Changes During Interim Status to Comply With Corrective Action Requirements

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comply with Federal regulations or State or local laws. The corresponding provision in today's rule § 270.72(a)(3), has been amended to clarify that "Federal regulations or State or local laws" encompasses all Federal, State, and local requirements. This includes regulations, orders, statutes, and permit-related requirements such as approved closure plans. EPA received no comments opposing this clarifying amendment.

3. Corrective Action

Section 3008(h) authorizes the Agency to order a facility owner or operator to conduct corrective action during interim status when the Agency determines that there is or has been a release of hazardous waste into the environment. Section 270.72(a)(5) promulgated today allows interim status facilities to make changes in accordance with corrective action orders issued by the Agency under section 3008(h) or other Federal authority (or orders issued by a Director under an equivalent State authority). In today's rule, the Agency has modified the language proposed in § 270.72(a)(5) to clarify that when the Agency or a State seeks corrective action through judicial proceedings and a court, rather than the Agency or State, issues an order requiring corrective action, changes made in accordance with such an order would also be permissible changes under § 270.72(a)(5).

In addition to the new § 270.72(a)(5), today's rule also promulgates § 270.72(b)(5), which removes the reconstruction limit for changes made in accordance with such corrective action orders.

Under the new § 270.72(a)(5), facility changes introduced in accordance with corrective action orders restricted to activities involving wastes associated with the facility. This limitation does not prevent treatment, storage, or disposal of wastes released from within the facility that migrated beyond the facility's boundaries. Rather the limitation prevents the owner or operator from making changes under this authority to manage wastes and materials that have no relationship to the facility. The limitation for unrelated materials is necessary to prevent the owner or operator seeking to manage such materials from evading the permit requirement for new facilities and change in interim status requirements for facility modifications.

Some commenters expressed concern that the new § 270.72(a)(5) limits changes permissible for purposes of corrective action to those made in accordance with a corrective action order. The commenters argued that the provision should be expanded to allow changes necessary for voluntary corrective action to be made as well and that the reconstruction limit should not apply to voluntary corrective action measures. The commenters noted that corrective action done early can decrease the cost of clean-up and provide increased protection of human health and the environment. The Agency, however, limited the changes permissible under new § 270.72(a)(5) to those made in compliance with a corrective action order because voluntary corrective action would not typically involve EPA or State oversight or public notice. By requiring that the changes made under paragraph (a)(5) be made in accordance with a corrective action order, the Agency has assured that those changes will be subject to Agency review and, additionally, to public comment. Therefore, the Agency has not made the modification to § 270.72(a)(5) that the commenter suggested.

The Agency, nevertheless, believes that the regulations already provide significant flexibility for voluntary corrective action at interim status facilities. Section 270.72(a) (2) and (3) allow the Director to approve increases in design capacity or the addition of new processes, if necessary to comply with Federal, State, or local requirements. This would include changes made as part of voluntary corrective action taken in anticipation of a section 3008(h) order or section 3004(u) permit conditions. These changes, however, would be subject to Director approval and would be limited by the reconstruction cap of § 270.72(b).[1]

Sections 270.72(a) (2) and (3) and 270.72(a)(5), therefore, impose somewhat different requirements on different types of corrective action. Where EPA or a State has required specific corrective action as part of a section 3008(h) or similar order, or a court has ordered correction action, approval of that action as a change in interim status is not necessary, and the reconstruction limit does not apply (§ 270.72 (a)(5) and (b)(5)). On the other hand, where the action is not explicitly required in an order, or it is taken merely in anticipation of an order, Director approval is required and the reconstruction limit potentially applies (§ 270.72(a) (2) and (3)).

4. Loss of Interim Status

In some cases, new land disposal units may be added to a facility as a change in interim status. For example, a surface impoundment handling nonhazardous waste at an interim status facility might be brought into the system if EPA subsequently listed the waste as hazardous. In this case, § 270.73(e) of today's rule (proposed as § 270.72(c) but moved in the final rule to § 270.73 for purposes of clarity) would require the facility to certify, 12 months after the effective date of the listing, that the unit was in compliance with all applicable ground-water monitoring and financial responsibility requirements. EPA added this requirement to ensure comparable treatment of land disposal units containing newly identified hazardous wastes at permitted, unpermitted, and interim status facilities.

5. Other Issues

One commenter argued that the Agency should have the authority to approve any change in interim status that would improve environmental quality, decrease costs, or improve safety or efficiency. Another commenter argued that the Agency should allow changes made to: (1) Protect human health and the environment, (2) avoid disrupting ongoing waste management, and (3) enable the permittee to respond to sudden changes in the types or quantities of wastes being managed at the facility. The agency believes that the criteria suggested by these commenters are too broad. In adopting its regulation for interim status facilities, the Agency chose an approach it believed would allow reasonable modification to existing facilities without nullifying the requirements for obtaining a RCRA permit. (See 45 FR 33290 at 33324, May 19, 1980). As part of its approach, the Agency allowed increases in design capacity and addition of or changes in existing processes at interim status facilities only for specified reasons, and made those changes subject to Agency approval and to the reconstruction limit. The Agency continues to follow this approach in its regulations at § 270.72. EPA believes that the criteria suggested by the commenter might result in expansions at interim status facilities that require full public participation and other protections of the permitting process.

[1] The Agency addressed this general issue in the preamble to the proposed Mobile Treatment Unit (MTU) regulation (52 FR 20914 to 20920, June 3, 1987). In that preamble, the Agency explained that MTU's may be allowed to operate at interim status facilities as a change necessary to comply with Federal, State, or local requirements. The Agency then went further to say that the use of an MTU for studies at an interim status facility to determine whether a specific treatment could meet BDAT in accordance with the land disposal restrictions, or to select a remedial measure in anticipation of Agency action under sections 3008(h) or 3004(u) would likely qualify as an acceptable change in interim status.