the wastes to be managed in the CAMU originated. EPA added this language because the Agency removed that limitation from the definition of remediation waste, as discussed below. EPA believes these restrictions are more appropriate in the regulatory text of the CAMU, temporary unit, and staging pile requirements instead of in the definitions.

[3] When using the term "remediation-only" facilities, EPA means facilities that require RCRA permits solely for the purposes of treating, storing or disposing of remediation wastes due to cleanup at the facilities. EPA uses this term to distinguish these facilities from operating treatment, storage and disposal facilities that manage as-generated process wastes as part of ongoing facility operations.

[4] For a discussion of State permit waiver authorities, see the memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA to Regional Administrators, Regions I–X, EPA (November 16, 1987), available in the docket to today's rule.

EPA is retaining the current limitation that CAMUs and temporary units may only be used within the contiguous property under the control of the owner/operator, and creating the same limitation for staging piles created under today's rule. However, EPA believes that it may be advantageous in some cases to use CAMUs, temporary units, and staging piles at off-site facilities. Today's rule provides some relief for off-site management of remediation wastes, but does not allow off-site CAMUs, temporary units, or staging piles. EPA may reconsider the need for and appropriateness of allowing off-site CAMUs, temporary units and staging piles in the future.

B. Remediation Waste—Changes to the Existing Definition

Under current regulations, the term "remediation waste" defines wastes that can be managed in a CAMU or temporary unit. Today's rule amends the definition for the same reason that EPA made the same change to the definition of CAMU—to remove the limitation to wastes managed under § 264.101 and RCRA § 3008(h). The new definition retains the term's current use, and makes the definition conform with the new RAPs and staging piles provisions by not limiting remediation wastes to wastes managed under certain specific corrective action authorities. Wastes managed under the provisions of today's rule will be managed during the course of a wide range of cleanups conducted under many different types of cleanup authorities.

The existing definition of remediation waste (in § 260.10) might be read as limiting the term to wastes managed under the RCRA corrective action cleanup authorities of 40 CFR 264.101 and RCRA section 3008(h). In the preamble to the proposed rule (61 FR 18836), EPA requested comment on a revised definition of remediation waste that eliminated the limitation to wastes "managed for the purpose of implementing corrective action requirements under § 264.101 and RCRA section 3008(h)," and added that wastes from a "media remediation site" could be considered remediation wastes. Today's definition is based on this definition and reads as follows:

Remediation waste means all solid and hazardous wastes, and all media (including groundwater, surface water, soils and sediments) and debris that contain listed hazardous wastes or that themselves exhibit a hazardous characteristic and are managed for implementing cleanup.

The Agency has made two changes to the existing § 260.10 definition of remediation waste originally promulgated for the CAMU and temporary unit rules. The first change removes references to RCRA corrective action authorities, and the second change eliminates the restriction that remediation wastes may originate only from within the facility boundary.

The first reference that was eliminated defined remediation waste as wastes "managed for the purpose of implementing corrective action requirements under § 264.101 and RCRA section 3008(h)." The revised definition refers to wastes "that are managed for implementing cleanup," without specifying the authority under which owner/operators must address these wastes. As mentioned above, the Agency specifically suggested this change in the preamble of the proposed rule (61 FR 18836) in a discussion of the Unitary.

No comments were submitted specifically on the definition of remediation waste, although several commenters expressed their views on the general issue of what materials should be subject to the proposed rule, which is the issue addressed by the definition of "remediation waste." For example, one commenter expressed support for the approach envisioned by the proposal, and finalized in today's clarification to the definition, stating that "the HWIR-media rule should be applied to any management of hazardous contaminated media (and further, to all remediation waste . . .), regardless of whether this remediation is conducted under RCRA, CERCLA, or other State or Federal authority."

In view of the statements made by commenters expressing support for allowing the use of different State and Federal authorities, EPA continues to believe that the purpose behind the provisions finalized today—to encourage cleanup by removing unnecessary regulatory barriers—is best served by the broad definition finalized today.[5]

The second change has removed the limitation that waste must originate from "within the facility boundary." This allows remediation waste managed at off-site locations, such as those permitted under § 270.230 to continue to meet the definition of remediation waste even though they are removed from the original site.

The changes made to the definition of remediation waste parallel changes in the definition of CAMU, and changes to the CAMU and temporary units regulations at §§ 264.552 and 264.553.[6]

Commenters were concerned about the status of wastes that have migrated beyond the traditional RCRA "facility" boundary, and the need to include those wastes in remediation waste. Some commenters were concerned that, as proposed, owners and operators would be required to obtain a RAP for on-site activities and an RCRA permit for off-site locations where wastes had migrated. Some were concerned that they would not be able to bring wastes that had migrated off-site back to the site for management; still others were concerned that they would be forced to manage wastes on-site even if it was not the most protective option. EPA has retained the inclusion of wastes that have migrated beyond the facility boundary by removing the clause that limited from where remediation waste could originate. EPA expects this to resolve the concerns of these commenters.

Finally, it is important to stress two points. First, it should be noted that remediation waste includes only waste managed because of cleanup, and does not include wastes generated from on-going hazardous waste operations, which are commonly referred to as "newly generated," "as generated," or "process" wastes. When managed as part of a legitimate cleanup action, any (non-"as-generated") hazardous wastes (for example, media, debris, sludges, or other wastes) are all remediation waste. Second, remediation waste includes both hazardous and non-hazardous solid wastes managed as a result of cleanup, including any wastes generated from treating remediation wastes (for example, carbon canisters and sludges generated from groundwater pump-and-treat or soil vapor extraction systems). Third, the changes made to the definition of remediation waste do not, in any way, change the scope of the CAMU and temporary unit regulations. EPA has replaced the limitation on contiguous property removed from this definition with a limitation in the CAMU and temporary unit regulations themselves at §§ 264.552 and 264.553. That same limitation also applies to staging piles created in today's rule.

[5] Many commenters on the proposal addressed the issue of the types of materials that should be eligible for the relief offered by the proposed rule—most notably, whether relief should be provided for both contaminated media and hazardous wastes that are managed during cleanup (for example, sludges that have not commingled with media). Because this issue was addressed differently under the various provisions of the proposed rule, these comments are addressed in the discussion of each specific provision finalized today.

[6] Today, EPA is also modifying §§ 264.552 and 264.553 to allow implementation of CAMUs and temporary units under permits (including RAPs) at facilities that are not subject to § 264.101 and 3008(h) as discussed in today's preamble under the definition of CAMU.

C. Remediation Waste Management Site and Facility—New Requirements for Remediation Waste Management Sites

The final definition for remediation waste management site included in § 260.10 in today's rule is:

Remediation waste management site means a facility where an owner or operator is or will be treating, storing or disposing of hazardous remediation wastes. A remediation waste management site is not a facility that is subject to corrective action under § 264.101 of this chapter, but is subject to corrective action requirements if the site is located in such a facility.

Traditionally, RCRA has focused on "facilities" when applying hazardous waste regulations. These are generally properties where industrial operations manage hazardous wastes that they have generated, or where commercial operations or entities conduct hazardous waste treatment, storage, and/or disposal operations. For corrective action under § 3004(u) and (v) (implemented through § 264.101) and 3008(h), a facility was defined (see § 260.10) as "all contiguous property under the control of the owner or operator" where hazardous wastes are managed.

In the proposal, EPA defined "media remediation site" as a new term that would apply to a location where certain remediation waste management activities were taking place, and might or might not include all or part of a pre-existing RCRA "facility." EPA felt that it was important to differentiate between existing "facilities" and a new kind of site that would be eligible for the streamlined permits (Remedial Action Plans or RAPs) promulgated in today's rule, and would be exempt from § 264.101 and certain other Part 264 requirements that are not necessary or appropriate for areas used solely to manage cleanup wastes.

1. EPA Changed the Term From "Media Remediation Site" in the Proposal to "Remediation Waste Management Site" in the Final Rule

EPA has replaced the term "media remediation site" with the more descriptive term "remediation waste management site." Commenters generally supported the concept of a media remediation site, but the term "media remediation site" caused confusion for some, because "remediation site" implies an area that is being cleaned up, not, as is meant in this case, an area where hazardous remediation wastes are being managed.

Also, the proposed rule allowed only contaminated media to be exempted from Subtitle C requirements, and the word "media" in the title "media remediation site" was meant to emphasize that the exemptions were only for contaminated media. In today's final rule, EPA is not exempting any wastes from Subtitle C, and all provisions of this final rule apply to all remediation wastes, so the term "media" is no longer needed in the definition of the site.

These are the reasons EPA changed the term from "media remediation site" to "remediation waste management site." Changes to the definition of the proposed term are discussed later in this section.

2. EPA has Created Different Requirements for Remediation Waste Management Sites Than for Facilities Managing "As-generated" Hazardous Wastes

Throughout today's rule and the proposal, EPA has emphasized that, to stimulate cleanup, it is important to regulate remediation waste management activities differently from as-generated process waste management where appropriate. This definition of remediation waste management site allows EPA to apply requirements to remediation waste management activities that are more appropriate for the remediation scenario than the current requirements that, until today's rule, have applied to both remediation waste management and as-generated process waste management.

In today's rule, to facilitate prompt and protective treatment, storage, and disposal of hazardous remediation wastes, EPA has created three new requirements for remediation waste management sites that are different from those for other facilities:

- A new form of an RCRA permit for treating, storing and disposing of hazardous remediation wastes (a RAP) that streamlines the permitting process for remediation waste management sites to allow cleanups to take place more quickly (Part 270, Subpart H);
- Performance standards for remediation waste management sites that replace the detailed requirements in Part 264 Subparts B, C, and D (General Facility Standards, Preparedness and Prevention and Contingency Plans and Emergency Procedures) (§ 264.1(j)); and
- A provision excluding remediation waste management sites from RCRA § 3004(u)'s requirement for facility-wide corrective action(§§ 264.1(j) and 264.101(d)).

As noted above, EPA believes it is appropriate to regulate facilities that manage as-generated process wastes and those that manage remediation wastes differently, and the designation of a remediation waste management site defines when the new provisions unique to areas that manage remediation wastes will apply.

3. Differences Between the Proposed Definition of Media Remediation Site and the Final Definition of Remediation Waste Management Site

The definition of media remediation site in the proposal which, like today's definition of remediation waste management site, was used to define where reduced permitting requirements would apply, was:

An area contaminated with hazardous waste that is subject to cleanup under State or Federal authority, and areas in close proximity to the contaminated area at which remediation wastes are being or will be managed pursuant to State or Federal remediation authorities (such as RCRA Corrective Action or CERCLA). A media remediation site is not a facility for the purposes of implementing corrective action under 40 CFR 264.101, but may be subject to such corrective action requirements if the site is located within such a facility (as defined in 40 CFR 260.10).

In response to the limitations to "contaminated areas" and "areas in close proximity," several commenters identified specific situations where those limitations might prevent owners and operators from conducting environmentally beneficial activities under a RAP. These comments are addressed in today's rule under new § 270.230, and the preamble discussion of that section instead of in today's definition.

EPA has removed from the proposed definition the requirement that limits media remediation sites to areas subject to cleanup under State or Federal authority, and wastes managed under State or Federal remediation authorities. EPA has always intended that today's rule would promote voluntary initiation of cleanup activities by people not already required to conduct cleanup under other authorities. EPA continues to hope that this will be a result of today's rule.

Therefore, EPA has removed this limitation to make it clear that people voluntarily initiating cleanup can have their properties designated as remediation waste management sites. These activities would still ordinarily require a RCRA permit (for example, a RAP) if owner/operators were to treat, store or dispose of hazardous remediation wastes, so that the proper requirements would be applied, and the public would have the opportunity to participate in the waste management decisions.

Finally, EPA has kept in the final rule the part of the proposed definition of

media remediation site that stated that these were not facilities for implementing facility-wide corrective action. As discussed elsewhere in this preamble, EPA believes that applying 3004(u) and (v) and 3008(h) requirements to facilities not already subject to these requirements is such a disincentive to voluntarily initiated cleanup actions that people often choose options that do not require permitting, rather than face such a responsibility.

4. Remediation Waste Management Sites Are Not Subject to Facility-wide Corrective Action

Today's rule, like the proposal, provides that a remediation waste management site is not subject to the requirements in RCRA section 3004(u) for facility-wide corrective action. EPA believes, as discussed more fully in the proposal, that requiring facility-wide corrective action for facilities that are or will be engaged in ongoing hazardous waste management outside the context of an environmentally beneficial cleanup activity may properly be seen as a quid pro quo for the costs of doing business in, and in some way profiting from, the management of hazardous wastes. In a remedial context, however, there is no profit or advantage gained by owners and operators from managing hazardous wastes; it is simply a necessary part of performing an act that is environmentally beneficial (that is, cleaning up a site). To view remediation-only sites as traditional hazardous waste facilities (which would impose additional cleanup responsibilities) can have the effect of penalizing those who wish to clean up their properties. EPA does not believe that this result is one that Congress intended. (See 61 FR 18792–93).

The large majority of commenters on this issue supported the interpretation, because it is widely recognized that the facility-wide corrective action requirement often acts as disincentive to cleanup of wastes subject to Subtitle C. Some commenters, however, expressed concern over the Agency's legal theory supporting the interpretation. This concern appears to stem from the commenters' perception that the Agency is making a purely semantic argument—that is, that by being renamed "media remediation sites," these sites are no longer the "facilities" to which section 3004(u) applies.

The Agency understands the commenters' confusion on this point. The corrective action requirement of section 3004(u) applies to "a treatment, storage, or disposal facility seeking a permit." Today EPA clarifies that the Agency's view is not that remediation-only facilities do not constitute "facilities" for RCRA purposes, but simply that they should not be interpreted to be the "facilities *seeking a permit*" to which the requirements in section 3004(u) apply. In the Agency's opinion, the reference to "a treatment, storage, or disposal facility seeking a permit" clearly refers to facilities that need permits because they are in the business of hazardous waste management. Remediation-only facilities, because they only obtain a permit to engage in remediation, do not fit into that category. EPA believes that it is a reasonable interpretation of section 3004(u) that sites that are or will be conducting hazardous waste management only as part of cleanup activities are not the types of facilities to which Congress intended to apply the section 3004(u) facility-wide corrective action requirements. (See 61 FR 18792–93).

In addition, in light of the disincentive to cleanup created by applying the facility-wide corrective action requirement to remediation-only facilities, to continue to apply the requirement would appear to be contrary to one of Congress' clear goals in enacting section 3004(u)—to ensure that currently unmanaged remediation wastes that pose a risk to human health and the environment are addressed.

Today's rule differs in one significant respect from the proposal: this interpretation is no longer limited to facilities that obtain RAPs, but also applies to remediation-only facilities that obtain traditional RCRA permits. Thus, any facility that meets the definition of a "remediation waste management site" (promulgated today), regardless of whether its hazardous waste management activities are authorized by a RAP or traditional RCRA permit, will not be subject to the facility-wide corrective action requirement. The Agency agrees with the one commenter who argued that there was no reason to limit the relief from section 3004(u) to facilities addressed under the RAP framework. After all, because the RAP standards are less stringent than existing requirements, States may choose not to adopt them as part of their authorized programs. There is no reason to prevent these States, however, from nonetheless amending their programs to reflect the section 3004(u) interpretation finalized today. Similarly, if a State not authorized for corrective action issues a RCRA permit for remediation-only sites (remediation waste management sites), Federal corrective action requirements will not attach.

Although the above discussion stresses the use of RAPs as the vehicle for permitting a remediation waste management site and for applying the benefits of RAPs, the new requirements in § 264.1(j), and the elimination of § 264.101 facility-wide corrective action through the new § 264.101(d) provision for remediation waste management sites are not limited to sites permitted under RAPs. States wishing to use the traditional RCRA permits process for activities at remediation waste management sites may do so, and the other benefits of remediation waste management sites (§ 264.1(j), and 264.101(d)) continue to apply to remediation waste management sites under permits, as well as under RAPs. The preamble discussion explaining the need and rationale for these other provisions can be found in the section of the preamble discussing those provisions.

5. Remediation Waste Management Sites Are Excluded From Only the Second Part of the Definition of Facility

This exclusion from the definition of facility is strictly limited to the definition of facility for purposes of corrective action, which is found in part (2) of the definition of facility. Remediation waste management sites are not excluded from part (1) of the definition of facility for other purposes.

6. Facility

EPA is revising the definition of facility, (to make conforming changes with the definition of remediation waste management site), as follows:

Facility means ... (3) Notwithstanding paragraph (2) of this definition, a remediation waste management site is not a facility that is subject to § 264.101, but is subject to § 264.101 corrective action requirements if the site is located within such a facility.

EPA requested comment on this change to the definition of facility at § 260.10 of the proposal, and did not receive any comments opposing this change, and is therefore finalizing this amendment with only two minor changes.

First, the proposed rule language stated that "notwithstanding (1) and (2)" remediation waste management sites were not subject to the facility-wide corrective action requirement, but on further reflection, it has become clear that the reference to paragraph (1) was an oversight. This is because the proposed definition clearly stated that remediation waste management sites are only not "facilities" "for the purposes of § 264.101." The facility definition in paragraph (1) is not used for those

purposes. In addition, because the facility definition in paragraph (1) is used in implementing the rest of the RCRA hazardous waste regulations, which continue to apply to activities at remediation waste management sites, paragraph (1) must remain applicable.

Second, the proposed definitional change did not include the current language that states "but may be subject to such corrective action requirements if the site is located within such a facility." EPA has added this clause to make the language consistent with the definition of remediation waste management site, which was included in this language at proposal.

As the Agency stated in the preamble to the proposed rule, this language is meant to provide for the following situation: "In some cases a media remediation site could be part of an operating (or closing) RCRA hazardous waste management facility that is already subject to the § 3004(u) and (v) corrective action requirements; in those cases, identifying an area of the facility as a media remediation site [today's remediation waste management site] would not have any effect on the corrective action requirements for that site or the rest of the facility." (61 FR 18793).

D. Staging Pile—A New Kind of Unit

The definition of staging pile states that "[s]taging pile means an accumulation of solid, non-flowing remediation waste (as defined in 40 CFR 260.10) that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the Director according to the requirements in 40 CFR § 264.554."

1. Differences Between the Definition of Staging Pile and the Existing Definition of Pile

This definition uses a slight alteration of the definition of "pile," as defined in § 260.10 for waste piles (§ 264.250), which better fits the purposes of today's staging pile rule. The definition of pile differs from the staging pile definition in three ways; the definition of pile:

- Is limited to non-containerized waste;
- Addresses the "accumulation of solid, nonflowing *hazardous* waste," rather than "solid, nonflowing *remediation* waste;" and
- Allows for "treatment or storage" rather than simply temporary storage.

First, EPA believes it may often be environmentally protective or simply more convenient to move remediation wastes in bags or other containers when placing them into a staging pile. Because bags may reduce blowing of wastes in a pile, or volatilization of hazardous constituents, EPA did not want to eliminate the option of bagging, or other protective activities, of wastes in a staging pile.

Second, because today's rule does not allow "as-generated" hazardous waste to be stored or treated in a staging pile, the rationale behind using the term remediation waste rather than simply hazardous waste should be clear. EPA also included the "solid, non-flowing" portion of the definition of pile to ensure that liquid wastes will not be placed in the staging pile. Liquid wastes are inappropriate for storing in staging piles because of the possibility of releases and run-off.

Third, the definition of "piles" allows both storage and treatment. However, as discussed below, staging piles allow only storage.

2. Differences Between the Proposed Definition of Remediation Pile and the Final Definition of Staging Pile

In the proposed rule, the definition of remediation pile reads that, "[r]emediation [p]ile means a pile used only for the temporary treatment or storage of remediation wastes, including hazardous contaminated media (as defined in § 269.3), during remedial operations."

This definition was altered for a number of reasons. First, the Agency felt that including the term "pile" in the staging pile definition would only serve to confuse staging piles with waste piles. Furthermore, because staging piles will accept hazardous remediation waste, rather than only hazardous contaminated media for the reasons previously discussed, this portion of the definition also had to be changed. Finally, treatment is not mentioned in today's staging pile definition, because treatment will not be allowed in staging piles. No commenters provided comments directly addressing the definition of remediation pile. For a fuller discussion of staging piles, and the comments EPA received, see the discussion of staging piles in section VII of this preamble.

E. Miscellaneous Unit—An Edit to the Existing Definition

EPA is simply adding the unit "staging pile" to the list of units excluded from the definition of miscellaneous unit. The revised definition is as follows:

Miscellaneous Unit means a hazardous waste management unit where hazardous waste is treated, stored, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under 40 CFR Part 146, containment building, corrective action management unit, unit eligible for research, development, and demonstration permit under § 270.65, or staging pile.

Miscellaneous units are meant to cover units that do not have regulatory provisions specific to that individual type of unit. Because EPA is today adding provisions for staging piles, staging piles should likewise be excluded from the definition of miscellaneous units.

IV. Information on Remedial Action Plans (RAPs) (§§ 270.2, 270.68 and 270.80—270.230)

General Information About RAPs

A. What Are EPA's Objectives for RAPs?

After considering the public comments on the proposal, the Agency crafted the final RAP regulation with the following six objectives in mind:

One, RAPs should be suited to the specifics of managing remediation waste in the context of cleanup, both in procedure and in substantive requirements;

Two, RAPs should ensure compliance with the applicable requirements for safe hazardous remediation waste management;

Three, RAPs should provide certainty and protection to the permitted party, as appropriate;

Four, the RAP approval process should provide opportunities for meaningful public involvement;

Five, because RAPs constitute RCRA permits, the RAP approval process must, at the least, follow the statutory minimum requirements for obtaining a permit; and

Six, RAPs, and the RAP approval process should accomplish the previous objectives through the most streamlined, reasonable, and understandable regulations possible.

In today's rule, EPA believes that it has reached a reasonable compromise consistent with these objectives. In summary, the RAP requirements promulgated today:

- Significantly reduce procedural steps in permitting, while retaining the minimum statutory public participation requirements and certain basic permitting steps or conditions (for example, permit appeal procedures);
- Replacing the detailed requirements in §§ 270.3—270.66 with broader performance standards;
- Significantly reducing and focusing information requirements; and
- Removing the requirement for facility-wide corrective action.

Given this flexibility, EPA believes that it will be possible for EPA and authorized States to develop RAPs that are much more suited to cleanups than are current RCRA permits—that is, a RAP will generally fit the model of a Superfund Record of Decision or an approval of a cleanup workplan, rather than that of a RCRA Part B permit. EPA believes this flexibility is essential for an effective cleanup program.

At the same time, EPA recognizes that its approach to RAPs in today's rule (and more broadly today's rule as a whole) only partially solves the long-standing problems associated with remediations involving hazardous waste regulated under RCRA Subtitle C. For example, as EPA and others have long emphasized, the statutory public participation requirements (newspaper notices and radio spots) are highly prescriptive without, in fact, ensuring effective public involvement. EPA believes a more flexible approach could better reflect the wide variety of cleanup actions, while still providing a full opportunity for public involvement. EPA also recognizes that it has made less extensive changes to Subtitle C permitting requirements as they apply to remediation waste than some have recommended. Indeed, EPA believes that, in the long run, further changes are appropriate.

For example, EPA has left the substantive, unit-specific requirements in 40 CFR part 264 intact (although the Agency has added new flexibility for staging piles), even though EPA recognizes that these requirements do not always make sense in a remedial context. (For example, secondary containment may not always be needed for tanks within an area of contamination.) EPA took this approach in today's rule because it has not yet aired these issues in detail in previous proposals. EPA is deferring action here, however, the issues are continuing to be discussed more fully in the context of possible statutory changes to RCRA.

In the meantime, EPA emphasizes that today's rule, in combination with existing rules and policies, provides important flexibility in cleanup scenarios. EPA not only expects that today's rule will provide significant benefits; EPA also intends (and encourages authorized States) to use existing flexibility in EPA land disposal standards for soils, the CAMU rule (which today's rule is retaining), the Agency's contained-in policy for contaminated media, the AOC concept for contaminated sites, and similar tools to expedite effective cleanups. The flexibility provided by today's rule should be understood within this broader context.

B. What Is a RAP? (§§ 270.68, 270.2 and 270.80)

§ 270.68

To make it clear that RAPs are subject to different, more streamlined requirements than other RCRA permits, EPA created a separate Subpart (40 CFR Part 270, Subpart H) for RAPs. The provision in today's rule in § 270.68 simply points readers who may look for RAPs in the existing Subpart F (Special Forms of Permits) to the section for RAPs in the new Subpart H.

1. The Differences Between a RAP and a Traditional RCRA Permit

§§ 270.2 and 270.80(a)

EPA defines a RAP in §§ 270.2 and 270.80(a) as a "special form of RCRA permit that you [a facility owner/operator] may obtain instead of a permit issued under sections 270.3–270.66, to authorize you to treat, store, or dispose of hazardous remediation waste (as defined in § 260.10) at a remediation waste management site." Often, remedies selected for cleanup sites involve treating, storing or re-disposing of hazardous remediation waste. RCRA permits are required whenever you treat, store or dispose of hazardous waste (unless a specific permit exemption or exclusion applies). Until now, treating, storing or re-disposing of hazardous remediation wastes required the same type of permit as that for as-generated process waste management. Traditional RCRA permits, however, were designed for operating hazardous waste treatment, storage, and disposal facilities managing as-generated process wastes. The permit procedures, requirements, and contents were designed specifically for those situations. Traditional RCRA permits also require facility-wide corrective action under RCRA Sections 3004 (u) and (v). Many of these requirements are not well suited to cleanup activities.

Section 270.80(a) also limits RAPs to permit activities done in the area of contamination or areas in close proximity. This is because EPA generally wishes to encourage owners and operators to conduct remediation waste management activities on-site. EPA does allow RAPs for off-site locations for limited circumstance under § 270.230, when managing the remediation waste off-site will be more protective than managing it on-site.

2. Some Advantages of a RAP Compared to a Traditional RCRA Permit

EPA believes that the traditional RCRA permitting requirements are not well suited for cleanup activities for many reasons.

First, flexibility in public participation for RAPs, as opposed to the more specific requirements for traditional RCRA permits, is necessary because cleanup activities vary greatly in volumes of waste to be managed; amount of time allocated for the project; types of activities to take place; and risks posed by the cleanup activities. Also, EPA and State cleanup programs generally involve ongoing dialogue with the surrounding community about choices of remedies and other considerations. Many of these programs have developed creative and successful public participation strategies which may vary slightly from specific procedures that could be set out in a nationally applicable Federal regulation.

Second, the more streamlined and flexible requirements for RAPs are better designed for the cleanup scenario than requirements for traditional RCRA permits in 40 CFR Part 270 because the Part 270 standards are designed specifically to mirror and implement the requirements throughout Subtitle C for as-generated process wastes. As discussed earlier, the Subtitle C requirements are designed for the on-going management of as-generated waste, and are designed to be a "cradle-to-grave" system of regulations that will prevent new releases from the possible mismanagement of hazardous wastes. While this "cradle-to-grave" system has been successful in preventing new releases and in providing incentives to minimize the amount of waste generated, the system is often cumbersome when applied to remediation wastes. Remediation wastes have already escaped into the environment, and often are found in unique volumes, matrices, mixtures, etc. The nationally applicable Subtitle C requirements do not often have the flexibility to respond to unique circumstances encountered at cleanup sites. Therefore, the permitting requirements based on the Subtitle C requirements also do not have the proper flexibility to respond to unique circumstances encountered at cleanup sites.

Third, information requirements for traditional RCRA permits are generally based on those nationally applicable requirements mentioned above, and so are not necessarily appropriate for all cleanup sites.

Fourth and finally, as discussed below, EPA believes that requiring facility-wide corrective action for all new RAPs provides disincentives to cleanups and to remedies that involve excavating and treating or moving wastes. These disincentives are discussed below.

In implementing, overseeing, and observing the hazardous waste cleanup programs under RCRA Corrective Action and State cleanup programs, EPA has concluded that the requirement to obtain a RCRA permit for on-site treatment, storage or disposal of hazardous remediation wastes often acts as a disincentive to cleanup, particularly in the cases where the site is not otherwise subject to RCRA. Cleanups may be desirable at these sites for many reasons (for example, a State or Federal cleanup authority might determine that the site presents a hazard; the facility owner/operator may wish to clean up the property voluntarily; or a potential future facility owner may hope to acquire and reuse the property.) Before today's rule, if facility owners and operators of these sites chose to treat, store, or dispose of hazardous remediation wastes on-site, they generally would be required to obtain a RCRA permit, along with all the requirements (including facility-wide corrective action) that come with that permit. Obtaining these permits can be very time-consuming and expensive, and facility-wide corrective action provides a strong disincentive to any action that would require a permit. This requirement to obtain a RCRA permit, especially the requirement for facility-wide corrective action, was found by EPA's Permits Improvements Team (PIT) [7] to be a major disincentive to cleanup. A recent study by the Government Accounting Office (GAO) came to a similar conclusion.[8] To avoid having to secure a RCRA permit, many remedial decision-makers often choose options for remediation that avoid application of the permit requirements, such as capping in place, which may not be the best remedial option for the site.

Under the streamlined approach to permitting promulgated today, these sites (which have sometimes been referred to as "remediation-only sites") can receive a RAP for remediation waste management activities that take place at the site rather than a traditional RCRA permit. EPA has designed the RAPs process to be more streamlined than that for existing permits to reduce disincentives to cleanups. As opposed to traditional RCRA permits, RAP procedures, requirements, and contents are designed specifically for the cleanup scenario.

The differences between the processes for receiving approval of RAPs and for receiving approval of traditional permits are described more fully in the sections that follow, as well as in the section entitled "Comparison of RAPs Process to That for Other Permits."

As discussed more fully in the preamble discussion of the definition of remediation waste management site, RAP recipients (other than those who are already subject to the corrective action requirements because of independent RCRA permitting requirements), are also not required to perform facility-wide corrective action. The regulatory language for the exemption from the requirements in RCRA sections 3004 (u) and (v) does not actually appear in the RAPs section of the regulatory language. Instead, because the requirements for RCRA sections 3004 (u) and (v) are implemented through the regulatory language at § 264.101, the exemption from these requirements in today's rule is found in Part 264 at §§ 264.1(j) and 264.101(d), as well as in the definition of remediation waste management site and facility in § 260.10, instead of part 270.

RAPs cannot be used to permit treatment, storage, and disposal of "as-generated" process wastes. RAPs are limited to authorizing the treatment, storage, or disposal of hazardous remediation wastes. As this preamble discusses, the definition of remediation waste is limited to wastes that are managed to implement cleanup. This does not include "as-generated" process waste or wastes from any activities that are not specifically implemented for the purposes of cleanup.

3. Differences Between "Remediation Management Plans" in the Proposal and "Remedial Action Plans" in the Final Rule

EPA proposed streamlined permits for remediation-only sites under the name Remediation Management Plans, or RMPs. The RMP concept was proposed at §§ 269.40 through 269.45. As in today's rule, RMPs were proposed as a special form of a permit for hazardous remediation wastes; however, RMPs [9] were also the vehicle by which EPA or a State could exempt low-level hazardous contaminated media from Subtitle C management requirements, and could impose any necessary site-specific management requirements on these wastes. As discussed in section II. E. of this preamble, the Agency is not finalizing the aspects of the proposed rule that exempt hazardous remediation waste from Subtitle C, but is finalizing the streamlined permitting process for treating, storing, and disposing of hazardous remediation waste (that is, wastes that would have remained within Subtitle C jurisdiction under the proposal). However, in the final rule, EPA has named these permits Remedial Action Plans or RAPs.

In today's rule, as in the proposal, RAPs streamline the permitting process but, unlike in the proposal, a RAP in today's rule is not used to document and enforce alternative management requirements for remediation wastes that are exempt from Subtitle C. Hazardous remediation wastes remain subject to the applicable requirements in parts 260–271. Many of the provisions of the proposed RMPs have been eliminated or revised to accommodate this change.

The specific differences between RMPs, as proposed, and RAPs, as finalized, are discussed under the description of each section of the final regulation. EPA emphasizes that the contained-in principle, which provided a legal rationale for the proposed approach exempting low-level contaminated media, remains an existing EPA policy. EPA continues to encourage States to apply this policy, where appropriate, to expedite cleanups.

Section 270.80(b)

In § 270.80(b) EPA states that the requirements in §§ 270.3–270.66 do not apply to RAPs unless those traditional RCRA permit requirements are specifically required under §§ 270.80–270.230, but that the definitions in § 270.2 do apply to RAPs. This is meant simply to identify those requirements that apply to RAPs and those that do not. Where appropriate, the RAPs requirements in Subpart H include their own provisions instead of those in §§ 270.3–270.66.

Section 270.80(c)

In addition, new § 270.80(c) provides that, notwithstanding any other

[7] EPA's Permits Improvement Team (PIT) was created in 1994 to identify specific actions that could be taken by EPA to increase the efficiency and effectiveness of environmental permitting programs. The PIT held numerous stakeholder meetings throughout the country and prepared a draft set of recommendations before it finished its work in 1997.

[8] *Hazardous Waste: Remediation Waste Requirements Can Increase the Time and Cost of Cleanups*, U.S. General Accounting Office, GAO/RCED–98–4, October 1997.

[9] EPA has chosen to use the term RAP in the final rule because it is more commonly understood than RMP.

provision of [Part 270] or Part 124, any document that meets the requirements in this section constitutes a RCRA permit under RCRA section 3005(c). This is to ensure that, although RAPs may not be expressly referred to in other provisions of Parts 270 and 124, they are indeed RCRA permits. Although today's rule contains additional language to enhance the reader's understanding, these two new provisions are the same as proposed at § 269.40(c). The Agency did not receive any negative comments on this provision, and has therefore finalized the approach as proposed.

Section 270.80(d)

To facilitate streamlining at cleanup sites, EPA included the provision at § 270.80(d), which states that a RAP may be either: (1) a stand-alone document that includes only the information and conditions required by this Subpart; or (2) part (or parts) of another document that includes information and/or conditions for other activities at the remediation waste management site, in addition to the information and conditions required by this Subpart.

EPA anticipates that RAPs will often be granted at the same time that other decisions, such as remedy selection, are made at a cleanup site. Under the cleanup program, the facility owner/operator or the Director may be preparing other documents, such as remedy decision documents, which may cover much if not all of what a RAP will cover. EPA has included this provision to make it clear that the facility owner/operator and the Director do not have to duplicate efforts, and can create one document that serves both purposes. This approach was proposed at § 269.40(e), and again, the Agency did not receive any negative comment on this provision. In this case—where the issuing authority is an authorized State—only the portion of the RAP imposed under today's rule will be enforceable as part of the Federal RCRA program.

Section 270.80(e)

Throughout the development of the HWIR-media rule, there has been much confusion about the relationship between RAPs and cleanup requirements. Notwithstanding the confusion, EPA believes this is a very simple relationship. Cleanup programs dictate the goals of cleanup (that is, "how clean is clean" and how to select remedies, investigate sites, and conduct other related activities). Frequently, the remedies selected under these cleanup programs involve treating, storing, or disposing of hazardous remediation wastes in a way that would require a RCRA permit.

RAPs are simply the permitting mechanism for authorizing (according to RCRA requirements) this treatment, storage or disposal. In § 270.80(e), EPA has clarified that, if you are treating, storing or disposing of hazardous remediation wastes as part of a cleanup compelled by Federal or State cleanup authorities, your RAP does not affect your cleanup obligations under those authorities in any way. The RAP does not affect "how clean is clean" (cleanup standards), and does not affect, in any way, existing legal obligations to perform cleanup actions. This was proposed at § 269.1(c), and the Agency did not receive any negative comments on this provision, and so it is being finalized as proposed, except for edits to make it easier to understand.

Section 270.80(f)

New § 270.80(f) provides that interim status facilities that treat, store or dispose of remediation waste under a RAP will not lose their interim status by virtue of receiving an approved RAP, because the RAP applies only to the remediation waste management activities that take place as a result of the cleanup, and not to any obligations under other authorities.

Under today's rule RAPs can now be used to designate CAMUs, temporary units and staging piles (as well as other non-combustion remediation waste management units and operations). Owner/operators of interim status facilities who wish to construct CAMUs, temporary units or staging piles may now apply for a RAP as the vehicle for imposing the site-specific requirements, providing a mechanism for enforcing those requirements and providing for public participation. RAPs provide for all three of these functions, and may be a desirable alternative to a 3008(h) enforcement order.

EPA is concerned that allowing a RAP at an interim status facility may cause confusion about the impact on that facility's interim status, and therefore has included § 270.80(f). Because RAPs are RCRA permits, and because permit issuance at an interim status facility often terminates interim status for that facility, EPA is concerned that some may think that issuing a RAP at an interim status facility terminates that facility's interim status. Existing § 270.1(c)(4) already provides that, if EPA issues or denies a permit for one or more units at a facility without simultaneously issuing or denying a permit to all units at the facility, this does not affect the interim status for any unit for which a permit has not been issued or denied. Section 270.80(f) in today's rule serves a similar function by providing that RAP issuance does not terminate interim status for the other parts of the facility not covered by the RAP (or for facility-wide corrective action purposes).

EPA did not specifically propose this provision, but has included it in the final rule to avoid confusion. In the proposed rule (see for example, 61 FR 18791), EPA stated that these provisions would be implemented under many different programs and agencies. In the proposed rule at 61 FR 18814, EPA gave examples of CERCLA sites and permitted treatment, storage and disposal facilities (TSDFs), but did not clarify how these requirements would apply at interim status TSDFs. This was an oversight and is corrected by § 270.80(f) in today's final rule.

C. When Do I Need a RAP? (§ 270.85)

Section 270.85(a)

Section 270.85(a) states that "whenever you treat, store, or dispose of hazardous remediation waste in a manner that requires a RCRA permit under § 270.1, you must either obtain: (1) a RCRA permit according to §§ 270.3—270.66 of [Part 270]; or (2) a RAP according to [Part 270 Subpart H]."

1.What Activities Require RCRA Permits?

Section 270.1 describes what activities require RCRA permits. If the facility owner/operator intends to perform activities that require permits, but is managing only hazardous remediation waste and not as-generated process wastes, he may take advantage of the streamlined procedures for RAPs, or may obtain a traditional RCRA permit. There are also instances where treating, storing or disposing of remediation wastes do not require a RCRA permit. Today's rule, like the proposal, will not change, in any way, when a RCRA permit is required. Thus, no RAP is needed where a permit would not otherwise be required.

One example of when neither RAPs nor traditional RCRA permits would be required is CERCLA removal and remedial actions. CERCLA Section 121(e) grants a RCRA permit waiver for on-site response actions selected under CERCLA Section 121. Generally, however, a Record of Decision (ROD) or other CERCLA decision document would specify the requirements for complying with the substantive RCRA Subtitle C requirements for treating, storing, or disposing of remediation waste on-site. Another example would be when State that is authorized to

implement the RCRA program has a permit waiver authority that is analogous to EPA's authority under CERCLA Section 121(e) or RCRA Section 7003. This permit waiver policy is described in a memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA to Regional Administrators, Regions I—X, EPA, (November 16, 1987) available in the docket to today's rule. Today's rule does not change or affect this policy in any way.

In addition, facility owner/operators may manage hazardous remediation wastes in a way that does not require a RCRA permit. For example, contaminated remediation wastes can be capped in place, or excavated and transported off-site to a designated, permitted facility for treatment or disposal. Another example is that wastes can be treated or stored on-site in units that are exempt from permitting requirements, such as wastewater treatment units. (See 40 CFR §§ 264.1(g)(6), 265.1(c)(10), and 270.1(c)(2)(v)). Still another example is that remediation wastes can be treated or stored on-site for less than 90 days in tanks, containers, or containment buildings (see 40 CFR 262.34), which also does not require a permit.

Section 270.85(b)

In the proposed rule at § 269.43(f), EPA proposed that RMPs involving on-site combustion of hazardous remediation wastes would have to follow the requirements for issuance of RCRA permits in 40 CFR parts 270 and 124, and would not be eligible to obtain RMPs. EPA has finalized that requirement at new § 270.85(b).

EPA received one negative comment on that provision, which stated that the Agency had not demonstrated how combustion of hazardous remediation waste is different from other management techniques. However, the Agency continues to believe, as stated in the preamble to the proposed rule (61 FR 18818), that it is necessary to include this provision because §§ 270.16 and 270.62 include requirements for trial burns and other important procedures for incinerators that EPA continues to believe are necessary, even for combustion units handling hazardous remediation waste. Also there is a high level of public interest in hazardous waste combustion, which EPA believes merits the extra public participation steps of the traditional RCRA permitting process.

Another commenter asked that EPA clarify the procedures required for permitting of combustion units under RAPs. The proposed rule stated that "for remedial actions involving on-site combustion of hazardous remediation wastes, the procedural requirements for issuance of RCRA permits . . . shall at a minimum be followed for review and approval of RMPs [which are RAPs in today's final rule]." This language led to confusion over what requirements are considered "procedural." Today's final rule states that "[t]reatment units that utilize combustion of hazardous remediation wastes at a remediation waste management site are not eligible for RAPs under this Subpart."

EPA believes that this revised regulatory language makes it clear that permitting for combustion units does not follow any of the RAP requirements, but instead the traditional RCRA permitting requirements. (However, 40 CFR 264.101(d) of today's rule would exempt a facility receiving a permit for a combustion unit from facility-wide corrective action, if that facility were a remediation-only site (remediation waste management site).)

§ 270.85(c)

The proposed rule provided for the situation where a facility owner/operator permitted for on-going hazardous waste operations sought a RAP for cleanup activities at the facility. Under the proposed rule, a facility owner/operator might desire a RAP for two reasons—the RAP was the vehicle by which remediation wastes could become exempt from Subtitle C, and, for wastes that remained in Subtitle C, the application and procedural requirements for RAPs were more streamlined and better tailored to the remediation scenario.

To accommodate these situations, the proposed rule would have allowed traditional RCRA permits to serve as RAPs (§ 269.40(e)(2)), and also would have allowed the permitted facility to obtain a RAP, which would only cover the remedial operations at a site, in addition to its RCRA permit, (see 61 FR 18814). Because under the final rule, RAPs are not a vehicle for obtaining an exemption from Subtitle C, there is no need to finalize the proposed rule provision allowing traditional RCRA permits to serve as RAPs. On the other hand, the Agency continues to believe it is appropriate to allow permitted facilities to obtain the benefits provided by the RAP format and has crafted today's rule accordingly.

Specifically, today's rule (§ 270.85(c)) states:

> You may obtain a RAP for managing hazardous remediation waste at an already permitted RCRA facility. You must have these RAPs approved as a modification to your existing permit according to the requirements in §§ 270.41 or 270.42 instead of the requirements in this Subpart. When you submit an application for such a modification, however, the information requirements in § 270.42(a)(1)(i), (b)(1)(iv), and (c)(1)(iv) do not apply; instead, you must submit the information required under § 270.110. When your permit is modified, the RAP becomes part of the RCRA permit. Therefore when your permit (including the RAP portion) is modified, revoked and reissued, terminated, or when it expires, it will be modified according to the applicable requirements in §§ 270.40 through 270.42, revoked and reissued according to the applicable requirements in §§ 270.41 and 43, terminated according to the applicable requirements in § 270.43, and expire according to the applicable requirements in §§ 270.50 and 270.51.

This approach differs from the proposal in that a facility with a permit covering ongoing hazardous waste operations would not obtain a RAP as a separate authorizing document for the hazardous waste management activities conducted during the course of cleanup. The Agency made this change to avoid potential overlaps, gaps or confusion in having two authorizing documents at one facility. Instead, the rule provides that a RAP at a permitted facility be integrated into the permit as a permit modification. Thus, the more streamlined RAP application content requirements in § 270.110 apply, but the procedures for RAP approval in these cases are the permit modification procedures § 270.41 or § 270.42.

The Agency chose the permit modification procedures over the RAP procedures because it believes that establishing two different procedures for permit modifications—depending on whether you were modifying permits to include a RAP, or doing any other form of permit modification under §§ 270.41 and 270.42—would be unnecessarily confusing.

Comments were mixed. Two commenters stated that the proposed rule was unclear as to how RAPs would apply at facilities that already had a RCRA permit. One commenter said that EPA should not require both a RAP and a permit for the same activity. Another commenter suggested amending permits to require compliance with RAPs. Two other commenters disagreed with each other. One stated that RAPs would be beneficial because they would avoid the cumbersome and costly permit modification process. The other stated that it was unnecessary and inappropriate to allow separate and less rigorous procedures at facilities already subject to permitting. EPA agrees with this commenter to the extent that today's rule requires issuance,

modification, revocation and reissuance, and termination of RAPs through standard permit procedures at permitted facilities. But, EPA also believes that the relief provided by the content requirements for RAPs at § 270.100 should be available at permitted facilities. EPA developed the standards of today's rule with cleanups specifically in mind. The Agency believes that they are generally appropriate for cleanups taking place at TSDs, as well as to cleanups taking place under RAPs elsewhere.

There are three classes of modifications for traditional permits, Classes 1, 2, and 3. When modifying a permit to incorporate a RAP, the Director and the facility owner/operator must follow the Class modification procedure that is appropriate for the activities being permitted under the RAP. The last sentence of new § 270.85(c) provides that once the RAP is part of the permit, the applicable permit procedures must be followed for modification, revocation and reissuance, termination and expiration. However, the content requirements for RAPs will always remain those in § 270.110. EPA included this provision to avoid confusion about which requirements apply when making changes to RAPs that are part of RCRA permits.

This does not mean that RAPs at permitted facilities must follow two procedures, one for approval of the RAP and one for permit modification. On the contrary, RAPs at permitted facilities need only follow one process, the permit modification procedure, to receive approval.

D. Does my RAP Grant me Any Rights or Relieve me of Any Obligations? (§ 270.90)

Today's rule at new § 270.90 applies the § 270.4 provisions to RAPs. Section 270.4(a) is known as "permit as a shield," and protects the facility owner/operator in that as long as they comply with the terms of their RAP, they will be considered in compliance with RCRA Subtitle C for enforcement purposes, except for the four exceptions noted below. This means that EPA will not take enforcement actions against facility owner/operators for activities that are in compliance with their RAP, unless one of the four exceptions in § 270.4(a) applies. Although the proposed rule did not contain this provision, EPA requested comment on applying it at 61 FR 18815 of the proposal.

One commenter expressed concern about EPA granting "permit as a shield" to RAPs, arguing that the shield concept presumes that all RAPs will be properly drafted, and that this presumption is inappropriate, given the Agency's own acknowledgment, embodied in the proposed rule's requirements for State HWIR-media program withdrawal, that improper drafting may occur. Several other commenters, however, stated that it is appropriate to specify that compliance with a RAP constitutes compliance with RCRA.

The Agency agrees with these latter commenters. The Agency believes that including this provision is necessary to provide facility owners and operators with a measure of assurance that activities performed under an approved RAP will be recognized by the Agency as satisfying Subtitle C requirements for those activities expressly addressed and permitted by the RAP. EPA articulated the rationale for a "shield" provision in the May, 19 1980 final rule, which established this provision for permits (see 45 FR 33311). Specifically, EPA stated:

> EPA believes that this "shield" provision is one of the central features of EPA's attempt to provide permittees with maximum certainty during the fixed terms of permits. . . . This new provision gives a permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act [e.g., RCRA] which was not a requirements of the permit . . . EPA agrees that one of the most useful purposes of issuing a permit is to prescribe with specificity the requirements that a facility will have to meet, both so that the facility can plan and operate with knowledge of what rules apply, and so the permitting authority can redirect its standard-setting efforts elsewhere. If all the 3004 standards were fully enforceable against a permitted RCRA facility even though they were not reflected in the permit (or, perhaps, not consistent with it), facilities would be exposed to unavoidable uncertainty as to the standing of their operations under the law. In addition, such a provision would increase pressure on EPA and States to keep permit conditions applicable to a given facility in a perpetual state of re-examination. EPA's resources will at most be barely sufficient to issue and renew RCRA permits, and review State permits, at the time of their initial issuance and periodic renewal. EPA and States are likely to make much better use of their resources if they restrict examination of permits between issuance and renewal to monitoring compliance and taking enforcement action where necessary.... [The shield] now places the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit. This means that a permittee may rely on its . . . permit document to know the extent of its enforceable duties.

With regards to the commenter who was concerned about granting "permit as a shield" to RAPs, EPA believes that the commenters concerns are alleviated by the differences between the proposed and the final rule. RAPs under the proposed rule performed a different function from RAPs under the final rule. In the proposed rule, RAPs were the vehicle for excluding remediation wastes from Subtitle C requirements and instead imposed site-specific requirements on these wastes. The commenter who was concerned about the permit as a shield provision may have been concerned that a poorly written RAP might include site-specific requirements for wastes excluded from Subtitle C that were not protective of human health and the environment. Because today's final rule does not exclude any wastes from Subtitle C requirements, that is no longer a concern.

As mentioned above, § 270.4(a) includes four exceptions to the "shield" provision. Specifically, the permit does not shield the facility owner/operator from enforcement for requirements not included in the permit which:

(1) Become effective by statute;

(2) Are promulgated under Part 268 of this chapter restricting the placement of hazardous wastes in or on the land;

(3) Are promulgated under Part 264 of this chapter regarding leak detection systems; or

(4) are promulgated under Subparts AA, BB or CC of Part 265 of this chapter limiting air emissions.

With respect to the fourth exception, under § 264.1080(b)(5) the requirements in Part 264 Subpart CC do not apply to "a waste management unit that is used solely for on-site treatment or storage of hazardous waste that is generated as the result of implementing remedial activities required under the corrective action authorities of RCRA sections 3004(u), 3004(v) or 3008(h), CERCLA authorities, or similar Federal or State authorities." Therefore, remediation waste management units permitted by RAPs will not be subject to Subpart CC requirements. EPA expects that any of these four exceptions to the shield, especially numbers (3) and (4), will often not be relevant to activities taking place under RAPs.

Also, in the same way as for traditional RCRA permits, the shield provisions cover only activities that are authorized by the RAP, not any other hazardous waste management activities the facility owner/operator may perform at the site. For example, if the RAP covers a treatment unit, then activities performed in compliance with the RAP requirements for that treatment unit are covered by the "shield."

However, if the operator decides to build and use a disposal unit on-site that is not addressed in the RAP, the

operator must either obtain a modification to the RAP, or a traditional RCRA permit for that new activity, or they will not be shielded from an enforcement action under RCRA for operating that unit without a permit. In no way does this provision be shield a facility owner or operator from an enforcement action for a RCRA violation for any as-generated waste management requirements (as those activities are excluded from coverage under RAPs). Finally, because a RAP is simply a permitting mechanism for managing remediation waste, but does not address cleanup obligations, § 270.4(a) does not shield a facility owner/operator from cleanup obligations that apply to facilities subject to Federal or State remedial authorities.

Section 270.4(b) and (c) address property rights, privileges, and authorization of injury, invasion of rights, or infringement of State or local law or regulations. Because the Agency received no adverse comments on these provisions proposed at § 269.40(f) and (g), and because they were the same as § 270.4(b) and (c) for traditional RCRA permits, EPA is not creating new provisions specific to RAPs, but is applying the identical § 270.4(b) and (c) provisions to RAPs as proposed.

Applying for a RAP

E. How do I Apply for a RAP? (§ 270.95)

The first step towards obtaining RAP approval is to apply for a RAP. This section simply states that to apply for a RAP the owner/operator must complete an application, sign it, and submit it to the Director according to the requirements in part 270 Subpart H.

F. Who Must Obtain a RAP? (§ 270.100)

This requirement explains that if the site is owned by one person, but the activities are operated by another person, then it is the operator's duty to obtain a RAP, except that the facility owner must also sign the RAP application. It mirrors the requirement for other permits in § 270.10(b). The operator is the person responsible for the activity being permitted by the RAP, is the most familiar with the proposed activity, and is therefore, the most reasonable choice for who should be responsible for obtaining the RAP. The proposed rule stated that "the owner/operator must receive approval by the Director of a Remediation Management Plan (RMP)." The proposal did not distinguish between the facility owner and operator, but the Agency believes that this provision of today's rule will provide additional clarity about who is responsible for obtaining a RAP.

G. Who Must Sign an Application for a RAP? (§ 270.105)

The proposed rule (at § 269.43(b)) (like the final rule today) required both the facility owner and operator to sign the application for a RAP according to § 270.11. Their signatures are meant to certify that the information contained in the RAP application, to the best of the signatory's knowledge and belief, is true, accurate, and complete (see § 270.11 (d)).

In response to the Agency's request for comment on whether signatures of both the facility owner and operator should be required (61 FR 18817), several commenters objected to the proposed requirement, pointing out that in many instances one party may take a completely passive role in the cleanup process. One commenter pointed out that the current owner of a site may not have technical involvement in the cleanup or may be unwilling to commit resources to the cleanup.

These commenters felt that it could obstruct or delay cleanup efforts if both parties are required to sign the RAP application, especially if the passive party was fearful of incurring liability by signing. Other commenters felt that both parties should be required to sign the RAP application (as is required for traditional RCRA permits) as an indication that they both agree with the provisions in it. One of these latter commenters pointed out that States still hold the facility owner responsible for activities on his property regardless of whether another party operates the site. This commenter felt that requiring the facility owner to sign as well as the operator would signify that the property owner is aware of the activities occurring on his property.

EPA has sympathy with commenters on this issue who argue that in some cases owners may take a passive role, especially with respect to how the remediation waste is managed. At the same time, EPA notes that, under the statute, RCRA permits must be issued to both the owner and the operator. EPA also believes that owners, as well as operators, should ordinarily be responsible for the conduct of cleanup activities. Finally, owners may know about activities on the property that the operator is not involved in or aware of, and can provide valuable information for the permit. To be sure, one of the prime justifications for requiring the facility owner's signature on the permit—that the facility owner is liable for facility-wide corrective action—does not apply in this case. Nevertheless, the facility owner's signature is generally important to confirm that the cleanup is proceeding with his knowledge and approval, and to put the facility owner on notice of potential liabilities. Where it is difficult to get a facility owner to agree to a RAP, EPA may find that an enforcement action is more appropriate than a permit.

As proposed (§ 269.43(b)), § 270.105 in today's rule requires the RAP application to be signed according to § 270.11. The requirements in § 270.11(a) specify the appropriate person to sign the RAP application in the case of a corporation, partnership, sole proprietorship, municipality, State, Federal, or other public agency. Section 270.11(b) requires that any reports required by the RAP be signed by the person specified in § 270.11(a) or a duly authorized representative. Section 270.11(c) describes what to do if authorization under § 270.11(b) changes. Section 270.11(d) requires a person signing a document under § 270.11(a) or (b) to certify that the documents were prepared under their direction, that the information is accurate and complete, and that they understand the penalties of submitting false information. EPA has provided that the facility owner may choose an alternative certification under § 270.11(d)(2) if the operator certifies under § 270.11(d)(1).

After reviewing comments on the respective role of the operator and the land owner, EPA concluded that a less rigorous certification may be appropriate for the land owner, if the operator is more familiar with the cleanup activities than the facility owner. As explained earlier, EPA expects that the operator will be preparing the RAP application and will be familiar with its details. He will also be responsible for carrying out the cleanup. Therefore, it makes sense to have the operator provide the certification. At the same time, as a signatory to the permit, the landowner remains jointly and severally liable with the operator, and EPA retains the ability to enforce the terms of the RAP against the landowner where this enforcement is appropriate in EPA's discretion.

EPA believes that the less rigorous certification in § 270.11(d)(2) is appropriate because it continues to require the facility owner to make appropriate inquiries and provide any information he has about the property that will be the subject of the RAP. Other than general comments on who should submit the permit application, EPA did not receive comment on these requirements. Therefore, with this one exception, EPA has finalized the requirements as proposed.

H. What Must I Include in My Application for a RAP? (§ 270.110)

1. Description of the Specific Content Requirements

This subsection lists the specific pieces of information that the owner/operator must include in a RAP application, and also requires the facility owner/operator to submit any other information the Director considers necessary. The information required under § 270.110(a) through (e) includes names and addresses, latitude and longitude of the site, a map showing site location, and scaled drawings of the remediation waste management site features and boundaries.

The proposal did not explicitly list in the "Content of RMPs" section the information required in the final rule under § 270.110(a) through (e). However, these details were suggested by a commenter on the proposal. EPA expected that this information would generally have been required under the proposed rule. Because the information would be important in identifying the activities to be authorized by a RAP, the information generally would either have been included in the RAP application, or if not, would have been required by the Director under the proposed § 269.41(c)(10) ("other information determined by the Director to be necessary").

The Agency, however, agrees with the commenter that it should be added as an express requirement, to avoid any unnecessary delay caused by an applicant's failure to submit it in the first instance. In addition, these information requirements are similar to the types of information required under a Part A application in § 270.13, although better tailored to the remediation scenario.

New § 270.110(f) requires the application to specify the hazardous remediation waste to be treated, stored, or disposed of, to estimate the quantity of waste to be managed, and to describe the processes to be used for treating, storing, and disposing of the waste. This provision finalizes appropriate aspects of what was required under proposed §§ 269.41 (c)(1) through (6).

Specifically, the proposed rule differs from the rule promulgated today in that it required information regarding not only what under today's rule constitutes "hazardous remediation waste," but also what constitutes "non-hazardous contaminated media." The Agency has eliminated references to "non-hazardous contaminated media" because, as discussed more fully in preamble section II. E., EPA has decided not to finalize any of the approaches from the proposal that would have excluded remediation waste from Subtitle C, and had the RAP address non-hazardous media. The Agency has therefore eliminated requirements that were proposed to implement that portion of the proposed rule (proposed § 269.41(c)(1) and (3)).

Section 270.110(g) requires the facility owner/operator to submit information to demonstrate that the remediation wastes will be managed according to the applicable hazardous waste management requirements found in Parts 264, 266 and 268. This provision finalizes the proposed provision of § 269.43(c)(2). Although many commenters would have preferred all remediation wastes to be exempt from the Subtitle C requirements, including Parts 264, 266 and 268, for the reasons discussed earlier in this preamble, the Agency has decided not to finalize either the Bright Line or Unitary approaches which would have exempted remediation wastes from Subtitle C, and therefore, all hazardous remediation wastes remain subject to these requirements.

This flexible requirement replaces the detailed, unit-specific requirements in 40 CFR 270.14 through 270.27 that apply to traditional RCRA permits, and which lay out the information required in a Part B permit application. EPA has taken this more flexible approach, both because of the wide variation in cleanup activities, and because of the Agency's interest in streamlining the permit process for remediation activities. In implementing current remedial programs, including CERCLA and EPA's RCRA enforcement programs, the regulated community, the regulators, and interested members of the public successfully work together to develop enforceable remediation plans, and EPA believes there is no need for the Agency at this point to mandate detailed "information" requirements for RAPs based on part B requirements. Thus today's rule simply requires the RAP applicant to provide enough information to demonstrate compliance.

Section 270.110(h) requires the RAP applicant to submit enough information for the Director to comply with other Acts, as required for traditional RCRA permits under § 270.14(b)(20). In approving any form of permit, the Director must comply with the requirements in other applicable laws, and therefore, may need information from the RAP applicant to determine the applicability of these other Acts. This was not specifically discussed in the proposal, but where applicable, could have been required under proposed § 269.41(c)(10). The Agency believes that making this requirement explicit will eliminate delays that might result from any potential confusion on this point.

The wide variation in possible hazardous remediation waste management that may take place under RAPs makes it difficult to anticipate all of the Director's information needs. Therefore, § 270.110(i) requires the RAP applicant to submit any other information the Director determines to be necessary for demonstrating compliance with the provisions of Subpart H of part 270 or for determining additional conditions necessary to protect human health and the environment.

The first part of § 270.110(i) was proposed at § 260.41(c)(10); because EPA received no comment on this provision, it is finalized as proposed. The second part § 270.110(i) about information for determining additional conditions necessary to protect human health and the environment simply makes express the Director's authority to request information necessary to enable him to fulfill his duty under the "omnibus" authority of RCRA section 3005(c) to include conditions in permits necessary to protect human health and the environment. This statutory provision is codified in today's rule at § 270.135(b)(4).

All of the information required under § 270.110 forms the basis for the Director's determination of whether or not to approve the RAP application. The Agency expects RAPs to be more streamlined than traditional permits and therefore expects that, as a general matter, the information the facility owner/operator will need to submit for a RAP application will be significantly less than is traditionally required for a RCRA Part B permit application under §§ 270.14 through 270.27. This is because the specific Part B requirements for units, which are much more extensive that what is required by today's rule, were designed with long-term operation of a TSDF in mind. This operation is generally very different from the activities that take place as part of a one-time remediation waste management activity.[10]

Also, the Agency believes that, due to the wide range of activities that might take place under a RAP, it is more appropriate to provide flexibility so that the appropriate amount of information can be determined by the site-specific action. RAPs may permit many different

[10] It should be noted that EPA is also developing a proposal to streamline (and in most cases eliminate) information requirements for RCRA permits covering on-site storage or treatment of hazardous waste in tanks or containers.

types of activities, from on-site storage of investigation-derived waste to treatment and permanent disposal under RCRA requirements. EPA has allowed considerable flexibility in what information is required to be submitted, to allow for the variation in the types of activities being performed under a RAP, and the anticipated generally shorter time-frames for remediation waste management activities.

2. Comments on the Contents of RAPs

Several commenters agreed with EPA's basic framework for the contents of RAP applications. Commenters suggested additional information that should be included in a RAP application if it were the vehicle for determining when hazardous contaminated media could be exempt from Subtitle C, but because the RAP is not serving that function, those comments no longer apply. One commenter was concerned that EPA would require information on management of wastes off-site, but that information is not required in today's rule.

One commenter was concerned that the requirements to include volumes of the waste being managed would require excessive site characterization. However, the regulatory language in § 270.110(f) reads, "an estimate of the quantity of these wastes," which is the same language used for Part A permit applications in § 270.13(j). The purpose of this information is simply to provide an idea of the scope of the operation, not to require an exhaustive site characterization effort. EPA understands that the estimated volume of waste to be managed may change significantly in the course of the cleanup.

Another commenter noted that the different types of wastes regulated under the proposed "Bright Line" approach made the contents of RAPs overly complicated, but EPA is not finalizing that option in today's rule, and so has eliminated that complication.

Several commenters asked that EPA allow the RAP to be coordinated with other submittals of the same information, so that efforts need not be duplicated to prepare numerous submittals. It is for precisely that reason that EPA has allowed other documents (or parts of other documents) to serve as parts or all of the RAP if they contain the information and conditions necessary for RAPs, so that the facility owner/operator does not have to duplicate efforts. This can be found at new § 270.125.

Finally one commenter suggested that EPA make it possible for a facility owner/operator to incorporate "presumptive remedies" into RAPs similar to the approach EPA developed in the CERCLA program. While EPA is not addressing issues such as proper cleanup levels or remedies under today's rule, EPA could develop a set of "standard" RAP provisions to cover commonly encountered situations at sites managing hazardous remediation wastes. These generic provisions could be customized, as necessary, to address appropriate site-specific considerations.

EPA believes that a "generic RAP provisions" approach can be appropriate at RCRA sites, and it agrees this approach can significantly streamline the development of new documents. EPA will consider creating such a model as guidance for the HWIR-media rule.

However, in the meantime, EPA encourages States, or even large companies with multiple sites, to develop model RAPs. For example, commenters have told EPA that there are multiple, similarly contaminated areas in Alaska involving petroleum product spills. EPA believes that this may be an appropriate situation for regulated industries, the State of Alaska, and EPA to work together to develop a model RAP that would cover the situations frequently encountered in Alaska with petroleum and other contaminants. Such a model RAP could be used, with minor modifications to consider any unique, site-specific circumstances, and would be faster to develop and approve if EPA, the State, and the facility owner/operator had already agreed on the basic principles in the model.

3. Contents of RAPs in the Proposal That Are Not Required in the Final Rule

Several parts of the proposed "RAPs contents" requirements are not included in the final rule. First, proposed § 269.41(c)(8) required facility owners and operators to submit information that describes planned sampling and analysis procedures. This requirement is not necessary because waste analysis is required under today's rule at § 264.1(j)(2).

Proposed §§ 269.41(c)(9) and 269.42(b) required facility owners and operators to submit data from treatability studies and full scale implementation of treatment systems to EPA. The Agency has not included that requirement in the final rule. EPA proposed to require the collection of treatability data so that it could set treatment standards with reasonable confidence that those standards could be met with available technologies, and to provide information on the effectiveness of available technologies in treating different kinds of contaminated media.

One of the proposed rule's goals was to provide data to ensure appropriate future treatment requirements. To collect this data, the proposed rule would have required owners and operators to submit data to EPA upon completing remedial treatment (both full-scale as well as treatability studies). EPA has decided not to mandate the collection of treatability data for contaminated media as originally proposed. Since the proposal, EPA has finalized new LDR treatment standards for contaminated soils. EPA believes that those new standards are supported by the available data and does not feel it is necessary to burden the regulated community with the requirement to submit treatability data. Treatability data is discussed more fully in the preamble to the LDR Phase IV rule (63 FR 28556 (May 26, 1998)), in which EPA finalized the soil treatment standards proposed in the HWIR-media proposal.

Also, in the proposed rule at § 269.42(a), EPA proposed that treatability studies that would require a RCRA permit could be conducted under a RMP instead. The significant benefit of this requirement was that those wastes in the treatability study could be excluded from Subtitle C requirements under the RMP. Because RMPs no longer serve that function, the remaining benefit would be the more streamlined process for receiving RAP approval under the final rule instead of a traditional permit.

As discussed throughout the RAPs section of today's rule, any on-site treatment, storage or disposal of hazardous remediation waste that would have otherwise required a RCRA permit may be authorized under a RAP, which would include any treatability studies. Therefore, a separate provision allowing treatability studies under a RAP is not necessary.

EPA recognizes that treatability studies conducted off-site may still confront the problem of needing a traditional RCRA permit, and EPA will evaluate this and any remaining issues with regard to treatability studies in the future.

In the preamble to the proposed rule at 61 FR 18817, EPA requested comment on the limits on the existing Treatability Sample Exclusion Rule (§ 261.4(e) and (f)), which exempts the generator of wastes for treatability studies from 40 CFR Parts 261 through 263, and from notification under RCRA Section 3010. The rule also exempts the facility conducting the study from 40 CFR parts

124, 261–266, 268 and 270 and from notification under RCRA Section 3010. This exemption is currently limited to volumes of no more than 10,000 kg of media contaminated with non-acute hazardous waste, 1000 kg of non-acute hazardous waste other than contaminated media, 1 kg of acute hazardous waste, and 2500 kg of media contaminated with acute hazardous waste for each process being evaluated for each generated waste stream.

This exemption remains in effect for no more than 90 days after the study is completed or one year (two years for bioremediation) after the shipment of the same sample, whichever comes first. The Regional Administrator may grant requests case by case for up to an additional two years for treatability studies involving bioremediation. The Regional Administrator may grant requests case by case for extensions of the quantity limits for up to an additional 5000 kg of media contaminated with non-acute hazardous waste, 500 kg of non-acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste, and 1 kg of acute hazardous waste.

When EPA requested comment on whether it should amend the rule to allow EPA to expand those limits on a site-specific basis; the Agency received several comments. All comments favored giving site-specific discretion to the Director to determine appropriate volumes of wastes to be included in the treatability study, and to determine appropriate timeframes. Despite the favorable comment, EPA is not including this provision in the final rule. The Agency is reviewing more broadly the issue of treatability studies and may consider more extensive relief at a future date.

I. What if I Want to Keep This Information Confidential? (§ 270.115)

Some information required under § 270.110 may be confidential business information, such as the design of treatment units. This provision simply requires the facility owner/operator to assert a claim of confidentiality at the time the information is submitted, and EPA will treat the information according to 40 CFR part 2 (Public Information).

EPA has included this provision in the final rule, which is substantially the same as § 270.12 (with only minor changes meant to make the regulation more readable), to allow the facility owner/operator to protect this information. This provision was not discussed in the proposal, but EPA has added it to allow for confidentiality in the same way as with other permitting requirements, and to protect legitimate confidential business information of RAP applicants.

J. To Whom Must I Submit My RAP Application? (§ 270.120)

This provision simply requires that the facility owner/operator submit the RAP application to the Director. This was proposed at § 269.41(a). The "Director" is the EPA or State official responsible for the RCRA hazardous waste management program in the relevant State or Tribal lands, and is defined in § 270.2.

K. If I Submit My RAP Application as Part of Another Document, What Must I do? (§ 270.125)

To avoid duplicative processes, today's rule (§ 270.80(d)) allows RAPs to be a part of another document, such as a State cleanup program's remedy selection document, or a workplan for a cleanup. In many cases, the Agency expects RAPs to be issued at the time that a site manager is selecting a remedy, which will often include a mandatory process for including the public in the remedy selection process, and completion of remedy decision documents, under a cleanup program. Therefore, it would be a waste of time and resources to require a separate RAP application. If the facility owner/operator is preparing the other document(s), then today's rule, at new § 270.125, allows the facility owner/operator to submit the RAP application as a part(s) of those documents. In this case, the rule requires that the facility owner/operator identify the parts of the document that make up the RAP application, so that the Director can develop an appropriate draft RAP, and so the public can comment on it. Often, however, it will be the Director who is preparing the other documents, in which case, the facility owner/operator may choose to submit a separate RAP application, and the Director may incorporate the elements that make up the draft RAP into the other document(s) that he is preparing prior to public comment.

1. Provisions From the Proposal That Are Not Included in the Final Rule

The proposed rule required that "such [other] documents must be approved by the Director according to procedures that allow equivalent or greater opportunities for public involvement than those prescribed in § 269.43." This statement was confusing as to whether those "other" documents would be considered RAPs.

Any RAP application to receive approval as a RAP must follow the authorized RAP procedures of the authorized State or EPA. However, EPA expects that different States will apply for authorization of different types of programs and processes to qualify as RAPs. Therefore, RAPs in different States may look somewhat different, and the processes may vary, but all RAPs must be approved under a program authorized for this regulation.

Because this is already required under the State authorization procedures, and therefore language in the RAPs section of the regulations is not necessary, EPA has not included it in the final rule. In addition, EPA intends it to be clear that the Director may do more in the way of public involvement than is required under today's rule and the facility owner/operator is certainly encouraged to do so. However, that is always possible under RCRA authorized programs, and again it is not necessary to include this statement in the RAPs regulatory language.

As mentioned elsewhere, EPA has written the process for RAP approval to be as flexible as possible so that approval of RAPs, be they stand alone documents or parts of other documents, can be integrated as smoothly as possible into other approval and public comment procedures taking place at the site. EPA expects EPA Regional and State programs implementing the RAP provisions to merge processes at cleanup sites as much as possible to streamline the approval and public participation processes. At the same time, since RAPs will be issued under a Federally authorized program, and will be Federally enforceable, it will be important for States to identify when requirements are imposed under RAPs, and when they are imposed under independent sate authority.

Getting a RAP Approved

L. What Is the Process for Approving or Denying My Application for a RAP? (§ 270.130)

Section 270.130 specifies the basis upon which the Director will determine whether to tentatively decide to either approve the RAP application and therefore prepare a draft RAP, or to deny the RAP application and therefore prepare a notice of intent to deny the RAP application ("notice of intent to deny"). If the Director finds that the RAP application includes all of the information required under § 270.110 (correct signatures, names addresses, maps, drawings, specifications of the wastes; information to demonstrate compliance with applicable part 264, 266 and 268 requirements; information necessary for the Regional Administrator to carry out his duties

under § 270.3; and other information specified by the Director) and he determines that the information is in fact sufficient to show compliance with the regulatory standards, then he will make a tentative decision to approve the RAP application and prepare a draft RAP. If the Director finds that the RAP application does not meet these criteria, and if the facility owner or operator fails or refuses to correct any deficiencies, then the Director will make a tentative decision to deny the RAP application, and prepare a notice of intent to deny. The most critical parts of the Director's determination is whether or not operation according to the RAP will ensure compliance with applicable Part 264, 266, and 268 requirements.

As with any permit, the Director may deny the RAP application either in its entirety or in part. If the Director decides to either approve or deny the RAP application, he will then solicit, consider, and respond to public comments before making his final decision on the RAP application. The Director's decision is called a "tentative" decision at this stage until he has solicited, considered, and responded to public comments.

Because it is important for the regulated community, the regulators, and the public to clearly understand the basis for the Director's decision to approve or deny a RAP application, EPA has added these provisions to provide clarity.

The proposed rule at § 269.43(e) simply stated that "[w]hen the Director determines that a draft RAP is complete and adequately demonstrates compliance with applicable requirements, the RMP shall be approved according to the [certain specified] procedures." Today's final rule provisions of § 270.130 make express both what was meant by "complete and adequate," and the Agency's underlying assumption that, like the traditional permit process, the RAP approval process will be one of interaction between the applicant and the Agency. In addition, the regulations allow the Director to tentatively deny the RAP in whole or in part, where appropriate.

Thus, in a tentative permit decision, the Director would solicit public comment both on the parts of the RAP that are tentatively approved and on the parts that are tentatively denied.

As stated above, EPA expects the RAP approval process will be one of interaction between the RAP applicant and the Director until the Director is satisfied that he has enough information to tentatively approve or deny the RAP application. Thus, the rule has been written to make this expectation clear. Of course, the exact number of opportunities the Director should provide to correct deficiencies will depend on site-specific circumstances. The rule does make clear, however, that some opportunity to correct deficiencies must be given before a RAP application is denied.

M. What Must the Director Include in a Draft RAP? (§ 270.135)

Sections 270.135(a) and (b) specify the contents of a draft RAP. In today's rule, EPA is allowing flexibility in the format for RAPs. EPA expects that the RAP application will form the basis of the draft RAP. EPA does not expect the regulatory agency to engage in a time-consuming process of re-creating or re-formatting all of the information in the RAP application. Generally, EPA believes that records of decision, workplans, and other documents developed under existing cleanup programs such as CERCLA and RCRA will provide good models for RAPs. Under § 270.135(a) and (b) the Director is required to include in the draft RAP:

(1) The information from the RAP application discussed above (§ 270.110(a)–(f)) (for example, name of the facility, ID number, site boundaries, etc.); and

(2) Terms and conditions required under this section.

Section 270.135(b) specifies that RAPs must include:

(1) Terms and conditions necessary to ensure that the operating requirements specified in the RAP comply with the applicable provisions of parts 264, 266, and 268;

(2) Terms and conditions in § 270.30;

(3) Terms and conditions for modifying, revoking and reissuing, and terminating the RAP; and

(4) any additional terms and conditions necessary to protect human health and the environment.

The Agency received no adverse comment on the proposed requirement that RAPs include terms and conditions that ensure compliance with the applicable provisions of Parts 264, 266, and 268 (proposed sections 269.40(b) and 269.41(c)(2)), and therefore today is finalizing this requirement at § 270.135(b)(i) with minor editorial changes. To promote streamlining, however, the final rule also expressly allows these requirements to be specified "expressly or by reference." In other words, when RAP conditions are based solely on what is required by the regulations (that is, there is no need to establish site-specific conditions), the RAP may either duplicate the text of the requirements from the regulations in describing what is required under the RAP, or may simply cite the applicable requirements. Of course, many Subtitle C requirements, such as design requirements for CAMUs, temporary units, and staging piles in Part 264, must be derived site-specifically, and therefore, must be included in each individual RAP if these units will be used.

The Agency did not specifically request comment on requiring the terms and conditions in § 270.30 to apply to RAPs. However, the Agency believes these terms and conditions provide legal clarity on such issues as "duty to comply," "duty to reapply," and "inspection and entry," and will ensure effective implementation of the RAP.

Therefore, EPA has added this requirement to RAPs at § 270.135(b)(2). Many of the conditions in § 270.30 will not apply to specific actions taken under a RAP. For example, if all remediation waste is managed on-site under the RAP, then there will be no requirement for manifests, and therefore the manifest discrepancy report required under § 270.30(l)(7) will not apply to that RAP. Similarly, the monitoring requirements in § 270.30(j) would apply only to monitoring associated with units regulated under the RAP. It would not apply to general site investigation or monitoring at the cleanup site. In the future, EPA may further simplify these requirements and revise them so they are tailored more specifically to cleanup, and so that they provide greater flexibility.

Section 270.135(b)(3) requires the Director to include in the draft RAP the procedures for modifying, revoking and reissuing, and terminating the RAP, as is required under §§ 270.175, 270.180 and 270.185. These procedures are discussed fully in the preamble sections discussing the procedures for modification, revocation and reissuance, and termination in §§ 270.175, 270.180 and 270.185.

Finally, the requirement of § 270.135(b)(4) for the Director to include "any additional terms or conditions necessary to protect human health and the environment," is simply a codification of RCRA section 3005(c)(3), commonly referred to as RCRA's "omnibus permit authority provision." This provision allows the Director to add terms and conditions necessary to protect human health and the environment as concerns the activities expressly permitted under the RAP.

However, the Agency has also added a degree of specificity to this provision in the final rule. Specifically, today's rule expressly provides that these

additional terms or conditions include, "any additional terms and conditions ... necessary to respond to spills and leaks during use of any units permitted under the RAP."

The Agency added this provision to clarify that, although remediation-only facilities are no longer subject to RCRA section 3004(u) facility-wide corrective action, they do not escape cleanup responsibilities for the units permitted by the RAP. Because any units permitted under a RAP will be subject to the applicable part 264 requirements and must be approved by the Director in the RAP, EPA believes that most units will not experience problems with spills or leaks, because they will be well designed and maintained.

Also, most units permitted under RAPs will be shorter term than most units at operating TSDF, and so will be less likely to develop leaks. However, if unlikely spills or leaks occur, these units are not exempt from spill response and cleanup requirements specific to these units. The omnibus provisions in § 270.135(b)(4) provide an added option for dealing with these events from activities permitted under the RAP.

The RAP is not required to include information or conditions related to cleanup levels, site investigation, remedy selection, or similar requirements not specifically related to hazardous remediation waste management subject to RCRA permitting.

New § 270.135(c) provides that if the draft RAP is part of another document, as described in § 270.80(d)(2), the Director must clearly identify the components of that document that constitute the draft RAP. This is the same requirement for the Director as the earlier requirement for the RAP applicant (in new § 270.125), that if the RAP applicant prepares the RAP application as part of another document, he must identify the portions of the other document that make up the RAP application. This simply allows for consolidation of documents when other decisions, such as remedy selection, are occurring at the same time as decisions on the RAP, and allows the Director to prepare only one document instead of several. This approach was proposed at § 269.40(e)(2) and EPA did not receive any negative comments on this procedure.

1. Provisions of the Proposal That Are Not Included in the Final Rule

The proposed rule also contained several additional requirements for RAP terms and conditions that the Agency is not finalizing today. First, during the development of the proposal, some of the FACA Committee members expressed concerns that certain cleanup activities may unintentionally cause additional contamination through cross-media transfer of contaminants (that is, transfer of contaminants to clean soil, air, and surface or ground water).

In response to these concerns, EPA proposed (at § 269.41(c)(7)) to require the facility owner/operator to submit information that demonstrates that any proposed treatment system will be designed and operated in a manner that will adequately control the transfer of pollutants to other environmental media. This aspect of the proposal was important because the proposal exempted significant portions of remediation waste from unit-specific standards.

However, in today's final rule all hazardous remediation wastes remain subject to Subtitle C requirements, including those designed to prevent cross media contamination (for example, the requirements in § 264.175 for tanks, § 264.221 for surface impoundments, and § 264.251 for waste piles, covering such cross-media prevention techniques as liners and covers, and controls to prevent migration into groundwater or surface water). This requirement therefore is no longer generally necessary and the Agency did not include it in the final rule. In addition, the Director may address any remaining concerns about cross-media transfer of contaminants related to the remediation waste management activities permitted by the RAP under the Agency's omnibus permitting authority, addressed above.[11]

[11] In addition to the existing regulatory requirements, since proposal, EPA has developed the Best Management Practices (BMPs) for Soil Treatment Technologies (EPA530-R97-007, May 1997) guidance document on how to identify and minimize the potential for causing cross-media contamination during implementation of cleanup technologies for contaminated soils or solid media. The guidance outlines the potential cross-media concerns for specific activities and recommends approaches for preventing cross-media transfer of contaminants. Its primary purpose is to prevent the cross-media transfer of contaminants during implementation of contaminated soils or solid media treatment technologies in compliance with applicable State and/or Federal regulations.

This document does not replace any existing State or Federal regulations or guidance. It was developed to support the HWIR-media rule. The BMPs guidance was not developed for and should not be used as a compliance guide for any particular set of cleanup standards, but instead as a reference during implementation of those standards. Similarly, BMPs are not meant as a selection tool for remedial treatment technologies; they should be used during the implementation stage of remedies once they are selected. The facility owner/operator and the Director should consider whether this guidance will provide helpful recommendations for the remediation waste management taking place under the RAP.

In addition, §§ 269.43(c) and (d) of the proposal allowed the Director to add provisions to the RAP specifying the conditions under which the owner/operator would manage media under a RAP, and concentration levels below which the Director would no longer consider the media to contain hazardous waste, and to add provisions (if necessary) specifying when the Director would consider threats to human health and the environment from the media to be minimized. These provisions were based on the proposed rule's provisions that would allow the Director to exempt hazardous contaminated media from Subtitle C if it were below the proposed Bright Line levels (see proposed § 269.4, and preamble about the Bright Line at 61 FR 18794; about the LDR requirements at 18804; and about treatability variances at 18810).

In some cases, under the proposal, the media would have been exempt from most of Subtitle C, but remain subject to LDR treatment standards. In those cases, the Director might specify minimize threat levels under a treatability variance as an alternative LDR level (instead of requiring treatment to the levels required in part 268). This approach was finalized in the recent Phase IV Land Disposal Restrictions Rule (63 FR 28556 (May 26, 1998)).

N. What Else Must the Director Prepare in Addition to the Draft RAP or Notice of Intent to Deny? (§ 270.140)

Once the Director has prepared the draft RAP or notice of intent to deny, § 270.140(a) requires the Director to prepare a statement of basis supporting the RAP decision. Section 270.140(b) requires the Director to compile an administrative record and specifies the contents of the administrative record for the draft RAP, which are:

(1) The RAP application and any supporting data;

(2) The draft RAP or notice of intent to deny;

(3) The statement of basis and all the documents cited in the statement of basis; and

(4) Any other documents supporting the decision to approve or deny the RAP.

Today's rule also provides that any documents which are readily available to the public do not need to be physically included in the administrative record as long, as these documents are specifically referenced. This eliminates the need to unnecessarily copy documents such as regulations and statutes, and other commonly available documents, and to crowd each administrative record with

documents that can be easily found elsewhere.

The statement of basis and the administrative record are essential to explain and document the basis for the Director's decision to approve or deny the RAP, and if the RAP is appealed, they provide the record for review by the Environmental Appeals Board or similar State body. The information in the administrative record allows members of the public to review the basis for the Director's decision in order to participate in a meaningful way during the comment period. The requirements for a statement of basis and administrative record are the same as the requirements in §§ 124.7 and 124.9 for other RCRA permits, except that they have to be re-worded to be more readable.

The proposed rule did not allow for administrative appeals and did not expressly require a statement of basis or compilation of an administrative record. However, because (in response to public comments) the final rule does allow for administrative appeals, as discussed later, the statement of basis and administrative record are essential to successful operation of the appeals process, and EPA has therefore added them to the requirements for RAPs in today's final rule.

New § 270.140 (c) requires that information contained in the administrative record be made available for public review upon request. This ensures that the public can review all relevant documents in preparing their comments on the draft RAP.

O. What Are the Procedures for Public Comment on the Draft RAP or Notice of Intent to Deny? (§ 270.145)

1. A Description of the Requirements

Today's rule sets out procedures for reviewing and approving RAPs. EPA considers public review and comment procedures an extremely important part of the review and approval process for remedial activities. EPA recognizes that remediation waste management activities will vary greatly in scope and risk involved, and the Agency in turn believes that public participation should vary depending on the scope and risk involved with the remediation waste management taking place. EPA expects that States that apply for authorization for today's rule may request authorization for programs that vary somewhat from today's requirements, and EPA wants to allow for flexibility in this process. EPA expects States and Regions issuing RAPs to make appropriate decisions about what levels of public participation are appropriate in different situations. However, to receive authorization for RAPs, States must at least require the minimum public participation requirement mandated by RCRA section 7004(b) and must have requirements equivalent to the other requirements in today's rule. For further discussion of State authorization issues, see the State Authority section of today's preamble.

EPA is finalizing its proposal to require the use of the statutory public participation requirements in RCRA section 7004(b). Thus, if the Director makes a tentative decision to approve or deny the RAP application, he must:

- Send notice to the facility owner/operator of his decision with a copy of the statement of basis (§ 270.145(a)(1);
- Publish that decision in a major local newspaper of general circulation (§ 270.145(a)(2);
- Broadcast his decision over a local radio station (§ 270.145(a)(3);
- Send a notice of his intent to approve or deny the RAP to each unit of local government having jurisdiction over the area in which the site is located, and to each State agency having any authority under State law with respect to any construction or operations at the site (§ 270.145(a)(4).

This was proposed at § 269.43(e)(1)(i) and (ii).

Section 270.145(b) requires that this notice provide the public with the opportunity to submit written comments on either the draft RAP or the notice of intent to deny within no fewer than 45 days. This was proposed at § 269.43(e)(1)(ii).

Section 270.145(c) specifies the information requirements for the notice, which are:

(1) The name and addresses of the office processing the RAP application;

(2) The name and address of the RAP applicant and the site or activity;

(3) A description of the activity;

(4) The name, address, and phone number of a person from whom interested persons may obtain further information;

(5) A description of the comment procedures and other procedures by which the public may participate;

(6) If a hearing is scheduled, the date, time, location, and purpose of the hearing;

(7) If a hearing is not scheduled, a statement of procedures to request a hearing;

(8) The location of the administrative record and times when it will be open for public inspection; and

(9) Additional information the Director considers necessary or proper.

These requirements ensure that the public will have enough information to participate in a meaningful way in the comment process.

The proposed rule required the same procedures. Proposed § 269.43(e)(1)(i) required notice according to the procedures of 40 CFR 124.10(d) for the contents of the notice. In the final rule, EPA has incorporated applicable requirements in § 124.10(d) directly into the regulations for RAPs (with non-substantive changes made to incorporate the requirements into today's readable format) to avoid potentially confusing cross-referencing.

Section 270.145(d) requires that if within the comment period the Director receives written notice of opposition to his decision to approve or deny the RAP and a request for a hearing, the Director must hold an informal public hearing. The Director may also determine on his own initiative that a hearing is appropriate. The hearing must include an opportunity for any person to present written or oral comments. Whenever possible, the Director must:

- Schedule the hearing at a location convenient to the nearest population center to the remediation waste management site;
- Give notice again in the newspaper and on the radio and to the local government including the information described above; and

(1) Reference the date of any previous public notices relating to the RAP application;

(2) Include the date, time, and place of the hearing; and

(3) Provide a brief description of the nature and purpose of the hearing, including procedures.

Again, these hearing requirements are identical to what was proposed at § 269.43(e)(2), but with minor editorial changes to increase readability. These requirements are also required under RCRA section 7004(b).

2. Commenters Requested More Flexibility

Several commenters requested additional flexibility in the public participation process under today's § 270.145 requirements. Commenters suggested that RAPs for media that were excluded from Subtitle C should not have to follow the RCRA statutory public participation requirements. Today's rule does not exempt any hazardous remediation waste from Subtitle C, so RAPs always must serve as RCRA permits and must follow the RCRA statutory requirements for permits. Commenters specifically mentioned the 45-day comment period, the requirement to hold a hearing if one is requested, and the requirement to send a copy of the RAP to each State

agency having any authority under State law with respect to any construction or operations at the site. Commenters generally suggested that EPA should allow flexibility in how public participation was performed, depending on the activities taking place at the site.

However, under today's rule, RAPs constitute RCRA permits, and therefore, the statute mandates certain very specific public participation activities in RCRA section 7004(b) including the 45-day comment period, hearings, and sending copies of the RAP to State agencies. EPA has limited any additional specificity (for example, the requirements for the contents of a notice in § 270.145(c)) of today's rule to information or procedures necessary for smooth implementation of those statutory requirements, and has not included other procedural requirements, such as §§ 124.31–124.33.

The requirements in § 270.145(a)(2), (3), (4), (b) and (d) are direct requirements from section 7004 of RCRA. The only requirements that EPA has added beyond the statutory requirements are:

- For the Director to send a notice of his decision to the RAP applicant (§ 270.145(a)(1));
- The content requirements for the public notice of the RAP decision (§ 270.145(c)); and
- The content requirements for the public notice for any hearings (§ 270.145(d)(1)–(3)).

EPA believes that it is important to notify the RAP applicant of the Director's decision, and for public notices to include sufficient information about RAP decisions and public hearings to allow meaningful public participation. This is why EPA has added these few requirements to the statutory minimum procedures, and these requirements are the same as the equivalent requirements for traditional RCRA permits. It is, however, the Agency's policy on public participation to stress the importance of appropriate public participation in environmental decision-making.

EPA has acknowledged repeatedly that the Agency believes that the RCRA statute is overly prescriptive in its definition of public participation requirements for RCRA permits applying to remediation-only sites. Indeed, cleanups under EPA's own Superfund program—which provides a full and extensive opportunity for public participation—might not meet all of the RCRA statutory standards. Ideally, EPA would provide significantly greater latitude for State programs in today's rule; however, the Agency believes it is constrained by the statute. For this as well as other reasons, the Administration is supporting legislative reform of RCRA specific to remediation waste.

P. The Importance of Public Involvement in the RAP Process

It is EPA's policy to encourage public involvement early and often in the permitting process, in its remediation programs, as well as in other Agency actions. EPA intends this rule, and its implementation, to be consistent with that policy.

EPA also recognizes that existing State and Federal authorities provide for public involvement through widely varying processes. EPA, in crafting today's rule, intends to provide enough procedural flexibility so that States will not have to either modify their public involvement policies, or duplicate their efforts towards public participation in order to comply with slightly different requirements under today's rule.

EPA recognizes that meaningful public participation means that all potentially affected parties have an opportunity to participate early in the process and have ample time to participate in the remediation waste management decisions. Today's rule establishes the minimum procedures for public involvement—public notice and opportunity for comment when the authorized regulatory agency makes a preliminary decision to either approve or deny a draft RAP. EPA wishes to encourage involvement of the public throughout the remediation waste management process. EPA also believes that particular situations may warrant more than these minimum requirements.

In general, the level of public involvement will depend on the action—for example, the Agency may simply provide the minimum required opportunity for public comment on a proposed RAP for on-site storage of waste with low levels of contamination before it is removed, but may provide higher levels of involvement when a RAP includes treatment of a large quantity of remediation waste or on-site waste disposal. For these reasons, EPA believes that public involvement should be tailored to the needs at the site, and has therefore provided necessary flexibility in this rule.

Some cases may warrant more than notice and opportunity for comment. The Director or the facility owner/operator may choose to voluntarily take additional steps beyond what is required in today's regulations when additional involvement is warranted. In some cases, meaningful public notice may include bilingual notifications, publication of site fact sheets or of legal notices in city or community newspapers (or other media, such as radio, church organizations, and community newsletters) at key milestones in the remediation waste management decision process. Existing forums of communication, such as regular community meetings and electronic bulletin boards can be used to provide regular progress reports on remediation waste management activities.

The idea of different levels of public involvement is not new. EPA has long recognized that the level of public involvement should be determined by the action taking place. As an example of EPA's recognition that different activities warrant different levels of public participation, in a final rule dated September 28, 1988 (53 FR 37936), EPA promulgated regulations to govern modification of permits. Those regulations established different levels of public involvement depending on the significance of the permit modification.

Class 1 modifications, which apply to minor changes to permits, require minimal public involvement. The permittee must send a notice of the permit modification to all persons on the facility mailing list, and to the appropriate units of State and local government. Interested persons may request review of these permit modifications.

Class 2 permit modifications require increased public involvement, and Class 3 modifications, for major modifications to permits, require far more extensive involvement of the public—publication in a local newspaper, a public meeting, and a public comment period. To assist facility owners and operators in implementing the rule, EPA classified different activities as Class 1, 2, or 3 modifications, based on the significance of the action in Appendix 1 to § 270.42. These different classes of permits show that EPA has long agreed that different levels of public participation are appropriate for different activities.

EPA has also issued guidance on public involvement which may, as appropriate, be used as guidance in implementing today's rule (*see* the RCRA Public Participation Manual, September, 1996, EPA 530–R–96–007). This manual provides guidance on addressing public participation in the permit process, including permitting and enforcing corrective action activities. The manual emphasizes the importance of cooperation and communication and highlights the public's role in providing valuable input. It stresses the importance of early and meaningful involvement of the

public in Agency activities, and of open access to information.

In addition to the manual, EPA fully encourages the Director and the RAP applicant to consider, as appropriate, The Model Plan for Public Participation, developed by the Public Participation and Accountability Subcommittee of the National Environmental Justice Advisory Council (a Federal Advisory Council to the U.S. Environmental Protection Agency) when taking actions that would benefit from additional public involvement beyond what is required in today's rule. The Model Plan encourages public participation in all aspects of environmental decision making. It emphasizes that communities, including all types of stakeholders, and regulatory agencies should be seen as equal partners in any dialogue on environmental justice issues. The model also recognizes the importance of maintaining honesty and integrity in the process by clearly articulating goals, expectations, and limitations.

Most recently, the Agency issued the Enhanced Public Participation Rule (60 FR 63431 (December 11, 1995)), which amended 40 CFR parts 124 and 270 to provide for public participation earlier in the permitting process, and expanded public access to information throughout the permitting process and the operational lives of facilities. It requires the person associated with the facility, usually the facility operator, to notify the public before applying for a permit under § 124.31.

The Agency encourages using this rule, as appropriate, as guidance for cleanups that require a RAP, especially when there is a highly toxic or large volume of remediation waste. Where a cleanup involves treating, storing or disposing of hazardous remediation waste and a RAP is issued, public participation on the RAP should generally be folded into the broader strategy for encouraging public involvement in the cleanup. EPA encourages regulators and facility owners/operators implementing the provisions of today's final rule to refer to these regulations and guidance documents as guidance in developing appropriate public participation activities for individual RAPs.

Q. How Will the Director Make a Final Decision on My RAP Application? (§ 270.150)

1. A Description of the Requirements

Section 270.150(a) requires the Director to consider and respond to any significant comments raised during the public comment period, or during any hearing on the draft RAP or notice of intent to deny. Section 270.150(b) and (c) require that, when the Director has responded to all significant comments and revised the RAP as appropriate and has determined whether the RAP includes all the required information and terms and conditions, he must issue a final decision on the RAP application, and notify in writing the RAP applicant and all commenters on the draft RAP or the notice of intent to deny. This was proposed at § 269.43(e)(4), on which the Agency received no adverse comment.

Section 270.150(d) specifies that if the Director's final decision is that his tentative decision to deny the RAP application was incorrect, he will withdraw the notice of intent to deny and proceed to prepare a draft RAP. This is the same as the approach taken for traditional RCRA permits (see § 124.6(b)), and the Agency sees no reason to deviate from that approach in today's rule.

Under new § 270.150(e), when the Director issues his decision, he must include reference to the procedures for appealing the decision. Because appeals were not provided for in the proposed rule, this is a new requirement EPA has added to the final rule. This is the same requirement as for permits under § 124.15(a), and EPA did not see any reason to differ from these existing requirements for permits.

New § 270.150(f) requires that, before issuing the final RAP decision, the Director compile an administrative record that includes the information from the administrative record from the draft RAP and also:

(1) All comments received;

(2) Tapes or transcripts of hearings;

(3) Written materials submitted at hearings;

(4) Responses to comments;

(5) New material placed in the record since the draft RAP was issued;

(6) Other documents supporting the RAP; and

(7) The final RAP.

This section again repeats that material readily available need not be included. This is the same as for the administrative record for draft RAPs and also for traditional RCRA permits.

Section 270.150(g) requires that the administrative record must be made available for review by the public upon request.

As described for the administrative record for the draft RAP, EPA believes that express requirements for compiling administrative records are essential for successful hearing of appeals, and because appeals were not permitted in the proposal, EPA did not include this requirement in the proposal. However, an administrative record is now a necessary part of today's final rule. The elements of the administrative records for RAPs are the same as those required for traditional RCRA permits under § 124.18. EPA believes that the same information that is necessary to understand the decision-making on a traditional RCRA permit is also appropriate for RAPs.

2. Comments on the Proposed Requirements

The proposed rule requirement for the Director to consider and respond to any significant comments, and to modify the RAP as appropriate, was at § 269.43(e)(3). (The final rule uses the word "revised" instead of "modified" to avoid confusion with §§ 270.170 and 270.175 pertaining to post-issuance modifications.) Several commenters were concerned that the Director would unilaterally modify RAPs due to public comments without consulting with the facility owner or operator. They asked that EPA require the Director to consult or negotiate with the facility owner or operator before making modifications due to public comment. One commenter explained that changes resulting from public comment may substantially increase the cost of compliance, or otherwise significantly affect the facility's ability to complete remedial actions, in which case the facility would have no choice but to comply, or suspend remedial activities while seeking judicial review. Commenters were also concerned that any action that requires approval from the Agency takes a very long time to get approved. The commenter asked for EPA to limit the Director's review period to 60 days, and if the Director had not acted on the RAP within 60 days, the RAP would go into effect automatically.

EPA considers open communication with the facility owner/operator important to successful implementation of the RCRA program. EPA encourages Regional offices and States implementing today's rule to discuss, when appropriate, any revisions that may be made to the RAP in response to public comment with the facility owner/operator before making them. The Agency has not added this as a requirement to the approval process, however. An overriding objective of today's rule is to eliminate unnecessary process from the regulations. The Agency believes that a mandatory consultation process such as that suggested by the commenter is unnecessary because today's rule, unlike the proposal, provides for appeal of the Director's final decision to EPA's Environmental Appeals Board. Facility

owner/operators who are unhappy with changes made in response to public comment will have ample opportunity, at that time, to convince the Agency to change the contested provisions.

EPA has also decided not to limit the amount of time the Director has to review and approve RAPs so that if the Director does not act, the RAP becomes effective. EPA does not believe that the Agency would be fulfilling its statutory obligation to ensure compliance with RCRA requirements if RAPs could become effective without an affirmative decision from the Director (see RCRA section 3005). In addition, this would be especially problematic because under new § 270.90, the RAP generally serves as a shield against enforcement, and therefore the Director must make an affirmative decision that the RAP will ensure compliance with the applicable Subtitle C requirements before the RAP can become effective.

Commenters also asked that the facility owner or operator be required to provide copies of all documents he is required to maintain during the remedial activity into a local library to allow for public review. EPA encourages any steps the Director can take to facilitate meaningful public involvement, but again has chosen to limit actual regulatory requirements in an effort to maintain a more flexible process. EPA already requires the Director to make the administrative record available under both §§ 270.140(c) and 270.150(g). In addition, the Director can require the facility owner/operator to set up an information repository as a part of the RAP under the terms and conditions imposed at § 270.135, if the Director considers a repository appropriate. We believe these authorities allow the full range of options to assure easy public access to information so that meaningful public involvement can occur.

The requirement for the Director to make a determination at § 270.150(b) and (c) was proposed at § 269.43(e)(4), and stated "When the Director determines that the RMP adequately demonstrates compliance with all applicable requirements. . . ." The requirements in § 270.150 of today's final rule clarify what the proposal meant by "all applicable requirements."

The proposed rule did not expressly outline the procedures if the Director decided to deny a RAP. This was an oversight. To correct that oversight, EPA has made denial procedures for RAPs equivalent to approval procedures for RAPs.

R. May the Decision To Approve or Deny My RAP Application Be Administratively Appealed? (§ 270.155)

The Agency had originally proposed to eliminate administrative appeals (that is, to the EPA Environmental Appeals Board) because EPA felt that allowing facility owner/operators to proceed directly to judicial review (if necessary) after the Director's decision on the RAP would streamline the process. However, numerous commenters did not believe that this particular part of the proposal resulted in any beneficial streamlining. Commenters expressed an interest in being able to avoid expensive and time-consuming judicial proceedings by first requesting an administrative appeal. Also, one commenter pointed out that in instances where the RAP applicant is a Federal agency, the judicial review process is not available because Federal administrative agencies are unable to seek judicial review of final actions of other Federal administrative agencies. No commenters wrote to support EPA's proposal to not provide for appeals.

The Agency agrees with these commenters that allowing for further review within the Agency will, in many cases, help avoid time-consuming and costly litigation. Because, in the remediation setting, this is time and money better spent on cleanups, the Agency has decided in this final rule to provide for administrative appeals for RAPs. Thus, the procedure in new § 270.155 requires facility owner/operators to follow the procedures of § 124.19 for appeals. The only difference between the process EPA requires for RAPs, and the traditional § 124.10 requirements is that when the Director gives public notice of appeals decisions for RAPs, (under § 124.19(c)), he will follow the RAPs public participation procedures in § 270.145 instead of those in § 124.10, which are used to give public notice of appeals decisions for traditional RCRA permits.

Sections 270.155(a)(1)-(3) include requirements for what the public notice of the appeal must include, which are: (1) the briefing schedule for the appeal; (2) a statement that any interested person may file an amicus brief with the Environmental Appeals Board; and (3) the appropriate information from § 270.145(c), such as the name and address of the remediation waste management site and a description of the proposed activities.

The requirements under § 270.155(a)(1) and (2) for what to include in the public notice already appear in § 124.19(c), but are repeated in § 270.155 for clarity. Section 124.19(c) also specifies that public notice of appeals decisions will be given as provided in § 124.10. However, EPA has specified in today's rule that public notice of appeals decisions for RAPs will follow the procedures of § 270.145, and will contain the information from § 270.145 (c), instead of § 124.10.

For clarity, new § 270.155(b) repeats the requirement in § 124.19 that exhausting the administrative appeals procedure of § 124.19 is a prerequisite to judicial review under RCRA section 7006(b). This is the same requirement as in place for traditional RCRA permits under § 124.19(e), and EPA saw no reason to differ from the current requirements.

S. When Does My RAP Become Effective? (§ 270.160)

Section 270.160 states that the RAP is effective 30 days after the Director has notified the facility owner and operator and all commenters that he approves the RAP. This is the same as the effective dates for traditional RCRA permits. The 30-day period allows time for parties to appeal the Director's final decision before the RAP is effective. EPA stated in the preamble to May 19, 1980 rulemaking, when these provisions for permits were promulgated, that the 30 days "is a necessary part of a party's right to request an evidentiary hearing."

Under § 270.160(a), the Director may specify a later effective date in the final RAP decision if he feels that a longer time is necessary to allow facility owners and operators more time to come into compliance with the new requirements, or knows of other necessary reasons for a later effective date.

Section 270.160(b) specifies that if a RAP has been appealed, and the appeal is granted, conditions of the RAP will be stayed according to the provisions of § 124.16, pending the outcome of the appeal. The Director may identify which conditions of the RAP are severable, and therefore are not stayed. However, the provisions that are appealed and any provisions that are not severable from the appealed provisions will be stayed.

Section 270.160(c) specifies that the RAP may become effective immediately if no commenters requested a change from the draft RAP. This is because if no one requested a change, then no one would have the right to an appeal. Only parties who comment on the draft RAP may request appeal.

The proposed rule did not specify effective dates for RAPs. This was an oversight EPA has corrected in today's final rule. These effective date requirements are the same as those currently required for traditional RCRA permits under § 124.15(b), and EPA saw

no reason to differ from these existing requirements.

T. When May I Begin Physical Construction of New Units Permitted Under the RAP? (§ 270.165)

Section 270.165 specifies that the RAP applicant cannot begin physical construction of new units before receiving a finally effective RAP. This is the same as the requirements for traditional RCRA permits at § 270.10(f)(1).

How May My RAP be Modified, Revoked and Reissued, or Terminated?

U. After My RAP Is Issued, How May It Be Modified, Revoked and Reissued, or Terminated? (§ 270.170)

Plans for remedial actions sometimes need to be modified, revoked and reissued, or terminated. Often, modifications, revocations and reissuances, or terminations are necessary as new information becomes available. To retain reasonable flexibility in the remedial process—where it is difficult to predict all contingencies, and where different State programs may have different existing requirements for when plans need to be modified, revoked and reissued, or terminated—today's rule (as did the proposal), does not include specific procedures for RAP modification, revocation and reissuance, or termination but requires the Director to specify these procedures in the RAP. This provides authorized State or Federal programs the ability to allow modifications, revocations and reissuances, and terminations when and how they would fit efficiently into the State or Federal program. Today's rule at § 270.170 requires (the same as the proposal) that the Director include these procedures in the RAP, and also requires that these procedures provide for public review and comment if there is a "significant" change in the management of hazardous remediation waste at the site, or in circumstances which otherwise merit public review and comment. This was proposed at § 269.44(a) and is consistent with EPA's preference for involving the public in important decisions.

While commenters agreed with this general approach, two commenters asked for clarification on what constitutes a "significant" modification. EPA expects the Director to consider examples such as changes in treatment processes, use of new units, or activities that would require Class 2 or 3 modifications in Appendix 1 to § 270.42 as "significant" modifications (see also § 270.42(d)(2)). EPA expects that activities that would require Class 2 or 3 modifications would generally be the same kinds of activities that would be considered "significant" in this case. However, because activities that take place at cleanup sites are so often influenced by the site-specific factors that affect the management of remediation wastes at each site, EPA has decided not to put any limits into the regulatory language defining a "significant" change. This allows the Director full discretion to determine what constitutes "significant" for any given site.

The proposed regulatory language explaining which modifications should include public participation included modifications that were "major or significant." EPA considers "major" and "significant" to mean the same thing in this instance—and so has eliminated that redundancy by limiting the final rule to the term "significant."

Proposed § 269.44 referred only to modifications and not to revocation and reissuance, which was an oversight. Proposed § 269.45 included revocation with expiration and termination. The requirements for both proposed sections were the same, stating that the Director would specify procedures for these actions. EPA has decided to move the requirement to specify procedures for all these activities into one section (§ 270.170) because the same requirement applies to all of these activities, that the Director must specify procedures for modification, revocation and reissuance, and termination in the RAP.

Today's final rule also allows the Director to specify these modification, revocation and reissuance, or termination procedures individually or to incorporate them by reference. EPA expects that State programs may already have or may develop standard modification and revocation and reissuance procedures. EPA intended for the proposed rule language, which simply stated that the "Director shall specify . . . procedures," to allow States having existing procedures to incorporate these procedures by reference, but the final rule language makes that explicit. EPA believes that incorporating already approved procedures by reference can save time and controversy in preparing and approving RAPs.

Section 270.170 also specifies that if your RAP has been incorporated into a traditional RCRA permit, then the RAP will be modified, revoked and reissued, or terminated according to the applicable traditional RCRA permit requirements. Of course, the Director may, as appropriate, specify in the RAP additional grounds or procedures, at his discretion. This is conforming change to make this requirement consistent with § 270.85(c), which allows RAPs to be incorporated into traditional RCRA permits.

V. For What Reasons May the Director Choose To Modify My Final RAP? (§ 270.175)

Today's rule specifies at § 270.175 that the Director may determine on his own initiative that a modification is necessary. New §§ 270.175(a) (1)–(8) specify the causes that justify a Director-initiated modification. The only cause specified in the proposal for Director initiated modifications was "new information which indicates that such modification may be necessary to ensure the effective implementation of remedial actions at the site" (see 61 FR 18854). The Agency received no adverse comment on limiting the Director's discretion in this area. However, the Agency has decided to clarify the causes for Director-initiated modifications in today's RAPs regulations to include the same causes for Director-initiated modifications as for traditional RCRA permits under §§ 270.41 and 270.43. EPA believes this is an outgrowth of the proposed requirement, and responds to commenters' concerns that the Director had too much discretion as to when he could modify RAPs.

As discussed above, the proposed rule allowed the Director to make "unilateral" modifications based on "new information which indicates that such modification may be necessary to ensure the effective implementation of remedial actions at the site." Commenters expressed concern about what they saw as the Director's too-broad discretion to make "unilateral" modifications. In response to these comments, today's final rule requirements for "causes" adds more specificity to what that "new information" may be.

Section 270.175(b) allows the Director to modify the RAP as necessary to ensure the facility continues to comply with the currently applicable requirements of parts 124, 260–266 and 270 when he reviews a RAP for a land disposal facility every five years, as is required under § 270.195. This same requirement applies to traditional RCRA permits under § 270.41(a)(5).

Also to protect the facility owner/operator, at new § 270.175(c) the Agency has included the provision that applies currently to traditional RCRA permits which specifies that the Director will not reevaluate the suitability of the location of the facility at the time of RAP modification. This would cause too

much disruption to facility operations. The location will be evaluated once when the RAP is initially approved, but once approved it will not be reevaluated unless new information or standards indicate that a threat to human health or the environment exists that was unknown at the time of RAP issuance.

W. For What Reasons May the Director Choose To Revoke and Reissue My Final RAP? (§ 270.180)

The Agency has specified in new § 270.180(a) causes for when the Director may modify or revoke and reissue a RAP. Again, these causes are the same as those for permits under the current regulations at §§ 270.41 and 270.43, and are intended to provide assurance to the facility owner/operator security that they can operate in compliance with their permit without fear that their permit will be modified without a good cause.

EPA explained its original reasoning for promulgating causes for Director-initiated modifications and revocation and reissuances of traditional RCRA permits at 45 FR 33314 (May 19, 1980). That preamble stated that "EPA has rewritten the permit modification section . . . to provide greater certainty to permittees during the period when they hold permits and thereby make it easier to make business decisions and obtain financing . . . Normally, a permit will not be modified during its term if the facility is in compliance with the conditions of the permit. The list of causes for modifying a permit is narrow; and absent cause from this list, the permit cannot be modified." In that notice, EPA also explains the specific rationale for each of the causes for Director-initiated modifications, revocations and reissuances, which are the same causes as allowed in today's rule. EPA included the same protection for owners and operators when RAPs are revoked and reissued at § 270.180(b) as is provided for when RAPs are modified at § 270.175(c). That is that the Director will not reevaluate the suitability of the location of the facility at the time of RAP revocation and reissuance. The reasons for this protection are discussed above at § 270.175(c).

X. For What Reasons May the Director Choose To Terminate My Final RAP, or Deny My Renewal Application? (§ 270.185)

Unlike in the proposed rule, the Agency has decided to retain the requirements in § 270.43 for causes for permit termination. Thus in new § 270.185, EPA cites the three reasons from § 270.175 why RAPs may be terminated. They are that:

(1) The facility owner/operator violates the RAP;

(2) The facility owner/operator did not fully disclose or misrepresented information during the application process; or

(3) The activity authorized by the RAP endangers human health or the environment, and can only be remedied by termination.

The Agency believes it is appropriate to retain these requirements for RAPs because they specify the basis of what EPA believes should be potential grounds for termination, while providing assurances of certainty to the facility owner/operator by limiting the reasons the Director may terminate the RAP. The proposed rule did not specify detailed reasons for why RAPs could be terminated, but simply left that up to the Director to specify in the RAP.

Y. May the Decision To Approve or Deny a Modification, Revocation and Reissuance, or Termination of My RAP Be Administratively Appealed? (§ 270.190)

Section 270.190(a) states that any commenter on the modification, revocation and reissuance or termination, or any participant in any hearings on these actions, may appeal the decision to modify, revoke and reissue or terminate a RAP to the Environmental Appeals Board, using the same procedures as those used for appealing the original RAP decision in § 270.155. Appeals of approvals of modifications, revocation and reissuances, and terminations of traditional RCRA permits follow the same process as appeals of original permit decisions. EPA has decided that it will be easiest to understand if RAPs follow the same construct as traditional RCRA permits. Also, modifications of RAPs could possibly include significant changes in the remediation waste management activities at the remediation waste management site, and so the right to appeal these decisions is important to the facility owner/operator and to the community.

Section 270.190(b) specifies that denials of requests for RAP modification, revocation and reissuance or termination may be informally appealed, and § 270.190(c) sets out the procedures for informal appeals which are that: (1) The person appealing the decision must send a letter to the Environmental Appeals Board; (2) the Board has 60 days to act; and (3) if the Board does not take action within 60 days, the appeal will be considered denied.

In the May 19, 1980 final rule which created the § 124.5 requirements for informal appeals, EPA explained the Agency's rationale in this way: "EPA rejected comments urging that modification denials be appealable through the same agency procedures as permit issuance or denial. Departures from the cycle of permit issuance and periodic examination should not be encouraged in such a manner. If encouraged, they could keep many permits in a state of perpetual reexamination thus impeding the control program being implemented." EPA has chosen to apply the same process for RAP modification, revocation and reissuance and termination denials as applies to the same decisions for traditional RCRA permits. This process for informal appeals is the same as the process for informal appeals of denials of requests for permit modification, revocation and reissuance and termination in § 124.5(b), except that it has been re-written to be more readable. EPA sees no reason why the processes should differ.

Section 270.190(d) states that this appeal is a prerequisite to judicial review of these actions. This same requirement applies to traditional RCRA permits under §§ 124.19(e) and 124.5(b).

Of course, because the proposal did not allow for appeal of RAPs, it also did not allow for appeal of RAP modification, revocation and reissuance, or termination. However, the Agency has provided these provisions in response to commenters' requests, as more fully discussed in the preamble section for § 270.155 entitled "May the decision to approve or deny my RAP application be administratively appealed?"

Z. When Will My RAP Expire? (§ 270.195)

As with all RCRA permits, § 270.195 requires (as proposed at § 269.45) that RAPs have a maximum life of 10 years, and that RAPs that permit land disposal units be reviewed every five years. This requirement is a statutory requirement under RCRA section 3005(c)(3). Of course, in many cases, remedies will be short-term; in those cases, the RAP would specify a shorter term than the 10-year maximum. The Agency did not receive any adverse comment on this requirement.

AA. How May I Renew my RAP if It Is Expiring? (§ 270.200)

Like the rule for traditional RCRA permits (see § 270.10(a)), today's rule provides that the procedures for renewing RAPs (new § 270.200) are the

same as the procedures for issuing RAPs. The proposed rule's silence on this issue was an oversight.

BB. What Happens if I Have Applied Correctly for a RAP Renewal, But Have Not Received Approval by the Time My Old RAP Expires? (§ 270.205)

The same as § 270.51 provides for traditional RCRA permits, new § 270.92(e) provides assurances to the facility owner/operator by stating that an expiring RAP remains in effect until a new RAP is effective, as long as a timely application has been submitted and, through no fault of the facility owner/operator, the Director has not issued an effective RAP before the previous RAP expires. This will ensure that remediation waste management will not be interrupted because the Director was unable to renew the RAP before the previous RAP expired. Again, EPA did not specify requirements in the proposed rule for this situation, but is expressly including these requirements in today's rule to ensure effective implementation.

Operating Under Your RAP

CC. What Records Must I Maintain Concerning My RAP? (§ 270.210)

As discussed above, the administrative record for RAPs must be kept by the Director under §§ 270.140 and 270.150. Under new § 270.210, however, the facility owner or operator is required to keep records of all data used to complete the RAP application and any supplemental information that is submitted for at least 3 years from the date the application is signed, and any operating and/or other records the Director requires the facility owner/operator to maintain as a condition of the RAP.

This language is included to remind the facility owner/operator that recordkeeping and reporting requirements may be imposed under the Director's authority to impose "terms and conditions necessary to ensure that the operating requirements specified in your RAP comply" with applicable requirements (§ 270.135). Although the Agency proposed that all recordkeeping and reporting requirements would be set on a site-specific basis (see 61 FR 18817), the Agency is including these requirements in today's rule to avoid unnecessary disputes each time a RAP is issued. In addition, the facility owner/operator must comply with recordkeeping requirements from the applicable Part 264 requirements.

The requirements in new § 270.210 are the same as those for traditional RCRA permits required under § 270.10(i), except that they have been reworded to be more readable. In the May 19, 1980 notice where EPA first promulgated the § 270.10(i) requirements, EPA justified the requirement saying that "[t]he recordkeeping requirements are necessary to support any subsequent EPA enforcement action for false reporting" (45 FR 33300 (May 19, 1980)).

Several commenters supported EPA's proposal to allow the Director to set all recordkeeping and reporting requirements site-specifically in the RAP. However, two commenters requested that EPA require the owner/operator to maintain certain records in all cases. One requested that EPA require the facility owner/operator to maintain records about waste that is shipped off-site for management to provide EPA the ability to track the waste if a non-hazardous determination was found to be inappropriate. Another commenter suggested requiring the facility owner/operator to maintain a copy of the RAP, testing results, and manifests and/or bills-of-lading for wastes moved off-site.

All of these comments were based on the premise that EPA was allowing some contaminated media to be exempted from Subtitle C requirements. However, in today's rule, all hazardous remediation wastes remain subject to Subtitle C, including the requirements for manifests, which should alleviate the concerns of the two commenters who recommended requiring manifests. Also, all hazardous remediation wastes remain subject to the applicable requirements in Part 264, some of which require the facility owner/operator to maintain certain records.

In addition to those requirements, EPA decided it was appropriate to require the same recordkeeping requirements for RAPs as are required for traditional RCRA permits under § 270.10(i). These provisions require the facility owner/operator to maintain records of data used to prepare the RAP application and supporting documents. EPA believes that these requirements sufficiently respond to the concerns raised by the two commenters.

DD. How Are the Time Periods in the Requirements of This Subpart and My RAP Computed? (§ 270.215)

Although the proposal did not discuss this issue, to avoid unnecessary disputes over the computation of time, EPA has decided to add new § 270.215, which keeps the provision at § 124.20 clarifying how time periods specified in the permitting rules will be computed. Specifically, § 270.215(a) specifies that any time period scheduled to begin on the occurrence of an act or event must begin on the day after the act or event. Section 270.215(b) specifies that any time period scheduled to begin before the occurrence of an act or event must be computed so that the period ends on the day before the act or event. Section 270.215(c) specifies that if the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day. Finally, § 270.215(d) specifies that whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days must be added to the prescribed term. The regulatory language includes examples to make these requirements easier to understand.

EE. How May I Transfer My RAP to a New Owner or Operator? (§ 270.220)

The Agency has decided to apply the same requirements to RAPs (under new § 270.220) that § 270.40 requires for traditional RCRA permits. This requires that if the ownership or operational control of the facility changes, the RAP must be modified or revoked and reissued to reflect this change. Again, although this was not proposed, the Agency added it to ensure that the appropriate person is responsible for activities permitted under the RAP.

Note, however, that a change in facility ownership or operational control should not be considered a "significant" change; the regulations for traditional RCRA permits in § 270.40 allow a change in facility ownership to be made as a Class 1 modification to a permit, which is not a significant change.

Like § 270.40, new § 270.220 requires the new facility owner or operator to submit a revised RAP application no later than 90 days before the scheduled change, and requires a written agreement for the date for transfer of RAP responsibility, and includes requirements for Part 264, Subpart H, Financial requirements. The requirement to submit the revised RAP application to the Director 90 days before the change allows adequate time to revise the RAP before the change occurs, makes clear when facility ownership or operational control is transferred, and ensures that a responsible person will be fulfilling the Part 264, Subpart H, financial responsibility requirements for the facility at all times. These requirements in new § 270.220 are identical to the requirements in § 270.40, except that they have been rewritten to be more readable and to use the words "RAP" and "remediation waste management site" instead of "permit" and "facility."

FF. What Must the State or EPA Region Report About Non-compliance With RAPs? (§ 270.225)

Section 270.225 requires the State or EPA Region implementing RAPs to report to the EPA Regional Administrator or to EPA headquarters, respectively, on noncompliance with RAPs according to § 270.5. The proposed rule did not explicitly include this permitting requirement, which is currently imposed for traditional RCRA permits. However, without soliciting comment on this issue more explicitly, EPA is reluctant to eliminate this requirement for RAPs.

Obtaining a RAP for an Off-site Location

GG. May I Perform Remediation Waste Management Activities Under a RAP at a Location Removed From the Area Where the Remediation Wastes Originated? (§ 270.230)

New § 270.80(a) states that a RAP may only be issued for the area of contamination where the remediation wastes to be managed under the RAP originated and areas in close proximity to the contaminated area, except as allowed in limited circumstances under this section. This limitation was originally included in the definition of remediation waste management site in the proposal for today's rule. Many commenters addressed this limitation in their comments. One commenter argued that managing remediation waste away from the area of contamination might be the most environmentally protective option in some cases. For example, permafrost in many areas in Alaska means that surface water is abundant and floodplains are extensive, so if the area of contamination were in these areas, it would be more environmentally protective to treat, store, or dispose the remediation waste at a more suitable, possibly remote, location. Other commenters suggested that it would be environmentally beneficial to locate remediation waste management sites away from the area of contamination if the contaminated area were located in a potable well field or over a sole-source aquifer.

One commenter raised the point that "pipelines and other industries that operate facilities on extensive linear rights-of-way frequently must deal with historical contamination of soils at multiple, noncontiguous locations, many of which may be extremely remote. In these instances, it is most cost-effective to establish a centralized remediation site, rather than to carry out remedial treatment at each site of original deposition. This allows the remedial treatment to be carried out at a location selected for characteristics to minimize exposure to sensitive environments and to resident human populations."

Other commenters pointed out that some large facilities may limit public access, and that plant services and equipment, such as waste water treatment plants and paved areas for staging may be far away from the contaminated areas. These commenters suggested expanding the definition to include, if necessary, the entire facility boundary (that is, areas under common ownership) to allow the use of an area that may be several miles away, but better suited or safer for remedial functions, yet contained within the perimeter of the facility's security fence.

Another commenter raised the point that contaminated areas are often located in areas of a site remote from utilities such as electricity, steam, roadways, etc., and that it would be reasonable to allow these remediation wastes to be managed in other areas of the site where these utilities were available. Finally, the Department of Energy (DOE) commented that there are locations where space is limited, and the remediation site needs to be expanded to a location that is removed from general employee access, and that at large sites with multiple areas of contamination, it might be most efficient to consolidate those wastes into one centralized management area within the boundaries of the facility.

The Agency proposed to limit media remediation sites to the "area of contamination" and "areas in close proximity" to ensure adequate oversight of the waste management activities, to ensure that the process was streamlined, and to reduce administrative complications. Many commenters considered EPA's concerns and also added additional potential concerns that locations away from the area of contamination might become contaminated in the course of waste management, that surrounding communities might be affected by this waste management, and that these might be long-term actions which might not be desirable to the surrounding community.

However, commenters also suggested solutions. Commenters suggested that the Agency set up a preference for locating remediation waste management sites in the area of contamination or areas in close proximity, unless good justification could be made why other locations would be preferable. In light of concerns about control over the boundaries of a remediation waste management site, and community involvement, commenters suggested that the RAP approval process would provide the Director the opportunity to approve or deny the designation of the boundaries of the remediation waste management site, would allow the surrounding community to participate in the decisions for activities that might affect them, and would provide the oversight to ensure proper waste management.

EPA agrees that in some cases, such as the commenters have raised, it may be preferable to designate alternative locations for remediation waste management, and has added the special requirements under § 270.230 for performing remediation waste management activities at a location removed from the area where the remediation wastes originated, to respond to these comments. Section 270.230(a) and (b) allow the facility owner/operator to request and the Director approve a RAP for an alternative location if performing the remediation waste management activities at such a location will be more protective than managing the remediation in the area of contamination or areas in close proximity. Section 270.230(c) specifies that a RAP for an alternative location will be approved or denied according to the procedures and requirements for RAPs in this Subpart.

EPA expressed concern about the possibility of contaminated areas being located in floodplains in the proposal, and was persuaded by the other examples provided by commenters such as permafrost areas, potable well fields, and sole source aquifers. EPA agrees that it would not be environmentally desirable to designate remediation wastes management sites in these locations. EPA agrees that centralized treatment, in the types of situations described by the commenters, may be environmentally beneficial. The Agency does not want to inhibit the remediation of contaminated properties.

The Agency has set specific requirements in § 270.230(d) for RAPs at alternative locations. First, EPA has specified in § 270.230(d)(1) that the RAP for the alternative location must be issued to the person responsible for the cleanup from which the remediation wastes originated. EPA wants to encourage environmentally beneficial cleanups, but does not want to allow a commercial remediation waste management facility to open as an "alternative location" which is owned and operated exclusively by someone who is not involved in the cleanup activities, and then be exempt from facility-wide corrective action

requirements. Therefore this limitation ensures that the facility owner or operator performing the cleanup activities be a permittee at the remote location, as either the operator or the owner, or both. Of course, others can also be permittees (for example, the land owner, if not the same as the person performing the cleanup). For example, in the situation discussed above where it may be more protective to remove remediation wastes for management outside of a floodplain in Alaska, the remote location may be owned by someone other than the person responsible for the cleanup, such as the Federal government. In that case, the person responsible for the cleanup and the Federal agency responsible for the land would be the permittees for the remote location.

Sections 270.230(d)(2) and (3) require that RAPs for alternative locations are subject to the expanded public participation requirements in §§ 124.31, 124.32, and 124.33, and the public notice requirements in § 124.10(c). EPA has required this additional public participation for these alternative locations to give the community surrounding the alternative location ample opportunity to participate in the decisions about managing remediation waste in their community.

Remediation waste management sites located in contaminated areas will presumably be subject to extensive public participation as part of the remedy selection process, and also the community will be receiving the benefit that a contaminated area in their community will be cleaned up. In alternative locations, the community would not be involved in the process of selecting the remedy for the contaminated area, nor would they be receiving the benefit of their community being cleaned up. Therefore, EPA felt it was important to require this additional public participation.

Section 270.230(d)(4) requires these alternative locations to comply with the location standards of § 264.18. Remediation waste management sites located in areas of contamination cannot choose their location. The area of contamination is already established, and therefore it does not make sense to require these remediation waste management sites to comply with the seismic location standard. However, owners and operators of these alternative locations can choose the location and so should comply with this standard.

Finally, § 270.230(e) specifies that these alternative locations are remediation waste management sites, and retain the benefits of remediation waste management sites, that is, the exclusion from facility-wide corrective action, and the application of the performance standards in § 264.1(j) instead of Part 264, Subparts B, C, and D. EPA believes that the disincentives to cleanup would remain if EPA required facility-wide corrective action for these alternative locations, and so is keeping this exclusion the same as it applies to other remediation waste management sites to eliminate disincentives to cleanup. Also, the same reasons why the § 264.1(j) performance standards are more appropriate for remediation waste management sites than Part 264, Subparts B, C, and D, also apply to why § 264.1(j) is more appropriate for these alternative locations than Part 264, Subparts B, C, and D.

EPA believes that the requirements for the Director to approve the designation of the remediation waste management site in the RAP or other permit will assure that the location will be decided for the best environmental reasons. Also, the RAP or other permit approval process for designating the remediation waste management site will ensure that the public has the opportunity to comment on the decisions of where to locate the remediation waste management site.

Finally, the Agency wishes to make it clear that if an owner/operator manages hazardous remediation wastes as part of cleanup on their facility, and ships that waste off-site, then, of course, they become a generator. Therefore, when they ship the waste off their facility, including shipping it to a facility under an off-site RAP under § 270.230, they must comply with the applicable requirements for generators, such as manifesting and transportation requirements.

If an owner/operator will be treating, storing, or disposing both on-site and off-site (in a way that triggers the requirement for a permit in § 270.1), the owner/operator must get a separate RAP (or a traditional RCRA permit) for both the on-site and the off-site activities. Only the off-site RAP, however, is subject to § 270.230.

HH. Comparison of the RAPs Process to That for Traditional RCRA Permits

The procedures for approving RAPs in today's rule are more streamlined than the requirements for traditional RCRA permits. EPA expects that RAPs will most often be developed concurrently with the cleanup's remedy selection process. Most cleanup programs contain a remedy selection process requiring the Director's approval and public participation. (As discussed in the State authorization section of this preamble, a program without the required RAP public participation provisions will not be authorized to implement today's rule.)

As described elsewhere in today's preamble, EPA has intentionally constructed the RAP requirements to allow enough flexibility to integrate them with remedy selection requirements. EPA expects remedy selection and RAP approval will most often occur together, and therefore has designed the RAPs process to allow this. EPA expects joint issuance of RAPs and remedy selection documents that will be significantly more streamlined than separate permitting and remedy selection processes and will still maintain meaningful public involvement.

In addition to general streamlining, there are eight specific steps in the traditional permitting process that EPA has eliminated for RAPs.

- First, and perhaps most significantly, in an effort to better tailor the RAPs requirements to the cleanup setting, the content requirements for RAP applications (from § 270.110) are significantly less than those required in a RCRA Part B permit application.
- Second, § 124.3(c) requires a "completeness check" for traditional permits, which EPA does not require for RAPs. Instead, for RAPs, new § 270.130 describes the finding that the Director will make to determine whether to tentatively approve or deny a RAP application. Obviously, if the Director feels that a RAP application is incomplete, the Director will communicate with the RAP applicant to fill in any gaps, but it is not a specific additional step in the process.
- Third, EPA has removed the facility mailing list (§ 124.10(c)(1)(ix)) requirements; and
- Fourth, has reduced the Director's public notice requirements under § 124.10(c)(1). (For RAPs, the Director must send notices to local and State agencies as required under RCRA 7004(b), and to the RAP applicant.)
- Fifth, EPA is not requiring a pre-application public meeting and notices (§ 124.31); nor
- Sixth, public notice at the application stage (§ 124.32); nor
- Seventh, the requirements for an information repository (§ 124.33) at remediation waste management sites, but encourages the Director and the RAP applicant to conduct these activities where appropriate.
- Eighth and finally, the procedural requirements for modification and termination, revocation and reissuance are much more flexible for RAPs than for traditional RCRA permits. Today's

rule allows the Director to specify these requirements site-specifically in the RAP, instead of the EPA-promulgated requirements such as in §§ 270.41, 270.42, and 270.43. EPA expects that many States will have established procedures in their remedial programs for modifying, terminating and revoking and reissuing RAPs. EPA is allowing for any of these State requirements as long as they meet the threshold requirements of including an opportunity for public participation whenever significant modifications are made (see § 270.170).[12]

V. Requirements Under Part 264 for Remediation Waste Management Sites (§ 264.1(j))

In the proposed rule at § 269.40(b), EPA proposed that media remediation sites (finalized in today's rule as remediation waste management sites) would be subject to the applicable provisions of part 264 except Subparts B (General Facility Standards) and C (Preparedness and Prevention). Subparts A and D–DD would continue to apply unchanged, at least for wastes above the Bright Line. EPA proposed this approach, as one option, because the unit specific standards of part 264 provided ready-made standards to ensure protection of human health and the environment. However, EPA recognized that part 264 standards other than those in Subparts B and C also may not be appropriate and solicited comment on which, if any, other provisions of part 264 should not apply to media remediation sites (61 FR 18814). EPA also requested comment on the "Unitary Approach" that would remove all part 264 standards for remediation wastes.

After examining public comments on this part of the proposal, EPA has decided to finalize a somewhat different approach from what was proposed. Specifically, today's rule at § 264.1(j) provides that remediation waste management sites must comply with all parts of part 264 except Subparts B, C, D (Contingency Plan and Emergency Procedures), and § 264.101.[13] In place of the requirements in Subparts B, C, and D, however, EPA is finalizing performance standards based on the general requirement goals in these sections.[14] These new standards eliminate the specific requirements of Subparts B, C, and D, which for two reasons can be inappropriate for remediation-only sites. Either the requirements were not specifically designed for the treatment, storage, and disposal activities during cleanups, or they are likely to duplicate or conflict with requirements imposed under the remedial authority compelling cleanup.

Thus, the provisions finalized today ensure that the concerns addressed by these provisions will be addressed by the Director in the permit or RAP, without requiring specific conditions that may be inappropriate. At the same time, EPA has chosen not to amend the unit-specific standards of Part 264 for remediation waste, although the Agency continues to believe a more extensive revision of these requirements is appropriate. The applicability of § 264.101 is discussed in section VII. of this preamble.

A. Comments on Applying Part 264 Standards to Remediation Waste Management Sites

Many commenters, arguing for the Unitary Approach, suggested that Part 264 standards should not apply to remediation waste management, and that regulatory Agencies overseeing cleanup should have broad flexibility in imposing conditions on specific units.

Other commenters suggested more narrowly that several of the specific Part 264 management provisions included in the HWIR-media proposal are unnecessary for managing remediation wastes under a RAP. The earlier commenters argued that these requirements were clearly intended for the long-term management of hazardous waste at facilities which manage these materials on an on-going basis, whereas many cleanups are short-term and do not lend themselves to these restrictive provisions. These commenters argued that more flexibility is necessary to allow cleanups to take place quickly and to proceed unencumbered by regulatory provisions more appropriate for the risks posed by managing hazardous "as-generated" process wastes.

Specifically, several commenters suggested that the Agency should allow the Director to waive specific requirements from Part 264 or make site-specific adjustments under appropriate site-specific circumstances.

Part 264, Subpart E

Commenters specifically mentioned Part 264, Subpart E, requirements for manifesting, and commented that these requirements should not apply to wastes managed on-site. One commenter stated that manifesting requirements were not appropriate for all corrective action activities and that specific manifesting requirements should be set out in the RAP for that site. EPA disagrees; the Agency believes that manifesting is no less important when hazardous wastes are being transported off-site in the remedial context than in the as-generated waste context, and so these requirements continue to apply to hazardous remediation wastes. However, manifests are not required when wastes are managed on-site.

Part 264, Subpart F

Another commenter stated that Subpart F §§ 264.90–264.100 groundwater monitoring and corrective action requirements should not apply to remediation waste units, because that would lead to a perpetual cycle of waste management activities. This commenter, in EPA's view, has raised a complex and important issue. EPA believes that, where a new land based unit is created as part of corrective action, it should be handled as a landfill—subject to Subpart F groundwater requirements (including Subpart F § 264.100 corrective action)—or as a CAMU, under which EPA establishes alternative site-specific conditions to protect groundwater.

On the other hand, where an old regulated unit has released hazardous constituents into the environment, and releases from the unit are being addressed as part of a cleanup, EPA believes that Subpart F requirements do not make sense (since these requirements were designed primarily as preventive standards for units that had not yet had releases into the environment); instead, remedial authorities like CERCLA or RCRA 3004(u) are better suited for defining groundwater monitoring and cleanup requirements at these units.

EPA's post-closure rule, which was promulgated on October 22, 1998 (63 FR 56710), is designed to allow integration of cleanup requirements at closing regulated units into broader cleanup requirements at specific sites, and may address the commenters' concerns. Areas of contamination, which are not typically "regulated units" subject to Subpart F or unit-specific RCRA requirements would be handled in a similar fashion. The regulatory agency facing an area of contamination would

[12] Note that by complying with the public participation requirements for RAPs, a facility owner/operator may not have automatically fulfilled all applicable public participation requirements for corrective action, closure/post-closure, or any other cleanup-related activities that require public participation and the facility owner/operator needs to remain cognizant of these separate public participation requirements.

[13] Note that § 264.1080(b)(5) already includes an exemption from Subpart CC for certain wastes that are generated as the result of implementing remedial activities.

[14] Of course, facilities other than remediation-only facilities must comply with Subparts B, C, and D.

base specific decisions on groundwater monitoring, cleanup levels, and cover requirements on the remedial authorities being invoked, rather than on RCRA Subpart F or other unit-specific requirements.

In summary, where a new land-based unit is created, EPA disagrees with the commenter; in this case, current Part 264 standards (including the CAMU) should continue to apply. But where an old or existing unit is being addressed as part of a cleanup, EPA shares the commenter's concerns. EPA believes that considerable flexibility already exists in the RCRA regulations to address this situation, but the Agency also acknowledges that further evaluation (including possible statutory changes) is appropriate.

Part 264, Subpart G

Another commenter stated that Subpart G closure requirements could be incorporated into the RAP, and therefore a separate closure plan or permit would be redundant. EPA agrees with this commenter, and throughout the RAPs section of today's preamble stresses the importance of integrating processes and documents whenever possible and helpful. EPA agrees that, if closure requirements can be integrated into the RAP, then two separate documents will not be necessary.

At the same time, today's rule does not alter the way that Subpart G or unit specific closure requirements apply to cleanup sites. Subpart G and unit specific closure requirements apply to new units permitted under a RAP, but not to areas of contamination, or to old units not already subject to Subtitle C (for example, units where non-hazardous wastes that subsequently became hazardous were disposed). This is how closure requirements apply at any other regulated facility. Thus, if a new landfill were created under a RAP in the course of a remediation, it would be subject to Subpart G closure standards. Or, the Director might approve a CAMU, which would provide greater flexibility than the landfill closure standards.

Subpart G or unit-specific closure standards will not apply in areas of contamination where new "placement" of hazardous wastes has not occurred.[15] Closure, and monitoring, at these units or areas will be a remedial issue, to be addressed under the remedial authority under which the cleanup is being performed.

Part 264, Subpart H

Several commenters focused on Part 264, Subpart H, financial assurance. They suggested that financial assurance for corrective action has a very different purpose from the propose it has for operating facilities. Also, they suggested that sites should be allowed to set up site-specific plans for financial assurance, depending on the specifics of the site and the activities taking place.

Today's rule, however, does not address financial assurance for corrective action requirements, such as the ability to finance a cleanup and meet remedy goals. It does not impose any additional requirements for financial assurance for corrective action, beyond what a facility may already be subject to under other authorities. Thus, at a remediation-only site, today's rule would impose no financial assurance for corrective action. However, if the site is located at a facility subject to corrective action, then the financial assurance requirements for the corrective action activities will still apply to the full extent provided by this Subpart (that is, on a facility-wide basis). That is, designation as a remediation waste management site does not eliminate otherwise applicable financial assurance requirements.

At the same time, however, EPA has chosen to retain the unit-specific financial assurance requirements for third-party liability and closure. EPA recognizes that the very detailed nature of the Agency's current requirements in these areas may constrain some State programs, and that in some cases it may be better for the environment if marginal facility owners are allowed (or required) to proceed with cleanup, even if they cannot secure financial assurance mechanisms. (In this case, an enforcement mechanism may be preferable to a permit mechanism.) EPA, however, did not solicit, or receive, sufficient comment in this area to change the current requirements. Thus, remediation units permitted under a RAP will remain subject to the unit-specific RCRA financial assurance requirements for third-party liability and closure.

Part 264, Subparts I, J, K, L, M, N, and O

One commenter suggested that the requirements in 40 CFR part 264, Subparts I, J, K, L, M, N, and O, be specifically incorporated into RAPs only as necessary. The commenter suggests that they might not be necessary for managing low-risk media. However, EPA is not finalizing the Bright Line which would have distinguished between high- and low-risk media. EPA agrees that these requirements only need to be incorporated into the RAP if they apply to units being permitted under the RAP.

Part 264, Subpart BB

Finally, one commenter suggested dividing Subpart BB into three tiers:

(1) Subpart BB would not apply to actions that would take place for a shorter time than one year;

(2) The Director would apply Subpart BB, as appropriate, to actions that would take between one and three years; and

(3) Subpart BB would apply in its entirety for actions taking longer than three years. Again, EPA has chosen not to amend the unit specific standards of part 264 for remediation waste, although the Agency continues to believe a more extensive revision of these requirements is appropriate.

EPA believes that it will be extremely rare for the Part 264, Subpart BB, requirements to apply to units managing remediation waste. The Subpart BB requirements only apply to units managing wastes with organic concentrations of at least 10 percent by weight. EPA believes that concentrations at that high a level are rarely found in remediation wastes. Also, if the Director determines that the Subpart BB requirements do apply, but are not appropriate for a particular cleanup site, the Director can designate the unit as a temporary unit. That allows the Director to modify the unit-specific standards as appropriate in cleanup situations. However, temporary units may only be used for a limited period of time.

B. EPA's Response to These Comments

The Agency agrees with the many commenters who pointed out that more flexibility is desirable for many cleanups, but does not believe at this point that a blanket exemption from Part 264 is appropriate. In the first place, certain requirements (for example, MTRs for landfills) are imposed by statute, and EPA does not believe the Agency has the authority to eliminate them in today's rule. In addition, EPA does not believe the Agency has fully aired the issues for public comment. For example, EPA is not convinced that secondary containment is needed for tanks in all remedial situations. However, EPA did not solicit comment specifically on this issue, and the Agency is not prepared today to finalize amendments to the current regulations.

[15] For a description of what constitutes "placement" in an area of contamination, see the March 13, 1996 memorandum from Michael Shapiro, Director, Office of Solid Waste, Stephen D. Luftig, Director, Office of Emergency and Remedial Response, and Jerry Clifford, Director, Office of Site Remediation Enforcement, regarding "Use of the Area of Contamination (AOC) Concept During RCRA Cleanups."

At the same time, EPA believes that the current regulations already provide significant flexibility in remedial contexts. Secondary containment, for example, is not necessarily required for tanks or other units used in remediation if they were approved as temporary units under § 264.553. Innovative technologies can often be permitted under the flexible standards of Subpart X. As discussed earlier, the CAMU regulations provide flexibility for land-based units, as do staging piles, which are promulgated in today's rule and discussed elsewhere in this preamble.

On the question of air emissions, raised specifically by one commenter, EPA notes that the temporary unit standards allow the Director to develop alternative operating standards for temporary tanks and containers managing remediation waste (which would include alternative standards to Subpart BB; if they applied). And furthermore, EPA has explicitly exempted on-site remedial activities under EPA or State cleanup authorities from Subpart CC standards. Thus, while EPA believes that further review and tailoring of the current technical permitting standards for remediation waste is appropriate, the Agency also concludes that considerable flexibility already exists.

C. EPA Is Providing Relief From Part 264, Subparts B, C, and D

On the other hand, in today's rule, EPA is amending the general facility standards of Subparts B, C, and D to provide greater flexibility for owner/operators of remediation waste sites. Instead of the current, detailed requirements in these Subparts, persons managing remediation waste sites will be able to meet general performance standards. These performance standards define the facility requirement, such as "inspect the facility . . . often enough to identify problems in time to correct them," but allow considerable flexibility to the regulator in determining how an owner/operator will meet those standards. The Agency believes that the basic goals of Subparts B, C, and D continue to be important, but also EPA believes that the protection desired under Subparts B, C, and D can be achieved at remediation waste management sites by applying the performance standards of today's rule.

Flexibility in applying many of these substantive requirements is important because of the wide variety of remediation waste management activities that may be permitted under a RAP, everything from managing small volumes of investigation-derived wastes, to remediating large volumes of contaminated soils, or treating highly concentrated remediation wastes. Also, some activities permitted under RAPs may be very short-term actions, and yet some may involve multi-year treatment of remediation wastes at a large remediation waste management site. The following paragraphs describe the flexibility EPA is providing for general RCRA facility standards in § 264.1(j).

The opening sentences of § 264.1(j) provide for applicability of these provisions instead of § 264.10.

Section 264.1(j)(1)

Instead of § 264.11, new § 264.1(j)(1) requires the facility owner/operator to obtain an EPA identification number. These identification numbers are important to allow EPA and States to track activities at facilities that generate hazardous wastes, whether as a result of ongoing processes or during cleanup. This is a simple procedure and can be done quickly. This standard is only different from § 264.11 entitled "identification number," because of editorial changes to enhance readability.

The requirements in § 264.12 do not apply to remediation waste management sites because they are requirements for receiving wastes from foreign (§ 264.12(a)) and off-site (§ 264.12(b)) sources, which will not occur at remediation waste management sites. (Owner/operators are exempt from the § 264.12(b) requirements when they are also the generator. The only way an owner/operator can have a RAP at an off-site location is if they are both the generator and the owner/operator of the off-site location. Therefore, this requirement will never apply to RAPs.)

Section 264.1(j)(2)

Instead of "general waste analysis" (§ 264.13), today's rule requires a chemical and physical analysis of the hazardous remediation waste under new § 264.1(j)(2) , which at a minimum must contain all the information needed to treat, store, or dispose of the waste according to this part and part 268. The waste analysis must be accurate and up to date.

This requirement mirrors the existing requirement in § 264.13(a)(1), which sets out the general goal of the waste analysis requirement. However, this standard eliminates requirements that:

(1) Were written with facilities engaged in the business of hazardous waste operations in mind (for example, § 264.13(a)(3), which addresses analysis of wastes from unfamiliar off-site sources); or

(2) Are likely to duplicate or conflict with requirements imposed by the remedial authority at the site (for example, 264.13(b) to develop an analysis plan that may duplicate testing done for site-characterization and remedy selection).

EPA expects that waste analysis plans developed under a reliable cleanup program, such as EPA's RCRA corrective action program or its CERCLA program, will provide enough data to meet this requirement. EPA emphasizes that waste analysis should be tailored to provide information needed to manage cleanup wastes successfully. EPA does not encourage analysis for analysis' sake.

Section 264.1(j)(3)

Instead of the "security" provision (§ 264.14), EPA has promulgated a performance standard at § 264.1(j)(3) to warn potential intruders and to minimize the unauthorized entry of persons or livestock onto the active portion of the remediation waste management site. EPA allows an exemption from this requirement if the facility owner or operator can show that this entry will not injure these persons or livestock or cause violations of the requirements in part 264.

For traditional RCRA permits, this requirement and the exemption are at § 264.14(a). However, § 264.14(b) and (c) are very detailed in exactly how to provide that security. EPA has determined that, for remediation waste management sites, the performance standard reasonably provides that the site will be secure, but allows flexibility in achieving that goal. This takes into account the different types of activities that may be taking place at remediation waste management sites.

Section 264.1(j)(4)

Instead of the "general inspection requirements" (§ 264.15), EPA has promulgated a performance standard at § 264.1(j)(4) requiring facility owner/operators to inspect the facility often enough to identify problems in time to correct them before a problem leads to a human health or environmental hazard. This performance standard, which is the same as the current permitting requirement, also:

- Requires the facility owner/operator to take action immediately if a hazard is imminent or has already occurred;
- Is drawn from the language in § 264.15(a) and (c);
- Ensures that the facility owner/operator will make appropriate inspections; but
- Allows for flexibility in how these inspections will be done.

EPA is not requiring the other parts of § 264.15(b) and (d) regarding a written schedule and log, but instead, new

§ 264.1(j)(12) and (13) require the facility owner/operator to have a plan and records. EPA expects this approach will be more streamlined than requiring a separate plan and record for each activity under 264.1(j).

Section 264.1(j)(5)

Instead of the "personnel training" requirements at § 264.16, EPA has promulgated § 264.1(j)(5) requiring the facility owner/operator to train personnel to perform their duties in a way that ensures the facility's compliance with the requirements in this part, and to respond effectively to emergencies. This performance standard is derived from the requirements in § 264.16(a)(1) and (3).

Training is important when personnel are dealing with hazardous substances, not only to ensure proper precaution during normal operations, but also to ensure that well-trained personnel are available and can respond effectively in emergencies. This performance standard requires training, but is flexible enough to cover a wide range of reasonable programs. For example, where a site is subject to Occupational Safety and Health Administration (OSHA) or similar training standards for hazardous waste site workers, additional standards probably will not be necessary. EPA does not want to create duplicative requirements where training is already adequate.

EPA is not specifying all of the details of how to provide and keep records of training as is required under § 264.16(a)(2), (b), (c), (d), and (e). EPA believes that each site will be very different and require different intensities of training. Also, § 264.1(j)(13) will ensure proper records are maintained.

Section 264.1(j)(6)

Instead of the § 264.17 "general requirements for ignitable, reactive, or incompatible wastes," EPA has promulgated the performance standard at § 264.1(j)(6). This standard requires facility owners and operators to take precautions when managing ignitable, reactive and incompatible wastes. This performance standard is similar to the § 264.17(a) and (b) requirements.

Because ignitable and reactive wastes can be highly dangerous materials, and because different properties of different hazardous wastes can cause explosions, toxic fumes, or other hazards if they react with other incompatible materials, it is important to take appropriate precautions when dealing with these wastes. EPA did not include the specifics of how to separate wastes from potential sources of ignition or reaction or what kinds of reactions to avoid or how to document compliance. EPA believes that, due to the level of oversight at cleanup sites, these precautions will be adequately addressed, and recordkeeping will be addressed under new § 264.1(j)(13).

Section 264.18(a) does not make sense for remediation waste management sites, as contaminated areas are already located in a certain location, and if the remediation waste management site must be located in the area of contamination or areas in close proximity, there is not much choice about where to locate the remediation waste management site. Therefore, EPA has not included a performance standard for remediation waste management sites instead of § 264.18(a). However, EPA expects facility owners and operators to do their best to locate units a safe distance from faults whenever possible. EPA has required compliance with this standard under § 270.230(d)(4) when alternative locations are approved for remediation waste management.

Section 264.1(j)(7)

Section 264.1(j)(7) is the same requirement as the provisions of § 264.18(b) for floodplains, but re-written to enhance readability. Section 264.18(b) already provides some flexibility for locating within a floodplain (provided certain mitigating design or operating criteria are met). Today's performance standard allows the same flexibility.

Section 264.1(j)(8)

Section 264.1(j)(8) is the same requirement as § 264.18(c) for salt dome formations, salt bed formations, underground mines, and caves. This is also a RCRA statutory requirement at RCRA § 3004(b), and is the same as that in § 264.18(c), but is re-written to enhance readability. EPA believes that it is unlikely that the situation contemplated in this provision would arise during a remediation, but—because the requirement is statutory—EPA included it in today's rule.

Section 264.1(j)(9)

Section 264.1(j)(9) requires the facility owner/operator to have a construction quality assurance (CQA) program for all new surface impoundments, waste piles (except staging piles), and landfill units at the remediation waste management site according to the requirements in § 264.19. While this requirement is included under "General Facility Standards," EPA views the requirement as more akin to the unit-specific, technical standards that appear later in Part 264. Because EPA did not specifically solicit comment on the technical need for these requirements in a remedial context, or the possibility of more flexible alternatives, the Agency is not prepared at this point to revisit them. Therefore, EPA (consistent with the Agency's decision to leave Part 264 unit-specific requirements intact) has simply required compliance with the existing requirements in § 264.19. EPA notes, however, that these requirements do not apply to CAMUs or to already existing areas of contamination where waste is left in place.

Section 264.1(j)(10)

Section 264.1(j)(10) requires that, instead of Subpart C—Preparedness and Prevention (§§ 264.30 through 264.37) and Subpart D—Contingency Plan and Emergency Procedures (§§ 264.50 through 264.56), the facility owner/operator must have accident preparedness and prevention procedures and a contingency and emergency plan. These plans must: (1) ensure that the hazardous waste units at remediation waste management sites are designed, constructed, maintained, and operated to minimize the possibility of an emergency; and (2) minimize hazards to human health or the environment from any emergencies from treating, storing, and disposing of the hazardous remediation waste.

The performance standard embodies the requirements in § 264.31 and § 264.51. However, the Part 264, Subparts C and D, requirements include considerable detail about preparing for and responding to emergencies. In the cleanup scenario, this detail can become a problem because of the wide variety of activities taking place. Detailed requirements may be redundant with other cleanup requirements or simply unnecessary in many cases. For example, the cleanup program overseeing the remediation may already have procedures for notifying police, fire departments, and emergency personnel. In this case, the specific requirements in Part 264, Subparts C and D, would be redundant. Because of the wide variety of activities that may be taking place at a remediation waste management site, and the fact that these activities may often be short-term, EPA is allowing considerable flexibility in these preparedness requirements.

Section 264.1(j)(11)

New 264.1(j)(11) requires the facility owner/operator to designate one or more employees as an emergency coordinator. This is the same requirement as under § 264.55. This requirement makes it possible to implement the emergency

procedures in the contingency and emergency plan quickly and efficiently. In any circumstance involving treating, storing, or disposing of hazardous wastes, including hazardous remediation wastes, an emergency coordinator facilitates an effective response.

Sections 264.1(j)(12) and (13)

New § 264.1(j)(12) requires the facility owner/operator to have and implement a plan or plans to meet the requirements in subparagraphs (j)(2) through (j)(6) and (j)(9) through (j)(11). Thus, the facility owner/operator must have a plan to address waste analysis, security, inspection, training, waste compatibility, construction quality assurance, and accident preparedness. Also, new § 264.1(j)(13) requires the facility owner/operator to maintain records documenting compliance with subparagraphs (j)(1) through (j)(12).

In the existing Subparts B, C, and D, each of the individual sections has requirements to have plans and keep records. New §§ 264.1(j)(12) and (13) streamline those requirements by requiring only one plan and one set of records to cover the requirements instead of several plans and sets of records. Note, however, that the owner/operator is not limited to one plan; more than one plan would be perfectly acceptable if that is more appropriate for the particular site. These plans and records are necessary so that the Agency or the public can inspect the facility's compliance with these requirements. EPA believes that any well-managed remediation project will have plans and records of this type, and the Agency does not anticipate that sites with acceptable plans as part of their remedial activities will have to reformat or rewrite these plans solely to meet the performance standards of today's rule.

It is important to note that, in the same way as the current Part 264 standards apply to facilities, these new standards under § 264.1(j) apply at remediation waste management sites only to *hazardous* remediation waste management units, not to units that are not otherwise subject to Part 264 requirements, such as solid waste management units, or exempt hazardous waste units.[16]

In the proposed rule, the requirements in Subparts B and C were waived for media remediation sites (which in the final rule are remediation waste management sites) under RAPs. There was no mention that there could possibly be a media remediation site that was not permitted by a RAP. Under the final rule, EPA acknowledges that there may be remediation waste management sites that are permitted under a traditional RCRA permit, and so has not specified that the new part 264 requirements for remediation waste management sites are limited to those permitted under RAPs, but are available for all remediation waste management sites.

The arguments for alternative standards still apply, even without the limitation to RAPs. Remediation waste management sites will vary greatly between the different types of remediation wastes and activities taking place. They will be subject to cleanup requirements under the programs requiring cleanup at these sites, and often cleanup requirements and the traditional part 264 standards may be duplicative. Therefore, today's rule makes these new part 264 performance standards available for all remediation waste management sites.

VI. Application of RCRA Sections 3004(u) and (v), and § 264.101 to Remediation Waste Management Sites (§ 264.101(d))

EPA proposed that the 3004(u) and (v) facility-wide corrective action requirement (which is implemented through § 264.101) would generally not apply to facilities that obtain RMPs (see proposed § 269.40(d)). EPA has included in the final rule in § 264.1(j) that § 264.101 does not apply to remediation waste management sites. However, some remediation waste management sites may be part of a facility that is subject to a traditional RCRA permit because that facility also treats, stores, or disposes of hazardous wastes that are not remediation wastes. The rule does clarify that in these cases, Subparts B, C, and D, and § 264.101 do apply to the facility subject to the traditional RCRA permit. EPA also amended § 264.101 to add a paragraph (d) as follows: "(d) This section does not apply to remediation waste management sites unless they are part of a facility subject to a permit for treating, storing or disposing of hazardous wastes that are not remediation wastes." Subpart F § 264.101 facility-wide corrective action does not apply to remediation waste management sites.[17] This issue is more fully discussed in today's preamble section on the definition of remediation waste management site.

VII. Staging Piles (§§ 260.10 and 264.554)

A. Introduction and Background

Today's rulemaking establishes a new type of unit— the staging pile— which will provide needed regulatory flexibility for the facilitation of certain cleanup activities, while ensuring environmentally protective results. A staging pile is an accumulation of solid, non-flowing remediation waste (as defined today in 40 CFR 260.10) that is not a containment building and is used only during remedial operations for temporary storage at a facility. Today's regulations provide the Director with the authority to designate and approve staging piles for the purpose of storing remediation waste. In today's staging pile provisions, EPA has modified the remediation pile concept proposed in the HWIR-media proposal on April 29, 1996 in response to comments and also to correspond with other changes that have been made to the rule since its proposal.

A goal repeated throughout today's final rule is the achievement of environmental progress by facilitating the cleanup of as many contaminated sites as possible. The physical, economic, and technical limitations on the operation of a cleanup program often dictate that remediation wastes be temporarily stored on-site prior to completion of the remedial activity. The regulations establishing staging piles are designed to provide greater flexibility for decision-makers to implement protective, reliable, and cost-effective remedies. Staging piles will allow short-term storage to occur under circumstances that are protective of human health and the environment, without the extensive set of prescriptive standards that may be required for units in long-term use.

EPA believes that the additional flexibility provided by staging piles will improve the ability of program implementors and facility owner/operators to implement the most effective remedy for any given facility. For example, the use of staging piles will facilitate short-term storage of remediation wastes so that sufficient volumes can be accumulated for shipment to an off-site treatment facility, or for efficient on-site treatment. The Agency also anticipates, for example, that staging piles will facilitate treatment technologies such as chemical extraction by allowing on-site accumulation of sufficient treatment

[16] Of course, solid waste management units are subject to § 264.101 corrective action requirements at facilities subject to corrective action.

[17] The exclusion of remediation waste management sites from the definition of facility in today's rule is strictly limited to the definition of facility for purposes of corrective action, which is found in part (2) of the definition of facility. Remediation waste management sites are not excluded from part (1) of the definition of facility for other purposes.

volumes. In addition, staging piles should be useful since they will allow storage of wastes during the conduct of interim measures at a facility, while decisions on the final remedy are being formulated. Longer-term and more complex activities such as land-based treatment and permanent disposal will not be allowed in staging piles. As discussed more fully below, the Agency believes that these activities are more properly conducted in CAMUs (§ 264.552, promulgated on February 16, 1993; 58 FR 8658).

To facilitate the cleanup of sites contaminated with hazardous waste, the Agency believes that it must remove some of the obstacles to cleanup that exist in the RCRA Subtitle C program. These obstacles stem from the Subtitle C program's structure as primarily a "prevention oriented" program, with requirements that can act as a disincentive to protective remedies in "response-oriented" programs and can limit the flexibility of decision-makers to choose the most appropriate remedy at a site. Although LDRs and MTRs, established in RCRA Section 3004 (m) and (o) respectively, are appropriate to ensure proper ongoing management or permanent disposal of hazardous industrial waste, these sections of the statute often become a barrier to cleanup and overall environmental protection when applied to remediation waste.

Under current regulations, waste piles are considered land disposal units, and all hazardous wastes must therefore be treated to LDR standards before being placed into a waste pile. Large volumes of waste and contaminated media are often encountered during remedial actions and, because LDR and MTR often create a disincentive to exhuming hazardous remediation waste, EPA believes that allowing these wastes to be temporarily stored in on-site piles without meeting LDR and MTR standards will significantly further prompt remediation. Accommodating the need for temporary storage in piles without imposing LDRs and MTRs was also generally supported by the Committee authorized by the Federal Advisory Committee Act (FACA), representing the interests of industry, government and environmental groups, whose recommendations formed the basis for the proposed rule. In addition, the overwhelming majority of commenters that addressed the proposed remediation piles expressed support for a new type of unit that would allow for temporary storage in piles. A number of commenters emphasized that, even if EPA decided to retain the CAMU regulation, piles would be useful as a reasonable option for storage of materials awaiting transport or on-site treatment. Although many of the commenters also supported treatment in piles (which is not allowed under today's rule), the consensus of commenters was that the ability to operate some kind of temporary pile that would not trigger LDRs or MTRs would be beneficial to the remedial process by promoting efficient cleanups. Not one of the commenters disputed that LDRs and MTRs can be a barrier to increasing the rate and quality of cleanups. It was with the backing of this consensus that today's staging pile regulation was formulated.

Applying LDRs to temporary placement of remediation waste often makes it impractical to store hazardous remediation wastes in a pile pending its ultimate disposition, since this land placement generally may not occur prior to treatment to LDR standards. This essentially presents the remedial decision maker with three options:

- Leaving remediation waste in place;
- Storing it in a tank or container (or temporary unit, when available) prior to further management;
- Or seeking a CAMU.

Leaving waste in place is often an unsatisfactory solution due to the potential for future risks to public health, an outcome that EPA strives to discourage. Temporary unit or tank and container storage, although sometimes preferable in cases where the volume of waste is not particularly large, may cause delay and add complexity for sites with a large volume of waste, while providing little, if any, additional benefit to human health and the environment. CAMUs are also an option, but they have proved to be administratively complex for relatively short-term storage. The Agency therefore believes that the temporary storage in staging piles, subject to regulatory imposition of site-specific requirements and oversight, is preferable to the present regime, which encourages the continuing, unmanaged presence of remediation waste for an indefinite period of time.

Staging piles do not replace existing mechanisms that allow remediation waste managers to tailor RCRA requirements to accommodate site-specific circumstances. These include CAMUs, temporary units (§ 264.553), treatability variances (§ 268.44), and the Area of Contamination (AOC) policy.[18] Rather, staging piles provide an additional mechanism which may be used for short-term storage when, for example, the AOC policy does not apply and tank, container, or temporary unit storage is not feasible. Below is a comparison chart of the units most applicable to today's rulemaking:

Type of unit	Unit structure	Kind of waste	Time limit	Management activities
Staging Pile § 264.554	Pile	Remediation Waste	2 years plus one 180-day extension period.	Storage.
CAMU § 264.552	Designated Area or Unit within a Facility.	Remediation Waste	None	Treatment, Storage, and/or Disposal.
Temporary Unit § 264.553.	Tank or Container Storage Area.	Remediation Waste	1 year plus a 1 year extension period.	Treatment and/or Storage.
Area of Contamination.	Land-based Area of Contamination.	Remediation Waste	None	Storage, In-Situ Treatment, Disposal.

B. A Summary of Principal Changes From the Proposal

1. Changes From the Proposal

The staging pile regulation promulgated today is based on the remediation pile regulation proposed on April 29, 1996 in the HWIR-media proposal. Today's regulation differs from the remediation pile proposal in five main ways:

- The name is changed;
- Treatment in the pile is not allowed;
- "Temporary" is defined;
- A more specific performance standard is added; and

[18] Memorandum from Michael Shapiro, Director, Office of Solid Waste, Stephen D. Luftig, Director, Office of Emergency and Remedial Response, and Jerry Clifford, Director, Office of Site Remediation Enforcement, EPA to RCRA Branch Chiefs and CERCLA Regional Managers (March 13, 1996).

• The closure requirements are defined.

These changes, as well as other issues and responses to major comments, are discussed below.

First, EPA changed the name from "remediation piles" to "staging piles" to make it clear that these piles are to be used only for the temporary storage of remediation wastes, and not for other remediation activities such as treatment.

Second, the primary difference between the staging pile regulation finalized today and the proposed remediation pile regulations is that today's rule does not allow for treatment in the pile. The Agency recognizes the effectiveness of many treatment approaches relying on engineered piles, and does not wish to discourage their use, where appropriate. At the same time, one commenter vigorously opposed treatment in remediation piles. The Agency acknowledges that some forms of "treatment," (for example, air stripping, or in some cases, biological treatment) may raise concerns with regard to air emissions. Therefore, for today's rule, EPA has restricted treatment to units other than staging piles, such as CAMUs. The CAMU decision criteria, as applied through the overseeing agency designation process, provide a way to ensure that the activities that occur in a CAMU have more protective design and operating controls than what is called for in the case of the short term, generally lower risk activities, allowed to take place in staging piles. The CAMU regulation includes, for example, a specific ground water monitoring requirement and an associated performance standard (40 CFR 264.552(e)(3)). Furthermore, the designation of a CAMU through a permit modification requires the more extensive Class 3 procedures while today's staging pile regulation requires Class 2.

In addition, the temporary unit regulation (§ 264.553, promulgated on February 16, 1993; 58 FR 8658) allows for treatment, as well as storage, of hazardous remediation waste in tanks or containers.[19] Like the CAMU rule, the regulations governing temporary units are designed to address the risks posed by treatment in the remedial setting. First, temporary units are containerized, rather than land-based, and therefore generally pose less risk of releases or cross-media transfer than do the land-based staging piles. In addition, temporary units may only operate for one year unless they receive an extension. The temporary unit extension, which can be granted once for one year, can only be provided after a site-specific determination is made by the Director that continued operation of the unit will not pose a threat to human health and the environment and is necessary to ensure timely and efficient implementation of remedial actions at the facility (§ 264.553(e)). The temporary unit time limitation is more stringent than the time limit provided in today's staging pile regulation. In general, the relatively short amount of time allowed for treatment in a temporary unit addresses the greater risk to human health and the environment that may arise through treatment activities.

Third, unlike the proposal, the final rule defines the temporary nature of staging piles as a two-year lifetime for the pile. At the end of the operating term for the staging pile (which can be designated by the Director as any amount of time up to two years), all hazardous remediation waste and residues in the pile must be removed unless an operating term extension (of up to 180 days) is granted by the Director.

Fourth, the Agency believes that the process and analysis necessary for the designation of a staging pile should be more straightforward than that needed for a CAMU due to the lower level of potential risks presented from the nature of activities that can take place in a staging pile, and EPA has designed today's regulation accordingly. Because staging piles are intended for the temporary storage of remediation waste, they will complement CAMUs and temporary units by providing program implementors and facility owners/operators with an intermediate option to use in a number of circumstances, such as when temporary units do not have the capacity for the chosen remedial strategy, but a CAMU is not necessary.

A modest difference between the proposed remediation piles and the staging piles promulgated today is that the Director will have more than the temporary unit decision factors (as proposed) to guide the establishment of design and operating criteria for a staging pile. In response to commenters' requests, today's rule includes a more specific performance standard, set out in § 264.554(d)(1), which expands upon the temporary unit decision factors to assist the Director in determining appropriate staging pile design and operating standards based on conditions at a particular site. This performance standard will be discussed in detail in the section of this preamble dealing with the staging pile performance criteria. The Agency's goal in providing this performance standard is to ensure that the design criteria used for a staging pile correspond to site- and waste-specific characteristics. The proposed regulation for remediation piles included only a reference to the decision factors for temporary units as a guide to the Director in setting case-by-case standards for remediation piles. Today's staging pile regulatory text includes language similar to the temporary unit decision factors, as well as a performance standard, both of which are incorporated directly into the regulation to add more predictability and assurance of protectiveness into the process of designating a staging pile. Clear expectations for performance should provide a beneficial focus for both the program implementor and the facility owner/operator.

Fifth, at the end of the staging pile's operating term or extension period, the staging pile is subject to one of two sets of closure requirements based on whether the staging pile has been located on either a previously contaminated or a previously uncontaminated area of the facility. If the pile has been located in an uncontaminated area of the site, any remaining contamination (containment system components, subsoils, etc.) must be decontaminated according to the clean closure standard for waste piles in § 264.258(a) and the closure performance standard of § 264.111. (For interim status facilities, the standards to be used are located in § 265.258(a) and § 265.111.) On the other hand, if the pile has been located on a previously contaminated area of the site, all remediation waste, contaminated containment system components, and structures and equipment contaminated with waste and leachate must be removed or decontaminated within 180 days after the expiration of the operating term of the staging pile. Also, the facility owner/operator must decontaminate contaminated subsoils in a manner and pursuant to a schedule that the Director determines will protect human health and the environment. These closure requirements were added to the final rule in response to comments pointing out that despite mentioning that "clean closure" was a requirement in the proposed rule preamble, the Agency had not included this language in the rule text.

2. Consistent With the Proposal

In keeping with the proposal, staging piles will be able to accept all types of solid, non-flowing remediation waste, rather than only hazardous

[19] Using the temporary unit regulation, the Director imposes alternative requirements, based on site-specific conditions, for temporary tank or container units used for the treatment or storage of remediation waste during a remedial action.

contaminated media. Like CAMUs and temporary units, staging piles cannot be used to manage hazardous waste from ongoing industrial processes, commonly referred to as "as-generated" hazardous waste. In addition, as proposed, a staging pile may be used only for the storage of "solid, non-flowing" hazardous remediation waste. Flowing wastes are inappropriate for staging piles because of the possibility of releases and run-off of these wastes.

Also unchanged from the proposal is the provision that staging piles will not be considered land disposal units and therefore placement of remediation waste into a staging pile will not trigger LDRs or applicable MTRs (RCRA section 3004(o). However, assuming the waste is subsequently managed in a way that triggers these requirements, LDRs and MTRs will ultimately apply to the remediation waste.

C. What Is a Staging Pile? (§ 264.554(a))

Section 264.554(a) states that "a staging pile is an accumulation of solid, non-flowing remediation waste (as defined in 40 CFR 260.10) that is not a containment building and is used only during remedial operations for temporary storage at a facility. A staging pile must be located within the contiguous property under the control of the owner/operator where the wastes to be managed in the staging pile originated. Staging piles must be designated by the Director according to the requirements in this section." This provision includes the definition of staging pile from § 260.10 which is discussed in the definitions section of this preamble. This provision also limits where the owner/operator may locate a staging pile to within the contiguous property under the control or the owner/operator. This limitation was originally in the definition of remediation waste, however, as discussed in the definitions section of this preamble, EPA believed this limit was more appropriate in the regulatory text rather than in definitions. Finally, this provision specifies that staging piles must be designated by the Director according to this section. Without designation as a staging pile, a pile will be considered a "waste pile" under § 264.250, and therefore subject to the requirements in that section (including LDRs and applicable MTRs). Since today's staging pile regulation is not self-implementing, the Director must incorporate the provisions for a staging pile into a permit (either traditional permit or RAP), closure plan, or order in which it is designated.

In keeping with the proposal, staging piles will be able to accept all types of solid, non-flowing remediation waste, rather than only hazardous contaminated media. Despite criticism from one commenter who stated that only media should be allowed to be managed in a remediation pile, not other forms of remediation waste, the Agency has retained this approach because non-media wastes can be generated in very high volumes creating remedial obstacles similar to those created by large volumes of hazardous contaminated media. In support of the proposed approach, another commenter argued that because contaminated media is often "found in the same shovel" as sludges and debris it would be both difficult and inefficient to attempt to regulate these differently. At sites where this occurs, staging piles would likely not facilitate an appropriate remedy if limited to accepting only media.

One commenter suggested that the Agency should encourage the management of sludges and other non-media remediation wastes in tanks and containers instead of piles. EPA believes that the Agency has at least partially addressed the commenter's concern by limiting the use of staging piles to non-flowing wastes. This restriction serves to eliminate some sludges as well as other problematic wastes. EPA also emphasizes that tanks and containers can provide important protection in certain circumstances (for example, to address run-off concerns), and the Agency recommends the use of these units where appropriate. At the same time, EPA disagrees with the commenter's premise that a waste's status as "media" or "non-media" is particularly relevant to the kind of unit that waste should be stored in. The concentration of hazardous constituents, their leachability, and their volatility are far greater concerns. More generally, EPA believes that the decision on which specific remediation unit is most appropriate at a given cleanup depends on numerous site-specific factors, and that this decision should be made through the site-specific permit process. EPA has issued extensive guidance on the management of remediation waste, both under RCRA and CERCLA (including the Best Management Practices Guidance developed in conjunction with this rule), which site managers and regulators can use in making their decision. EPA, however, has concluded that more specific direction on this issue is not appropriate or necessary in today's rule.

Finally, as mentioned above, the final rule provides that staging piles may be used only for storage of remediation wastes. "Treatment" will not be permitted primarily for the reasons outlined in the "A Summary of Changes from the Proposal" section of this preamble. To summarize, treatment was a particularly sensitive issue for one commenter and EPA acknowledges that treatment, in some cases—such as air stripping—may involve higher levels of risks than typical storage. Furthermore, treatment, especially biological treatment, is often a long-term activity. Since staging piles are to be temporary, they will not necessarily require fixed controls such as leachate collection and removal systems, which are more appropriate for long-term use. Instead, staging piles should be relatively easy to create and dismantle given their temporary nature and to expedite remedial activities by providing the opportunity for short-term storage. Given these considerations, EPA has decided that treatment should occur in units that provide more specific safeguards; that is, treatment units meeting 40 CFR Part 264 requirements, including those units specifically designed for treatment in the cleanup context (for example, CAMUs and temporary units).

Although many commenters supported both treatment and storage in temporary piles, no commenter suggested that, without including the possibility of treatment, the piles would not facilitate the remedial process. Rather, a number of commenters directly supported the need for temporary storage of remediation waste in piles, without LDR or MTR applicability, before subsequent management. One commenter specifically stated that EPA should limit these piles to storage only, citing the increased potential for emissions to the air and other pathways if treatment were allowed. The Agency believes that today's staging pile regulation adequately addresses the commenters' concerns.

D. How Is a Staging Pile Designated? (§ 264.554(b))

Staging piles are subject to a few key limitations. First, today's rule specifies that the facility owner/operator may use a staging pile to store hazardous remediation waste (or remediation waste otherwise subject to LDRs) [20] only if you follow the standards and design criteria the Director has designated for that staging pile. This language is an outgrowth of the language proposed in § 264.554(a), which provided that a

[20] For a discussion of situations where remediation wastes that are no longer "hazardous" may nonetheless remain subject to LDRs see 63 FR 28617–28620 (May 26, 1998).

remediation pile would only be used for the storage of remediation waste based on design and operating standards the Director had designated on a case-by-case basis. Both versions of this language make it clear that remediation piles would not be self-implementing and would have standards that must be designated by the Director. The Agency received no adverse comments on this aspect of the proposal, and so has only re-worded this requirement for readability in the final rule.

Second, the final rule states that the Director must designate the staging pile in either a permit or, at an interim status facility, in a closure plan or order (consistent with §§ 270.72(a)(5) and (b)(5)). Consequently, staging piles can also be approved under a RAP as finalized by today's rule in Part 270 (because a RAP is a form of a permit). The proposed rule would have required remediation piles to be designated in a "permit or order" (proposed § 264.554(a)). Commenters did not question this approach; however, today's rule includes one clarifying change to the proposed regulatory language, as well as an additional mechanism for designating a staging pile.

The Agency adds a clarifying change to today's final rule language which specifies that staging piles may be designated in orders at interim status facilities only. In the proposal, the Agency did not specify when orders could be used to designate a staging pile. EPA intended that the same mechanisms be used under today's rule to designate staging piles as can be used under the current regulations to designate other types of units. At most facilities, it is necessary to receive a permit to implement hazardous waste management units. However, at interim status facilities, units can be implemented according to §§ 270.72(a)(5) and (b)(5) when required under an order. EPA, therefore, has included the language in the final staging pile rule clarifying that orders may be used to designate a staging piles at interim status facilities to be consistent with how other types of units can currently be designated.

In today's rule EPA has included an additional mechanism—the closure plan—for the designation of staging piles at interim status facilities, since the Agency believes that staging piles will be useful to facility owner/operators where remediation is conducted during the closure of waste management units. EPA believes it is appropriate to allow staging piles to be designated through closure plans since final closure plans are enforceable and because the closure plan approval process, both at permitted and interim status facilities, incorporates sufficient public participation. In addition, EPA believes it is also appropriate to make closure plans available for the approval of staging piles at interim status facilities because an order may not always be suitable. For example, the owner/operator of an interim status facility may wish to conduct cleanup at a regulated unit and achieve closure by removal even when he is not required to do so under an order. As part of the closure, the facility owner/operator may find it most practical to stage the removed waste in a pile, before it is moved to an on or off-site treatment unit. In this case, the facility owner/operator can include staging piles, if necessary for voluntary cleanup, into his closure plan.

At a permitted facility, a closure plan is a part of the original permit, and so is approved following the traditional permit approval process. Modifications to closure plans are incorporated into permits as permit modifications and follow the appropriate permit modification procedures found in § 270.42. Because staging piles require a Class 2 permit modification, as discussed in the "How may my existing permit (for example, RAP), closure plan, or order be modified to allow the use of a staging pile?" section of today's preamble, a staging pile incorporated into a closure plan modification would also require at least Class 2 procedures. Because staging piles can be approved through permits, it follows that a staging pile can be designated in a closure plan at a permitted facility. Nonetheless, EPA wanted to make this clear, and therefore has explicitly stated that staging piles can be designated in closure plans.

At interim status facilities, the process used to gain approval of a closure plan also requires an opportunity for public notice and comment. Specifically, these closure plans are approved according to the requirements in § 265.112(d). These requirements include the opportunity, available through a newspaper notice, for the facility owner/operator and the public to submit written comments on the closure plan and request modifications to the plan within 30 days of the date of the notice. In addition, the Director can hold a public hearing to clarify any issues regarding the closure plan. Therefore, approved closure plans can be used to designate staging piles under today's rule.

The regulations regarding staging piles are expected to be applicable or relevant and appropriate requirements (ARARs) for the remediation of RCRA hazardous wastes at CERCLA sites. In these cases, staging pile requirements would be incorporated into CERCLA decision documents rather than permits, closure plans, or orders. This section of the rule also includes language to make it clear that a staging pile only need be designated in a permit (for example, a RAP), closure plan, or order when hazardous remediation waste (or remediation waste otherwise subject to LDRs) is being stored. Non-hazardous remediation waste or remediation waste that is no longer subject to LDRs can, of course, be stored in a pile without being designated as a "staging pile."

The third provision of new § 264.554(b) is the provision that the Director must establish conditions in the permit, closure plan, or order that comply with paragraphs (d)–(k) of the staging pile regulation. This portion of the regulation simply serves to affirm that the provisions of the staging pile regulation will be incorporated by the Director into the designating mechanism for the pile.

E. What Information Must I Provide To Get a Staging Pile Designated? (§ 264.554(c))

Section 264.554(c)(1) sets out the requirement that the facility owner/operator must provide information to the Director that will enable him to designate a staging pile according to the regulatory requirements in today's rule. The Agency does not believe that the evaluation of these performance criteria will generally involve detailed quantitative analyses; the level of detail needed by the Director to make decisions on appropriate design and operating criteria will vary case-by-case depending on site-specific factors, such as proximity to points of exposure, physical and chemical characteristics of the waste, and hydrogeological conditions at the site. The Agency anticipates that the information contained in the RCRA Facility Investigation or an analogous document will contain most of the information necessary to designate a protective staging pile. The Agency's intention with this portion of the regulation is not to create a burdensome reporting requirement, but rather to authorize the Director to require sufficient information to enable him to designate a staging pile.

Today's rule also requires a certification by an independent, qualified, registered professional engineer for technical data, such as design drawings and specifications, and engineering studies, unless the Director determines, based on information provided by the facility owner/operator, that this certification is not necessary to

ensure a staging pile that is protective of human health and the environment (§ 264.554(c)(2)). This certification should be incorporated into any documentation necessary for the permit, closure plan, or order in which the staging pile is designated. The Agency's intention is not to create an obstacle for the facility owner/operator, but rather to provide assurance that the technical information is accurate, has been prepared by technically competent personnel, and can be relied upon by the Director. If the Director believes that this certification is unnecessary, such as in a case where the staging pile design is to be very simple due to a short term of storage or relatively low constituent concentrations, the Director may waive the need for the professional engineer certification. Finally, RCRA § 264.554(c)(3) enables the Director to request any additional information that he determines is necessary to protect human health and the environment. EPA expects that this provision will be used infrequently, but considers it important to ensure that all pertinent information is available to the Director when making a decision on designating a staging pile or staging pile extension. Because this is not intended to be a burdensome provision, the Director should restrict any information request to that which is necessary to protect human health and the environment. The Agency intends this portion of the regulation to reinforce the Director's ability to request additional information to ensure that, for example, staging piles are designed so as to prevent or minimize releases of hazardous wastes and hazardous constituents into the environment (§ 264.554(d)(1)(ii)).

Although an information requirement was not included explicitly in the proposed remediation pile regulation, EPA believes that the Director's need for information to designate a protective staging pile was a principle embedded in the proposal. The proposed remediation pile regulation was centered around providing, both the regulatory agency and the facility, site-specific flexibility with the goal of matching the risk-based regulatory requirements with the conditions at a particular site. This flexibility can only be granted when there is an exchange of accurate and sufficient information between the facility and the regulatory agency. Moreover, under the proposal, the Director could, of course, have denied a request to designate a remediation pile if he did not have sufficient information to make a sound protectiveness judgement, so his ability to obtain additional information was implicit. Therefore, to clarify this expectation, today's § 264.554(c) explicitly defines what kind of information must be provided to the Director to enable him to make the findings mandated by the regulations.

F. What Performance Criteria Must the Staging Pile Satisfy? (§ 264.554(d))

1. Performance Standards for Staging Piles (§ 264.554(d)(1))

Many commenters requested that the Agency avoid prescriptive national standards that would not take into account site-specific considerations and therefore would be likely to over or under estimate the exact design and operating requirements needed at any given facility. There were, however, persuasive comments suggesting that a performance standard for staging pile design and operation is necessary, in addition to the decision factors, to better guide the program implementor and facility owner/operator in setting site-specific design and operating criteria that will protect human health and the environment. Consequently, today's rule finalizes a performance standard that, in combination with a specific time limit for the piles, will ensure that staging piles are protective without sacrificing the flexibility that helps make staging piles an implementable option at facilities.

The Agency proposed a standard for remediation piles that reads "the Director may prescribe on a case-by-case basis design and operating standards for such units that are protective of human health and the environment." In response to comments suggesting a more specific performance standard for staging piles, the Agency has promulgated today's performance standard for staging piles. The staging pile performance standard is based on the principles underlying the staging piles provisions, as well as provisions that were already included in the proposed remediation pile regulation. In designating the performance standard the Agency looked to the standard in the CAMU rule as guidance (§ 264.552(c)).

The performance standard finalized in today's rule (§ 264.552(d)(1)) supplements the decision factors for temporary units as proposed. The Agency believes that finalizing more than the decision factors provides the designating authority with more complete guidance for the establishment of protective design and operating criteria. Under the rule, the decision factors are elements that must be considered when establishing standards for the staging pile. The performance standard is the Agency's overall requirement for the construction and engineering of the unit. There were some commenters that suggested the Agency promulgate specific technical requirements for the staging piles. These comments appear to be based on the concern that the proposed remediation piles, which allowed treatment and longer term storage, did not have baseline standards. EPA believes that today's staging pile regulation, which allows short-term storage only, would not be improved by prescriptive standards due to the relatively low risk posed by the piles and the requirement that the Director take into account site-specific conditions in setting standards.

The performance standard for staging piles has three parts. First, "the staging pile must facilitate a reliable, effective and protective remedy." (§ 264.552(d)(1)(i)) Second, "the staging pile must be designed so as to prevent or minimize releases of hazardous wastes and hazardous constituents into the environment, and minimize or adequately control cross-media transfer, as necessary to protect human health and the environment (for example, through the use of liners, covers, run-off/run-on controls, as appropriate)," (§ 264.552(d)(1)(ii)). Finally, "the staging pile must not operate for more than two years, except when the Director grants an operating term extension under paragraph (i) (entitled "May I Receive an Operating Extension for a Staging Pile?") of this section. You must measure the two-year limit, or other operating term specified by the Director in the permit, closure plan, or order, from the first time you place remediation waste into a staging pile. You must maintain a record of the date when you first placed remediation waste into the staging pile for the life of the permit, closure plan, or order, or three years, whichever is longer," (§ 264.552(d)(1)(iii)).

Therefore, in designating a staging pile, the first consideration of the Director will be whether the pile will facilitate the implementation of a reliable, effective, and protective remedy (§ 264.554(d)(1)(i)). This criterion is designed to require a site-specific showing that the premise behind allowing for these piles (see 61 FR 18831) is satisfied at each site where they are used. By including this criterion, the Agency is emphasizing that the goal of today's staging pile regulation is not to undercut the protectiveness of the existing Subtitle C regime, but rather to assist in the execution of reliable, effective, and protective remedies.

The second criterion requires that activities associated with the design and

operation of the staging pile must prevent or minimize releases of hazardous wastes and hazardous constituents into the environment, and minimize or adequately control cross-media transfer, as necessary to protect human health and the environment (§ 264.554(d)(1)(ii)). This portion of the performance standard is an outgrowth of the proposed remediation pile regulation, because it simply adds specificity to the proposed rule's requirement that the standards must be "protective of human health and the environment" (proposed § 264.554(a)) and that the "Director shall specify in the permit or order . . . any requirements for control of cross-media contaminant transfer" (proposed § 264.554(d)). Section 264.554(d)(1)(ii) also builds upon the fourth and sixth decision factors mentioned later in this section of the preamble (§ 264.554(d)(2)(iv) and (vi)) which require the Director to consider the potential for releases from the unit and the potential for human and environmental exposure when establishing standards for the staging pile). A similarly worded performance standard was suggested by one of the commenters on the proposal. The Agency agrees with the commenter that it is advantageous to include a provision directly in the performance standard for staging piles, as is finalized in today's rule. The Agency emphasizes that minimizing or adequately controlling cross-media transfer (for example, transfer to air through volatilization or particulate matter) is vital to the protectiveness of a staging pile.[21]

This second criterion is also included to ensure that there will be no unacceptable risks created by the storage of hazardous remediation waste in a staging pile either during the remedial activities or afterwards. Liners, covers, and run-off/run-on controls are all examples of design stipulations that might be appropriate in specific circumstances, and these examples have been included directly in the regulation to assist the Director. These examples, however, are in no way a definitive list of possible design stipulations that could be included in the permit, closure plan, or order, nor would they always be necessary. Depending on site-specific circumstances, ground water and air monitoring equipment may also be appropriate to ensure adequate attention to cross-media transfer from a staging pile. However, the Agency anticipates that this monitoring equipment will often be installed as part of the overall cleanup at the site rather than for the staging pile itself. In addition to the type of substantive standards and design criteria described above, the rule also allows the Director to specify operating requirements for the staging pile by providing that the Director must include "standards." Examples of these operating requirements include appropriate inspection schedules and recordkeeping.

The Agency believes that the Director will be able to make a determination of what design and operating requirements are necessary to prevent or minimize releases from the staging pile based on information from the facility owner/operator, site assessments, past overseeing agency experience, and standard good engineering practices. If the facility owner/operator does not provide the information necessary for an informed decision to be made regarding what requirements are protective, the staging pile should not be designated by the Director.

One commenter suggested a "no significant migration" standard be included in the rule. The Agency agrees that a staging pile should be designed to prevent any significant additional migration of hazardous waste and hazardous constituents. However, EPA did not include this precise language in the final rule because EPA believes that the requirement that a staging pile be designed so as to prevent or minimize releases of hazardous waste and hazardous constituents into the environment and minimize or adequately control cross-media transfer will have an equivalent effect.

The final performance criterion (§ 264.554(d)(1)(iii)) limits the use of staging piles to two years, unless a 180-day extension is provided, and establishes a recordkeeping requirement. Refer to the discussion later in this section on time limits for details of this provision.

2. Decision Factors for Staging Piles (§ 264.554(d)(2)

In the proposal, EPA requested comment on whether to prescribe any specific design or operating standards for remediation piles or to allow the Director to establish requirements on a case-by-case basis using the decision factors specified for temporary units. The Agency's intent to use the slightly modified temporary unit decision factors, as expressed in the proposal, received no negative comments and consequently they are finalized in today's rule. The Agency continues to believe that these decision factors are reasonable and will result in sound decisions for staging pile design. Specifically, the rule requires the Director to consider the following factors in establishing the standards and design criteria for the staging pile:

(1) Length of time the pile will be in operation;

(2) Volumes of wastes to be stored;

(3) Physical and chemical characteristics of the wastes to be stored in the unit;

(4) Potential for releases from the unit;

(5) Hydrogeological and other relevant environmental conditions at the facility which may influence the migration of any potential releases; and

(6) Potential for human and environmental exposure to potential releases from the unit.

EPA believes that these considerations will help ensure that the staging pile will be designed to protect human health and the environment.

G. May a Staging Pile Receive Ignitable, Reactive, or Incompatible Remediation Wastes? (§ 264.554(e))

The final rule contains a new provision, § 264.554(e), that addresses the handling of ignitable or reactive remediation wastes in a staging pile. This new provision is a modification of § 264.256, the special requirements for ignitable and reactive wastes in a waste pile. Section 264.554(e) prohibits placement of ignitable or reactive remediation waste into a staging pile unless the waste is made non-ignitable or non-reactive as these characteristics are defined in § 261.21 and § 261.23, while also complying with § 264.17(b) (which lists reactions that precautions must be taken to prevent) or the waste is managed in such a way that it is protected from materials or conditions which may cause it to ignite or react. EPA expects that non-flowing wastes encountered during cleanup will rarely be ignitable or reactive.

When they are, however, they clearly require continuing protection from conditions which may cause them to ignite or react. An important factor to note is that mixing of wastes in a staging pile is relatively common when storing large volumes of waste. Unless these wastes are rendered non-ignitable or non-reactive, the facility owner/operator may find it difficult to protectively manage these wastes in a staging pile. Reactive wastes may be particularly difficult to manage since a staging pile can be directly exposed to the

[21] Consulting the Agency's Best Management Practices (BMPs) for Soil Treatment Technologies (EPA530-R97-007, May 1997) guidance document, which was developed to provide guidance on how to identify and minimize the potential for causing cross-media contamination during implementation of cleanup technologies for contaminated soils or solid media, is recommended to assist in ensuring that this portion of the performance standard is achieved.

environment. The Agency will allow the management of ignitable or reactive wastes in a staging pile, as long as the wastes are protected from the material or conditions which may cause them to ignite or react. The modification to § 264.256 makes the provision applicable to remediation waste in staging piles rather than hazardous waste in waste piles and enhances its readability. Also, the language modified from that of § 264.256 does not allow waste to be treated, rendered, or mixed immediately after placement in a staging pile, although this language is included in the waste pile regulation (§ 264.256(a)).

Since treatment is not permitted in a staging pile, this portion of the waste pile regulation was considered by the Agency to be inappropriate and therefore was not included in today's rule.

H. How Do I Handle Incompatible Remediation Wastes in a Staging Pile? (§ 264.554(f))

The final rule also contains a new provision, (§ 264.554(f)), that deals with the handling of incompatible wastes in a staging pile. This provision is a modification of § 264.257, the special requirement for incompatible wastes in waste piles. The modification makes the provision applicable to remediation waste in staging piles rather than hazardous waste in waste piles and enhances its readability. The potential dangers from the mixing of incompatible wastes include, but are not limited to, extreme heat, fire, explosion, and violent reaction. Clearly, the potential impacts on human health and the environment which could result from these conditions must be avoided.

To this end, the regulation includes a provision that staging piles should not contain incompatible wastes unless precautions are taken to avoid the reactions listed in § 264.17(b). The regulation also states that if remediation waste in a staging pile is stored near incompatible wastes, precautions must be taken to ensure that these materials are protected or separated from one another. Finally, for the same reasons as those provided above, today's regulation states that remediation waste must not be piled on the same base where incompatible wastes or materials were previously piled, unless the base has been decontaminated sufficiently to ensure compliance with § 264.17(b).

Although these provisions were not included in the proposed rule, EPA believes that it is reasonable to include them in today's final rule because the provisions do not create an additional regulatory burden for either the Director or facility owner/operator. The Director would normally examine the possibility of risk from ignitable, reactive, or incompatible wastes being placed in a pile before designating a pile, so these provisions simply serve to ensure that this caution will be exercised in every case.

I. Are Staging Piles Subject to Land Disposal Restrictions (LDR) and Minimum Technological Requirements (MTR)? (§ 264.554(g))

Like placement of remediation waste into CAMUs, placement of remediation wastes into staging piles will not trigger RCRA LDRs. Because staging piles are generally a subset of units that, absent today's rule, would be CAMUs, this provision is based on the Agency's view, fully explained in the preamble to the CAMU rule, that placement into these units does not constitute "land disposal" under RCRA section 3004(k) (See 58 FR 8658, 8662 (February 16, 1993)). As stated in that preamble, EPA believes this interpretation is reasonable "since remedial areas are not a listed regulatory unit under 3004(k), because Congress recognized that the application of LDRs to remediation wastes might require a different framework than that developed for the application to as-generated wastes, and, . . . because the direct application of preventive standards to remediation wastes is often inappropriate and counterproductive." (See 58 FR 8662). Also, as explained in the preamble to the CAMU rule, staging piles would not be subject to the MTRs under section 3004(o), because the pile is not a land disposal unit subject to those requirements.

J. How Long May I Operate a Staging Pile? (§ 264.554(h))

The remediation pile provisions, as proposed, did not set limits on the amount of time that remediation waste could be in the pile, other than to say that these piles would be "temporary" and only available for use during remedial operations. The proposal requested comment on whether time limits and renewals that prescribe the lifetime of remediation piles should be set at the national level.

Only one commenter agreed with the proposal that EPA should not set a specific limit, but instead allow the staging pile to operate indefinitely.

All other commenters on this issue recommended that EPA set a specific time limit for operation of staging piles. Suggestions ranged from six months to three years, however, the majority of commenters recommended two years. Several commenters also suggested that EPA allow a limited extension of the time limit when necessary. Suggestions for extensions ranged from six months to three years.

EPA has decided to impose a two-year time limit on staging piles, with the opportunity to obtain a six month extension, when necessary. EPA agrees with commenters who feel that there is a need to define "temporary" in the context of staging piles. The Agency also agrees with commenters who argued that a two-year time limit is reasonable for the staging piles and therefore has promulgated this limit in today's rule. The Agency does not believe that staging piles should exist indefinitely or with an undefined "temporary" lifetime because these units might not be designed in a manner protective enough for the "de facto" disposal that might occur. In other words, if "temporary" was left as the only standard, the storage in staging piles could take place for such a long period of time that the risks to human health and the environment would be essentially equivalent to a disposal scenario, which the staging piles standards in today's rule are not designed to address. The Agency does not believe it is necessary to create standards in today's rule to accommodate a long-term storage scenario because long-term storage and disposal can be conducted in CAMUs and, as discussed below, the operations the Agency intends to accommodate in this rule—staging—can generally be conducted during the 2-year time period.

EPA believes that a time limit that generally corresponds to the length of time needed for staging or storage activities at a site is appropriate. EPA consulted with program implementers at the Regional and State level who agreed that 2 years was an appropriate limit for staging piles.

In response to commenters' suggestions, EPA has decided to allow a 6-month extension for staging pile operation when necessary (see the preamble discussion for § 264.554(i)). EPA again consulted with Regional and State program implementers who agreed that six months was an appropriate amount of time to allow for an extension. As discussed below in section K, EPA believes that six months provides an adequate balancing of interests in providing flexibility while ensuring that staging piles are indeed temporary.

In practice, a facility owner/operator could request, or the Director could designate on his own initiative, a shorter lifetime for a staging pile and consequently the Director could set design and operating requirements that

would take into account this shorter period of storage. The Director is encouraged to establish a duration shorter than two years, when appropriate.

Longer-term use of a staging pile, however, is much more similar to "disposal" activities which provide a greater opportunity for releases. As stated in the "Summary of Principal Changes from the Proposal" section above, the Agency has concluded, for the purposes of today's rule, that land-based treatment activities, long-term storage, and permanent disposal are more appropriately addressed using the CAMU provisions in § 264.552.

One commenter suggested that a two-year time limit on staging piles is also consistent with the limits on the storage of prohibited wastes under § 268.50, EPA's regulations implementing RCRA section 3004(j).[22] In response to this comment, which highlighted the relationship between the staging pile provisions and § 268.50, the Agency today is also amending § 268.50 to expressly provide that storage of hazardous wastes in approved staging piles is not subject to the prohibition contained in that section (§ 268.50(g)).

Section 268.50 provides that hazardous wastes prohibited from land disposal may not be stored unless certain conditions are met. For treatment, storage, or disposal facilities, those conditions are that this storage takes place in tanks, containers or containment buildings and is "solely for the purpose of accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal." In addition, dates of accumulation generally must be clearly marked and recorded.

EPA believes an express exemption from these requirements (as opposed to amending them to add staging piles to the list of units in which storage may conditionally take place) will eliminate the need for regulatory agencies and site owner/operators to engage in unnecessarily duplicative factual findings, because the concerns underlying the requirements in § 268.50 (that is, that storage of prohibited wastes only occur "as necessary to facilitate proper recovery, treatment, or disposal") will necessarily be satisfied during approval of the staging pile. Specifically, as discussed above, by imposing a two-year time limit on staging pile operation, today's rule is consistent with the time limits in § 268.50 (and, by way of analogy, the two-year cap on case-by-case capacity variances under RCRA section 3004(h)(3)). In addition, staging piles will only be used during remediation, a process that is specifically designed to "facilitate proper recovery, treatment or disposal" of wastes. The final staging pile rule promulgated today will further ensure this result, since it specifically requires that staging piles only be approved where they will "facilitate the implementation of a reliable, effective and protective remedy."

The final rule also makes clear that the operating term limit (§ 264.554(h)) is to be measured from the initial placement of remediation waste in a staging pile. The closure process must begin at the end of the operating term or extension term (if approved by the Director) for the staging pile. EPA believes that, to make this requirement implementable, a record must be kept which defines the date of initial placement of waste into the staging pile. Therefore, EPA has included a provision in the staging pile performance standard (§ 264.554(d)(2)(iii)) that requires that a record of initial placement date be kept by the facility owner/operator for the life of the permit, closure plan, or order or for three years, whichever is longer. This will aid in the enforcement of staging pile time limits by providing a specific date by which to measure how long remediation waste has been stored in the pile. The three-year period used in today's rule as the minimum period of record retention, is in keeping with the recordkeeping requirement of "at least three years" found in § 270.30(j) (which outlines the monitoring and recordkeeping regulations applicable to all permits) and a number of other recordkeeping requirements in RCRA regulations (for example, § 262.40).

K. May I Receive an Operating Term Extension for a Staging Pile? (§ 264.554(i))

In the proposal, the Agency requested comment on whether any time limits placed on remediation piles should be renewable. In response, an operating term extension period was suggested by a number of commenters. Recommendations for the length of this extension period varied from six months to three years. The Agency agrees with these commenters in that it can be difficult to judge in advance the amount of time that will be necessary to store remediation wastes in furtherance of a remedy. EPA recognizes that in some cases unforeseen circumstances may dictate that a staging pile remain in service beyond the limit originally set in the permit, closure plan, or order. For example, unexpectedly large volumes of waste may need to be handled to complete the remedy, or the remedial process may be slowed by forces beyond the control of the facility owner/operator or Director. An extension would be appropriate, for example, when wastes being stored in a staging pile are to be taken to an off-site facility, but that facility no longer has the capacity, or is unwilling, to accept the wastes. Consequently, today's rule includes a provision, § 264.554(i), that states the Director may provide one extension of up to 180 days as a modification of the original permit, closure plan, or order.

To justify to the Director the need for an operating term extension, the facility owner/operator must provide sufficient information to enable the Director to make a determination that continued operation of the unit:

- Will not pose a threat to human health and the environment; and
- Is necessary to ensure timely and efficient implementation of remedial actions at the facility. In addition, the regulation states that the Director may, as a condition of the extension, specify further standards and design criteria in the permit, closure plan, or order, as necessary to ensure protection of human health and the environment. This language is based, in large part, on the time limit extension language for temporary units, which provides a one-year extension beyond a one-year operational limit (§ 264.553(e)). EPA believes that this language is both appropriate and reasonable for staging piles. The Agency believes that the language addresses the concerns of commenters who suggested, among other things, that the extension should be consistent with the extension in § 264.553, especially since the temporary unit extension provision can only be approved after a showing that a time extension will not threaten increased environmental risk. The Agency agrees with these comments, as well as with other commenters who saw the need for an extension period to ensure that unexpected circumstances will be accommodated by the staging pile regulations. The Agency believes that the criteria that must be met before the Director grants an extension of the operating term for a staging pile are appropriate as they correspond to the overall goals of the staging pile regulation.

The initial criterion, ensuring that continued operation of the unit will not pose a threat to human health and the environment, is a reasonable test to maintain the protective nature of the staging pile despite the increased

[22] RCRA section 3004(j) provides that wastes prohibited from land disposal may be stored "solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal."

storage time. The second criterion allows the Director to specify further standards or design criteria for the staging pile if the increased storage time requires more protective or different specifications. EPA believes that it is unlikely that additional standards will be necessary for only a 180 day extension; however, this criterion will allow the Director to impose these standards in unusual circumstances. One commenter stated that the temporary unit extension provision of§ 264.553(e) was too prescriptive to be appropriate for remediation piles. This commenter felt that any extension should be approved or rejected based solely on site-specific considerations. However, EPA believes that the criteria finalized today leave the Director with ample discretion to consider site-specific factors in making decisions on extensions, and yet place appropriate limits on that discretion. The Agency also believes that limiting the number of extensions to one of up to 180 days will reduce the potential administrative burden that could be created by facility owner/operators seeking multiple extensions for staging pile operations, as well as ensuring that staging piles are indeed "temporary."

Furthermore, if the facility owner/operator or Director can anticipate, before designating the staging pile, that additional time will be necessary for staging activities, EPA recommends the use of a CAMU instead of a staging pile. If the facility owner/operator and Director are not able to anticipate that a CAMU will be preferable to a staging pile, the option remains to designate an existing staging pile as a CAMU through the CAMU approval process. This might require modifications to the design of the staging pile to address the risk posed by longer-term storage. Modifications necessary to designate a CAMU from what was previously a staging pile might include leak detection systems, run-off controls, air emissions controls, ground water monitoring systems, and leachate collection systems. However, the specific modifications will depend on the nature of the unit and the future plans for it.

L. What Is the Closure Requirement for a Staging Pile Located in a Previously Contaminated Area? (§ 264.554(j))

The preamble to the proposal stated that "remediation piles would be required to close by removal of all wastes (i.e. 'clean close')." This requirement, however, was not explicitly stated in the proposed regulation. This created confusion with some commenters, who requested that "clean closure" be defined and stated clearly in the final rule. In response to these comments, explicit closure requirements are included in today's rule. EPA foresees two scenarios applicable to closure in which a staging pile might be designated: (1) in an area of previous contamination, with remediation waste consolidated from non-contiguous areas of contamination (designation of a staging pile is not necessary if all the wastes are consolidated from within one area of contamination, see discussion below); and (2) in an uncontaminated area of the site. Consequently, the closure requirement is divided into two parts: § 264.554(j), which applies to staging piles designated at contaminated areas of the site; and § 264.554(k), which applies to staging piles designated at uncontaminated areas of the site.

At closure of staging piles located in previously contaminated areas, the final rule requires the facility owner/operator to "remove or decontaminate all remediation waste, contaminated containment system components, and structures and equipment contaminated with waste and leachate within 180 days after the expiration of the operating term of the staging pile." The Agency included this provision, which contains typical "clean closure" language (see § 264.258(a)), to ensure that closure of staging piles at facilities is completed in a safe and protective manner, as well as within a reasonable time frame. The 180-day time limit for removal and decontamination is an outgrowth of comments made requesting that the Agency ensure that temporary piles will indeed be temporary and of the intention expressed in the preamble to the proposal to require clean closure, a process under the Agency's regulations that must be complete within 180 days (§ 265.113). The Agency believes that a 180-day period is reasonable, as well as comparable to existing closure requirements in Parts 264 and 265.

The closure standard for staging piles designated in previously contaminated areas differs from the typical clean closure standard in the way that any contaminated subsoils created by the staging pile will be addressed. [23] Today's standard, instead of simply requiring "removal or decontamination," specifies that the facility owner/operator, "must also decontaminate contaminated subsoils in a manner, and pursuant to a schedule, that the Director determines will protect human health and the environment." This change was made in response to a commenter who identified the utility of considering the closure of a pile as part of the ongoing remedial process at a site. The Agency was persuaded by this comment to design a standard that recognizes that staging piles will only be used in the cleanup context, where the staging piles will likely be an intermediate step towards the cleanup of a site. In addition, since the portion of the facility where the staging pile will be located will have been previously contaminated, it may be very difficult to distinguish this previous contamination from residues that may have been left by the staging pile. Therefore, in designing today's standard, the Agency felt it was appropriate to include a standard that would allow any cleanup of soils contaminated by the staging pile to be coordinated with the site remedy, rather than addressed under a distinct set of resource-intensive requirements.

Because the final remedy at the site may not occur within 180 days after the operating term of the staging pile expires, the closure requirement does not include a time limit for this decontamination of contaminated subsoils. It is the Agency's expectation that the decontamination of any contaminated subsoils will be consistent with the overall remedy at the site. The Agency expects that the Director will often incorporate the schedule and cleanup levels for the chosen remedy at the site as the closure standards for the staging pile in the authorizing vehicle (for example, the RAP). By providing that contaminated subsoils must be decontaminated "in a manner, and pursuant to a schedule, that the Director determines is necessary to protect human health and the environment," the Agency believes it is providing essential flexibility, while at the same time ensuring that the use of a staging pile does not increase contamination where it was located. The Agency believes that this design fulfills the goal of protection of human health and the environment in these unique circumstances.

[23] Of course, EPA expects (and today's rule requires) that staging piles located in previously contaminated areas will be designed and operated in a manner that prevents or minimizes the release of additional contaminants to the degree technically practicable. A prime objective of remedial waste management is preventing further releases that will require cleanup. Consequently, EPA fully expects that at the majority of facilities that use staging piles, no decontamination of subsoils will be necessary due to the protective structure of the site-specific staging pile design and operating standards. However, as with other units regulated under Subtitle C, the Agency acknowledges the possibility that residues can remain after all remediation waste is removed from the pile and containment system components are decontaminated.

M. What Is the Closure Requirement for a Staging Pile Located in an Uncontaminated Area? (§ 264.554(k))

Under today's rule (§ 264.554(k)), staging piles located in previously uncontaminated areas of the site must be closed according to the closure requirement for waste piles in § 264.258(a) as well as the closure performance standard of § 264.111 (or the requirements in § 265.258(a) and § 265.111) within 180 days after the expiration of the operating term of the staging pile (Part 265 is applicable to staging piles designated at interim status facilities). The Agency does not prefer the siting of staging piles in previously uncontaminated areas of the facility, yet acknowledges that site conditions may dictate such a siting (for example, to site the staging pile outside of a floodplain or lagoon area). As stated above, the 180-day time limit for removal and decontamination is, in part, in response to comments made requesting the Agency to ensure that staging piles would indeed be temporary. It should be noted that the reference to "post-closure escape of hazardous wastes" in the § 264.111 and § 265.111 does not eliminate the need for clean closure of staging piles. As stated in § 264.258(a) and § 265.258(a), all waste residues, contaminated containment system components, contaminated subsoils, and structures and equipment contaminated with waste and leachate must be removed or decontaminated. The closure requirements that a staging pile located in a previously uncontaminated area of the site must fulfill should be included, according to currently applicable procedures, directly into the permit, closure plan or order in which the staging pile is designated to ensure a clear and enforceable outcome.

N. How May My Existing Permit (for Example, RAP), Closure Plan, or Order Be Modified To Allow Me To Use a Staging Pile? (§ 264.554(l))

The proposal did not specifically address the process for designating a staging pile at an already permitted facility. EPA anticipates that staging piles will most often be designated as part of the approval of remedy selection at a site; and therefore, like selection of the remedy, staging piles will generally be approved using the Agency's permit modification procedures. To add certainty to this process, today's rule specifically requires that incorporation of a staging pile, or staging pile extension, into an existing permit be conducted according to the Agency-initiated permit modification procedures (§ 270.41) or the Class 2 permit modification procedures under § 270.42. The Agency believes that a Class 2 designation is generally appropriate as it corresponds to the Class 2 permit modification necessary for the approval of temporary units, a close analogue to staging piles. If the Agency did not specify permit modification procedures in today's rule, the procedure outlined in § 270.42(d) would have been necessary, requiring a Class 3 modification unless the modification requestor could have provided information sufficient to support the requested classification. EPA believes that it is preferable to explicitly state that Class 2 procedures should be used to designate a staging pile or staging pile operating term extension, rather than default to § 270.42(d) procedures. Furthermore, the Class 3 modification procedures that would be required under § 270.42(d) are inappropriate for staging piles. Class 3 permit modification procedures are designed for changes that substantially alter the facility or its operations (§ 270.42(d)(2)(iii)). EPA believes the additional requirements in the Class 3 procedures would unnecessarily delay the process of designating a staging pile, diminishing the ability of staging piles to facilitate the remedial process. The subject of what permit modification procedure to use when designating a staging pile did not surface in the comments on the proposal.

Other than through a traditional permit modification, a staging pile or staging pile operating term extension can also be designated through modification of a RAP, closure plan, or order. As finalized by today's rule, RAPs are a new type of permit in which staging piles can be approved. Because traditional permit modification procedures are available when incorporating a staging pile or staging pile operating term extension into a traditional RCRA permit, EPA also believes it is reasonable to allow staging piles and staging pile operating term extensions, designated through a RAP, to be modified through RAP modification procedures. Therefore, as stated in the staging pile regulations at § 264.554(l)(2), "[t]o modify a RAP to incorporate a staging pile or staging pile operating term extension, you must comply with the RAP modification requirements under §§ 270.170 and 270.175." Although this language was not used in the proposed remediation pile regulation, it is an outgrowth of the RAP section of the proposal to use the RAP modification procedures to incorporate staging piles or staging pile operating term extensions, similar to the way traditional permit modification procedures would be used.

In addition, modification of a closure plan to incorporate a staging pile or staging pile operating term extension should proceed according to the requirements in § 264.112(c) at permitted facilities or the requirements in § 265.112(c) at interim status facilities. As discussed in the "How is a Staging Pile Designated?" section of today's preamble, the closure plan is an additional mechanism by which a staging pile can be designated. In keeping with the use of closure plans, the Agency believes that the use of the established closure plan modification procedures cited above is reasonable.

Finally, modification of an order to incorporate a staging pile or staging pile operating term extension must occur according to the terms of the order and the applicable provisions of § 270.72 (a)(5) or (b)(5). Any inclusion will be governed by the standards promulgated today and, as noted below, the Agency's policy on public participation and corrective action orders should be followed.

The Agency received no comments on the proposal regarding the use of these, or any other, modification procedures to designate a staging pile or staging pile operating term extension.

O. Is Information About the Staging Pile Available to the Public? (§ 264.554(m))

Section 264.554(m) requires the Director to document the rationale for designating a staging pile or operating term extension for a staging pile and to explain the basis for the designation. The rationale for these decisions should be incorporated as part of the Statement of Basis in a permit, closure plan or order modification. Documentation of staging pile decisions is analogous to the documentation the Agency currently makes to support the selection of a remedy. Therefore, if a staging pile is incorporated as part of a final remedy, this explanation would be incorporated into the Statement of Basis for the remedy under a permit modification, closure plan or under an order. The staging pile rationale, as determined by the Director, will be available to the public through the appropriate public participation process. This requirement was not included in the proposal, but is intended simply to clarify and emphasize that staging pile decisions must be documented and explained as part of the existing notice and comment procedures for orders, permits, and closure plans. EPA believes that documenting the designation rationale is necessary to ensure that the public

has access to information relevant to the designation of a staging pile which is both substantial and clear. The Agency believes that including regulatory language to this effect is in keeping with EPA policy with regard to the importance of meaningful public participation.[24]

Public participation during the staging pile designation process, when implemented through the traditional (non-RAP) permit process, will proceed as prescribed in the Class 2, or Agency initiated, permit modification procedures. If the staging pile is designated in an order, it is the Agency's current policy that the order provide a level of public participation and comment comparable to that provided for in a permit modification (see RCRA Public Participation Manual, Chapter 4; and "Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule," 61 FR 19432; (19453–19454) (May 1, 1996)). Since a staging pile has been designated as a Class 2 permit modification, these procedures should be used for public participation under an order. Documentation should be made available to the public through the order approval or order modification process.

P. What Is the Relationship Between Staging Piles, Corrective Action Management Units, and the Area of Contamination Policy?

The CAMU rule provides flexibility to EPA and implementing States to specify site-specific design, operating, and closure/post closure requirements for units used for land-based storage, or for treatment of wastes that are generated during cleanup at a RCRA facility. The CAMU regulations also specify requirements for units that are used as long-term repositories for cleanup wastes. The proposed remediation piles were intended to replace, to some extent, the flexibility that would be lost if the CAMU rule was withdrawn and the use of CAMUs was no longer available. However, as discussed more fully above, the Agency believes that, although CAMUs are retained in today's rule, staging piles will be a useful part of a remedial strategy in cases where waste is temporarily staged during remediation.

The staging piles provisions in today's rule will not affect current implementation of the AOC policy. The AOC policy is an interpretation of the statutory RCRA term, "land disposal" (section 3004(k)). The AOC policy, first elucidated in the March 8, 1990 "National Oil and Hazardous Substances Pollution Contingency Plan (NCP, 55 FR 8758–8760)," equates dispersed areas of contamination with RCRA landfills, and clarifies that hazardous wastes may be moved within the AOC without triggering LDRs.[25] The Agency anticipates that staging piles will aid in situations in which the AOC policy does not apply. For example, a staging pile will be a valuable option in cases where a site has non-contiguous areas of contaminated soil, and where waste is being staged in a pile within one of the areas prior to further management. A staging pile will allow for consolidation of remediation waste into the pile without triggering RCRA LDRs. In cases where a facility owner/operator would like to consolidate remediation waste within one area of contamination, this can be accomplished under the AOC policy, and therefore a staging pile would not be necessary.

VIII. Corrective Action Management Units (CAMUs) (§ 264.552)

This final rule retains the regulations for Corrective Action Management Units (CAMUs) promulgated on February 16, 1993 at § 264.552 (see 58 FR 8658).

The CAMU regulations allow EPA to impose site-specific standards for on-site units used to manage remediation wastes. As discussed in the preamble of that final rule, the CAMU regulations were adopted by EPA to provide remedial decision-makers with flexibility to expedite and improve remedial decisions by removing barriers to cleanup created by RCRA hazardous waste requirements—specifically, the LDRs in Part 268 and the MTRs in Parts 264 and 265 applicable to land-based units . As is discussed in the preamble to the CAMU rule, the Agency believed (and still believes) that these Subtitle C requirements, when applied to remediation wastes, can act as a disincentive to more protective remedies, and can limit the flexibility of a regulatory decision maker in choosing the most practicable remedy at a specific site (see 58 FR 8658 at 8660).

Under the final CAMU regulations, LDRs do not apply to CAMUs because placement of remediation wastes into or within a CAMU does not constitute land disposal of hazardous waste, and MTRs do not apply because consolidation or placement of remediation wastes into or within a CAMU does not constitute creation of a unit subject to MTRs (see 58 FR 8658 at 8661). The purpose of the CAMU regulations is to provide for more and improved cleanup of wastes, thus, providing increased protection of human health and the environment (see 58 FR 8658 at 8659).

While the CAMU regulations provided some flexibility to address the problems described above, the April 29, 1996 HWIR-media proposal was intended to be a more comprehensive response to the problems faced when applying traditional RCRA Subtitle C standards to the management of remediation wastes. In developing the HWIR-media proposal, EPA evaluated the CAMU regulations in the context of the proposed provisions and recognized that the proposed revisions to Part 269 in the HWIR-media rule, if promulgated, would provide flexibility similar to that provided by the CAMU regulations. EPA considered that the CAMU regulations might not be necessary if the HWIR-media proposal was promulgated, and thus the Agency proposed to withdraw the CAMU regulations if the proposed revisions to Part 269 were promulgated. The Agency noted in that preamble, however, that it did not intend to withdraw the CAMU regulations without, at the same time, substituting one of the two major options proposed in the HWIR-media proposal in its stead. The preamble of the proposed HWIR-media rule made clear that the Agency believed the CAMU regulations provided needed flexibility to remediation sites, and that the Agency intended to withdraw the CAMU regulations only if the site-specific flexibility provided in the CAMU rule would be preserved by the final HWIR-media rule (see 61 FR 18780 at 18829).

When EPA promulgated the CAMU final regulations in 1993, the Agency explained that, in implementing CAMUs, the Agency would have a preference for "treatment-based remedies" and that "long-term reliability and protectiveness of remedial activities is directly tied to effective treatment of wastes that pose future release threats" (see 58 FR 8658 at 8670). In retaining the CAMU regulations, EPA does not alter that long-standing position and further notes that it is consistent with EPA's coordination and "principle of parity" between RCRA and CERCLA cleanup activities (see Memorandum from Steven A. Herman and Elliott P. Laws to RCRA/CERCLA Policy Managers,

[24] For more information see the September 1996 RCRA Public Participation Manual, Chapter 4, EPA530–R–96–007.

[25] For more information consult the March 13, 1996 Memorandum: "Use of the Area of Contamination (AOC) Concept During RCRA Cleanups," from Michael Shapiro, Director Office of Solid Waste, Stephen D. Luftig, Director, Office of Emergency and Remedial Response, and Jerry Clifford, Director, Office of Site Remediation Enforcement to RCRA Branch Chiefs and CERCLA Regional Managers.

September 24, 1996, entitled "Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities"). EPA considers the CAMU requirements, and in particular § 264.552(c)(6), as the functional equivalents of CERCLA's expectation that treatment should be used, whenever practicable, to address principal threats posed by a site (see 40 CFR 300.430(a)(1)(iii)(A)). EPA continues to believe that the implementation of the CAMU regulations, as described above, enhances protection of human health and the environment.

While EPA recognized that the proposed HWIR-media rule would have provided flexibility similar to that provided by the CAMU regulations, EPA also recognized that the proposed rule applied to a more limited spectrum of waste—the proposed rule covered only contaminated media, whereas the CAMU regulations allowed all types of cleanup wastes to be managed. Thus, when it proposed to withdraw the CAMU regulations, the Agency also requested comment on what benefits might accrue if the CAMU rule were retained, and on what the ramifications might be if the final rule failed to provide the degree of relief that the CAMU rule has provided.

A majority of commenters favored the retention of the CAMU regulations. In many cases, commenters favored the retention of the CAMU regulations, even if EPA promulgated extensive regulatory reforms in this final rule. (Two commenters voiced their support for withdrawal of the CAMU rules, but did not explain their specific objections). Many commenters argued that EPA had failed to articulate a persuasive rationale for removing the CAMU regulations.

Many commenters on the proposal to withdraw the CAMU regulations believed that the CAMU regulations are important and should be retained because the proposed HWIR-media rule would have been limited to contaminated media. Commenters pointed out that contaminated debris, remediation sludges, and other waste generated as part of corrective action activities would not qualify for any site-specific flexibility that might be provided by the final HWIR-media rule. Without the CAMU regulations, commenters believed, the site decision makers would lose a large amount of flexibility (that is, LDR/MTR relief). One commenter pointed out that, because the HWIR-media proposal would only have applied to contaminated media, withdrawing the CAMU regulations would create a disincentive to remediation of non-media wastes. EPA agrees with these commenters.

This final rule does not include the extent of additional flexibility for remediation wastes that EPA anticipated when it proposed to withdraw the CAMU provisions. As is discussed in section II of this preamble, either the Bright Line or the Unitary approach of the proposed rule would have exempted certain remediation wastes from Subtitle C requirements (such as LDRs and MTRs), and subjected them, instead, to site-specific requirements. Neither of those options is promulgated in this final rule; thus, this type of flexibility is currently available only to remediation wastes managed in CAMUs. EPA believes this flexibility is vital to remove impediments to cleanup imposed by certain Subtitle C requirements. For these reasons, EPA is retaining the CAMU regulations in this final rule.

Since the promulgation of the CAMU regulations, just more than 30 CAMUs have been approved by the Agency. Though this small number might, on its face, appear to indicate that CAMUs have not proved useful to the regulated community, EPA believes, and commenters on the proposed HWIR-media rule verified, that this number is misleadingly low. EPA believes, and again commenters verified, that litigation on the CAMU regulations[26] has resulted in uncertainty about the future of CAMUs and, consequently, provides a disincentive to their use. Thus, despite the low number of CAMUs approved to date, EPA continues to believe that CAMUs provide a valuable tool to promote more and better cleanup of remediation wastes.[27] In fact, EPA expects that the use of CAMUs will increase as more corrective action sites move to the remedy selection phase, and the Agency strongly encourages States who are the major implementers of the corrective action program, to adopt and take advantage of this mechanism for cleanup.

[26] On May 14, 1993, a petition for review of the final CAMU rule was filed with the U.S. Court of Appeals for the District of Columbia Circuit (see Environmental Defense Fund v. EPA No. 93-1316 (D.C. Cir.)). Petitioners challenged both the legal and policy basis for the final CAMU regulations. On October 27, 1994, the litigation was stayed pending EPA's publication of a final HWIR-media rule, to allow parties to determine whether the final rule would resolve issues raised in the petition for review.

[27] The October 27, 1994 stay of the CAMU litigation provided that within 91 days after the final HWIR-media rule is published in the **Federal Register**, the parties will inform the court whether they intend to dismiss the petitions for review, enter into settlement discussions, or proceed with the litigation. Thus, the litigation should be resolved in the near future, thereby removing the uncertainty surrounding implementation of the CAMU regulations.

IX. Dredged Material Exclusion (§ 261.4(g))

A. What Is the Dredged Material Exclusion?

Today's final rule contains an exclusion from the definition of hazardous waste for dredged material subject to a permit that has been issued under section 404 of the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (CWA) or under section 103 of the Marine Protection, Research, and Sanctuaries Act (MPRSA, also known as the Ocean Dumping Act).[28] EPA proposed this change to reduce potential overlaps between the CWA or MPRSA and RCRA regulation of dredged material disposal. At present, if dredged material proposed for disposal in the aquatic environment is contaminated or suspected of being contaminated with hazardous waste, the potential application of both RCRA Subtitle C regulations and dredged material regulations under CWA or MPRSA complicates efficient assessment and management of dredged material. Today's rule eliminates the overlap of RCRA Subtitle C with the CWA and MPRSA programs by excluding dredged material managed under a CWA or MPRSA permit from RCRA Subtitle C, while ensuring an accurate and environmentally sound evaluation of any potential impacts to the aquatic environment. This exclusion will not alter existing practice significantly, but it clarifies regulatory roles within EPA in an effort to avoid duplication of administrative efforts and is authorized under RCRA section 1006.

The U.S. Army Corps of Engineers ("Corps") and other entities must dredge large volumes of sediment and other materials to maintain navigable waterways, ports and marinas. Dredged material can be mechanically or hydraulically dredged, and disposed of by barges or pipelines into river channels, lakes, and estuaries. Of the total amount of dredged material excavated, approximately one-fifth is disposed of in the ocean at designated sites in accordance with section 103 of the MPRSA. Most of the remaining dredged material is discharged into waters of the United States, either in open water, at confined disposal facilities (CDFs), or for beneficial uses, which are all regulated under the CWA. Any discharge of dredged material that

[28] "Permit" also includes the administrative equivalent of a CWA or MPRSA permit for U.S. Army Corps of Engineers' civil works projects.

occurs in upland areas and has return flow to waters of the United States is regulated under the CWA. However, if upland-disposed dredged material were to have no return flow to waters of the United States, as defined by CWA section 404, that dredged material would not be regulated under the MPRSA or CWA, and is not, therefore, subject to the exclusion under today's rule.[29]

B. Regulation of Dredged Material Under CWA and MPRSA

Section 404 of the CWA establishes a permit program to regulate the discharge of dredged material into waters of the United States that is administered by the Corps and EPA. Proposed discharges must comply with the environmental criteria provided in 40 CFR part 230 to be authorized by a CWA 404 permit. The EPA and Corps regulations under section 404 define dredged material as "material that is excavated or dredged from waters of the United States." In addition to such discharges as open water disposal from a barge, the section 404 regulations specifically identify the runoff or return flow from a contained land or water disposal area into waters of the United States as a discharge of dredged material. In most cases, this type of discharge occurs from a weir and outfall pipe to drain water from a confined disposal facility, including the water entrained with the solid portion of the dredged material discharged at the site and from rainwater runoff.

The MPRSA regulates the management of material, including dredged material, that will be dumped into ocean waters. Section 102 of the MPRSA requires that EPA, in consultation with the Corps, develop environmental criteria for reviewing and evaluating applications for ocean dumping permits. Section 103 of the MPRSA assigns to the Corps the responsibility for authorizing the ocean dumping of dredged material, subject to EPA review and concurrence. In evaluating proposed ocean dumping activities, the Corps is required to determine whether these proposals comply with EPA's ocean dumping criteria (40 CFR parts 220–228).

C. Dredged Material and RCRA Applicability

RCRA regulates the management of hazardous wastes at treatment, storage, and disposal facilities (TSDFs). Hazardous wastes are a subset of solid wastes. A solid waste is considered hazardous for regulatory purposes if it is listed as hazardous in RCRA regulations or exhibits any of four hazardous waste characteristics: ignitability, corrosivity, reactivity, or toxicity. Dredged material could trigger RCRA's Subtitle C requirements by exhibiting any of the four characteristics or by containing a listed hazardous waste. Environmental media (such as the sediments which make up dredged material) is not itself waste, but is sometimes contaminated with hazardous waste and must be managed as a hazardous waste when it exhibits a characteristic or "contains" a listed waste. These media would be subject to the RCRA requirements applicable to the contaminated waste. As a practical matter, naturally occurring sediments will not normally be associated with any specific industrial waste stream, so as to "contain" listed waste. Consequently, the most likely means by which dredged sediments could become subject to RCRA Subtitle C regulation is by failing one of the tests for characteristic hazardous waste. Given the nature of sediments, they would be most likely to become subject to RCRA Subtitle C if they fail toxicity testing (that is, Toxicity Characteristic Leaching Procedure, or TCLP). In fact, dredged sediments from navigational dredging projects very rarely, if ever, fail TCLP tests. In all but a very small number of cases, RCRA has not been applied in practice to proposed discharges of dredged material. Nevertheless, as asserted by the commenters, the potential applicability of RCRA Subtitle C requirements has been a concern at many dredging operations.

The Agency is confident that today's exclusion will promote efficient handling of dredged material since future use of the TCLP will not be necessary for dredged material subject to a permit issued under CWA Section 404 or MPRSA Section 103. Specifically, today's rule will eliminate the unnecessary expense and effort, currently borne by the Corps and other entities, of applying the TCLP to large volumes of dredged material. The Corps and other entities typically apply testing procedures under CWA and MPRSA that are better suited to the chemical and biological evaluation of dredged material disposed of in the aquatic environment, where the vast majority of dredged material is managed. These tests are specifically designed to evaluate effects such as the potential contaminant-related impacts associated with the discharge of dredged material into oceans and waterways of the United States. Thus it is appropriate to assess and manage dredged material under the aquatic testing and management protocols developed by the Corps and EPA under the MPRSA and CWA.

D. Determination of Regulatory Jurisdiction

Today's rule establishes an integrated approach to the regulation of dredged material disposal that will avoid duplicative regulatory processes while ensuring an accurate, appropriate, and environmentally sound evaluation of potential impacts to the environment. This approach is authorized under section 1006(b) of RCRA, which states that "the Administrator * * * shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of * * * the Federal Water Pollution Control Act (CWA), * * * the Marine Protection, Research and Sanctuaries Act, * * *, and such other Acts of Congress as grant regulatory authority to the Administrator." Section 1006(b) of RCRA calls for the provisions of RCRA to be integrated with other statutes, including the CWA and the MPRSA, to avoid duplication when the integration "can be done in a manner consistent with the goals and policies expressed" in RCRA and the other Acts. Applying the RCRA Subtitle C program together with the CWA and MPRSA permitting programs can be redundant and unduly burdensome, and may cause unnecessary procedural difficulties (for example, by requiring duplicate permit applications and procedures). It is also possible that the duplicative nature of the programs could in fact increase environmental risks by causing delays in proper disposal. The Agency believes that today's rule is appropriate and consistent with the goals and policies in each of these statutes.

The Agency believes that the CWA and MPRSA permit programs protect human health and the environment from the consequences of dredged material disposal to an extent that is at least as protective as the RCRA Subtitle C program. These programs incorporate appropriate biological and chemical assessments to evaluate potential impacts on water column and benthic organisms, and the potential for human health impacts caused by food chain transfer of contaminants. As improved assessment methods are developed, they can be incorporated into these procedures. The programs also make available appropriate control measures (for example, 40 CFR 230.72) for addressing contamination in each of the relevant pathways.

The Agency believes that RCRA Subtitle C coverage of dredged material

[29] Ground water flow is not considered return flow under CWA section 404 unless there is a "direct hydrogeological connection" to a surface water body.

disposal in the aquatic environment, whether or not this disposal is considered to be "land disposal" under RCRA, is duplicative and unnecessary when considered alongside the CWA and MPRSA coverage of these activities. The overriding goal of each of the three statutory programs is to protect human health and the environment, and the CWA and MPRSA programs achieve this goal appropriately by addressing the proposed aquatic disposal of dredged material.

The exclusion also applies in the case of a Corps civil works project which receives the administrative equivalent of a CWA or MPRSA permit, as provided for in Corps regulations. This regulatory language refers to the fact that the Corps does not process and issue permits for its own activities, but authorizes its own discharges of dredged or fill material by applying the same applicable substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines or MPRSA criteria. EPA has the authority to develop environmental guidelines and the authority to prohibit or conduct further review of a proposed discharge by the Corps, in the same manner as it can with a private permit applicant. Thus, the exclusion in today's rule includes CWA and MPRSA permits, as well as their administrative equivalents in the case of Corps civil works projects.

E. Clarification of Future Practice

With the promulgation of today's rule, the regulation of dredged material will generally proceed in one of the following two ways, with the vast majority of activities expected to fall under the first example:

1. If the dredged material is subject to a permit that has been issued under CWA section 404 or MPRSA section 103, RCRA Subtitle C requirements do not apply.

2. If the dredged material disposal is not subject to a CWA section 404 or MPRSA section 103 permit, RCRA Subtitle C requirements may apply. (For example, if dredged material were to be disposed in upland facilities with no runoff or return flow to waters of the United States, this material would not be under the jurisdiction of the CWA or MPRSA and therefore would be subject to RCRA Subtitle C if it meets the definition of an RCRA hazardous waste.)

For dredged material covered by a CWA or MPRSA permit, the combination of statute, Federal regulations, and Regional guidance, along with the testing and management protocols that have been developed jointly by EPA and the Corps, will be adequate to address potential contaminant-related impacts in both ocean and inland waters. Examples of the existing testing and management protocols include: *Evaluation of Dredged Material Proposed for Discharge in Waters of the U.S.—Testing Manual* (EPA–823–B–98–004) and *Evaluation of Dredged Material Proposed for Ocean Dumping—Testing Manual* (EPA–503–B–91–001), which contain current procedures on implementing the dredged material testing requirements under the CWA and MPRSA respectively. The manuals contain tiered evaluation systems that include, as appropriate: physical analysis of sediment; chemical analysis of sediment, water, and tissue; bioassay tests; and bioaccumulation tests of contaminant impacts. EPA believes that CWA and MPRSA permits coupled with these testing manuals and relevant Regional guidance will ensure the protective management and discharge of dredged material.

F. Comments on the Dredged Material Exclusion

Comments from 18 sources mentioned the dredged material exclusion. These sources included various industries and trade groups, as well as federal and state agencies. These comments are included in the record and are available for review in the RCRA docket. Commenters generally supported the exclusion of dredged material from RCRA Subtitle C regulation when the discharge is covered by a permit issued under the CWA or MPRSA. There was also general concurrence among commenters that this exclusion would avoid current unnecessary and duplicative regulation under RCRA. The proposed dredged material exclusion received only one comment that could be considered adverse. The comment was from a state environmental agency and addressed only a portion of the exclusion. The commenter stated that dredged material disposed upland should not be excluded from RCRA Subtitle C requirements. EPA agrees with this concern when there would be no return flow to waters of the United States since, under these circumstances, CWA section 404 or MPRSA 103 permits would not be issued. However, for the reasons provided in today's rule, EPA does not agree with the commenter in cases where there is return flow to waters of the United States and the dredged material is subject to a permit under CWA section 404 or MPRSA section 103. Moreover, the commenter provides no rationale as to why dredged material disposed upland under a CWA section 404 or MPRSA section 103 permit should not be excluded from the definition of hazardous waste. Therefore, EPA has finalized the rule as proposed. In addition to this comment, several commenters raised further issues that are outlined and discussed below.

G. Dredged Material as a Solid Waste

The Agency proposed that the dredged material exclusion apply only to the hazardous waste requirements of RCRA Subtitle C and not to the solid waste requirements of RCRA Subtitle D. Today's final rule adopts this approach as proposed.

Some commenters noted that the context and wording of the proposed dredged material exclusion implied that all dredged material is solid waste. They were concerned that excluding dredged material from the definition of hazardous waste could be interpreted to mean that all dredged material is inherently a hazardous waste, and consequently, also a solid waste. They believe that is not the case, and asked EPA to clarify this matter in the final rule.

EPA agrees with these comments. Nothing in the proposal or in today's final rule is meant to imply that dredged material is always a solid waste. Dredged material, which is media, may or may not contain a RCRA solid or hazardous waste. Dredged material should not be assumed, a priori, to contain a solid waste and today's rule does not expand the scope of dredged material regulation under RCRA.

In cases where dredged material may be both a solid and a hazardous waste, today's rule excludes these materials from the hazardous waste requirements only. Two commenters requested that the dredged material exclusion extend to all aspects of RCRA (that is, that dredged material be excluded not only from hazardous waste requirements, but also from solid waste requirements). EPA has not adopted this suggestion. While EPA believes that excluding dredged sediments from Subtitle C regulation is appropriate, the Agency is not persuaded that these sediments should be excluded from all RCRA jurisdiction. It would be inappropriate to extend the exclusion to Subtitle D because, in certain circumstances, this exclusion would remove the ability of states to exercise authority over dredged material under their RCRA Subtitle D programs. (For example, in some States, State authorities preclude State regulations from being more stringent than Federal regulations.) Also, because there is no federal permit program for Subtitle D, state and local authorities have well-established regulatory discretion in the non-hazardous waste

arena, which the Agency does not wish to alter at this time. Consequently, today's rule does not alter the existing abilities of States and local authorities to regulate dredged material as a solid waste under RCRA.

Furthermore, although certain dredged materials will no longer be considered hazardous wastes under today's rule, this exclusion does not affect whether dredged materials are considered solid wastes for the purposes of RCRA section 7003. As advanced in the proposal, EPA may take action under RCRA section 7003 to address the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste that may present an imminent and substantial endangerment to human health or the environment. This authority remains intact, regardless of the Agency's decision to exclude dredged materials from RCRA's hazardous waste provisions. Thus, this rule does not diminish in any way the Administrator's authority to take action under section 7003 in connection with dredged material. EPA believes this authority provides an important backstop to the regulatory authorities of the CWA and MPRSA. Emergency powers under these other two statutes are different from and not co-extensive with RCRA section 7003 authority. Furthermore, many States have comparable authorities over non-hazardous waste, which EPA does not wish to undercut.

In sum, the status of dredged material as potentially a solid waste under RCRA is unchanged by today's rule. Where dredged material is (or contains) both a solid and a hazardous waste and is subject to a permit that has been issued under CWA section 404 or MPRSA section 103, today's rule excludes it from RCRA's hazardous waste requirements, but not from solid waste requirements.

H. Clarification of Terms Related to Dredged and Fill Material

Two commenters stated that transferring the term "discharge of dredged material" from CWA section 404 regulations into the dredged material exclusion regulation, as was done in the proposal, would complicate the exclusion unnecessarily. EPA agrees with these comments. The term "discharge of dredged material," which was incorporated into the proposed exclusion, is defined in 40 CFR 232.2 (and the Corps' 33 CFR 323.2) and includes descriptions of the scope of these discharges. The definition also describes discharges that do not require a section 404 permit. Confusion could have resulted, for example, over whether dredged sediments should be removed from RCRA regulation when they are within the scope of a section 404 permit exclusion. The references to this term and its definition have been removed from the rule to avoid confusion and misinterpretation, and only the term "dredged material" (which is defined in 40 CFR 232.2 as "material that is excavated or dredged from the waters of the United States") is used in the final rule.

Similarly, EPA stated that the exclusion did not address "fill material". The Agency's goal is to ensure that upland-derived fill material is not eligible for the exclusion, but the language in the proposal did not distinguish between dredged material used as fill and fill material not excavated from waters of the U.S. The "fill material" that is not included in the exclusion is any material that does not meet the definition of dredged material. For example, dredged material can be used as fill under a CWA 404 permit for beneficial purposes, such as the creation of an underwater berm for erosion control. EPA sees no reason to differentiate between dredged material that is discharged for disposal and dredged material that is used as fill, as long as both are subject to the CWA or MPRSA dredged material permitting requirements.

As a result, as in the case of the term "discharge of dredged material," "discharge of fill material" and "fill material" are not terms pertinent to the dredged material exclusion and therefore are not included in today's regulatory language.

I. Normal Dredging Operations and the Exclusion

Two commenters recommended extending the exclusion to normal dredging operations for navigation or flood control that are subject to some form of federal regulation other than CWA or MPRSA permitting, in particular when the dredged material would be disposed in upland facilities with no return flow. EPA was asked to interpret RCRA section 1006(b) expansively to avoid regulatory duplication with the Rivers and Harbors Act of 1899 (RHA, 33 U.S.C. 403) which regulates normal dredging operations. However, section 1006(b) of RCRA requires EPA to avoid duplication with Acts of Congress that grant regulatory authority to the Administrator, and RHA does not grant regulatory authority to the Administrator. Furthermore, the proposed rule's exclusion for dredged material was premised only on the applicability of CWA or MPRSA permitting, and the proposal did not request comments on expanding the exclusion from RCRA Subtitle C for dredged material that is not subject to CWA or MPRSA permits. Therefore, the Agency will limit the scope of the exclusion to dredged material subject to a permit that has been issued under CWA section 404 or MPRSA section 103, as proposed.

J. The Exclusion and Nationwide Permits

One commenter asked whether the proposed exclusion would not only apply to project-specific individual permits issued by the Corps, but also to general permits.[30] The proposed rule and the preamble implied to this commenter that the scope of the exclusion includes only individually-issued permits. Although under today's rule the exclusion applies to any dredged material subject to a section 404 permit and, therefore, would technically extend to Corps general permits (those which allow for certain dredging activities without requiring an individual application), it is important to note that it is very unlikely that any dredged material suspected of being contaminated would be authorized under a general permit. General permits may not authorize discharges where contaminant-related impacts are expected to be more than minimal, evaluated separately, as well as cumulatively. However, in the unlikely event that these discharges are authorized under a general permit, both the Corps and the appropriate state regulatory agency retain the authority to impose individual permit requirements or deny a permit to avoid impacts of concern. Therefore, EPA believes that it is appropriate, and in keeping with the logic of the proposal, to retain dredged material managed under CWA section 404 general permits within the exclusion from RCRA Subtitle C.

X. State Authority (§ 271.1(j))

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA Subtitle C program within the State. Following authorization, EPA retains independent enforcement authority under sections 3008, 3013, and 7003 of RCRA to initiate an action, although authorized States have primary enforcement responsibility. The

[30] The Agency notes that there are no nationwide permits under MPRSA that are applicable to dredged material, so the following discussion is in the context of CWA section 404.

standards and requirements for authorization are found in 40 CFR part 271.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program instead 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 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 RCRA section 3006(g), (42 U.S.C. 6926(g)), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in unauthorized States. Although the States are still required to update their hazardous waste programs to remain equivalent to the Federal program, EPA is directed to carry out HSWA requirements and prohibitions in authorized States, including the issuance of permits implementing those requirements, until the State is granted authorization to do so.

Authorized States are required to modify their programs only when EPA promulgates Federal requirements that are more stringent or broader in scope than existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program. See also, 40 CFR 271.1(i). Therefore, authorized States can, but are not required to, adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent. Less stringent regulations, both HSWA and non-HSWA, do not go into effect in authorized States until those States adopt them and are authorized to implement them.

B. Effect on State Authorization

Today's rule is promulgated, in part, pursuant to non-HSWA authority and, in part, pursuant to HSWA. Requirements applicable to Remedial Action Plans (RAPs) and the dredged material exclusion are promulgated pursuant to non-HSWA authority. Therefore, these requirements are effective on the effective date of this rule only in those States without final authorization. They will become effective in States with final authorization once the State has amended its regulations and the amended regulations are authorized by EPA.

The requirements for staging piles are promulgated pursuant to HSWA. Specifically, as discussed in the HWIR-media proposal (see 61 FR 18830–18831), the requirements relating to staging piles are based on an interpretation of RCRA sections 3004(k) and (o). (See below for details regarding implementation in authorized States.) Also, the provisions exempting remediation waste only management sites from the requirements in RCRA section 3004(u), namely §§ 264.1(j) and 264.101(d), are promulgated under HSWA authority. The Agency is adding these requirements to Table 1 in § 271.1(j), which identifies rulemakings that are promulgated pursuant to HSWA.

As noted above, authorized States are only required to modify their program when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. The standards promulgated today (including those promulgated under HSWA authority) are less stringent than the existing Federal standards. Therefore, States are not required to modify their programs to adopt today's rulemaking. However, EPA strongly encourages States to adopt the provisions promulgated today, as the Agency believes that they will increase the pace and efficiency of hazardous waste cleanups. The swift authorization of States that have adopted provisions equivalent to those promulgated today is a high priority for EPA.

1. Staging Piles

The implementation of the provisions regarding staging piles will vary, depending on the authorization status of a particular State. Although these provisions are promulgated under HSWA authority, they are less stringent than the existing Federal provisions, namely the Land Disposal Restrictions (LDR) and Minimum Technology Requirements (MTR) that apply to waste piles. Thus, if a State is authorized for the LDR and MTR provisions, EPA will not implement the provisions regarding staging piles in that State, even where it is conducting a corrective action. In some cases, however, a State that has LDR and MTR authorization and has adopted the staging pile provision, but is not yet authorized for staging piles may be able to implement its staging pile provisions if, under State law, it has a waiver authority comparable to the Federal authorities under RCRA section 7003 and CERCLA section 121(e). (A State's waiver authority is discussed further below.) If, prior to authorization for staging piles, the State exercises this authority in a way that is consistent with today's provisions regarding staging piles, EPA would not consider the State's program to be less stringent than the Federal program. These approaches should be used only to cover the transition period during which the State amends its regulations and obtains formal authorization for the staging pile provisions.

In those States that do not have authorization for the LDR and MTR rules, EPA is responsible for implementing the provisions regarding staging piles, because they are part of the Federal RCRA program operating in these States. EPA will use the Federal procedures for the implementation of the staging pile. For example, if the facility at which the staging pile is to be located holds a RCRA permit, EPA will modify the HSWA portion of the permit using the Federal permit modification procedures. However, EPA will not implement the staging pile provisions if this implementation is in conflict with a State's hazardous waste program. In some cases, States may have adopted the LDR or MTR provisions in their regulations, but may not have received authorization from EPA. Thus, these provisions may be effective under State law, preventing the implementation of the staging pile provisions. To address this situation, to the extent permitted by EPA regulations, EPA may modify its action so it is consistent with State law, or structure its action to mirror existing State requirements which allow waiver of the authorized State LDR and MTR provisions. Alternately, the State may use an authority under its own laws to provide a waiver.

C. Authorization for Today's Rule

In today's rule (as described later in the preamble), EPA establishes streamlined procedures for authorizing States for routine or minor program revisions of RCRA requirements. Streamlined authorization procedures were a major feature of the HWIR-media proposal, as well as several other recent regulatory proposals, and they are a key feature of EPA's program to reinvent the RCRA State authorization process.

The specific substantive provisions of today's rule, however, are not eligible for these streamlined procedures. This is because EPA considers today's rule to be fairly complex, and not part of a series of routine rulemakings. For these reasons EPA disagrees with the several commenters who wanted the abbreviated authorization procedures promulgated today to apply to the authorization of the HWIR-media rule.

At the same time, EPA is placing a high priority on authorization of States who seek to implement today's rule. The success of the regulatory reforms in today's rule depends on its rapid adoption by the program implementers, that is, the States. Furthermore, EPA intends to use its existing discretion under 40 CFR 271.21(b), to follow the streamlined procedure for the authorization of States which only adopt § 264.101(d) of today's rule. This provision eliminates § 264.101 facility-wide requirements from RCRA permits or RAPs issued to facilities not otherwise subject to facility-wide corrective action. The streamlined authorization procedure and EPA's existing discretion are discussed below.

Although today's HWIR-media rule is not eligible for the streamlined authorization procedures, EPA believes that in most cases, the authorization of States for this rule should be straightforward. Today's rule, for the most part, does not change the current regulatory standards for waste management, but merely streamlines procedures for a particular category of waste (that is, remediation waste). Any State currently authorized to implement RCRA hazardous waste regulations, particularly those States authorized for the LDR program and for corrective action, should have little difficulty becoming authorized for today's rule, as long as the State adopts a program that meets the minimum standards in today's rule.

EPA particularly emphasizes that, in authorizing States for the RAP part of today's rule, it will not be judging the adequacy, the stringency, or the resources of State clean-up programs. This is because today's rule does not modify or alter in any way clean-up requirements, but simply streamlines the permitting process for management of hazardous remediation wastes.

EPA will be reviewing the State's regulations and program for managing hazardous remediation waste to determine whether they are equivalent to the standards promulgated in today's rule. If a State program is already authorized to regulate hazardous waste under the base RCRA program, there is every reason to presume it can adequately regulate that same waste under a RAP or in a staging pile. The main task for EPA will be to ensure that States, in providing relief for remediation waste, meet the national minimum standards. EPA anticipates that, in most cases, this will be a clear and simple standard for States to meet, and authorization will be correspondingly expedited.

EPA also emphasizes that State programs seeking authorization must be equivalent to and no less stringent than the program EPA will be administering under today's rule. State programs, however, do not need to be identical to the federal program. EPA included considerable detail on procedural requirements in today's rule, because it will be implementing the rule in unauthorized States. Thus, the Agency needed to spell out permitting procedures, information requirements, and similar provisions explicitly and in detail. Although some States may choose to adopt these requirements verbatim or by reference, EPA expects that other States will prefer to establish different procedures (e.g., for RAP issuance or revisions, appeal rights, computation of time periods, and similar requirements), analogous to the situation regarding 40 CFR part 124 requirements such as administrative permit appeals that States are not required to adopt for authorization (see §§ 270.155, 270.190, and 270.215). EPA stresses that State programs will be eligible for authorization, as long as they comply with the statutory minimum in areas like public participation, their requirements apply equivalent (or more rigorous) procedures, they provide for adequate enforcement, and they meet the substantive standards of the federal regulations.

D. Authorization of State Non-RCRA RAP Authorities

In some instances, States may want to use as RAPs, enforceable documents issued by a State program other than the State's authorized RCRA program (see section IV of today's preamble for further discussion). Enforceable documents containing hazardous remediation waste management requirements that are not specifically issued through EPA's or an authorized State's RCRA program are not considered to be RAPs (this is, RCRA permits). Where a State wishes to use enforceable documents issued under authorities other than State RCRA authorities to implement hazardous waste remediation requirements, this will require specific authorization review to determine whether the State has the requisite implementation and enforcement authority and whether the provisions are consistent and equivalent to those promulgated today. In order to provide EPA with a basis for its authorization determination, during the authorization process for this rule, the State should specifically identify the enforceable documents it intends to use as RAPs, as well as the State authorities under which they are issued. If EPA approves the authorization, then the enforceable documents become a part of the RCRA program and the State will have the discretion to use such documents as RAPs. As part of RCRA, the RAP portion (i.e., hazardous remediation waste requirements and conditions) of the enforceable document is enforceable pursuant to the State RCRA enforcement authorities and by EPA pursuant to its independent RCRA enforcement authority.[31]

Elsewhere in this preamble, EPA discusses the appropriate level of public involvement in site cleanups, given the need for flexibility to do what makes sense in a given situation. Thus, States need to ensure in particular, that any enforceable documents to be used as RAPs will be developed through procedures that meet the public participation requirements in § 270.145; otherwise they will not meet the standards for authorization. Further, the authorities used to issue these documents must also ensure that hazardous waste is managed under the appropriate standards of the hazardous waste program.

As noted earlier, nothing in today's rule limits or expands the authorities States may already have to waive RCRA permit requirements, consistent with EPA's authority in section 7003 of RCRA or section 121(e) of CERCLA. RCRA section 7003 allows EPA to order response actions in the case of imminent and substantial endangerment to health or the environment, "notwithstanding any other provision in this Act." An authorized State may use a comparable authority to authorize activities consistent with today's rule. Similarly, where comparable authority exists under a State Superfund program, the State may use that authority. As explained in EPA guidance, the two preconditions to allowing the use of this authority are that: "(1) the State has the authority under its own statutes or regulations to grant permit waivers; and (2) the State waiver authority is used in no less stringent a manner than allowed under Federal permit waiver authority, for example, section 7003 of RCRA or section 121(e) of CERCLA." (See the Memorandum, "RCRA Permit Requirements for State Superfund Actions", from J. Winston Porter to Regional Administrators, Region I–X (Nov. 16, 1987) (OSWER Dir. No. 9522.00–2).) A State cannot, however, waive applicable Federal requirements. Thus, if a State is not authorized to

[31] Nothing in either the State's authorized "enforceable document" or in the State's law can restrict EPA's independent authority to enforce the authorized RCRA program.

implement a portion of the RCRA program in that State, the exercise of the State's waiver authority does not waive the Federal portion of the RCRA requirements. Also, EPA recognizes that many States have enforcement authorities allowing them to compel corrective action at interim status facilities comparable to EPA's section 3008(h) authority. States with appropriate regulatory and enforcement authority would be able to use these authorities in the same way EPA uses its section 3008(h) authority, for example, to approve the use of a staging pile outside the context of a RAP. As long as the authorized State acted in a way that was consistent with Federal requirements, its program would be considered to be as stringent as the Federal program.

XI. Abbreviated Authorization Procedures (§ 271.21(h))

EPA and States have recognized the need to improve the RCRA State authorization procedures for many years. For example, in the 1990 RCRA Implementation Study, the authorization process was identified as being too slow and cumbersome. In response to these longstanding concerns, the practices used by EPA and States have evolved over the years. The purpose of these attempts has been to make the authorization process operate more smoothly. Further, because Federal regulatory revisions promulgated under non-HSWA statutory authority do not go into effect until States have adopted them and received authorization, a more speedy authorization process will enhance environmental protection.

In several notices published during the past three years, EPA has proposed abbreviated authorization procedures intended to expedite the review and approval of revisions to authorized State programs. In the August 22, 1995, Land Disposal Restrictions (LDR) Phase IV proposal, EPA proposed a procedure (subsequently called Category 1) for authorizing minor or routine rules (see 60 FR 43654). This abbreviated procedure would require an application that was reduced in scope and composed of a statement from the State that its laws provide authority that is equivalent to and no less stringent than EPA's regulations, and a copy of those State statutes and regulations. After a complete application was submitted, EPA would then conduct a speedy review, and within 60 days after receiving an acceptable application, finish its action by publishing a **Federal Register** notice. With this notice and the associated public comment period, EPA would provide notice to the public of authorization decisions in the same fashion as is currently done. This procedure was proposed to apply to certain minor amendments to the LDR program that had become a routine part of the LDR program. EPA also requested comment on the future applicability of this procedure.

EPA modified this proposal in the January 25, 1996, LDR Phase IV supplemental proposal (see 61 FR 2338). EPA also proposed streamlined procedures for the authorization of more significant rules in the April 29, 1996, HWIR-media proposal (see 61 FR 18818). This proposed procedure was known as Category 2.

However, after carefully evaluating the comments received on these proposals, as well as the Agency's goal of speeding up the State authorization process, EPA has decided to promulgate abbreviated authorization procedures based on the procedures proposed in the August 22, 1995, LDR Phase IV notice. Thus, EPA is not promulgating the more extensive proposed Category 2 procedures from the HWIR-media proposal and the modifications to the proposed Category 1 procedures outlined in the January 25, 1996 LDR supplemental proposal. This preamble explains the details of today's abbreviated procedures, and discusses EPA's overall approach towards streamlining and improving the authorization process for all State authorization revisions.

A. Existing Authorization Process

During the past 15 years, EPA has frequently amended the Federal RCRA program by promulgating rulemakings to reflect statutory mandates, court decisions, and technical and scientific progress. EPA Regions and States have worked together to incorporate these regulatory amendments into revised State hazardous waste programs. This has been accomplished through the State adoption of rules equivalent to the Federal rulemakings, and the subsequent authorization of States. The existing regulations regarding the revision of a State's authorized program are located in 40 CFR 271.21.

Authorization revision applications generally consist of a copy of the State regulations, a revised Attorney General's (AG) statement, a revised Program Description (PD), a revised Memorandum of Agreement (MOA), or other documents EPA determines to be necessary (see 40 CFR 271.21(b)(1)). This provision does provide EPA with flexibility regarding the content of authorization applications. However, all of these components are generally submitted to EPA because the State applications often cover Federal rulemakings promulgated during a period of one to several years and therefore address significant Federal rulemakings. This practice is based on provisions located in 40 CFR 271.21(e). These provisions set forth the concept of "clustering" rules, and established deadlines for State submission of applications. Because State applications address Federal rulemakings promulgated during a set period of time, it is common that these applications contain analogous State rules that are both very minor and quite significant.

Although the regulations in § 271.21 contain only general provisions regarding the EPA review and approval process, over time EPA Regions and States have developed practices for the development and review of State applications that vary according to the content of the application, method of State adoption, and the individual approaches of State and EPA staff. Of course, all of these practices are based on the standards for review set forth in the RCRA statute, along with other sections of 40 CFR part 271, and the content and nature of the individual applications. Typically, the State provides a draft of its application, including draft or proposed State regulations, to the EPA Region for review and comment. After the Region submits comments back to the State, the State addresses the comments, and prepares and sends a final application to the EPA Region for review, comment if necessary, and in most cases, approval through notice in the **Federal Register** as an immediate final rule, also known as a direct final rule (see 40 CFR 271.21(b)(3)).

The authorization revision process as implemented does not incorporate formal deadlines or time lines. Many factors have contributed to the duration of the entire process, which EPA and States have often characterized as being too lengthy. One factor is the size and complexity of many revision applications. Another factor is the time necessary for a State to conduct rulemakings to revise its regulations, and to put together a complete application. Allowing EPA review of draft or proposed State regulations may also lengthen the process, even though it is particularly recommended in cases where States find it difficult to amend regulations after they are first promulgated.

B. Summary of Comments on the August 22, 1995 Proposal

EPA did not receive any adverse comments regarding the abbreviated

authorization procedures that were proposed in the August 22, 1995 notice. Some of these commenters wanted these procedures to apply to the authorization of States for all Federal RCRA rulemakings, and not just to rules that are minor in nature. Other commenters thought that the procedures were appropriate for the authorization of minor rules that would be promulgated in the future, or were already promulgated by EPA. One commenter maintained that the procedures should not be applied to authorizations involving rules that are significant, since the necessary EPA review may involve State enforcement and technical capability.

C. Basis and Rationale for Today's New Procedures

EPA has determined that, while the authorization processes that are currently employed may be appropriate for the authorization of significant changes to the RCRA program, a process that does not include all the possible components of the application, and that provides deadlines for certain actions is better suited for routine or minor changes. As discussed in the August 22, 1995 proposal, routine or minor rulemakings are those EPA rulemakings that do not change the basic structure of the RCRA hazardous waste program, or expand the program into significant new areas or jurisdictions. For example, a new waste listing which amends 40 CFR part 261, a technical correction to a previously promulgated rulemaking, or a rulemaking that is part of a series of rulemakings where the basic regulatory authority has already been established (and remains largely the same), could be considered a minor or routine rulemaking and appropriate for the abbreviated authorization process.

As already discussed, these rules would have a limited impact on the implementation and scope of the RCRA program and therefore, the minor or routine rulemakings do not significantly expand or change the nature of existing State authorized regulatory authority. Further, such rules have a negligible effect on the resources necessary to implement the RCRA program, and do not have an effect on the intergovernmental relationship between EPA and States. Thus, it is appropriate to have an abbreviated authorization process for minor or routine rules to be used by States that have already received authorization for the significant parts of the RCRA program that are being revised, since those States have demonstrated capability in both the administration and implementation of those aspects of the program.

Additionally, an abbreviated authorization process is appropriate since certain components of the normally submitted authorization application (such as the MOA and PD) are affected only rarely by minor or routine revisions. Rather, revisions to these components are usually required in the authorization revision application for a set of rules because of the presence of significant rulemakings, not the minor or routine rules. Likewise, much of the time and effort expended on reviewing and revising authorization applications is due to the extensive changes to the RCRA regulations caused by significant rulemakings.

Further, revisions to the PD or MOA should not be necessary because, as already mentioned above, the minor or routine rules to which today's new, abbreviated procedures apply do not have any significant impact on the States' capability to implement the RCRA program, and do not present any new issues for EPA-State coordination. Also, due to the nature of these minor or routine rules, they should not have an effect on State program consistency and the adequacy of a State's enforcement program. Thus, EPA believes that today's procedure will expedite the implementation of many minor or routine rulemakings, and will enable EPA Regions and States, including the State Attorney General's Office, to devote their resources towards efficient authorization of more significant rules.

EPA has always had the discretion to implement authorization procedures similar to those promulgated today without promulgating regulations. For example, § 271.21(b)(1) allows EPA to determine what documents are necessary in a revision application, according to the circumstances presented by each particular rule. Nonetheless, EPA believes that this codification of procedures is useful for two reasons. First, a codification will provide a consistent procedure for States and EPA to use when processing an application for minor or routine rules. Second, since these procedures will be included in the CFR, all parties involved in the authorization process, including States and the general public, will be aware of this alternative procedure.

Section 3006(b) of RCRA establishes the legal standard for State program approval. As detailed below, the application required in today's procedure includes a statement that the State's regulations for which the State is seeking authorization are equivalent to the Federal regulations. EPA has concluded that this statement, coupled with the review EPA conducts on these minor or routine rules as part of the authorization process, will provide an adequate basis for EPA to make its required findings and grant approval of a program revision under 40 CFR part 271.

D. Rule Listed in Table 1 to § 271.21 to Which the Abbreviated Procedure Applies

In new Table 1 to 40 CFR 271.21, EPA has listed the first rule for which the new abbreviated procedure may be used. This rule is the Universal Treatment Standards (UTS) in §§ 268.40 and 268.48 that were promulgated in the Phase II LDR rule (see 59 FR 47982, September 19, 1994). Note that States are not required to use the new procedures in 40 CFR 271.21(h) when they seek authorization for this rule and other rules that may be placed in Table 1 in the future.

Note that the August 22, 1995, notice proposed to use the abbreviated procedures for the authorization of other LDR rules. These rules were portions of the proposed Phase III LDR rule, and the Phase IV LDR rule (which was split up into two final rules). These LDR proposals have since been finalized (see 61 FR 15660, April 8, 1996, for the Phase III LDR rule; 62 FR 26040, May 12, 1997 for the LDR rule) on wood preserving wastes (part of the Phase IV; and 63 FR, 28556, May 26, 1998 for the Phase IV LDR rule). EPA has decided not to use today's abbreviated procedures in 40 CFR 271.21(h) for the authorization of these final rules. This is because these rules, in addition to the routine modifications and additions to the LDR treatment standards, made changes to the definition of solid waste and other aspects of the RCRA program which affected its scope in a more significant manner.

Today's HWIR-media final rule is also not listed in Table 1 and therefore, as explained earlier, the abbreviated authorization process will not be used for its authorization. EPA considers today's HWIR-media rule to be a significant rule because, for example, it provides for a new type of permit mechanism and a new type of waste management unit. Although EPA believes that today's rule will have many environmentally beneficial effects, it involves several complex regulatory concepts, and thus EPA believes the abbreviated procedures are not appropriate for its authorization.

In the future, as EPA proposes rulemakings under RCRA, EPA will also propose to list additional minor or routine rules in Table 1 to 40 CFR 271.21, to ensure that today's procedure

can be used for their authorization. These future proposed additions to Table 1 will generally be in the same notice as the proposed minor or routine rule. This action was supported by commenters to the August 22, 1995 proposal. Once public comment is received on the proposed listing in Table 1, EPA will promulgate it as appropriate.

In the August 22, 1995 proposed rule, EPA discussed and requested comment on the rules a State must be authorized for to use the abbreviated process. In particular, EPA suggested that States should be authorized for the LDR Third Third rule (see 55 FR 22520, June 1, 1990) to use the new procedure for the LDR Phase II, III and IV rules, or the designated parts of them. Based on the comments, EPA has concluded that the proposed approach was reasonable. However, the prerequisite has been modified so that it is more generally applicable, and easier to understand and implement. Therefore, today's rule simply requires that States be authorized for the part of the program that the routine rule is amending. One example is a revision to an existing rule. Another example is a new waste listing, which amends the list of hazardous wastes in 40 CFR part 261. This prerequisite requirement is located in § 271.21(h)(5).

E. Use of Today's Abbreviated Procedure for the Authorization of Previously Promulgated Rules

In today's rule, EPA explicitly identifies a portion of the Phase II LDR rule as subject to the abbreviated authorization procedures. However, EPA considers the development and review of an authorization application that contains only this rule to be inefficient, and not justified by the administrative resources that EPA and States would expend to develop and review such a small application. This situation would render today's new procedures largely ineffective in accomplishing the goal of making the authorization process more efficient, considering that authorization applications generally cover a large number of Federal rulemakings, ranging in size from about 20 to 100 rules. Further, EPA does not believe that it should treat the authorization of minor or routine rules in a different manner based solely on when the rule was promulgated.

Section 271.21(b)(1) provides the Agency with the flexibility to tailor the contents of a State's application to revise its authorization. Thus, under this provision, EPA could require the same information that is required to be in the State application under the new requirements in § 271. 21(h)(1). EPA also has the discretion to review authorization applications in the same manner as promulgated in today's abbreviated procedures. EPA has always had the ability to commit to an expedited review of State applications. For example, EPA has committed to conducting a speedy review of State applications for several recent rules.

Since today's procedure continues to meet the review requirements set forth in the RCRA statute and existing regulations, and EPA has discretion under 40 CFR 271.21(b)(1) to appropriately tailor the authorization application requirements and review schedules, EPA intends to use the timetables and application requirements in today's procedure for previously promulgated rules, as long as those rules are minor or routine in nature and scope. EPA is developing guidance to enable States and Regions to make speedy and proper decisions regarding which previously promulgated rules should be included in an authorization application that uses the abbreviated procedures. This guidance will identify those previous rulemakings which EPA considers to be minor or routine in nature. It will also identify those rules that are not minor or routine, and for which the abbreviated procedures will not be used. One example of such a rule is the Boilers and Industrial Furnace rule, which establishes authority over a new and complex area. This guidance will take into account the criteria EPA will use to propose to list a new rule in Table 1, the considerations discussed in the section regarding basis and rationale in today's preamble, and EPA's previous experience in authorizing these existing rules. This guidance will also consider how EPA's checklist guidance that is contained in the annual State Program Advisories treats these rules, since the guidance is widely used in those States that do not incorporate the Federal regulations by reference. Copies of the checklist guidance for all existing rules as well as other authorization related guidance are located on the Internet (at: http://www.epa.gov/epaoswer/hazwaste/state/index.htm). For example, many technical corrections to significant rules, which on their own would be considered minor, are included on the same checklist as the original major rule. EPA does not think that States which use the checklist guidance would separate out these technical corrections into a second application because doing so would be difficult and inefficient. Thus, these corrections would not be listed as minor in the guidance. (However, if a State had already been authorized for the major rule, and would prefer to seek an abbreviated process for the subsequent technical corrections, EPA has the discretion to process it accordingly.) EPA encourages States to discuss and coordinate upcoming authorization applications with EPA Regions to determine the most efficient approach to take regarding the submission of revision applications in light of today's rulemaking.

It is important to note that this abbreviated process for the authorization of minor or routine rules only addresses the procedures for processing certain State authorization applications. Today's procedure does not affect the continued responsibility of States to inform EPA of changes to its basic statutory or regulatory authority under 40 CFR 271.21(a). Likewise, today's rule does not affect EPA's ability under 40 CFR 271.21(d) to request a supplemental Attorney General's statement, program description, or other documents or information as necessary.

Occasionally, EPA requests additional information from a State under 40 CFR 271.21(d). A prime example is when a State uses non-RCRA authorities to implement rule requirements. If a State were to use alternative authorities to seek authorization for a rule that is considered to be minor or routine, EPA would probably request additional information from the State Attorney General. Further, where a rulemaking would have a significant impact on the size of a State's universe of regulated facilities, EPA may ask for a revised Program Description and/or a revised MOA. Although EPA does not believe that situations such as this will be common, States should be aware of these and work with the EPA Region before an application is submitted, so that issues regarding the contents and review requirements for an application may be resolved.

F. Final Abbreviated Authorization Procedures

Today's rule amends 40 CFR 271.21 to create a new authorization procedure in paragraph (h) of § 271.21 that consists of an abbreviated application and an expedited process. Note that this procedure was originally proposed in a new § 271.28, but then paragraph (h) of § 271.21 was reserved for this procedure in the April 29, 1996, HWIR-media proposal. Likewise, in the proposal, the rules for which this authorization procedure would be used were listed in 40 CFR 271.28(a), but are now listed in new Table 1 to § 271.21. EPA believes

that this table format is easier to read than the proposed listing.

G. Authorization Application Requirements

The requirements for a State's abbreviated application are located at 40 CFR 271.21(h)(1). These application requirements are essentially unchanged from the August 22, 1995 proposal. This abbreviated application does not require a revised Program Description, Memorandum of Agreement, or Attorney General's Statement. Instead, the application must include a statement from the State that the laws and regulations of the State provide authorities that are equivalent to, and no less stringent than the Federal authorities for which the State is seeking authorization. The certification must include appropriate citations to the specific statutes, administrative regulations and where appropriate, judicial decisions. It must also include a copy of the applicable State laws and regulations. The cited State statutes and regulations must be lawfully adopted at the time the certification is signed and fully effective by the time the program revisions are approved. This statement may be signed by the signatory of the State application. Although the Attorney General may sign this statement, the signature of the Attorney General is not necessary for the authorization of the minor rules subject to today's procedures. These minor or routine rules do not affect the previously authorized legal authority of the State to carry out its hazardous waste program. This requirement is consistent with the provisions of the proposed rule, which did not require the Attorney General to sign the statement. EPA did not receive any negative comments on this aspect of the proposed rule.

H. Procedures for Reviewing and Approving Applications

EPA expects that a concerted effort from both the EPA Regions and States will be essential to meet the deadlines specified in new § 271.21(h). Thus, the Agencies should coordinate their efforts before and after the State application is submitted. EPA encourages States to submit applications in draft form where feasible. This will make it easier for the State to incorporate any changes to its application, and will reduce the frequency of errors in the final application. States should note that high level signatures, such as from the State Director, are not required for a draft application. Further, to make the Regional review more efficient, States should provide clear explanations regarding changes they have made to the Federal regulations and provide a crosswalk between State and Federal regulations.

Once the State submits an application to EPA, the Agency will conduct an expedited review of the State's regulations. This review will consist primarily of a check for completeness and errors within the State regulations, such as LDR treatment levels that are above the Federal levels (and thus are less stringent). EPA anticipates that these errors will be rare because the rulemakings eligible for this abbreviated procedure are not complex, and are easily adopted by the State. This review will constitute the finding of equivalency required by section 3006 of RCRA. Note that this procedure does not affect in any way a State's ability to promulgate regulations more stringent than the Federal regulations under section 3009 of RCRA.

Under § 271.21(h)(2), EPA is required to notify the State within 30 days of receipt of the application if EPA determines that the application, including the statement, is not complete or contains errors. The reasons why EPA can determine that an application is not complete are specified in § 271.21(h)(3). These reasons are: (1) Copies of applicable statutes or regulations are not included; (2) the statutes or regulations relied on by the State to implement the program revisions are not lawfully adopted or effective by the time the program revisions are approved; (3) in the statement, the citations to the specific statutes, administrative regulations and where appropriate, judicial decisions are not included or incomplete; and (4) the State is not authorized to implement the prerequisite RCRA rules as specified in § 271.21(h)(5). If EPA does find that an application is incomplete or contains errors, EPA will summarize the deficiencies in the completeness notice sent to the State under § 271.21(h)(2).

After the State submits an application to the Region (either in draft or final form), the EPA Region should discuss any questions and concerns with State staff. One purpose of these discussions is to seek clarification regarding the State's application, and to attempt to resolve these questions and concerns. Thus, if EPA's questions and concerns are resolved through these discussions, a completeness notice may not be necessary since there would be no outstanding issues. EPA Regions also should commit to conduct additional reviews only on application components that are new or have changed since the previous submission. EPA Regions will prioritize any comments submitted to the States regarding a draft or final application, and will make distinctions between those errors that cause a State's regulations to be less stringent and need to be changed before the application can be approved, and those that may be made at a State's discretion, such as typographical errors. After addressing EPA comments, if any, the State will then resubmit the application to EPA as a final application. Of course, EPA encourages the States to seek clarification regarding any of the Regional comments so they can be properly resolved before resubmitting an application.

Under § 271.21(h)(4), EPA will publish an immediate final rule in accordance with the requirements in § 271.21(b)(3), within 60 days of receiving a complete final application under paragraph (h)(2). Thus, if EPA does not find any deficiencies in a State's final application, this notice will be published within 30 days after EPA completes its check. Likewise, if EPA finds deficiencies in a State's application, this notice will be published within 60 days after receipt of a new corrected application. This immediate final rule is the same promulgation procedure used for other revision authorization decisions, which provides the public the ability to comment on tentative EPA authorization decisions before they become effective. The notice would provide for a 30-day public comment period, and would normally go into effect 60 days after publication unless an adverse comment is received by EPA.

I. EPA's Decision To Not Promulgate Proposed Category 1 and 2 Procedures

In comments on the proposed Category 2 procedures, most commenters supported the concept of improving the authorization procedures. However, many commenters did not support the specific procedural changes that would apply to the authorization of significant rules. These commenters maintained that the proposed Category 2 procedures were too complex and cumbersome, and did not address the underlying interactions between EPA and States within the process. In addition, the proposed procedures would not have affected the authorization process for the dozens of previously promulgated rules for which States are not authorized. Other commenters believed that the proposed Category 2 procedures would amend the EPA review process and standard of review in a way that was not consistent with the RCRA statutory requirements. As a result of these comments, EPA has

further evaluated the existing barriers to accomplishing the goals of the proposals. EPA has concluded that many of the barriers to the authorization of significant rules involve the process of communication and coordination between EPA and States that is more appropriately addressed through guidance and other non-regulatory means. Therefore, EPA is not finalizing the Category 2 procedures proposed in the HWIR-media proposal. EPA is also not finalizing the modifications to the proposed Category 1 procedures that were proposed in the January 25, 1996 notice (see 61 FR 2338). These modifications were opposed by commenters.

J. Improvements to the Existing Authorization Process

EPA believes that the abbreviated procedures promulgated today will help make the State authorization program more efficient. However, most of the authorization work that confronts EPA and States will continue to involve rules that are considered to be significant rules, which are not affected by today's procedure. Examples of these rules include the Boiler and Industrial Furnace rule, the Used Oil rule, and today's HWIR-media rule. EPA believes that many of the coordination and communication activities recommended for today's abbreviated process should be applied to the development and review of all other authorization applications. One example is the prioritization of Regional comments that may be submitted to the State. Further, EPA recommends that EPA Regions and States hold discussions throughout the authorization process to foster closer coordination between the agencies. For example, before a State develops an application, the agencies should discuss what revisions to the MOA and PD may be necessary, and any major changes to the regulations planned by the State. These discussions can be used to produce an authorization process time line that satisfies the needs of both agencies. This time line should contain commitments by both the Region and State to provide expeditious turn-around of comments on applications, revisions to applications, and other correspondence. To meet these commitments, Regions should set internal deadlines for review based on the size of the application and the method a State uses to adopt the Federal regulations. Finally, to avoid numerous submissions of the same document, Regions should help the State develop acceptable language when appropriate or desired by the State.

XII. Conforming Changes (§§ 265.1(b), 268.2(c), 268.50(g), 270.11(d), and 270.42 Appendix I)

Section 265.1(b), which discusses the applicability of part 265 and other standards at interim status facilities, is amended in today's rule to incorporate 40 CFR 264.554 (staging piles requirements) into the list of standards that apply to interim status facilities. Because today's rule for staging piles includes part 264 requirements for staging piles, but not part 265 requirements, EPA wanted to make this conforming change to make it clear that staging piles can be used at interim status facilities. The same conforming change was made in the February 16, 1993 CAMU rule to incorporate CAMUs and temporary units into the same provision for the same reason. The CAMU rule stated, "heretofore, technical requirements for interim status facilities were specified only under part 265. Therefore conforming changes are necessary * * *". The CAMU, temporary unit and staging pile provisions are the only part 264 standards that apply to interim status facilities. The CAMU rule also made a similar conforming change to § 264.3; however that change used the phrase "40 CFR part 264 Subpart S," which includes the provisions for staging piles, so no additional conforming changes to § 264.3 are necessary.

The conforming change to § 268.2(c) is a change to the definition of land disposal. Because placement in a staging pile does not constitute land disposal, it is necessary to make that clear in the definition of land disposal. EPA made the same change for CAMUs in the February 16, 1993 CAMU rule. The new language changes the definition to read that "land disposal means placement in or on the land, except in a corrective action management unit or staging pile." For further discussion of the applicability of land disposal restrictions to staging piles, see the staging piles of today's preamble.

The conforming change to § 268.50(g) makes it clear that storage in a staging pile is not prohibited under the part 268 Subpart E prohibitions on storage. A full discussion of this change can be found in the staging piles of today's preamble.

The changes to § 270.11(d) in today's rule offer an alternative certification for land owners applying for a RAP at a remediation waste management site. A full discussion of this change can be found in the preamble discussion of § 270.82(a) in today's preamble.

The changes to Appendix I of § 270.42 specify which type (Class 1, 2, or 3) of permit modification is necessary for using staging piles at closing facilities and for approval of staging piles or operating term extensions at corrective action facilities. Both of these activities require a Class 2 permit modification. This decision is discussed further in the staging pile of today's preamble.

XIII. How Does Today's Rule Relate to Other EPA Regulations, Initiatives and Programs?

A. Subpart S Initiative

EPA expects today's rule to complement activities being done under the Subpart S Initiative. The Subpart S initiative is an effort to identify and implement broad-based improvements to the corrective action program, drawing upon more than ten years of experience in program implementation. The Subpart S Initiative addresses such issues as corrective action program priorities, use of administrative flexibility in implementing corrective action, and development of guidance and regulations for setting site-specific conditions in permits and orders for investigating and remediating releases. The May 1, 1996 Advance Notice of Proposed Rulemaking (61 FR 19432) describes the Subpart S Initiative in detail. Because the HWIR-media regulations specifically address the management of remediation waste during site clean up, they complement the broader Subpart S Initiative.

B. Suspension of the Toxicity Characteristic for Non-UST Petroleum Contaminated Media and Debris

EPA had hoped that the more comprehensive reforms proposed in the HWIR-media proposal would sufficiently address the issues raised in the "Suspension of the Toxicity Characteristic for Non-UST Petroleum Contaminated Media and Debris" proposal. This proposal, generally referred to as the "Non-UST TC Suspension," was published on December 24, 1992 (57 FR 61542). EPA never finalized the Non-UST Suspension, but stated in the HWIR-media proposal that finalization would not likely be necessary because a final HWIR-media rule would solve the problems that the Non-UST TC Suspension was intended to address. However, especially in light of the more limited changes included in today's final rule, EPA recognizes that additional reform may be needed for the cleanup of non-UST petroleum contaminated media and debris.

States have developed petroleum response programs to respond to petroleum contamination including contaminated media and debris.

However, as stated by many States with these programs, if the wastes must be managed as RCRA hazardous because they fail the TCLP test for benzene (as is sometimes the case), then the applicable Subtitle C requirements such as LDR, MTR and permitting delay the response actions, significantly increase costs, and in some cases may act as a disincentive to full cleanup. If remediation wastes, including petroleum contaminated media and debris, had been excluded under either the Bright Line or Unitary Approaches proposed in the HWIR-media proposal, then those State programs may have been able to conduct responses as they had planned, and the Non-UST TC Suspension may have no longer been needed. However, today's HWIR-media rule does not exclude any wastes from Subtitle C requirements, and although EPA is streamlining the permitting process, it is still time consuming in comparison to the fast response times needed by these State petroleum response programs. EPA will continue to review the issues addressed in the Non-UST TC Suspension proposal (and subsequently raised in comments received on the proposed HWIR-media rule); however, the Agency is not taking final action today on that proposal.

C. Deferral of Petroleum-Contaminated Media and Debris from Underground Storage Tank Corrective Actions

Today's rule does not affect the temporary deferral from certain portions of EPA's hazardous waste regulations of petroleum-contaminated media and debris that are generated from underground storage tank corrective actions that are subject to Subtitle I of RCRA. This UST deferral was published on March 29, 1990 (55 FR 11862), and amended later on June 29, 1990 (55 FR 26986). The deferral appears at 40 CFR part 261.4(b)(10).

D. Hazardous Waste Identification Rule (HWIR-waste) (May 20, 1992, and December 21, 1995)

Although today's rule and the HWIR-waste rule are often discussed together, they are two separate rulemaking efforts on separate schedules. Today's rule does not address, in any way, the key issue of the HWIR-waste rule, which is at what point wastes and media should exit the Subtitle C regulatory system. EPA will sign a new proposal for HWIR-waste by October 31, 1999 and a final rule by April 30, 2001.

E. CERCLA

EPA expects that the provisions in today's rule applicable to staging piles will provide the CERCLA program with more flexibility at CERCLA sites where these provisions are ARARs. EPA does not expect the new RAP provisions to have any effect on CERCLA sites, because CERCLA sites do not require permits for on-site management of remediation wastes. Likewise, because the dredged sediments exclusion will not alter current practice significantly, EPA does not expect significant impact from the new dredged material provisions on the CERCLA program. Finally, today's streamlined State authorization procedures will have no effect on the CERCLA program. In summary, EPA anticipates some positive effect on the CERCLA programs from staging piles, but little or no effect on the CERCLA program from the other provisions of HWIR-media.

F. Legislative Reforms

While EPA believes today's rule will improve remediation waste management and expedite cleanups, the Agency also recognizes that additional reform is needed, especially for management of non-media remediation wastes, such as remedial sludges, and to provide for more tailored land disposal requirements, minimum technological requirements, and address certain statutory permitting requirements. The Agency considers today's rule to be a partial step, rather than a full solution to the problems raised by the application of RCRA Subtitle C requirements to remediation wastes. The Agency will continue to participate in discussions on potential legislation to promote this additional needed reform. If legislation is not forthcoming, the Agency may reexamine its approach to remediation waste management and may take additional administrative action.

G. Brownfields

Today's rule complements EPA's continuing efforts to address Brownfields properties. The Agency defines Brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. In February 1995, EPA announced its Brownfields Action Agenda, launching the first Federal effort of its kind designed to empower States, tribes, communities, and other parties to safely clean up, reuse, and return Brownfields to productive use. In 1997, to broaden the mandate of the original agenda, EPA initiated the Brownfields National Partnership Agenda, involving nearly 20 other Federal agencies in Brownfields cleanup and reuse. Since the 1995 announcement, EPA has funded Brownfield pilots and reduced barriers to cleanup and redevelopment by clarifying environmental liability issues, developing partnerships with interested stakeholders, and stressing the importance of environmental workforce training.

As the Agency's Brownfield activities have increased, EPA and stakeholders have recognized that the statutory and regulatory hazardous waste management and permitting requirements under RCRA can render the cleanup and reuse of Brownfields properties cost and time prohibitive. In particular, certain RCRA requirements, written with "end of pipe" wastes in mind, may be unnecessarily burdensome when applied to Brownfield cleanups. By streamlining the permitting process and removing the requirement for facility-wide corrective action at remediation-only facilities, today's rule should facilitate cleanup activities. Reducing RCRA impediments to cleanup activities not only addresses existing Brownfield sites by facilitating cleanups at these sites, but also helps prevent the creation of future Brownfields by encouraging proactive responses to site contamination during the productive life of a facility.

H. Land Disposal Restrictions (Part 268)

EPA proposed revisions to the treatment standards for hazardous contaminated soils first in the Phase II LDR rule, "Land Disposal Restrictions for Newly Identified and Listed Hazardous Wastes and Hazardous Soils," 58 FR 48092, and again in the April 29, 1996 HWIR-media proposal, 61 FR 18780. EPA finalized the soil treatment standards in the final LDR Phase IV rule (63 FR 28556 (May 26, 1998).

XIV. When Will the Final HWIR-media Rule Become Effective?

Today's rule will become effective June 1, 1999.

XV. Regulatory Requirements

A. Assessment of Potential Costs and Benefits

1. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether any proposed or final regulatory action is "significant" and therefore, subject to Office of Management and Budget (OMB) review and the requirements in the Executive Order. The order defines "significant regulatory action" as one that is likely to result in a rule that may:

(a) have an annual effect on the economy of $100 million or more, or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(b) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(c) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(d) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Agency has determined that today's final rule is a "significant regulatory action" because it raises "novel legal or policy issues" as specified in (d) above. OPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record for this rulemaking (*see* Docket # F–98–MHWF–FFFFF). The Agency has prepared an economic assessment background document in support of today's final rule which provides much greater detail than this preamble discussion on the analysis of today's standards ("Economic Assessment of the Final Hazardous Waste Identification Rule for Contaminated Media"). A copy of that document can be found in the docket for today's rule; a summary of this assessment is presented below.

2. Background

Today's rule addresses three main issues: dredged material exclusion, staging piles, and remedial action plans (RAPs). Although still believing there is a need for comprehensive regulatory reform of remediation waste management requirements, the Agency has decided not to go forward with the comprehensive regulatory changes which were proposed in the April 29, 1996 HWIR-media Proposed Rule (61 FR 18780). (Please see section II.E. for a full discussion of the basis for the Agency's decision.) The economic assessment prepared in support of today's rule addresses only the three main issues covered in the rule, none of which were analyzed in the proposed rule economic assessment due to their relatively small scale impacts compared with the other proposed rule provisions. The response to comments document for today's rule responds to comments received on the proposed rule economic assessment, and is available in the docket for today's rule.

3. Need for Regulation

Today's rule provides relief from existing regulatory requirements in three specific cases dealing with remediation and management of wastes. The dredged material exclusion excludes from RCRA requirements a portion of dredged material handled under CWA and MPRSA permits, and thus provides clarity of regulatory jurisdiction and removes the potential for duplicative effort. The staging pile provision allows for temporary storage of remediation wastes in preparation for future management. This temporary relief from the traditional requirements for land placement provides potential cost savings and encourages remediation of wastes. Additionally, the RAP provision allows for remedial activities to occur under an expedited vehicle instead of the customary RCRA permit requirements. Furthermore, use of this vehicle does not invoke RCRA 3004(u) facility-wide corrective action obligations; those facilities already under facility-wide corrective action requirements which employ a RAP remain under these requirements. Thus, today's rule represents a modest reform of the remediation waste requirements, while maintaining protection of human health and the environment.

4. Assessment of Potential Regulatory Costs

The economic assessment examines the cost impacts of the provisions of today's rule. Benefits of the rule, in the form of human health and environmental risk impacts, are not examined in this assessment. The Agency believes, however, that these provisions will tend toward greater protection of human health and the environment by promoting more cleanups. Economic impacts to industries affected by today's rule have not been estimated, as the rule provides an overall cost savings.

a. Methodology and Results for Estimating Regulatory Costs

i. Dredged Material Exclusion

The Agency did not assess impacts from the dredged material exclusion in the proposed rule economic assessment, and provided a qualitative assessment of the cost savings for this provision in the final rule.

The Agency believes that this exclusion will result in minor reductions of compliance costs with respect to current practices of dredged material management. The Agency did not collect volume data on dredged material management under RCRA. Therefore, no estimate of the cost savings has been developed, although it is not expected to be significant. In addition to the minor cost savings associated with this provision, the exclusion may also decrease the potential for procedural delays (caused by multiple permit applications) that delay timely waste disposal.

ii. Staging Piles

The Agency did not assess the impacts of remediation piles (the predecessor of staging piles in the proposed rule) in the proposed rule economic assessment, and has not quantified the impacts from this provision in today's final rule economic impact assessment. Because of the narrow scope of the staging pile provisions and their significant overlap with existing CAMU, temporary unit, and AOC provisions, the Agency believes that this portion of the rule will likely have only minor cost savings and economic impacts. As discussed earlier, in some cases, staging piles may facilitate the short-term accumulation of remediation wastes until a sufficient volume can be shipped to a treatment or disposal facility or accumulated to implement cost-effective on-site management. In these situations, the new provisions will result in cost savings. The Agency, however, does not expect that the use of staging piles will provide significant quantifiable cost savings, and any savings realized must be evaluated in light of the costs associated with obtaining staging pile approval (either through an RCRA permit or a RAP). The staging pile provisions will, however, not result in any increase in cost because their use is voluntary.

One alternative which the Agency has determined not to adopt in today's final rule is to allow treatment in staging piles. Allowing treatment would potentially increase the use of staging piles, making them more beneficial in certain cases where a CAMU is not necessary for disposal and a temporary unit does not provide enough management flexibility. However, the Agency believes that these cases would be relatively few, and that treatment is more appropriate in a CAMU, which has design and operating standards to fit the requirements surrounding treatment in a unit.

iii. Remediation Action Plans (RAPs)

This section of the preamble summarizes the methodology and results for the cost assessment performed on the RAP provisions in today's final rule. The Agency estimates

a total cost savings of between $5 million and $35 million per year for the RAP provision. The Agency did not assess the impacts of RAPs in the proposed rule economic assessment.

To evaluate this new provision, the Agency performed a quantitative analysis focusing on the cost saving opportunities provided by RAPs to unpermitted facilities which excavate contaminated media and send it off-site for treatment. An additional savings is estimated to occur at unpermitted facilities which are not currently undertaking remediation due to requirements involved in RCRA permitting; however, this savings has not been quantified.

Facilities permitted under RCRA, as well as interim status facilities, are already under facility-wide corrective action obligations, and would therefore be much less likely to shift to use of RAPs given the relatively minor incremental savings of using a RAP over obtaining a permit modification. Therefore, unpermitted facilities, mainly from State and voluntary cleanups, were examined for a cost savings impact from the RAP provisions. To calculate this savings, the Agency: (1) Estimated the total number of unpermitted facilities currently sending remediation waste off site in the baseline; (2) determined the number of facilities in this group which will shift current practices to take advantage of the RAP provision (that is, will shift to on-site treatment); (3) projected an incremental cost savings for this shift; and (4) applied it to the number of facilities determined to shift to estimate the total cost savings for that group. The cost savings was quantified as the reduction in transportation costs for facilities which are estimated to no longer ship waste off-site for treatment, and the reduction in treatment costs for those facilities projected to shift from off-site ex-situ treatment in the baseline to on-site in-situ treatment in the post-regulatory case. The Agency estimated the number of States which already have permit-waiver authority, and thus where the RAP provision is less likely to have a significant impact; this figure was employed in determining the number of facilities likely to be impacted.

The total number of facilities estimated to shift to use of RAPs is between seven and 66 facilities, all of which currently (in the baseline) treat excavated contaminated media off-site. The total cost savings estimated for this group is between $5 million and $35 million per year.

B. Executive Order 12898: Environmental Justice

Under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," as well as through EPA's April 1995, "Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report," and National Environmental Justice Advisory Council, EPA has undertaken incorporation of environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities. To address this goal, EPA considered the impacts of the HWIR-media final rule on low-income populations and minority populations.

EPA has concluded that today's final rule will potentially advance environmental justice causes. The HWIR-media final rule will potentially assist in expediting site cleanups across the nation by reducing the need for time-consuming permitting of on-site cleanup activities, increasing the flexibility of decision-makers to respond to site-specific conditions, and lessening administrative and regulatory complications and delays. This may free remediation resources to address additional sites. By encouraging excavation of contaminated media, the HWIR-media final rule will expedite the restoration of sites and lead to their beneficial use, which may result in new jobs and increased economic activity in low-income or minority communities. This economic activity could take the form of increased employment of local community members at the cleanup sites; the sale and redevelopment of sites for new economic activities; and new beneficial uses for remediated properties, such as parks, transportation facilities, and even hospitals.

C. Unfunded Mandates Reform Act

The Agency also evaluated the final HWIR-media rule for compliance with the Unfunded Mandates Reform Act of 1995. Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal Mandates" that may result in expenditures to State, Local, and Tribal governments, in the aggregate or to the private sector, of $100 million or more in one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government Agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, Local, or Tribal governments or the private sector because the UMRA generally excludes from the definition of "Federal intergovernmental mandate" duties that arise from participation in a voluntary Federal program. HWIR-media is a voluntary program as it applies to State, Local, and Tribal governments. In addition, promulgation of the HWIR-media rule, because it is considered less stringent than current requirements, is not expected to result in mandated costs estimated at $100 million or more to any State, Local, or Tribal governments, in any one year. Thus, today's proposal is not subject to the requirements in sections 202 and 205 of the UMRA. Finally, EPA has determined that the proposed HWIR-media rule contains no regulatory

requirements that might significantly or uniquely affect small governments, and thus is not subject to the requirements in section 203 of the UMRA. Specifically, the program is generally less stringent than the existing program and makes no distinctions between small governments and any potentially regulated party.

D. Executive Order 12875: Enhancing the Intergovernmental Partnership

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

This rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. It provides more flexibility for States to implement already-existing requirements.

E. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) at the time the Agency publishes a proposed or final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis that describes the effect of the rule on small entities. However, no regulatory flexibility analysis is required if the Administrator certifies the rule will not have a significant adverse impact on a substantial number of small entities. The following discussion explains EPA's determination.

The Agency has determined that today's final rule will not have a significant adverse economic impact on a substantial number of small entities, because the rule is estimated to provide regulatory relief, and will not impose any costs on the regulated community. (For the analysis of impacts showing the relief nature of today's rule, see the above economic assessment.) Therefore, no RFA has been prepared. Based on the foregoing discussion, I hereby certify that this rule will not have a significant adverse economic impact on a substantial number of small entities.

F. Paperwork Reduction Act

The information collection requirements in this rule will be submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. *1775.02*) and a copy may be obtained from Sandy Farmer by mail at OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460, by e-mail at farmer.sandy@epamail.epa.gov, or by calling (202) 260–2740. A copy may also be downloaded off the Internet at http://www.epa.gov/icr. The information requirements are not effective until OMB approves them.

The Agency has estimated the burden associated with complying with the requirements in this proposed rule. Included in the ICR are the burden estimates for the following requirements for industry respondents: reading the regulations; for staging piles, applying, keeping records, requesting extensions, closing, and incorporating into permits; for general facility standards for remediation waste management sites, obtaining an EPA identification number, performing waste analysis, demonstrations for locating units in floodplains, and contingency and emergency plans; for RAPs at permitted facilities, the permit modification procedures; and finally, for RAP applicants, the data in the RAP application, transfer of facility ownership, and recordkeeping. Included also are the burden estimates for State respondents for applying for abbreviated State authorization.

The Agency has determined that all of this information is necessary to ensure compliance with today's rule. Specifically, the information for staging piles is required to ensure that the design and operating of staging piles will comply with all applicable regulations and will be protective of human health and the environment, to ensure that staging piles are operated within the two year limit, to ensure that any requested extensions are necessary and will not threaten human health and the environment, to ensure that staging piles are closed according to the applicable regulations, and finally, to ensure that permits are modified appropriately. The information for general facility standards is necessary to ensure consistent and coordinated identification of the site, to have adequate knowledge of the waste being managed to ensure the appropriate waste management requirements are complied with, and to be adequately prepared for contingencies and emergencies. The information for RAPs is necessary to determine whether the remediation waste management activities will comply with the applicable regulatory requirements, to ensure smooth transfer of facility ownership, and to ensure that facility owners and operators have access to all relevant information regarding their RAP application. The information for State respondents seeking authorization is necessary to verify legal authorities and confirm that the State requirements are no less stringent than Federal law.

All of the information required under today's rule is required only when the respondent wishes to obtain a benefit such as a staging pile, a RAP, or State authorization. Provisions already exist, such as other units in part 264, and traditional RCRA permits whereby respondents could perform the same functions allowed in staging piles and RAPs, except that staging piles and RAPs may be more desirable because they are more flexible and more appropriate for the cleanup scenario, so respondents may voluntarily choose to obtain staging piles and RAPs instead of other options, but they are not required to. Also, because today's rule is less stringent than the existing RCRA regulations, it is optional for States to adopt and seek authorization for this rule. Therefore, States could choose not to adopt today's rule.

Section 3007(b) of RCRA and 40 CFR part 2, Subpart B, which define EPA's general policy on the public disclosure of information, contain provisions for confidentiality and apply to today's rulemaking.

EPA has tried to minimize the burden of this collection of information in respondents. The universe of respondents is expected to be sites conducting cleanup under State and Federal cleanup programs. EPA expects that the industries most likely to be affected by these requirements will be associated with the following SIC codes:

SIC Code	Industry
2491	Wood preserving
2812	Alkalies and chlorine
2819, 2869	Industrial organic chemicals

2821 Plastics materials and resins
2879 Agricultural chemicals
2899 Chemical preparations
2911 Petroleum refining
3000 Rubber and miscellaneous plastics products
3089 Plastics products
3229 Pressed and blown glass
3316 Cold finishing of steel shapes
3339 Primary nonferrous metals
3341 Secondary nonferrous metals
3470 Metal services
3480, 3489 Ordnance and accessories
3482 Small arms ammunition
3568 General industrial machinery
3662 Communications equipment
3674 Semiconductors and related devices
3691 Storage batteries
3728 Aircraft parts and equipment
3764 Space propulsion units and parts
3792 Travel trailers and campers
3820 Measuring and controlling devices
3840 Medical instruments and supplies
4230 Trucking terminal facilities
4581 Airports, flying fields, and services
4953 Refuse systems
7210 Laundry, cleaning, and garment services
8221 Colleges and universities
9711 National security

EPA estimates the projected annual hour burden for industry respondents will be 33,733 hours, and cost of $1,967,699. Total estimates over three years are 101,199 hours and $5,903,097. EPA estimates that State agency respondent will incur a total annual burden of 886 hours and $22,410, which over three years would be 2,658 hours and $67,230. EPA estimates that the annual Agency burden will be 5,726 hours and $176,899, which over three years would be 17,178 hours and $530,697. As subsets of the above total costs, EPA estimates no annual capital costs, and annual operation and maintenance costs for staging piles and RAPs of $49,902, and for State authorization of $54. As a subset of operation and maintenance, EPA estimates $750 each time a responder purchases services for waste analysis, for a total of $65,472. This is the only area where EPA expects purchase of services.

For complying with the requirements in the HWIR-media rule, industry respondents are expected to spend an average of 13.7 hours per year on recordkeeping requirements and 5.0 hours per year on reporting requirements. State agency respondents are expected to spend no time on recordkeeping, as there are no recordkeeping requirements for the States, and 16.4 hours per year on reporting requirements.

EPA estimates that 1,805 sites are eligible for RAPs and staging piles, and are assumed by EPA to be the universe of potential responders. These 1,805 potential responders are expected to read the regulations. EPA estimates that 90 responders per year will use staging piles, and 66 responders per year will use RAPs. EPA estimates that 18 States per year will apply for authorization. Responders will only need to respond once for each activity for staging piles, RAPs, or State authorization.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA." Comments are requested by December 30, 1998. Include the ICR number in any correspondence.

G. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act, the Agency is directed to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using these standards.

EPA is not proposing any new test methods or other technical standards as part of today's final rule. Thus, the Agency has no need to consider the use of voluntary consensus standards in developing this proposed rule.

H. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

I. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (*see* 62 FR 19885, April 23, 1997) applies to any rule that EPA determines: (1) is "economically significant" as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to E.O. 13045 because this is not an "economically significant" regulatory action as defined by E.O. 12866.

J. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not

required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. In addition, this rule imposes no new requirements on owners and operators, but rather, allow flexibility to regulators to implement requirements already in place. Accordingly, the requirements in 3(b) of Executive Order 13084 do not apply to this rule.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 261

Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Parts 264 and 265

Air pollution control, Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds.

40 CFR Part 268

Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 271

Administrative practice and procedure, Confidential business administration, Hazardous materials transportation, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Authority: 42 U.S.C. 6912(a), 6921, 6924, 6926, and 6927.

Dated: November 2, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

2. Section 260.10 is amended by revising the introductory text; by removing the definition for "Corrective action management unit or CAMU"; by revising the definitions for "Miscellaneous unit" and "Remediation waste"; by adding paragraph (3) to the definition of "Facility"; and by adding definitions in alphabetical order for "Corrective action management unit (CAMU)," "Remediation waste management site" and "Staging pile" to read as follows:

§ 260.10 Definitions.

When used in parts 260 through 273 of this chapter, the following terms have the meanings given below:

* * * * *

Corrective action management unit (CAMU) means an area within a facility that is used only for managing remediation wastes for implementing corrective action or cleanup at the facility.

* * * * *

Facility * * *

(3) Notwithstanding paragraph (2) of this definition, a remediation waste management site is not a facility that is subject to 40 CFR 264.101, but is subject to corrective action requirements if the site is located within such a facility.

* * * * *

Miscellaneous unit means a hazardous waste management unit where hazardous waste is treated, stored, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under part 146 of this chapter, containment building, corrective action management unit, unit eligible for a research, development, and demonstration permit under 40 CFR 270.65, or staging pile.

* * * * *

Remediation waste means all solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris that contain listed hazardous wastes or that themselves exhibit a hazardous characteristic and are managed for implementing cleanup.

Remediation waste management site means a facility where an owner or operator is or will be treating, storing or disposing of hazardous remediation wastes. A remediation waste management site is not a facility that is subject to corrective action under 40 CFR 264.101, but is subject to corrective action requirements if the site is located in such a facility.

* * * * *

Staging pile means an accumulation of solid, non-flowing remediation waste (as defined in this section) that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the Director according to the requirements of 40 CFR 264.554.

* * * * *

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

3. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

4. Section 261.4 is amended by adding paragraph (g) to read as follows:

§ 261.4 Exclusions.

* * * * *

(g) *Dredged material that is not a hazardous waste.* Dredged material that is subject to the requirements of a permit that has been issued under 404 of the Federal Water Pollution Control Act (33 U.S.C.1344) or section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413) is not a hazardous waste. For this paragraph (g), the following definitions apply:

(1) The term *dredged material* has the same meaning as defined in 40 CFR 232.2;

(2) The term *permit* means:

(i) A permit issued by the U.S. Army Corps of Engineers (Corps) or an approved State under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(ii) A permit issued by the Corps under section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413); or

(iii) In the case of Corps civil works projects, the administrative equivalent of the permits referred to in paragraphs (g)(2)(i) and (ii) of this section, as provided for in Corps regulations (for example, see 33 CFR 336.1, 336.2, and 337.6).

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

5. The authority citation for part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

6. Section 264.1 is amended by adding new paragraph (j) to read as follows:

§ 264.1 Purpose, scope and applicability.

* * * * *

(j) The requirements of subparts B, C, and D of this part and § 264.101 do not apply to remediation waste management sites. (However, some remediation waste management sites may be a part of a facility that is subject to a traditional RCRA permit because the facility is also treating, storing or disposing of hazardous wastes that are not remediation wastes. In these cases, Subparts B, C, and D of this part, and § 264.101 do apply to the facility subject to the traditional RCRA permit.) Instead of the requirements of subparts B, C, and D of this part, owners or operators of remediation waste management sites must:

(1) Obtain an EPA identification number by applying to the Administrator using EPA Form 8700–12;

(2) Obtain a detailed chemical and physical analysis of a representative sample of the hazardous remediation wastes to be managed at the site. At a minimum, the analysis must contain all of the information which must be known to treat, store or dispose of the waste according to this part and part 268 of this chapter, and must be kept accurate and up to date;

(3) Prevent people who are unaware of the danger from entering, and minimize the possibility for unauthorized people or livestock to enter onto the active portion of the remediation waste management site, unless the owner or operator can demonstrate to the Director that:

(i) Physical contact with the waste, structures, or equipment within the active portion of the remediation waste management site will not injure people or livestock who may enter the active portion of the remediation waste management site; and

(ii) Disturbance of the waste or equipment by people or livestock who enter onto the active portion of the remediation waste management site, will not cause a violation of the requirements of this part;

(4) Inspect the remediation waste management site for malfunctions, deterioration, operator errors, and discharges that may be causing, or may lead to, a release of hazardous waste constituents to the environment, or a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment, and must remedy the problem before it leads to a human health or environmental hazard. Where a hazard is imminent or has already occurred, the owner/operator must take remedial action immediately;

(5) Provide personnel with classroom or on-the-job training on how to perform their duties in a way that ensures the remediation waste management site complies with the requirements of this part, and on how to respond effectively to emergencies;

(6) Take precautions to prevent accidental ignition or reaction of ignitable or reactive waste, and prevent threats to human health and the environment from ignitable, reactive and incompatible waste;

(7) For remediation waste management sites subject to regulation under subparts I through O and subpart X of this part, the owner/operator must design, construct, operate, and maintain a unit within a 100-year floodplain to prevent washout of any hazardous waste by a 100-year flood, unless the owner/operator can meet the demonstration of § 264.18(b);

(8) Not place any non-containerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine or cave;

(9) Develop and maintain a construction quality assurance program for all surface impoundments, waste piles and landfill units that are required to comply with §§ 264.221(c) and (d), 264.251(c) and (d), and 264.301(c) and (d) at the remediation waste management site, according to the requirements of § 264.19;

(10) Develop and maintain procedures to prevent accidents and a contingency and emergency plan to control accidents that occur. These procedures must address proper design, construction, maintenance, and operation of remediation waste management units at the site. The goal of the plan must be to minimize the possibility of, and the hazards from a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water that could threaten human health or the environment. The plan must explain specifically how to treat, store and dispose of the hazardous remediation waste in question, and must be implemented immediately whenever a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment;

(11) Designate at least one employee, either on the facility premises or on call (that is, available to respond to an emergency by reaching the facility quickly), to coordinate all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan;

(12) Develop, maintain and implement a plan to meet the requirements in paragraphs (j)(2) through (j)(6) and (j)(9) through (j)(10) of this section; and

(13) Maintain records documenting compliance with paragraphs (j)(1) through (j)(12) of this section.

7. Section 264.73 is amended by adding paragraph (b)(17) to read as follows:

§ 264.73 Operating record.

* * * * *

(b) * * *

(17) Any records required under § 264.1(j)(13).

8. Section 264.101 is amended by adding paragraph (d) to read as follows:

§ 264.101 Corrective action for solid waste management units.

* * * * *

(d) This does not apply to remediation waste management sites unless they are part of a facility subject to a permit for treating, storing or disposing of hazardous wastes that are not remediation wastes.

9. Section 264.552 is amended by revising paragraph (a) to read as follows:

§ 264.552 Corrective Action Management Units (CAMU).

(a) To implement remedies under § 264.101 or RCRA 3008(h), or to implement remedies at a permitted facility that is not subject to § 264.101, the Regional Administrator may designate an area at the facility as a corrective action management unit, as defined in § 260.10, under the requirements in this section. A CAMU must be located within the contiguous property under the control of the owner/operator where the wastes to be managed in the CAMU originated. One or more CAMUs may be designated at a facility.

(1) Placement of remediation wastes into or within a CAMU does not constitute land disposal of hazardous wastes.

(2) Consolidation or placement of remediation wastes into or within a CAMU does not constitute creation of a unit subject to minimum technology requirements.

* * * * *

10. Section 264.553 is amended by revising paragraph (a) to read as follows:

§ 264.553 Temporary Units (TU).

(a) For temporary tanks and container storage areas used to treat or store hazardous remediation wastes during remedial activities required under § 264.101 or RCRA 3008(h), or at a permitted facility that is not subject to § 264.101, the Regional Administrator may designate a unit at the facility, as a temporary unit. A temporary unit must be located within the contiguous property under the control of the owner/operator where the wastes to be managed in the temporary unit originated. For temporary units, the Regional Administrator may replace the design, operating, or closure standard applicable to these units under this part 264 or part 265 of this chapter with alternative requirements which protect human health and the environment.

* * * * *

11. New § 264.554 is added to subpart S to read as follows:

§ 264.554 Staging piles.

This section is written in a special format to make it easier to understand the regulatory requirements. Like other Environmental Protection Agency (EPA) regulations, this establishes enforceable legal requirements. For this "I" and "you" refer to the owner/operator.

(a) *What is a staging pile?* A staging pile is an accumulation of solid, non-flowing remediation waste (as defined in § 260.10 of this chapter) that is not a containment building and is used only during remedial operations for temporary storage at a facility. A staging pile must be located within the contiguous property under the control of the owner/operator where the wastes to be managed in the staging pile originated. Staging piles must be designated by the Director in according to the requirements in this section.

(b) *When may I use a staging pile?* You may use a staging pile to store hazardous remediation waste (or remediation waste otherwise subject to land disposal restrictions) only if you follow the standards and design criteria the Director has designated for that staging pile. The Director must designate the staging pile in a permit or, at an interim status facility, in a closure plan or order (consistent with § 270.72(a)(5) and (b)(5) of this chapter). The Director must establish conditions in the permit, closure plan, or order that comply with paragraphs (d) through (k) of this section.

(c) *What information must I provide to get a staging pile designated?* When seeking a staging pile designation, you must provide:

(1) Sufficient and accurate information to enable the Director to impose standards and design criteria for your staging pile according to paragraphs (d) through (k) of this section;

(2) Certification by an independent, qualified, registered professional engineer for technical data, such as design drawings and specifications, and engineering studies, unless the Director determines, based on information that you provide, that this certification is not necessary to ensure that a staging pile will protect human health and the environment; and

(3) Any additional information the Director determines is necessary to protect human health and the environment.

(d) *What performance criteria must a staging pile satisfy?* The Director must establish the standards and design criteria for the staging pile in the permit, closure plan, or order.

(1) The standards and design criteria must comply with the following:

(i) The staging pile must facilitate a reliable, effective and protective remedy;

(ii) The staging pile must be designed so as to prevent or minimize releases of hazardous wastes and hazardous constituents into the environment, and minimize or adequately control cross-media transfer, as necessary to protect human health and the environment (for example, through the use of liners, covers, run-off/run-on controls, as appropriate); and

(iii) The staging pile must not operate for more than two years, except when the Director grants an operating term extension under paragraph (i) of this section (entitled "May I receive an operating extension for a staging pile?"). You must measure the two-year limit, or other operating term specified by the Director in the permit, closure plan, or order, from the first time you place remediation waste into a staging pile. You must maintain a record of the date when you first placed remediation waste into the staging pile for the life of the permit, closure plan, or order, or for three years, whichever is longer.

(2) In setting the standards and design criteria, the Director must consider the following factors:

(i) Length of time the pile will be in operation;

(ii) Volumes of wastes you intend to store in the pile;

(iii) Physical and chemical characteristics of the wastes to be stored in the unit;

(iv) Potential for releases from the unit;

(v) Hydrogeological and other relevant environmental conditions at the facility that may influence the migration of any potential releases; and

(vi) Potential for human and environmental exposure to potential releases from the unit;

(e) *May a staging pile receive ignitable or reactive remediation waste?* You must not place ignitable or reactive remediation waste in a staging pile unless:

(1) You have treated, rendered or mixed the remediation waste before you placed it in the staging pile so that:

(i) The remediation waste no longer meets the definition of ignitable or reactive under § 261.21 or § 261.23 of this chapter; and

(ii) You have complied with § 264.17(b); or

(2) You manage the remediation waste to protect it from exposure to any material or condition that may cause it to ignite or react.

(f) *How do I handle incompatible remediation wastes in a staging pile?* The term "incompatible waste" is defined in § 260.10 of this chapter. You must comply with the following requirements for incompatible wastes in staging piles:

(1) You must not place incompatible remediation wastes in the same staging pile unless you have complied with § 264.17(b);

(2) If remediation waste in a staging pile is incompatible with any waste or material stored nearby in containers,

other piles, open tanks or land disposal units (for example, surface impoundments), you must separate the incompatible materials, or protect them from one another by using a dike, berm, wall or other device; and

(3) You must not pile remediation waste on the same base where incompatible wastes or materials were previously piled, unless the base has been decontaminated sufficiently to comply with § 264.17(b).

(g) *Are staging piles subject to Land Disposal Restrictions (LDR) and Minimum Technological Requirements (MTR)?* No. Placing hazardous remediation wastes into a staging pile does not constitute land disposal of hazardous wastes or create a unit that is subject to the minimum technological requirements of RCRA 3004(o).

(h) *How long may I operate a staging pile?* The Director may allow a staging pile to operate for up to two years after hazardous remediation waste is first placed into the pile. You must use a staging pile no longer than the length of time designated by the Director in the permit, closure plan, or order (the "operating term"), except as provided in paragraph (i) of this section.

(i) *May I receive an operating extension for a staging pile?* (1) The Director may grant one operating term extension of up to 180 days beyond the operating term limit contained in the permit, closure plan, or order (see paragraph (l) of this section for modification procedures). To justify to the Director the need for an extension, you must provide sufficient and accurate information to enable the Director to determine that continued operation of the staging pile:

(i) Will not pose a threat to human health and the environment; and

(ii) Is necessary to ensure timely and efficient implementation of remedial actions at the facility.

(2) The Director may, as a condition of the extension, specify further standards and design criteria in the permit, closure plan, or order, as necessary, to ensure protection of human health and the environment.

(j) *What is the closure requirement for a staging pile located in a previously contaminated area?* (1) Within 180 days after the operating term of the staging pile expires, you must close a staging pile located in a previously contaminated area of the site by removing or decontaminating all:

(i) Remediation waste;

(ii) Contaminated containment system components; and

(iii) Structures and equipment contaminated with waste and leachate.

(2) You must also decontaminate contaminated subsoils in a manner and according to a schedule that the Director determines will protect human health and the environment.

(3) The Director must include the above requirements in the permit, closure plan, or order in which the staging pile is designated.

(k) *What is the closure requirement for a staging pile located in an uncontaminated area?* (1) Within 180 days after the operating term of the staging pile expires, you must close a staging pile located in an uncontaminated area of the site according to §§ 264.258(a) and 264.111; or according to §§ 265.258(a) and 265.111 of this chapter.

(2) The Director must include the above requirement in the permit, closure plan, or order in which the staging pile is designated.

(l) *How may my existing permit (for example, RAP), closure plan, or order be modified to allow me to use a staging pile?* (1) To modify a permit, other than a RAP, to incorporate a staging pile or staging pile operating term extension, either:

(i) The Director must approve the modification under the procedures for Agency-initiated permit modifications in § 270.41 of this chapter; or

(ii) You must request a Class 2 modification under § 270.42 of this chapter.

(2) To modify a RAP to incorporate a staging pile or staging pile operating term extension, you must comply with the RAP modification requirements under §§ 270.170 and 270.175 of this chapter.

(3) To modify a closure plan to incorporate a staging pile or staging pile operating term extension, you must follow the applicable requirements under § 264.112(c) or § 265.112(c) of this chapter.

(4) To modify an order to incorporate a staging pile or staging pile operating term extension, you must follow the terms of the order and the applicable provisions of § 270.72(a)(5) or (b)(5) of this chapter.

(m) *Is information about the staging pile available to the public?* The Director must document the rationale for designating a staging pile or staging pile operating term extension and make this documentation available to the public.

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

12. The authority citation for part 265 continues to read as follows:

Authority: 42 U.S.C. 6905, 6906, 6912, 6922, 6923, 6924, 6925, 6935, 6936 and 6937, unless otherwise noted.

§ 265.1 [Amended]

13. Section 265.1(b) is amended in the first sentence by revising ", and of 40 CFR 264.552 and 40 CFR 264.553," to read ", and of 40 CFR 264.552, 264.553, and 264.554,".

PART 268—LAND DISPOSAL RESTRICTIONS

14. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

15. Section 268.2 is amended by revising paragraph (c) to read as follows:

§ 268.2 Definitions applicable in this part.

* * * * *

(c) *Land disposal* means placement in or on the land, except in a corrective action management unit or staging pile, and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, or placement in a concrete vault, or bunker intended for disposal purposes.

* * * * *

16. Section 268.50 is amended by adding new paragraph (g) to read as follows:

§ 268.50 Prohibitions on storage of restricted wastes.

* * * * *

(g) The prohibition and requirements in this do not apply to hazardous remediation wastes stored in a staging pile approved pursuant to § 264.554 of this chapter.

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

17. The authority citation for part 270 continues to read as follows:

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

Subpart A—General Information

18. Section 270.2 is amended by adding a definition for "Remedial

Action Plan (RAP)" in alphabetical order to read as follows:

§ 270.2 Definitions.

* * * * *

Remedial Action Plan (RAP) means a special form of RCRA permit that a facility owner or operator may obtain instead of a permit issued under §§ 270.3 through 270.66, to authorize the treatment, storage or disposal of hazardous remediation waste (as defined in § 260.10 of this chapter) at a remediation waste management site.

* * * * *

Subpart B—Permit Application

19. Section 270.11 is amended by revising paragraph (d) to read as follows:

§ 270.11 Signatories to permit applications and reports.

* * * * *

(d)(1) Any person signing a document under paragraph (a) or (b) of this must make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision according to a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(2) For remedial action plans (RAPs) under subpart H of this part, if the operator certifies according to paragraph (d)(1) of this section, then the owner may choose to make the following certification instead of the certification in paragraph (d)(1) of this section:

Based on my knowledge of the conditions of the property described in the RAP and my inquiry of the person or persons who manage the system referenced in the operator's certification, or those persons directly responsible for gathering the information, the information submitted is, upon information and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Subpart D—Changes to Permits

20. Appendix I to § 270.42 is amended by adding new modification D.3.g. and new modification N.3. to read as follows:

§ 270.42 Permit modification at the request of the permittee.

* * * * *

Modifications	Class
* * * * *	
D. Closure	
* * * * *	
3. Addition of the following new units to be used temporarily for closure activities:	
* * * * *	
g. Staging piles	2
* * * * *	
N. Corrective Action:	
* * * * *	
3. Approval of a staging pile or staging pile operating term extension pursuant to § 264.554 ...	2

Subpart F—Special Forms of Permits

21. A new § 270.68 is added to subpart F to read as follows:

§ 270.68 Remedial Action Plans (RAPs).

Remedial Action Plans (RAPs) are special forms of permits that are regulated under subpart H of this part.

Subpart G—Interim Status

22. Section 270.73 is amended by revising paragraph (a) to read as follows:

§ 270.73 Termination of interim status.

* * * * *

(a) Final administrative disposition of a permit application, except an application for a remedial action plan (RAP) under subpart H of this part, is made.

* * * * *

23–24. A new Subpart H is added to Part 270 to read as follows:

Subpart H—Remedial Action Plans (RAPs)

Sec.

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Subpart H—Remedial Action Plans (RAPs)

§ 270.79 Why is this subpart written in a special format?

This subpart is written in a special format to make it easier to understand the regulatory requirements. Like other

Environmental Protection Agency (EPA) regulations, this establishes enforceable legal requirements. For this Subpart, "I" and "you" refer to the owner/operator.

General Information

§ 270.80 What is a RAP?

(a) A RAP is a special form of RCRA permit that you, as an owner or operator, may obtain, instead of a permit issued under §§ 270.3 through 270.66, to authorize you to treat, store, or dispose of hazardous remediation waste (as defined in § 260.10 of this chapter) at a remediation waste management site. A RAP may only be issued for the area of contamination where the remediation wastes to be managed under the RAP originated, or areas in close proximity to the contaminated area, except as allowed in limited circumstances under § 270.230.

(b) The requirements in §§ 270.3 through 270.66 do not apply to RAPs unless those requirements for traditional RCRA permits are specifically required under §§ 270.80 through 270.230. The definitions in § 270.2 apply to RAPs.

(c) Notwithstanding any other provision of this part or part 124 of this chapter, any document that meets the requirements in this section constitutes a RCRA permit under RCRA section 3005(c).

(d) A RAP may be:

(1) A stand-alone document that includes only the information and conditions required by this subpart; or

(2) Part (or parts) of another document that includes information and/or conditions for other activities at the remediation waste management site, in addition to the information and conditions required by this subpart.

(e) If you are treating, storing, or disposing of hazardous remediation wastes as part of a cleanup compelled by Federal or State cleanup authorities, your RAP does not affect your obligations under those authorities in any way.

(f) If you receive a RAP at a facility operating under interim status, the RAP does not terminate your interim status.

§ 270.85 When do I need a RAP?

(a) Whenever you treat, store, or dispose of hazardous remediation wastes in a manner that requires a RCRA permit under § 270.1, you must either obtain:

(1) A RCRA permit according to §§ 270.3 through 270.66; or

(2) A RAP according to this subpart.

(b) Treatment units that use combustion of hazardous remediation wastes at a remediation waste management site are not eligible for RAPs under this Subpart.

(c) You may obtain a RAP for managing hazardous remediation waste at an already permitted RCRA facility. You must have these RAPs approved as a modification to your existing permit according to the requirements of § 270.41 or § 270.42 instead of the requirements in this Subpart. When you submit an application for such a modification, however, the information requirements in § 270.42(a)(1)(i), (b)(1)(iv), and (c)(1)(iv) do not apply; instead, you must submit the information required under § 270.110. When your permit is modified the RAP becomes part of the RCRA permit. Therefore when your permit (including the RAP portion) is modified, revoked and reissued, terminated or when it expires, it will be modified according to the applicable requirements in §§ 270.40 through 270.42, revoked and reissued according to the applicable requirements in §§ 270.41 and 270.43, terminated according to the applicable requirements in § 270.43, and expire according to the applicable requirements in §§ 270.50 and 270.51.

§ 270.90 Does my RAP grant me any rights or relieve me of any obligations?

The provisions of § 270.4 apply to RAPs. (**NOTE:** The provisions of § 270.4(a) provide you assurance that, as long as you comply with your RAP, EPA will consider you in compliance with Subtitle C of RCRA, and will not take enforcement actions against you. However, you should be aware of four exceptions to this provision that are listed in § 270.4.)

Applying for a RAP

§ 270.95 How do I apply for a RAP?

To apply for a RAP, you must complete an application, sign it, and submit it to the Director according to the requirements in this subpart.

§ 270.100 Who must obtain a RAP?

When a facility or remediation waste management site is owned by one person, but the treatment, storage or disposal activities are operated by another person, it is the operator's duty to obtain a RAP, except that the owner must also sign the RAP application.

§ 270.105 Who must sign the application and any required reports for a RAP?

Both the owner and the operator must sign the RAP application and any required reports according to § 270.11(a), (b), and (c). In the application, both the owner and the operator must also make the certification required under § 270.11(d)(1). However, the owner may choose the alternative certification under § 270.11(d)(2) if the operator certifies under § 270.11(d)(1).

§ 270.110 What must I include in my application for a RAP?

You must include the following information in your application for a RAP:

(a) The name, address, and EPA identification number of the remediation waste management site;

(b) The name, address, and telephone number of the owner and operator;

(c) The latitude and longitude of the site;

(d) The United States Geological Survey (USGS) or county map showing the location of the remediation waste management site;

(e) A scaled drawing of the remediation waste management site showing:

(1) The remediation waste management site boundaries;

(2) Any significant physical structures; and

(3) The boundary of all areas on-site where remediation waste is to be treated, stored or disposed;

(f) A specification of the hazardous remediation waste to be treated, stored or disposed of at the facility or remediation waste management site. This must include information on:

(1) Constituent concentrations and other properties of the hazardous remediation wastes that may affect how such materials should be treated and/or otherwise managed;

(2) An estimate of the quantity of these wastes; and

(3) A description of the processes you will use to treat, store, or dispose of this waste including technologies, handling systems, design and operating parameters you will use to treat hazardous remediation wastes before disposing of them according to the LDR standards of part 268 of this chapter, as applicable;

(g) Enough information to demonstrate that operations that follow the provisions in your RAP application will ensure compliance with applicable requirements of parts 264, 266, and 268 of this chapter;

(h) Such information as may be necessary to enable the Regional Administrator to carry out his duties under other Federal laws as is required for traditional RCRA permits under § 270.14(b)(20);

(i) Any other information the Director decides is necessary for demonstrating compliance with this subpart or for determining any additional RAP conditions that are necessary to protect human health and the environment.

§ 270.115 What if I want to keep this information confidential?

Part 2 (Public Information) of this chapter allows you to claim as confidential any or all of the information you submit to EPA under this subpart. You must assert any such claim at the time that you submit your RAP application or other submissions by stamping the words "confidential business information" on each page containing such information. If you do assert a claim at the time you submit the information, EPA will treat the information according to the procedures in part 2 of this chapter. If you do not assert a claim at the time you submit the information, EPA may make the information available to the public without further notice to you. EPA will deny any requests for confidentiality of your name and/or address.

§ 270.120 To whom must I submit my RAP application?

You must submit your application for a RAP to the Director for approval.

§ 270.125 If I submit my RAP application as part of another document, what must I do?

If you submit your application for a RAP as a part of another document, you must clearly identify the components of that document that constitute your RAP application.

Getting a RAP Approved

§ 270.130 What is the process for approving or denying my application for a RAP?

(a) If the Director tentatively finds that your RAP application includes all of the information required by § 270.110 and that your proposed remediation waste management activities meet the regulatory standards, the Director will make a tentative decision to approve your RAP application. The Director will then prepare a draft RAP and provide an opportunity for public comment before making a final decision on your RAP application, according to this subpart.

(b) If the Director tentatively finds that your RAP application does not include all of the information required by § 270.110 or that your proposed remediation waste management activities do not meet the regulatory standards, the Director may request additional information from you or ask you to correct deficiencies in your application. If you fail or refuse to provide any additional information the Director requests, or to correct any deficiencies in your RAP application, the Director may make a tentative decision to deny your RAP application. After making this tentative decision, the Director will prepare a notice of intent to deny your RAP application ("notice of intent to deny") and provide an opportunity for public comment before making a final decision on your RAP application, according to the requirements in this Subpart. The Director may deny the RAP application either in its entirety or in part.

§ 270.135 What must the Director include in a draft RAP?

If the Director prepares a draft RAP, it must include the:

(a) Information required under § 270.110(a) through (f);

(b) The following terms and conditions:

(1) Terms and conditions necessary to ensure that the operating requirements specified in your RAP comply with applicable requirements of parts 264, 266, and 268 of this chapter (including any recordkeeping and reporting requirements). In satisfying this provision, the Director may incorporate, expressly or by reference, applicable requirements of parts 264, 266, and 268 of this chapter into the RAP or establish site-specific conditions as required or allowed by parts 264, 266, and 268 of this chapter;

(2) Terms and conditions in § 270.30;

(3) Terms and conditions for modifying, revoking and reissuing, and terminating your RAP, as provided in § 270.170; and

(4) Any additional terms or conditions that the Director determines are necessary to protect human health and the environment, including any terms and conditions necessary to respond to spills and leaks during use of any units permitted under the RAP; and

(c) If the draft RAP is part of another document, as described in § 270.80(d)(2), the Director must clearly identify the components of that document that constitute the draft RAP.

§ 270.140 What else must the Director prepare in addition to the draft RAP or notice of intent to deny?

Once the Director has prepared the draft RAP or notice of intent to deny, he must then:

(a) Prepare a statement of basis that briefly describes the derivation of the conditions of the draft RAP and the reasons for them, or the rationale for the notice of intent to deny;

(b) Compile an administrative record, including:

(1) The RAP application, and any supporting data furnished by the applicant;

(2) The draft RAP or notice of intent to deny;

(3) The statement of basis and all documents cited therein (material readily available at the issuing Regional office or published material that is generally available need not be physically included with the rest of the record, as long as it is specifically referred to in the statement of basis); and

(4) Any other documents that support the decision to approve or deny the RAP; and

(c) Make information contained in the administrative record available for review by the public upon request.

§ 270.145 What are the procedures for public comment on the draft RAP or notice of intent to deny?

(a) The Director must:

(1) Send notice to you of his intention to approve or deny your RAP application, and send you a copy of the statement of basis;

(2) Publish a notice of his intention to approve or deny your RAP application in a major local newspaper of general circulation;

(3) Broadcast his intention to approve or deny your RAP application over a local radio station; and

(4) Send a notice of his intention to approve or deny your RAP application to each unit of local government having jurisdiction over the area in which your site is located, and to each State agency having any authority under State law with respect to any construction or operations at the site.

(b) The notice required by paragraph (a) of this section must provide an opportunity for the public to submit written comments on the draft RAP or notice of intent to deny within at least 45 days.

(c) The notice required by paragraph (a) of this section must include:

(1) The name and address of the office processing the RAP application;

(2) The name and address of the RAP applicant, and if different, the remediation waste management site or activity the RAP will regulate;

(3) A brief description of the activity the RAP will regulate;

(4) The name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft RAP or notice of intent to deny, statement of basis, and the RAP application;

(5) A brief description of the comment procedures in this section, and any other procedures by which the public may participate in the RAP decision;

(6) If a hearing is scheduled, the date, time, location and purpose of the hearing;

(7) If a hearing is not scheduled, a statement of procedures to request a hearing;

(8) The location of the administrative record, and times when it will be open for public inspection; and

(9) Any additional information the Director considers necessary or proper.

(d) If, within the comment period, the Director receives written notice of opposition to his intention to approve or deny your RAP application and a request for a hearing, the Director must hold an informal public hearing to discuss issues relating to the approval or denial of your RAP application. The Director may also determine on his own initiative that an informal hearing is appropriate. The hearing must include an opportunity for any person to present written or oral comments. Whenever possible, the Director must schedule this hearing at a location convenient to the nearest population center to the remediation waste management site and give notice according to the requirements in paragraph (a) of this section. This notice must, at a minimum, include the information required by paragraph (c) of this section and:

(1) Reference to the date of any previous public notices relating to the RAP application;

(2) The date, time and place of the hearing; and

(3) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

§ 270.150 How will the Director make a final decision on my RAP application?

(a) The Director must consider and respond to any significant comments raised during the public comment period, or during any hearing on the draft RAP or notice of intent to deny, and revise your draft RAP based on those comments, as appropriate.

(b) If the Director determines that your RAP includes the information and terms and conditions required in § 270.135, then he will issue a final decision approving your RAP and, in writing, notify you and all commenters on your draft RAP that your RAP application has been approved.

(c) If the Director determines that your RAP does not include the information required in § 270.135, then he will issue a final decision denying your RAP and, in writing, notify you and all commenters on your draft RAP that your RAP application has been denied.

(d) If the Director's final decision is that the tentative decision to deny the RAP application was incorrect, he will withdraw the notice of intent to deny and proceed to prepare a draft RAP, according to the requirements in this subpart.

(e) When the Director issues his final RAP decision, he must refer to the procedures for appealing the decision under § 270.155.

(f) Before issuing the final RAP decision, the Director must compile an administrative record. Material readily available at the issuing Regional office or published materials which are generally available and which are included in the administrative record need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis or the response to comments. The administrative record for the final RAP must include information in the administrative record for the draft RAP (see § 270.140(b)) and:

(1) All comments received during the public comment period;

(2) Tapes or transcripts of any hearings;

(3) Any written materials submitted at these hearings;

(4) The responses to comments;

(5) Any new material placed in the record since the draft RAP was issued;

(6) Any other documents supporting the RAP; and (7) A copy of the final RAP.

(g) The Director must make information contained in the administrative record available for review by the public upon request.

§ 270.155 May the decision to approve or deny my RAP application be administratively appealed?

(a) Any commenter on the draft RAP or notice of intent to deny, or any participant in any public hearing(s) on the draft RAP, may appeal the Director's decision to approve or deny your RAP application to EPA's Environmental Appeals Board under § 124.19 of this chapter. Any person who did not file comments, or did not participate in any public hearing(s) on the draft RAP, may petition for administrative review only to the extent of the changes from the draft to the final RAP decision. Appeals of RAPs may be made to the same extent as for final permit decisions under § 124.15 of this chapter (or a decision under § 270.29 to deny a permit for the active life of a RCRA hazardous waste management facility or unit). Instead of the notice required under §§ 124.19(c) and 124.10 of this chapter, the Director will give public notice of any grant of review of RAPs by the Environmental Appeals Board through the same means used to provide notice under § 270.145. The notice will include:

(1) The briefing schedule for the appeal as provided by the Board;

(2) A statement that any interested person may file an amicus brief with the Board; and

(3) The information specified in § 270.145(c), as appropriate.

(b) This appeal is a prerequisite to seeking judicial review of these EPA actions.

§ 270.160 When does my RAP become effective?

Your RAP becomes effective 30 days after the Director notifies you and all commenters that your RAP is approved unless:

(a) The Director specifies a later effective date in his decision;

(b) You or another person has appealed your RAP under § 270.155 (if your RAP is appealed, and the request for review is granted under § 270.155, conditions of your RAP are stayed according to § 124.16 of this chapter); or

(c) No commenters requested a change in the draft RAP, in which case the RAP becomes effective immediately when it is issued.

§ 270.165 When may I begin physical construction of new units permitted under the RAP?

You must not begin physical construction of new units permitted under the RAP for treating, storing or disposing of hazardous remediation waste before receiving a finally effective RAP.

How May my RAP be Modified, Revoked and Reissued, or Terminated?

§ 270.170 After my RAP is issued, how may it be modified, revoked and reissued, or terminated?

In your RAP, the Director must specify, either directly or by reference, procedures for future modifications, revocations and reissuance, or terminations of your RAP. These procedures must provide adequate opportunities for public review and comment on any modification, revocation and reissuance, or termination that would significantly change your management of your remediation waste, or that otherwise merits public review and comment. If your RAP has been incorporated into a traditional RCRA permit, as allowed under § 270.85(c), then the RAP will be modified according to the applicable requirements in §§ 270.40 through 270.42, revoked and reissued according to the applicable requirements in §§ 270.41 and 270.43, or terminated according to the applicable requirements of § 270.43.

§ 270.175 For what reasons may the Director choose to modify my final RAP?

(a) The Director may modify your final RAP on his own initiative only if one or more of the following reasons listed in this section exist(s). If one or

more of these reasons do not exist, then the Director will not modify your final RAP, except at your request. Reasons for modification are:

(1) You made material and substantial alterations or additions to the activity that justify applying different conditions;

(2) The Director finds new information that was not available at the time of RAP issuance and would have justified applying different RAP conditions at the time of issuance;

(3) The standards or regulations on which the RAP was based have changed because of new or amended statutes, standards or regulations, or by judicial decision after the RAP was issued;

(4) If your RAP includes any schedules of compliance, the Director may find reasons to modify your compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which you as the owner/operator have little or no control and for which there is no reasonably available remedy;

(5) You are not in compliance with conditions of your RAP;

(6) You failed in the application or during the RAP issuance process to disclose fully all relevant facts, or you misrepresented any relevant facts at the time;

(7) The Director has determined that the activity authorized by your RAP endangers human health or the environment and can only be remedied by modifying; or

(8) You have notified the Director (as required in the RAP under § 270.30(l)(3)) of a proposed transfer of a RAP.

(b) Notwithstanding any other provision in this section, when the Director reviews a RAP for a land disposal facility under § 270.195, he may modify the permit as necessary to assure that the facility continues to comply with the currently applicable requirements in parts 124, 260 through 266 and 270 of this chapter.

(c) The Director will not reevaluate the suitability of the facility location at the time of RAP modification unless new information or standards indicate that a threat to human health or the environment exists that was unknown when the RAP was issued.

§ 270.180 For what reasons may the Director choose to revoke and reissue my final RAP?

(a) The Director may revoke and reissue your final RAP on his own initiative only if one or more reasons for revocation and reissuance exist(s). If one or more reasons do not exist, then the Director will not modify or revoke and reissue your final RAP, except at your request. Reasons for modification or revocation and reissuance are the same as the reasons listed for RAP modifications in § 270.175(a)(5) through (8) if the Director determines that revocation and reissuance of your RAP is appropriate.

(b) The Director will not reevaluate the suitability of the facility location at the time of RAP revocation and reissuance, unless new information or standards indicate that a threat to human health or the environment exists that was unknown when the RAP was issued.

§ 270.185 For what reasons may the Director choose to terminate my final RAP, or deny my renewal application?

The Director may terminate your final RAP on his own initiative, or deny your renewal application for the same reasons as those listed for RAP modifications in § 270.175(a)(5) through (7) if the Director determines that termination of your RAP or denial of your RAP renewal application is appropriate.

§ 270.190 May the decision to approve or deny a modification, revocation and reissuance, or termination of my RAP be administratively appealed?

(a) Any commenter on the modification, revocation and reissuance or termination, or any person who participated in any hearing(s) on these actions, may appeal the Director's decision to approve a modification, revocation and reissuance, or termination of your RAP, according to § 270.155. Any person who did not file comments or did not participate in any public hearing(s) on the modification, revocation and reissuance or termination, may petition for administrative review only of the changes from the draft to the final RAP decision.

(b) Any commenter on the modification, revocation and reissuance or termination, or any person who participated in any hearing(s) on these actions, may informally appeal the Director's decision to deny a request for modification, revocation and reissuance, or termination to EPA's Environmental Appeals Board. Any person who did not file comments, or did not participate in any public hearing(s) on the modification, revocation and reissuance or termination may petition for administrative review only of the changes from the draft to the final RAP decision.

(c) The process for informal appeals of RAPs is as follows:

(1) The person appealing the decision must send a letter to the Environmental Appeals Board. The letter must briefly set forth the relevant facts.

(2) The Environmental Appeals Board has 60 days after receiving the letter to act on it.

(3) If the Environmental Appeals Board does not take action on the letter within 60 days after receiving it, the appeal shall be considered denied.

(d) This informal appeal is a prerequisite to seeking judicial review of these EPA actions.

§ 270.195 When will my RAP expire?

RAPs must be issued for a fixed term, not to exceed 10 years, although they may be renewed upon approval by the Director in fixed increments of no more than ten years. In addition, the Director must review any RAP for hazardous waste land disposal five years after the date of issuance or reissuance and you or the Director must follow the requirements for modifying your RAP as necessary to assure that you continue to comply with currently applicable requirements in RCRA sections 3004 and 3005.

§ 270.200 How may I renew my RAP if it is expiring?

If you wish to renew your expiring RAP, you must follow the process for application for and issuance of RAPs in this subpart.

§ 270.205 What happens if I have applied correctly for a RAP renewal but have not received approval by the time my old RAP expires?

If you have submitted a timely and complete application for a RAP renewal, but the Director, through no fault of yours, has not issued a new RAP with an effective date on or before the expiration date of your previous RAP, your previous RAP conditions continue in force until the effective date of your new RAP or RAP denial.

Operating Under Your RAP

§ 270.210 What records must I maintain concerning my RAP?

You are required to keep records of:

(a) All data used to complete RAP applications and any supplemental information that you submit for a period of at least 3 years from the date the application is signed; and

(b) Any operating and/or other records the Director requires you to maintain as a condition of your RAP.

§ 270.215 How are time periods in the requirements in this subpart and my RAP computed?

(a) Any time period scheduled to begin on the occurrence of an act or event must begin on the day after the act or event. (For example, if your RAP

specifies that you must close a staging pile within 180 days after the operating term for that staging pile expires, and the operating term expires on June 1, then June 2 counts as day one of your 180 days, and you would have to complete closure by November 28.)

(b) Any time period scheduled to begin before the occurrence of an act or event must be computed so that the period ends on the day before the act or event. (For example, if you are transferring ownership or operational control of your site, and wish to transfer your RAP, the new owner or operator must submit a revised RAP application no later than 90 days before the scheduled change. Therefore, if you plan to change ownership on January 1, the new owner/operator must submit the revised RAP application no later than October 3, so that the 90th day would be December 31.)

(c) If the final day of any time period falls on a weekend or legal holiday, the time period must be extended to the next working day. (For example, if you wish to appeal the Director's decision to modify your RAP, then you must petition the Environmental Appeals Board within 30 days after the Director has issued the final RAP decision. If the 30th day falls on Sunday, then you may submit your appeal by the Monday after. If the 30th day falls on July 4th, then you may submit your appeal by July 5th.)

(d) Whenever a party or interested person has the right to or is required to act within a prescribed period after the service of notice or other paper upon him by mail, 3 days must be added to the prescribed term. (For example, if you wish to appeal the Director's decision to modify your RAP, then you must petition the Environmental Appeals Board within 30 days after the Director has issued the final RAP decision. However, if the Director notifies you of his decision by mail, then you may have 33 days to petition the Environmental Appeals Board.)

§ 270.220 How may I transfer my RAP to a new owner or operator?

(a) If you wish to transfer your RAP to a new owner or operator, you must follow the requirements specified in your RAP for RAP modification to identify the new owner or operator, and incorporate any other necessary requirements. These modifications do not constitute "significant" modifications for purposes of § 270.170. The new owner/operator must submit a revised RAP application no later than 90 days before the scheduled change along with a written agreement containing a specific date for transfer of RAP responsibility between you and the new permittees.

(b) When a transfer of ownership or operational control occurs, you as the old owner or operator must comply with the applicable requirements in part 264, subpart H (Financial Requirements), of this chapter until the new owner or operator has demonstrated that he is complying with the requirements in that subpart. The new owner or operator must demonstrate compliance with part 264, subpart H, of this chapter within six months of the date of the change in ownership or operational control of the facility or remediation waste management site. When the new owner/operator demonstrates compliance with part 264, subpart H, of this chapter to the Director, the Director will notify you that you no longer need to comply with part 264, subpart H, of this chapter as of the date of demonstration.

§ 270.225 What must the State or EPA Region report about noncompliance with RAPs?

The State or EPA Region must report noncompliance with RAPs according to the provisions of § 270.5.

Obtaining a RAP for an Off-Site Location

§ 270.230 May I perform remediation waste management activities under a RAP at a location removed from the area where the remediation wastes originated?

(a) You may request a RAP for remediation waste management activities at a location removed from the area where the remediation wastes originated if you believe such a location would be more protective than the contaminated area or areas in close proximity.

(b) If the Director determines that an alternative location, removed from the area where the remediation waste originated, is more protective than managing remediation waste at the area of contamination or areas in close proximity, then the Director may approve a RAP for this alternative location.

(c) You must request the RAP, and the Director will approve or deny the RAP, according to the procedures and requirements in this subpart.

(d) A RAP for an alternative location must also meet the following requirements, which the Director must include in the RAP for such locations:

(1) The RAP for the alternative location must be issued to the person responsible for the cleanup from which the remediation wastes originated;

(2) The RAP is subject to the expanded public participation requirements in §§ 124.31, 124.32, and 124.33 of this chapter;

(3) The RAP is subject to the public notice requirements in § 124.10(c) of this chapter;

(4) The site permitted in the RAP may not be located within 61 meters or 200 feet of a fault which has had displacement in the Holocene time (you must demonstrate compliance with this standard through the requirements in § 270.14(b)(11)) (See definitions of terms in § 264.18(a) of this chapter);

Note to paragraph (d)(4): Sites located in political jurisdictions other than those listed in Appendix VI of Part 264 of this chapter, are assumed to be in compliance with this requirement.

(e) These alternative locations are remediation waste management sites, and retain the following benefits of remediation waste management sites:

(1) Exclusion from facility-wide corrective action under § 264.101 of this chapter; and

(2) Application of § 264.1(j) of this chapter in lieu of part 264, subparts B, C, and D, of this chapter.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

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

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

26. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication in the **Federal Register**, to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

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

Promulgation date	Title of regulation	Federal Register reference	Effective date
* * *	* * *	* * *	*
November 30, 1998	Hazardous Remediation Waste Management Requirements[5].	[Insert FR page numbers]	June 1, 1999.
* * *	* * *	* * *	*

[5] These regulations implement HSWA only to the extent that they apply to the standards for staging piles and to §§ 264.1(j) and 264.101(d) of this chapter.

27. Section 271.21 is amended by adding paragraph (h) and table 1 to the end of the section to read as follows:

§ 271.21 Procedures for revision of State programs.

* * * * *

(h) Abbreviated authorization revisions. This abbreviated procedure applies to State Program revisions for the Federal rulemakings listed in Table 1 of this section. The abbreviated procedures are as follows:

(1) An application for a revision of a State's program for the rulemakings listed in Table 1 of this section shall consist of:

(i) A statement from the State that its laws and regulations provide authority that is equivalent to, and no less stringent than, the designated minor rules or parts of rules specified in Table 1 of this section, and which includes references to the specific statutes, administrative regulations and where appropriate, judicial decisions. State statutes and regulations cited in the statement shall be lawfully adopted at the time the statement is signed and fully effective by the time the program revisions are approved; and

(ii) Copies of all applicable State statutes and regulations.

(2) Within 30 days of receipt by EPA of a State's application for final authorization to implement a rule specified in Table 1 of this section, if the Administrator determines that the application is not complete or contains errors, the Administrator shall notify the State. This notice will include a concise statement of the deficiencies which form the basis for this determination. The State will address all deficiencies and resubmit the application to EPA for review.

(3) For purposes of this section an application is considered incomplete when:

(i) Copies of applicable statutes or regulations were not included;

(ii) The statutes or regulations relied on by the State to implement the program revisions are not lawfully adopted at the time the statement is signed or fully effective by the time the program revisions are approved;

(iii) In the statement, the citations to the specific statutes, administrative regulations and where appropriate, judicial decisions are not included or incomplete; or

(iv) The State is not authorized to implement the prerequisite RCRA rules as specified in paragraph (h)(5) of this section.

(4) Within 60 days after receipt of a complete final application from a State for final authorization to implement a rule or rules specified in Table 1 of this section, the Administrator shall publish a notice of the decision to grant final authorization in accordance with the procedures for immediate final publication in paragraph (b)(3) of this section.

(5) To be eligible to use the procedure in this paragraph (h), a State must be authorized for the provisions which the rule listed in Table 1 to this section amends.

TABLE 1 TO § 271.21

Title of regulation	Promulgation date	Federal Register reference
Land Disposal Restrictions Phase II—the Universal Treatment Standards in §§ 268.40 and 268.48 of this chapter only.	September 19, 1994.	59 FR 47982

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