Chapter 8

PERMITS AND STATE PROGRAMS
PERMITS AND STATE PROGRAMS

Summary

- RCRA permit procedures are contained in EPA's Consolidated Permit Regulations, which also cover permitting under the Safe Drinking Water Act, the Clean Water Act, and (in certain respects) the Clean Air Act.

- RCRA covers both owner and operator of every hazardous waste facility. Most RCRA facilities need individual permits, but some facilities may be subject to permit-by-rule.

- Major steps in permit application process:
  - Applicant submits Part A application;
  - Applicant submits Part B application, voluntarily or upon request;
  - EPA determines that application is complete;
  - EPA issues draft permit or notice of intent to deny permit;
  - EPA gives public notice and allows 30 days for written comments;
  - EPA holds public hearing if adverse comments are received;
  - EPA issues final decision and responds to comments; any person may appeal to EPA Administrator, or seek review in U.S. court of appeals.

- State agencies may receive interim authorization or final authorization to administer part or all of RCRA program, including issuance of permits. State requirements may differ in details and may be more stringent.

- In any state which has not received final authorization by January 26, 1985, interim authorizations will terminate, and EPA will be obliged to reinstate a federal program. That prospect threatens disruption and confusion.
The permit for treatment, storage, and disposal facilities (TSDFs) is the key mechanism for federal control of hazardous waste management facilities. RCRA states that after November 19, 1980, "the treatment, storage, or disposal of any . . . hazardous waste is prohibited except in accordance with . . . a permit." Thus, each person who owns or operates a TSDF must obtain a permit, and each person who generates or transports hazardous waste must use only a permitted TSDF. The terms and conditions of a TSDF permit will reflect the performance standards EPA has found "necessary to protect human health and the environment."

Because TSDF permits will impose serious restrictions on important industrial operations for long periods of time, companies must be aware of both the content of TSDF permits and the procedures by which permits are issued, modified, and revoked. Since only a handful of RCRA permits have been issued to date, firms seeking to understand the program must focus on the statute and on EPA's regulations.

Regulations for TSDF Permits

The procedural requirements applicable to TSDF permits under RCRA are set out in EPA's Consolidated Permit Regulations. These regulations also cover permits under several pollution control programs in addition to RCRA, and they have provoked legal challenges that overlap in many respects the litigation aimed at EPA's substantive RCRA regulations. Extended settlement discussions between EPA and the numerous industry petitioners concluded in November of 1981, resulting in an agreement by EPA to propose amendments to many important provisions of the RCRA-related permit regulations. The major changes likely to result from settlement of the consolidated permit litigation will be discussed in this chapter.

The Permit Application

A complete TSDF permit application consists of Part A and Part B. The information to be provided in Part A is specified in two official EPA forms, Form 1 and Form 3, which must be used. EPA does not intend, however, to prescribe a specific form for Part B.

Form 1, which is used by applicants under all programs covered by the Consolidated Permit Regulations, calls for general information about the activities subject to the application, the mailing address and location of the facility, SIC codes identifying major activities at the facility, information about the operator and owner of the facility, a topographic map of the facility showing the major activities, and a brief narrative description of the business.

Form 3 is only for TSDFs under RCRA, and, like Form 1, demands fairly general information: latitude and longitude of the facility, name and address of the owner, whether the facility is new or existing, drawings and photographs of the major activities at existing facilities, a description of the hazardous waste management processes used at the facility, identification and quantifica-
Form 3 is particularly important for existing facilities, since the information given on this form will determine whether an owner or operator can expand or modify the facility during interim status.9

Part B of the TSDF permit application is not a form, but rather a list of required items of information.10 The general information called for in Part B is far more detailed than that in Part A: a general description of the facility; chemical and physical analyses of all hazardous wastes; a copy of the waste analysis plan; a description of security procedures; a copy of the inspection schedule and contingency plan; a description of certain safeguard procedures, such as methods for preventing runoff from waste handling areas to other areas of the facility; a description of traffic patterns, access roads, traffic signals, and traffic volume in the facility. EPA has also issued specific Part B informational requirements for storage facilities,11 incinerators,12 and land disposal facilities.13

Permit Conditions

A TSDF permit will contain a list of conditions that the facility is required to meet. There are two types of conditions: those applicable to all RCRA permits and those imposed on a case-by-case basis.14

Conditions that must appear in every RCRA permit include several substantive requirements that EPA regards as necessary regardless of the specific type of HWm facility, such as the so-called “duty to halt or reduce” activities to avoid noncompliance,15 the duty to mitigate the effects of noncompliance,16 and the duty to properly operate and maintain all facilities and control systems.17 However, the emphasis in these standard permit conditions is on recordkeeping and reporting which will enable EPA to monitor compliance. For example, the permittee must retain records of monitoring information for a period of three years;18 allow authorized inspections;19 and report noncompliance incidents that threaten human health or the environment within 24 hours.20

By imposing standard permit conditions such as these, EPA obtains leverage over TSDFs. A facility must create, make available, and, in serious cases, report, information concerning its compliance with the permit. Failure to do so is itself noncompliance with the permit. As either form of noncompliance could result in permit revocation or other enforcement action, this approach to permitting creates a powerful incentive for self-policing by facility operators.

The case-by-case permit conditions that EPA develops may be either specifically tailored to circumstances of the individual permittee or more general provisions for the specific type of facility for which the permit is sought. These conditions will cover the duration of the permit, schedules of compliance for facilities that qualify for permits but require some upgrading, recording and reporting the results of monitoring, and adherence to certain other federal statutes with environmental objectives.21 The permit conditions
will apply to the individual facility the requirements of the facility performance standards themselves. Those standards have already been discussed in Chapter 7. Once the permit is issued its terms and conditions are decisive — compliance with it will constitute full compliance with all requirements under RCRA. It is sufficient to point out here that any flexibility allowed under a true performance standard should be captured in the permit issuance process if possible, for post-issuance modifications may prove difficult or impossible to obtain.

**Procedural Requirements for Submitting a TSDF Application**

An existing facility ordinarily submits its TSDF permit application in two stages. *Part A* of the application is submitted to qualify for interim status. For most existing facilities, therefore, *Part A was submitted on or before November 19, 1980.* As explained in Chapter 6, facilities that can qualify for interim status after November 19, 1980 must meet either a 6-month or a 30-day filing deadline, depending on the reasons for their entry into the HWMS.22 A facility that becomes subject to coverage as the result of new or revised EPA regulations has 6 months to file a Part A from the date the regulations were published. A facility that becomes subject to coverage because of a change in its own operations (e.g., a small quantity generator exceeds the 1000 kg limit) has 30 days from the change.

Existing facilities may submit *Part B* permit applications in either of two ways. First, once the Part 264 permitting standards for a particular type of facility have been issued, the owner or operator may *voluntarily* submit his *Part B* at any time.23 Second, once those standards have become effective EPA may *require* the owner or operator to submit his *Part B.* In this situation, the regulations provide that he shall be given at least six months to complete and submit Part B.24

New facilities must submit Part A and Part B simultaneously. The regulations require that the application be filed at least 180 days before construction of the facility is expected to commence.25 Since physical construction is currently prohibited until the permit is issued,26 the 180-day preconstruction interval is intended principally as a commitment by EPA to complete the permit proceeding within that period. The commitment is probably unrealistic, and it is definitely unenforceable, if the pre-permit ban on construction creates problems, the solution, according to EPA, is for applicants to file even sooner in the planning process, thus giving EPA more than 180 days in which to review the application.27

**Permits for Special Situations**

In addition to regular permits for existing and new facilities, the regulations provide for two types of permits to cover special situations. Certain facilities are not required to submit permit applications and are deemed to have permits so long as they meet the conditions listed in the regulations. These "permits-by-
rule” are available for ocean disposal vessels and barges, underground injection wells, and publicly owned treatment works, if these facilities have permits under other pollution control programs. EPA is also considering permit-by-rule standards for wastewater treatment units—other than surface impoundments—and for neutralization tanks. These units are exempt from regulation until the permit-by-rule standards are issued.

If a hazardous waste would create an imminent and substantial endangerment to human health or the environment, it may be treated, stored, or disposed of under an emergency permit, which may be issued either to a person with no regular permit or to allow unpermitted activities at a facility with a regular permit. An emergency permit may be issued orally (but must then be followed by a written permit), may not exceed 90 days duration, and must incorporate the standard permit conditions to the extent possible. Deviations from the conditions of a regular permit are not considered noncompliance if authorized by an emergency permit.

Who Must Submit and Sign Applications

The duty to obtain a TSDF permit is imposed on the operator of the facility rather than on the owner. When an application is submitted, however, the owner is required to sign it, and it is EPA’s intention to hold the owner jointly responsible for compliance with a permit even if he does not operate the facility.

The owner signatory requirement has proven highly controversial. As one example, persons involved in exploration and production of oil, gas, or minerals may handle hazardous wastes, and these facilities may therefore need RCRA permits, yet the “owner” is very often a federal, state, or local governmental entity. Industry litigants challenging the Consolidated Permit Regulations argued that the companies operating these facilities should not be forced to obtain the signature of the Secretary of the Interior or some other government official in these situations. In response, EPA recently proposed to waive the owner signatory requirement in situations of this sort, provided certain other conditions are met.

Another problem with the owner signatory requirement arises when the absentee owner has little or no real control over his property and may be unwilling to sign the operator’s permit application. The Agency’s recent proposal would authorize a discretionary waiver of the signatory requirement in appropriate cases. In addition, a Regulatory Interpretation Memorandum (RIM) issued in 1980 ruled that a person whose sole ownership interest in property is that of a security holder in a financing agreement is not an “owner” for this purpose and need not sign the application form.

The signature of a corporate owner or operator on the application must be supplied by an executive officer at the vice-presidential level or higher. The signature requirement is slightly less strict for required documents other than permit applications, which may be signed either by an executive officer or by...
his duly authorized representative. The vice-presidential signatory requirement, which applies not only to the RCRA program, but also to the UIC and NPDES programs, was vigorously opposed by industry. In August of 1980, EPA issued a policy statement to the effect that the term “vice-president” embraced “[a]ny other person who performs similar policy-making functions for the corporation.” This approach was also resisted, both because it appeared to contradict the plain language of section 122.6(a) of the regulations, and because it would still prevent a plant manager or similar corporate official from signing applications relating to the plant for which he is responsible. As part of the settlement of the consolidated permit litigation, EPA recently proposed to amend the regulation so as to allow signature by a vice-president or “any other person who performs similar policy- or decision-making functions for the corporation” or divisional or plant managers responsible for major corporate facilities.

Is the Application Complete?

EPA will not begin the permit issuance process until the application is complete. EPA has committed itself to reviewing TSDF applications for completeness within 30 days for new facilities and 60 days for existing facilities. If the Agency believes that more information is needed, it so advises the applicant by sending a notice of deficiency. Submission of the information specified in this notice constitutes completion of the application. EPA may still request additional information, but such requests do not render the application incomplete. Failure to provide information identified as necessary to complete a permit application is grounds for denial of the application.

A closely related problem arises with respect to existing interim status facilities. EPA’s regulations provide that if the Agency determines that a Part A application filed by an existing facility fails to provide the required information, EPA may then “notify the owner or operator that the application is deficient and that the owner or operator is therefore not entitled to interim status.” The same provision continues: “The owner or operator will then be subject to EPA enforcement for operating without a permit.” Obviously this approach could force the shutdown of an existing facility based solely on the Agency’s unilateral determination that the Part A was “deficient.” As part of the settlement of the consolidated permit litigation, EPA agreed to propose an amendment to this provision that would give the facility owner or operator written notice of the alleged deficiency and an opportunity to explain or cure the deficiency prior to any EPA enforcement action.

Interim status facilities that have submitted only a Part A permit application must update the Part A if they begin to handle additional hazardous wastes or receive authorization for certain permissible changes in existing facilities. There is no specific requirement for updating completed permit applications during the permit issuance process. As a practical matter, however, important new information or a substantial change in circumstances...
affecting the facility should be reported to the Agency. Failure to do so would render the permit revocable for failure "to disclose fully all relevant facts," and might invoke criminal sanctions as well for knowingly making a false statement in a permit application.

Confidentiality of Information

Federal law and EPA regulations prohibit the Agency from disclosing proprietary information submitted in permit applications. In an apparent attempt to ease the administrative burden of reviewing applications when it receives Freedom of Information Act (FOIA) requests, EPA initially required RCRA permit applicants to both assert and substantiate the confidentiality of proprietary information at the time the application is submitted. Failure to do this constituted a waiver of confidentiality. Applicants for permits under the other programs were not required to provide justification concurrently with submission of the application, and objections were raised to this disparate treatment. The Agency's approach, besides demanding more of RCRA permit applicants, could have induced wasted effort as companies attempted to justify the confidentiality of information for which no FOIA requests would ever be filed. As part of its settlement of the consolidated permit litigation, EPA recently did away with this extra burden on RCRA permit applicants.

The Permit Application Review Process

Once EPA determines that the permit application is complete and sends the applicant a notice so stating, the Agency will initiate the application review process. At present, few permit applications have been reviewed in accordance with EPA's published procedures, and therefore it is impossible to predict exactly how the new system will work in practice. There is a widespread assumption, however, that the approval process will be lengthy, particularly for incinerators and land disposal facilities. Many predict that major new facility permits will require years to review, and that it will take EPA five to ten years at a minimum to complete its evaluation of applications for the nearly eleven thousand existing interim status facilities.

These predictions are surely realistic. Given EPA's current staff shortages, a political climate not conducive to expanding the Agency's bureaucratic capacity, the continuing fallout from protracted litigation, and other present circumstances, the Agency is not likely to establish any speed records when it comes to operating the permit approval machinery. It may also be noted that RCRA imposes no statutory time limits on how long EPA may take to review a RCRA permit application. Moreover, the Agency's regulations impose no such deadlines, even for the routine applications. For a "major new HWM facility," the regulations do require EPA to prepare a project decision schedule, which includes target dates for the sequence of steps leading to final disposition of the application. There is nothing, however, to compel EPA to meet the target dates.

Public

EPA (deny), a Amendment hearing « opposition comment prescribe
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At a public meeting on September 15, 1982, EPA officials indicated that it is the Agency's intent to request submission of Part B applications for 250 facilities during the first year. Criteria have been distributed to the regional offices for selection of those 250 facilities. In general, they concentrate upon the potential for adverse environmental and public health impacts associated with particular facilities and the compliance history of facilities. EPA has also indicated in public statements that it will give priority to permit applications for new facilities, where construction is precluded until the permit processing is completed.

Putting aside the important but unanswerable question of how long it will take EPA to complete them, the steps in processing a permit application are as follows:

**Draft Permit or Intent to Deny.**

EPA may decide that the application should not be approved. In that case, it will issue a “notice of intent to deny.” If the Agency believes that the application is approvable, it will prepare a draft permit. Ordinarily, EPA would not be expected to deny an application at this stage. The application will have been prepared with knowledge of the permitting standards, and in the nature of things owner/operators will not often submit applications for facilities that they know do not meet the minimum standards for approval. Should EPA issue a notice of intent to deny, however, it is treated thereafter as a draft permit for purposes of the remaining procedures in the review process.

**The Draft Permit and Supporting Documents.**

A draft permit consists of the list of conditions previously described, e.g., monitoring and reporting requirements and facility standards. Supporting the draft permit (or notice of intent to deny) is either a statement of basis or a fact sheet. EPA must prepare a fact sheet for every major HWM facility and for any other HWM facility determined to be of widespread public interest. The fact sheet is a detailed description of the facility and explanation of the factors underlying the conditions included in the permit. The statement of basis is a condensed version of the fact sheet, and is used to support more routine draft permits.

**Public Comment and Hearing.**

EPA is required to give public notice of a draft permit (or notice of intent to deny), and to allow 30 days for written comments. Under the 1980 Amendments to RCRA, EPA is also required to hold an informal public hearing on its proposed action if the Administrator receives written notice of opposition to the Agency's draft permit. According to the regulations, comments on all "reasonably ascertainable issues" must be made during the prescribed comment period or not at all. Although the comment period will
be extended in complicated cases, this restriction makes clear that once the comment period is closed no additional facts or issues will be entertained, an important consideration during any subsequent administrative or judicial review of the permit decision. In a further effort to avoid the prolongation of the public proceeding, the regulations provide that the comment period may be reopened only if information submitted during the initial comment period appears to raise substantial new questions. In connection with the reopened comment period, EPA may prepare a modified draft permit or a revised fact sheet or statement of basis. Additional comments are limited to the questions that caused the comment period to be reopened.

After the comment period has closed, EPA issues a final permit decision together with a response to comments filed during the proceeding. The decision becomes effective immediately if the draft permit was uncontested. If comments requested changes in the draft permit, the decision is effective 30 days after issuance unless the decision is appealed. The decision may be appealed to the Administrator of EPA or reviewed by the Administrator on his own initiative. The action of the Administrator is final; any remaining dissatisfaction may be taken up with the local U.S. court of appeals where the applicant (or other interested person) resides or transacts business.

The regulations provide an alternative mechanism for receiving comments on draft permits. The non-adversary panel (NAP) hearing is a hearing before a Presiding Officer—who has not previously been involved in the proceeding—and a three-person panel consisting, in the usual case, of EPA employees. At least two of the employees must not have directly participated in the preparation of the draft permit.

The NAP hearing may be held on EPA’s initiative or on request from any interested person, including the permit applicant. The hearing is similar to the “science court” recently advocated by some as a means of resolving complex technical issues that arise in government proceedings. The advantage of the science court is that technical questions can be decided by persons already knowledgeable in the field rather than by legally-trained judges who must become instant experts. The EPA procedure is a hybrid of the traditional legal proceeding and the science court: the Presiding Officer is a lawyer, but the three-person EPA panel is made up of appropriately qualified experts.

One type of proceeding that is not offered by the EPA during the permit approval process is the full-dress evidentiary hearing so often criticized as inappropriate when scientific issues are involved. An evidentiary hearing is conducted, like a court trial, by lawyers before a judge. Whether EPA is required as a matter of law, or should as a matter of policy, afford this type of hearing as part of the permitting process has been controversial, but clearly that procedure would be time-consuming and administratively burdensome. The Agency will, however, afford an evidentiary hearing on a RCRA permit if it is related to and consolidated with an evidentiary hearing on an NDPES permit, but only because the Clean Water Act requires an evidentiary hearing.

Permits and the ownership of a permit terminate with the ownership of the site. There can be no permit for any controlled waste and there is no permit for any controlled waste.
Changes In An Approved Permit

As stated above, a RCRA permit must contain conditions requiring the permit holder to provide detailed information concerning facility operations on an ongoing basis. These reporting requirements include: physical changes in or additions to the facility; anticipated noncompliance; transfers of ownership; the results of required monitoring; adherence to any compliance schedules; manifest discrepancy and unmanifested waste reports; and information requested by EPA to determine whether "cause" exists to modify or terminate the permit. Failure to comply with these conditions, which may be observed during inspections or reported outside the permit updating process, is grounds for terminating the permit.

Modification or Revocation and Reissuance.

The information that is reported, of course, may impact the status of the permit. In extreme cases, it could lead to termination. More likely, it will either provoke no response from EPA, or cause the Agency to take one of two less drastic forms of action: modification or revocation and reissuance.

EPA has adopted the general principle that once a permit has been approved the permit holder is entitled to rely on the permit for as long as it lasts. Accordingly, a permit may not be modified, over the objection of the permit holder, because EPA has reevaluated the information in the application and decided that the decision to approve the permit in its original form was wrong, or that different conditions would better suit the Agency's revised view of how the facility should be operated. Nor may EPA modify a permit to conform with a new regulation unless the permit holder so requests, (although this rule may be changed as a result of the NRDC settlement). In fact, there are only two grounds on which EPA may modify a permit without the permit holder's consent:

1. the permit holder makes material and substantial alterations or additions to the facility,
2. information comes to light that was not available when the permit was issued and would have justified different permit conditions had it been known.

There are two other situations in which EPA could revoke and reissue the permit, but instead EPA may choose the less severe measure of modification. A permit may be either modified or revoked and reissued if there is cause to terminate the permit or if the holder proposes to transfer the permit. Transfer of a permit warrants such action because EPA regards a permit as personal to the owner and operator who executed the permit application. On this theory, there can be no such thing as a transfer of a permit; however, in the usual case any consequences from substituting a new owner or operator are slight and there is no need for a more elaborate procedure.

The procedures for modifying or for revoking and reissuing a permit are
similar to those for the initial approval of a permit. Thus, a draft revised permit is prepared and, together with a statement of basis or fact sheet, made available for public comment and, if the revised permit is of significant public interest, a public hearing. The non-adversary panel procedure may be used for a revised draft permit, just as for an initial draft permit. There is one difference between the procedures applicable to a draft modified permit and a draft reissued permit: When a permit is proposed to be modified, only the conditions to be modified are subject to the proceeding whereas a revoked and reissued permit is subject to comment on all issues encompassed by the permit.

**Termination**

The regulations provide three grounds for terminating a permit: noncompliance with a permit condition; failure to disclose, or misrepresentation of relevant facts in the application or during the permit issuance process; and a determination that a permitted activity endangers human health or the environment. The existence of unacceptable health or environmental risks is the only circumstance in which EPA will change the ground rules established in the original permit. This provision may seriously disrupt the operation of a facility, but it should be remembered that an approved permit does not insulate a permit holder from action based on the imminent hazard provisions of RCRA or other statutes, under which even a permitted facility may be ordered to close down if its activities may present an imminent and substantial endangerment to health or the environment.

The procedure for terminating a permit is the same as that for initial approval of a permit, except that the permit holder is entitled to request a formal evidentiary hearing to challenge a final decision to terminate the permit. A formal hearing on a proposed permit termination is a trial-type proceeding before an administrative law judge. At the end of the proceeding, briefs are filed and an initial decision is issued, which becomes final unless appealed to the Administrator or reviewed by the Administrator on his own motion. The Administrator’s decision may then be taken to the local U.S. court of appeals.

**State-Administered RCRA Programs**

The description of the permit requirements and procedures given above applies specifically to the HWM program administered directly by EPA. In most states, however, state agencies will eventually request and receive authorization to conduct their own RCRA programs in lieu of the EPA program.

A state program may not receive final authorization unless (1) it is “equivalent to” the federal program, (2) it is “consistent with” the federal program and other state programs, and (3) it provides for adequate enforcement. Nor may it receive interim authorization unless it is...
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"substantially equivalent" to the EPA program. For this reason, the above description of the EPA permit program applies in large part to state HWM programs. Significant differences may exist, however, on a large number of details. These may relate to both the substantive conditions included in a permit and the procedural requirements governing the permit process, in addition of course to possible differences in the operating approach and attitudes of the permit-issuing authorities.

The basic approach of the federal program in providing for a transfer of operating responsibility to state agencies follows the pattern of other federal environmental statutes, such as the Clean Air Act and the Clean Water Act. This approach is designed ultimately to avoid duplicative programs and to provide a more efficient, integrated environmental regulatory framework. The system also establishes a method for making federal grants to assist the administration of state programs.

Despite potential advantages of state agencies administering the programs under RCRA, there are a number of drawbacks, especially in the short run. The biggest immediate problem is confusion, which affects many aspects of program operations during the transitional phase while state programs are being established.

In cases involving a particular permit application, it will be necessary to check carefully whether responsibility for that permit rests with EPA or the state agency (and whether any change is imminent or has just occurred). As indicated earlier, a state may have assumed responsibility under either interim authorization or final authorization. The requirements a state must satisfy to receive interim authorization are less stringent than those specified for final authorization, and therefore variations among state requirements are more likely during the interim authorization period. Moreover, interim authorization may be granted with respect to a portion or portions of the regulatory framework. For example, a state may have received authorization to administer the program with respect to tanks and containers but not for land disposal facilities. As of September 30, 1982, 34 states had received interim authorization for Phase I (generator and transporter standards, manifest requirements, etc.) and 5 states had received interim authorization for Phase II (permits), Parts A and B (tanks and containers; incinerators).

Another element of prospective confusion is the requirement that all interim authorizations will automatically expire 24 months after the effective date of the last component of Phase II regulations (namely, January 26, 1985). If states have not obtained final authorization by that date, the authority of state agencies to issue RCRA permits will terminate, and EPA will have to reinstitute a federal program. As of September 30, 1982 no states had obtained final authorization, and it was not possible for states to apply for final authorization until after the July 26, 1982 regulations were issued. Most states will need new state enabling legislation, as well as new state regulations, before they can qualify to obtain final authorization.
A number of practical problems will occur as responsibility for administering the permit programs shifts from EPA to state agencies, and possibly back again. It is quite probable that progress in processing individual permit applications may be disrupted, producing further delays. It should be noted that the interim authorization and final authorization both relate to responsibilities broader than permit issuance alone. Under such authorization the states will administer not only the permit program but also all other aspects of the RCRA regulatory framework, such as the listing of hazardous wastes and the enforcement of generator and transporter standards.

The points on which state-run permit programs may differ from the EPA program may cover a wide range of details.86 For example, a state agency does not have to use the two-part application for a TSDF permit. Other allowable differences relate to automatic continuation of expiring permits pending renewal,87 minor modifications in permits without going through the modification procedure,88 and up-front substantiation of the confidentiality of information submitted in an application.89 In addition, many of the more detailed procedures EPA follows in reviewing permit applications and in modifying and terminating permits are not imposed on state programs. Although the regulations require states to provide the same basic procedural protections both to the public and to permit applicants and permit holders, the precise means by which these safeguards are afforded is left to the discretion of the state agencies.

By far the most important allowable difference between the EPA program and a state-run program is that states may impose more stringent requirements than those mandated in the EPA regulations.90 Any lingering doubt on this point was eliminated by the 1980 Amendments to RCRA.91 Although there is no limitation on a state's discretion in fashioning stricter hazardous waste requirements for TSDFs, a state seeking final authorization to operate its own RCRA program must have a program that is consistent with both the federal program and the other states' programs. The consistency requirement evidently will not be applied by EPA to curtail stricter state standards, however, except with respect to interstate transportation and waste importation ban issues.

One might assume that once a state receives either interim authorization or final authorization to administer its own RCRA program, then all future permitting and enforcement activities would be run by the state agency. In point of fact, however, significant questions remain over the scope of EPA's involvement in the administration of duly authorized state programs.

For example, EPA's regulations provide that the Regional Administrator may comment on permit applications received by, and draft permits prepared by, the state agency. If the Regional Administrator believes that issuance of the permit would be inconsistent with the EPA approved state program, he is required to notify both the state agency and the permit applicant. What happens next depends upon whether the state issues a permit that responds to the objections voiced by the Regional Administrator.
If the final permit does respond to the EPA objections, and the Regional Administrator withdraws his comment, then any subsequent enforcement would be limited to violations of the state-issued permit. A far more serious problem arises where the final permit issued by the state fails to satisfy the Regional Administrator. Under EPA's regulations, the Agency may seek to enforce a permit condition that is not even included in the facility's permit, so long as the Regional Administrator stated in his written comment that this condition was required by the state RCRA program. The federal enforcement effort could come as a complete surprise to the permittee, who has no way of knowing whether the Regional Administrator ever withdrew his comment on the draft permit. Accordingly, this feature of the Agency's regulations was dubbed "permit-by-ambush" and challenged in the consolidated permit litigation.

After extended discussions with industry litigants, EPA agreed to propose certain modifications designed to assure procedural fairness to the permittee whose state-issued permit fails to satisfy the Regional Administrator.
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2. Id. § 6924.
4. The Underground Injection Control (UIC) program under the Safe Drinking Water Act, the NPDES and §404 dredge or fill programs under the Federal Water Pollution Control Act, and the PSD program under the Clean Air Act.
5. The challenges to EPA's Consolidated Permit Regulations were consolidated under the lead case of Natural Resources Defense Council Inc. v. EPA, No. 80-1607 (D.C. Cir.). All of the issues relating to EPA's Underground Injection Control (UIC) program were settled, as were all of the RCRA-related issues raised by industry petitioners. The State of West Virginia will probably litigate one issue involving the Part 123 regulations governing penalties under state RCRA programs. Several issues relating to the Agency's National Pollutant Discharge Elimination System (NPDES) program remain to be litigated, either in the D.C. Circuit or in another forum.

7. Id. § 122.4(d).
8. Id. § 122.24.
9. This issue is discussed in detail in Chapter 6.
14. 40 C.F.R. §§ 122.7 and 122.28 set forth conditions applicable to "all permits" and "all RCRA permits." 40 C.F.R. §§ 122.8 and 122.29 require the permitting authority to establish facility-specific conditions as appropriate.
15. Section 122.7(c), by its terms, imposes no "duty" to halt or reduce activities, but rather states that it is no defense to an enforcement action that the permittee would have had to halt or reduce activities in order to avoid noncompliance. As settlement of the consolidated permit litigation, EPA
recently amended the caption of § 122.7(c) to read "Need to Halt or Reduce Not a Defense." 47 Fed. Reg. 15,304 (April 8, 1982).

EPA recently proposed an amendment that would narrow the potentially limitless scope of § 122.7(d) as presently worded. 47 Fed. Reg. 25,546 (1982) (to be codified at 40 C.F.R. § 122.28(d)) (proposed June 14, 1982).

40 C.F.R. § 122.7(e) (1981).

Id. § 122.7(j).

Id. § 122.7(i). EPA at first took the position that unannounced inspections could occur at any time, but recently added a limitation based on RCRA's explicit reference to entry "at reasonable times." See 47 Fed. Reg. 15,304 (April 8, 1982).


Id. § 122.8(a), 122.9, 122.10, 122.11, 122.12. Requiring compliance with other federal laws as a condition of a RCRA permit arouses considerable hostility in the private sector. Although the laws selected have an environmental flavor (e.g., the Wild & Scenic Rivers Act, the Endangered Species Act), the logic for enforcing them through RCRA permit conditions arguably applies to any law, including those unrelated to environmental concerns.

24 These issues are discussed in greater detail in Chapter 6.


26 Id.

27 Id. § 122.22(b)(2).

28 Id. § 122.22(b)(1). Note, however, that as part of the settlement of the consolidated permit litigation EPA agreed to propose an amendment lifting the pre-permit construction ban for most RCRA facilities other than land disposal facilities.


31 Id. § 122.27(a).

32 Id. § 122.28(a).

33 Id. § 122.4(b).


36 Id.


38 40 C.F.R. § 122.6(a) (1981).

39 Id. § 122.5(b).


41 47 Fed. Reg. 25,546 (June 14, 1982).

42 Id. § 124.3(a)(2) (1981).

43 Id. § 124.3(c).

44 Id. § 129.3(d).


46 Id.
As part of the settlement of the consolidated permit litigation, EPA agreed to propose an amendment that would allow essentially "automatic" transfers of RCRA permits so long as the transferee adheres to the existing permit.

45 40 C.F.R. § 122.22(c) (1981). See Chapter 7 supra.
46 Id. § 122.16(a)(2).
47 Id. § 122.19(d).
49 40 C.F.R. § 124.3(c) (1981).
50 Id. § 124.3(g).
51 Id. § 124.6(a).
52 Id. § 124.6(d).
53 Id. § 124.6(e).
54 Id. § 124.8.
55 Id. § 124.7.
56 Id. § 124.10.
60 Id. § 124.14(a).
61 Id. § 124.15(a).
62 Id. § 124.17(a).
63 Id. § 124.15(b)(3).
64 Id. § 124.15(b)(2).
65 Id. § 124.19.
68 Id. § 124.119, 124.120.
69 Id. § 124.114(b).
72 Id. § 122.15(a)(2).
73 Id. § 122.15(a)(3).
74 Id. § 122.15(a)(1).
75 Id. § 122.15(a)(2).
76 Id. § 122.15(b).
78 Id. §§ 122.15; 122.5(c)(2).
79 Id. § 122.16.
80 See 40 C.F.R. § 122.13(a) (1981).
81 Id. §§ 124.15(b)(2), 124.71(a).
83 Id.
As of May 28, 1982, more than 30 states had received Phase I of interim authorization, which gives them control over most existing interim status facilities. In addition, 4 states had received Phase II of interim authorization, which allows them to begin issuing RCRA permits for certain types of facilities.


CHAPTER 9. ENFORCEMENT AND PENALTIES.


42 U.S.C. § 6930(b) (1976). Issuance of the standards is ongoing. Standards are codified in 40 C.F.R. as follows: Generators—Part 262; Transporters—Part 263; Owners and Operators of TSDFs—Parts 264 (permitting standards), 265 (interim status), and 266 (special types of wastes and facilities).


Id. § 6925(a) (1976 & Supp. III 1979).

Id. § 6925(e). These TSDFs must comply with the interim status standards in Part 265.

Operating without a permit and operating contrary to the conditions in a permit amount to the same thing as a conceptual matter. If a permit has been issued, noncompliance can be excused, but only if the owner/operator obtains an emergency permit covering the noncomplying activity. 40 C.F.R. §§ 122.27, .28(a) (1981).

40 C.F.R. § 122.13(a) (1981). Compliance with permit conditions does not insulate the owner/operator from an action based on § 7003 of the Act or from any form of liability for damages. See Chapter 10 and Appendix infra.


Id.

Id. § 6934. Section 3013 is discussed in greater detail in Chapter 10.

Id. § 6927.

Id. § 6928.

Id. § 6928(a)(1).

42 U.S.C. § 6928(a)(2) (1976). The minimum elements of a state enforcement program are specified in 40 C.F.R. § 123.9 (1981). It is reasonable to assume