

OSWER 9522.1987(01), 1987 WL 417946 (OSWER)



Environmental Protection Agency  
Office of Solid Waste and Emergency Response

## OSWER Directive

**\*1** REGION X'S RECOMMENDED REVISION OF 40 CFR 270.4(a) AND 270.32(b)(1)

November 19, 1987

From:

Gene Lucero  
Director  
Office of Waste Programs Enforcement

Marcia Williams  
Director  
Office of Solid Waste

TO:

Charles E. Pindley, Director

Hazardous Waste Division

MEMORANDUM

In your memorandum dated June 26, 1987, you identify several potential enforcement problems in the RCRA permitting regulations and in the corresponding language in the Agency's model permits. In addition, you present alternative language that Region X intends to incorporate into permits to prevent these enforcement problems. Specifically, you express concerns with the language of §270.4(a) (and similar language in §270.32(b)(1)) which states,

Compliance with a RCRA permit during its term constitutes compliance, for purposes of enforcement, with Subtitle C of RCRA

Several issues are involved in the consideration of this "permit shield" provision. First, we agree that this language may be overly broad for some of the reasons you cited in your memorandum. However, we do not believe that it presents a serious impediment to enforcing the RCRA Subtitle C requirements that are outside the permit's scope. Although an argument can be made that § 270.4(a) limits the enforceability of any RCRA Subtitle C requirements not addressed by the permit, such an interpretation would conflict with the intent of other RCRA provisions. Many of the Subtitle C requirements are not designed for, and are not appropriate for inclusion as permit conditions, namely Parts 260, 261, 262, and 263. An illustration of the Agency's intent to implement these Part 260-263 standards outside of the permit is §262 10(r) which applies the Subtitle C Part 262 generator standards to permitted facilities that generate hazardous wastes.

Second, the regulations at §270.32(b)(1) indicate that A permit should include conditions that incorporate the standards specified in Parts 264, 266, 267, and 268. (Note, however, that the applicability of Part 267 has expired.) The purpose of §270.32(b)(1) and the "permit as a shield" provision of § 270.4(a) is to assure the permittee that by complying with the permit, he or she is in compliance with the RCRA facility standards. Thus, given § 270.32(b)(1) the permit shield applies in all cases to the facility standards of Parts 264 and 266.

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The relation of the permit shield provision to Part 268 is more complex. As a result of HSWA the self-implementing facility standards imposed by statute and the Part 268 land disposal restrictions apply to all permitted facilities despite the shield provision of §270.4(a). Consequently the Agency proposed to amend §270.4 to make it consistent with the self-implementing requirements (See 51 FR 10715, Karch 28, 1986) The final rulemaking should be published soon. EPA maintains its position that it is generally preferable to incorporate the Part 268 and related statutory standards into new permits whenever possible. According to the proposed language for §270.4, if the self-implementing RCRA provisions are incorporated into the permit, the permit will act as a shield from these self-implementing requirements.

**\*2** Based on the two points discussed above, we believe that §270.4(a) is not as serious an impediment as you suggest. However, we agree with your concern that there is a potential for confusion, and concur with your approach to modifying the permit language to clarify the effect of the permit for enforcement purposes. We recommend a few changes to your suggested alternative language to indicate more clearly which 40 C.F.R. Parts are shielded by the permit and those that are not shielded. Thus, the boilerplate language should read as follows.

Compliance with this permit during its term constitutes compliance, for purposes of enforcement, with 40 C.F.R. Parts 264 and 266 only for those management practices specifically authorized by this permit. [Note, include a reference to Part 268 only if these standards have been incorporated into the permit]. The permittee is also required to comply with Parts 260, 261, 262, and 263 [and 268, if not included in the permit] to the extent the requirements of those Parts are applicable.

You may also add a general provision which states that compliance brought under law to protect human health or the environment including other requirements not necessarily included in the permit.

Thank you for bringing this matter to our attention. We will continue to reexamine the entire permit shield issue to determine whether further changes to §270.4(a) are warranted. If you have additional questions or observations on this subject please contact Frank McAlister of the Office of Solid Waste (FTS 352-2223) or Susan Hodges of the Office of Waste Programs Enforcement (FTS 475-9315).

cc:

Waste Management Division Directors. Regions I-IX

RCRA Branch Chiefs. Regions I-X

Regional Counsels, Regions I-X

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