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Procedural Closure

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 265 and 270

[SWH-FRL 2868-3]

Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities; EPA Administered Permit Programs: the Hazardous Waste Permit Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of implementation and enforcement policy.

SUMMARY: On November 8, 1984, the Hazardous and Solid Waste Amendments of 1984 (HSWA) were enacted (Pub. L. 98-616). These Amendments made changes to section 3005(e) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6925(e). Under the amendment to section 3005(e), an interim status land disposal facility will lose interim status on November 8, 1985 unless the facility applies for a final determination regarding the issuance of a permit and certifies compliance with all applicable ground-water monitoring and financial responsibility requirements by that date. This notice sets forth the Environmental Protection Agency's (EPA) policy regarding the implementation of this provision as it applies to interim status land disposal facilities.

DATE: All interim status land disposal facilities are required to submit an application for a final determination and the applicable certifications by November 8, 1985, or interim status will be terminated by statute. In the case of each land disposal facility which is in existence on the effective date of statutory or regulatory changes under RCRA that render the facility subject to the requirement to have a permit under section 3005, facilities will have 12 months after the date on which the facility first becomes subject to permit requirements to submit an application for a final determination and the applicable certification, or interim status will be terminated by law.

FOR FURTHER INFORMATION CONTACT:

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Region III: Peter Schaul, Hazardous Waste Enforcement Branch 3H-WLL, U.S. EPA, 841 Chestnut Street, Philadelphia, PA 19107, (215) 597-8334, FTS 597-8334.

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Region VIII: Diana Shannon, Chief, RCRA Compliance Monitoring 8HWM-WM, U.S. EPA, Denver Place, Suite 1300, 899 18th Street, Denver, CO 80202-2413, (303) 293-1502, FTS 564-1500.

Region IX: Judy Walker/Industry Assistance, Toxics and Waste Management Division T-2-1, U.S. EPA, 215 Fremont Street, San Francisco, CA 94105, (415) 974-7472, FTS 454-7472.

Region X: Charles Rice, Chief, RCRA Compliance Section M/S-533, U.S. EPA, 1200 6th Avenue, Seattle, WA 98101, (206) 442-0895, FTS 399-0895.

SUPPLEMENTARY INFORMATION: The contents of today's Notice are listed in the following outline:

- I. Background
- II. Statutory Interpretations
 - A. Land Disposal Facility
 - B. Interim Status
 - 1. Class I Hazardous Waste Underground Injection Wells
 - 2. Waste Exclusions
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 - C. Application for Final Determination Regarding the Issuance of a Permit
 - D. Certification of Compliance with all Applicable Ground-Water Monitoring and Financial Responsibility Requirements
- III. Failure to Satisfy Statutory Requirements

I. Background

Under section 3005(a) of RCRA, owners or operators of hazardous waste treatment, storage or disposal facilities are required to obtain a RCRA permit.

Recognizing that EPA would not be able to issue permits to all hazardous waste management facilities at once, section 3005(e) of RCRA provides that a hazardous waste management facility that meets certain requirements will be treated as having been issued a permit. This statutorily-conferred authorization to operate pending issuance or denial of a permit is known as "interim status." A facility may lawfully operate only if it has a permit or interim status.

Prior to the enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA) a facility's interim status could be terminated only when final administrative disposition of the permit application was made, or if the facility failed to furnish the necessary application information. HSWA amended section 3005(c) to provide additional grounds for termination of interim status for land disposal facilities.

Section 3005(e)(2) which is referred to hereafter, as the Loss of Interim Status provision states:

In the case of each land disposal facility which has been granted interim status under this subsection before the date of enactment of the Hazardous and Solid Waste Amendments of 1984, interim status shall terminate on the date 12 months after the date of enactment of such Amendments unless the owner or operator of such facility

"(A) applies for a final determination regarding and issuance of a permit under subsection (c) for such facility before the date 12 months after the date of enactment of such Amendments; and

"(B) certifies that such facility is in compliance with all applicable ground-water monitoring and financial responsibility requirements."

Interim status land disposal facilities must satisfy these requirements by November 8, 1985. Under section 3005(e)(3) each land disposal facility which is in existence on the effective date of statutory or regulatory changes under this Act that render the facility subject to the requirement to have a RCRA permit and which qualifies for interim status must apply for a final determination and submit the applicable certifications within twelve months after the date on which the facility first becomes subject to such RCRA permit requirements or interim status terminates.

The owner/operator of each interim status land disposal facility is responsible for applying for the final permit determination and satisfying certification requirements. In view of the importance of proper and timely filings of permit applications and certifications, and to provide an orderly process for



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the submittal of both permit applications and compliance certifications for interim status land disposal facilities, the Agency is today publishing this policy on the Loss of Interim Status provision.

II. Statutory Interpretations

This section defines key terms which appear in the statute.

A. Land Disposal Facility

The statute specifies that "... all interim status land disposal facilities ..." are subject to the requirements of the Loss of Interim Status provision. For the purpose of section 3005(e), the Agency interprets the term "land disposal facilities" to encompass the following types of facilities: landfills; land treatment units; surface impoundments for disposal, treatment, or storage; waste piles; and Class I hazardous waste underground injection wells. EPA believes this interpretation is consistent with RCRA statutory definitions of land disposal (see sections 1004(3), 3004(k)), the legislative history of section 3005(e)(2) and (3) and the general objective of this provision (i.e., to facilitate prompt processing of permits for the compliance by land-based facilities).

B. Interim Status

A treatment, storage or disposal facility that was in existence on November 19, 1980, or on the effective date of statutory or regulatory changes that rendered the facility subject to the requirement to have a RCRA permit, notified EPA as required by RCRA section 3010, and filed a timely application for a RCRA permit (Part A application), is considered to be in interim status until final administrative disposition of the permit application or until interim status is terminated for failure to submit information required to process the permit application. These facilities are subject to the Loss of Interim Status provision. In addition, in States or territories with EPA-authorized RCRA programs, land disposal facilities that have not yet been granted or denied a final RCRA permit (including land disposal facilities that were issued State permits after November 8, 1984) are to submit certifications and Part B applications.

1. Class I Hazardous Waste Underground Injection Wells

Class I hazardous waste injection wells that were in existence on November 19, 1980, or the effective date of statutory or regulatory changes that rendered the facility subject to the requirement to have a RCRA permit, notified EPA as required by § 3010, and

filed a Part A RCRA application are considered to be in interim status under RCRA until such time as final administrative disposition of a RCRA section 3005(c) permit application is made. Such facilities must comply with the applicable sections of Subparts A-E of Part 265 interim status requirements. They are exempted under 40 CFR 265.430 from the RCRA interim status closure/post-closure and financial responsibility requirements of Subpart G and H and are not subject to the ground-water monitoring requirements of Subpart F.

Every state and jurisdiction has an Underground Injection Control (UIC) program in place, either state-administered or EPA-administered, so that all Class I hazardous waste wells are also subject to the UIC requirements. The requirements at 40 CFR 144.21 authorize existing Class I injection wells to operate, subject to certain conditions, until the effective date of UIC permit issuance or denial, in States with approved UIC programs, for five years after approval or promulgation of the UIC program (but not thereafter unless a complete permit application is pending). In States with EPA-administered UIC programs, injection is authorized under the same section, subject to certain conditions, for one year after promulgation of the UIC program and is prohibited thereafter unless a complete permit application is pending. Therefore, until the UIC permit is issued as stated above, the Class I hazardous waste underground injection well is operating under authorization by rule and must comply with UIC program requirements specified, *inter alia*, under 40 CFR 144.28.

Under previous regulations, once a well received a UIC permit, the well was deemed to have a permit-by-rule under RCRA. However, the regulations have been changed due to the enactment of section 3004(u) of RCRA, which provides that corrective action requirements for all solid waste management units must be addressed in any section 3005(c) RCRA permit. The regulations, therefore, have been amended to provide that until such time as a corrective action plan at a given facility addresses corrective action for *all* units, UIC permits issued to Class I hazardous waste underground injection wells after November 8, 1984 will be considered valid permits under the Safe Drinking Water Act, but will not be section 3005(c) RCRA permits-by-rule. 50 FR 28702, 28715-16, 28752 (July 15, 1985) (amending 40 CFR 270.60(b)). Therefore, wells at facilities which have not yet met corrective action requirements for *all* units at the facility, consistent with State law under

approved UIC program, retain RCRA interim status, whether or not they have been issued a UIC permit. Such well operators who have interim status must, therefore, certify compliance with the "applicable" ground-water monitoring and financial responsibility requirements. The specific ground-water monitoring and financial responsibility requirements with which the facility must certify compliance are discussed in detail below in section D.

2. Waste Exclusions

Sections 260.20 and 260.22 of EPA's hazardous waste regulations provide a regulatory mechanism whereby the Agency may temporarily exclude a hazardous waste generated at a specific facility from being treated as a hazardous waste under the RCRA regulations. Interim status land disposal facilities handling wastes that have received "temporary" exclusions are also subject to the Loss of Interim Status provision. A "temporary" exclusion granted under 40 CFR 260.20 and 260.22 by EPA does not terminate the interim status of facilities handling that waste. Thus, the requirements of section 3005(e)(2) apply to these facilities, including facilities where the temporarily excluded waste is the only "hazardous" waste managed.

Facilities which only handle "hazardous" waste subject to a temporary exclusion, however, are not considered to be managing hazardous waste under EPA regulations. Thus they are not currently required to meet Part 265 standards (including ground-water monitoring and financial responsibility requirements), or to obtain a permit. In other words, facilities whose only "hazardous" waste has been "temporarily" excluded, while subject to the Loss of Interim Status provision, are not required to certify compliance with groundwater monitoring and financial responsibility requirements and/or submit a Part B application by November 8, 1985 in order to retain interim status after that date unless their exclusion is revoked prior to this time. If such waste exclusion is revoked, this regulatory action will immediately subject the facility to the requirements of section 3005(c)(3) of RCRA.

3. Late and Non-Notifiers

The Agency believes that the intent of the Loss of Interim Status provision was to bring all unpermitted land disposal facilities into compliance with ground-water monitoring and financial responsibility requirements or to close them. In order to advance this purpose, the Agency believes that it should also

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address the problem of those facilities which never qualified for interim status, or who are operating under Interim Status Compliance Letters or section 3008 compliance orders. 40 CFR 265.1(b) states that "the standards in this Part apply to those owners and operators of facilities in existence on November 19, 1980, who have failed to provide timely notification as required by Section 3010 of RCRA, and/or failed to file Part A of the Permit Application as required by 40 CFR 270.10 (e) and (g).

The December 12, 1981 "Guidance on the Applicability of the Interim Status Standards (40 CFR Part 265) to Facilities which have Failed to Qualify for Interim Status" to EPA Regional Enforcement Division Directors also addresses the problem of "non-notifiers." The guidance directed that the Agency would enforce the interim status requirements through the use of Interim Status Compliance Letters (ISCL) and 3008 compliance orders including the assessment of penalties, where appropriate. This use of penalties was emphasized to eliminate the competitive advantage that might otherwise be enjoyed by the "non-notifiers" over facilities that complied with all notification and filing requirements.

In keeping with that policy, EPA believes it reasonable to require owners and operators of land disposal facilities to submit a Part B application and the ground-water monitoring and financial responsibility compliance certifications as a condition of EPA's continued forbearance from enforcement action. Therefore, those facilities which have not fully qualified for interim status should also submit certifications and permit applications if they wish to continue operating.

4. Protective Filers

Protective filers, i.e., facilities that were in existence on November 19, 1980, notified the Agency of their activities according to section 3010, and submitted their Part A application, but have never conducted a regulated activity requiring a permit are not considered by the Agency to be in Interim Status and are not subject to the Loss of Interim Status provision.

C. Application for Final Determination Regarding the Issuance of a Permit

Prior to the enactment of the HSWA, land disposal facilities were not required to submit their Part B permit applications to EPA (or a State) until 6 months after EPA (or the State) requested it. Section 3005(e)(2) now provides that land disposal facilities must "apply for final determination regarding the issuance of a permit" by

November 8, 1985 or lose their interim status, regardless of whether the EPA Regional Office or authorized State has requested the Part B application.

Land disposal facilities wishing to retain interim status and continue operations as a hazardous waste land disposal facility after November 8, 1985, are required to submit a Part B permit application (or in an authorized State, the State equivalent of the Part B application) by November 8, 1985, to satisfy this requirement. These permit applications need to address all applicable requirements, including those set forth in the Hazardous and Solid Waste Amendments of 1984. In States where EPA manages the RCRA program, the Part B application is to be sent to the EPA Regional Office. In authorized States that manage the RCRA program, the permit application is to be sent to both the EPA Regional Office and to the State.

Some facilities have indicated that they plan to continue receiving waste after November 8, 1985, but intend to stop waste receipt and close shortly thereafter. Such facilities must submit an application for a final operating permit, as noted above. This is necessary because, as of November 8, 1985, it is assumed that an operating permit of some kind will be issued to them if they have not closed in a manner that precludes the duty to obtain a permit. The content of the application, however, may be affected by the expected remaining operating life of the facility. For example, if the facility will close before November 1988 and this is reflected in the application (e.g., in the closure plan), then there would be no need to address the HSWA requirement to retrofit existing surface impoundments (section 3005(j)). Applicants planning to continue waste receipt after November 8, 1985, and to close shortly thereafter should discuss the applicability of permit provisions with the EPA Regional Office (and the Authorized State, if appropriate) as soon as possible.

D. Certification of Compliance With All Applicable Ground-Water Monitoring and Financial Responsibility Requirements

In accordance with the requirements of the Loss of Interim Status provision, land disposal facilities must also "certify compliance with all applicable ground-water monitoring and financial responsibility requirements." All applicable ground-water monitoring and financial responsibility requirements are defined as 40 CFR Part 265 Subparts F and H, or the State analogue thereto. The requirements that are considered

applicable depend upon the authorization status of the State in which the facility is located.

- *Facilities located in a State with a Federally managed RCRA program* must certify compliance with 40 CFR Subparts F and H ground-water monitoring and financial responsibility requirements.

- *Facilities located in a State with Only Phase I Authorization* under the RCRA program must certify compliance with the authorized State ground-water monitoring requirements. In States with financial responsibility requirements incorporated as a part of their RCRA programs, facilities must certify compliance with authorized State financial responsibility requirements.

- *Facilities located in a State with Phase II or Final Authorization* must certify compliance with authorized State ground-water monitoring and financial responsibility requirements.

As stated in section II. A., Land Disposal Facility, Class I hazardous waste underground injection wells must comply with a different set of interim authorization requirements.

- *Facilities located in States with Federally managed underground injection control (UIC) programs* must certify compliance with 40 CFR 144.28(g)(1)(iii) ground-water monitoring requirements, as required by the Director. To certify compliance with financial responsibility requirements, Class I hazardous waste underground injection wells must be in compliance with 40 CFR 144.28(d) and 40 CFR Part 144 Subpart F financial responsibility requirements.

- *In primary States, facilities with Class I hazardous waste underground injection wells* must certify compliance with requirements that are the equivalent of 40 CFR 144.28(g)(h)(iii) ground-water monitoring and Part 144 Subpart F and 144.28(d) financial responsibility requirements.

- *Facilities issued a UIC permit after November 8, 1984, but which are still under RCRA interim status* (see Section II. B. 1) must certify compliance with 40 CFR 146.13(b)(4), ground-water monitoring requirements, where applicable, and 40 CFR 144 Subpart F financial responsibility requirements; or, in primary States, with equivalent State requirements.

To certify compliance with all applicable requirements a facility must be in "physical" compliance. "Physical" compliance, for the purpose of certification under this provision, means that a facility has "physically" in place all that is specified in the applicable Federal or State ground-water

monitoring and financial responsibility requirements.

A facility that is not in compliance with applicable ground-water monitoring and/or financial responsibility requirements of 40 CFR Part 265 or applicable State requirements may not certify compliance. For example, a facility lacking monitoring wells and a valid waiver may not certify. Similarly, a facility failing to meet financial responsibility requirements may not certify. If a representative of a facility has admitted noncompliance in an enforcement action the facility may not certify unless it achieves and maintains compliance.

Compliance with the financial responsibility requirements is the second pre-requisite for retaining interim status after November 8. The Agency recognizes that some facilities are encountering difficulties in obtaining insurance to satisfy the financial responsibility requirement governing liability coverage (40 CFR 264.17 and 265.17). EPA has recently published a proposed rule which solicits comment on five options the Agency is considering to remedy the problem regarding the availability of liability insurance for RCRA facilities. (See 50 FR 33507.)

For the purpose of this provision, facilities are urged to certify compliance with all applicable ground-water monitoring and financial responsibility requirements for the facility as a whole. If the owner/operator submits the application and the applicable certifications of compliance for some but not all land disposal units, the termination of Interim Status only affects the unit or units at the hazardous waste management facility for which the application and/or certification were not submitted.

EPA believes that this interpretation is reasonable. EPA sees no evidence in the legislative history to suggest that Congress meant to stop all operations at a multi-unit facility because a Part B or applicable certifications had not been

properly submitted for one unit. Furthermore, this interpretation of taking action at facilities on a unit-by-unit basis has precedent in EPA's hazardous waste regulations. Section 270.1 allows EPA to deal with permit issuance to a facility on a unit-by-unit basis. With regard to permit issuance, § 270.1(c)(4) states that "EPA may issue or deny a permit for one or more units at a facility without simultaneously issuing or denying a permit to all of the units at the facility. The interim status of any unit for which a permit has not been issued or denied is not affected by the issuance or denial of a permit to any other unit at the facility."

Facilities should certify compliance by typing or printing a certification statement as shown in Appendix A. These forms should be signed by the individuals specified in 40 CFR 270.11. An original certification will be required for each submission (no photocopies of signatures will be acceptable).

Copies of a facility's certification and Part B or state final operating permit application must be submitted to both the EPA Regional Office and the State in which the facility is located. However, facilities in a State with a Federally run RCRA program need only submit these documents to the Region.

III. Failure To Satisfy Statutory Loss of Interim Status Requirements

All owners/operators of land disposal facilities or units that do not apply for a final determination with regard to a permit and certify compliance with all applicable ground-water monitoring and financial requirements, must comply with all applicable closure and post-closure requirements as specified in 40 CFR Part 265 Subpart G or the equivalent State requirement, as applicable, and must stop introducing wastes into facilities or units not retaining interim status on and after November 8, 1985. The owner/operator of the facility or affected units will be required to submit a closure plan within 15 days of loss of interim status (40 CFR 265.112), i.e., by November 23, 1985. In addition, facilities that closed after

January 26, 1983, must submit their post-closure permit application (upon request by the Region or authorized States). Post-closure permit applications must address continuing releases as required by the newly amended section 3004(u) of RCRA. (Facilities losing interim status remain subject to corrective action orders and civil actions.)

Owners and operators of facilities should be aware that false certification and operation without interim status are criminal offenses. In addition, the Agency intends to take enforcement action regarding inadequate closures.

Dated: September 16, 1985.

Lee M. Thomas,
Administrator.

Appendix A—Certification Statement

I, _____, am the owner/
operator of _____
(EPA ID #) located at _____
I certify that the _____
(name of unit(s) as
identified on the attached surface
topography map) at this facility is in
compliance with: (1) (All applicable
ground-water monitoring and financial
responsibility requirements in 40 CFR
Part 265 Subparts F and H; or (2) all
applicable State ground-water
monitoring and financial responsibility
requirements which are part of the
State's authorized hazardous waste
program under section 3006 of RCRA.

I, _____, as owner-operator of
_____ located at _____
knowingly and willfully make this true
and accurate certification to the United
States Environmental Protection Agency
pursuant to section 3005(e) of the
Hazardous and Solid Waste Disposal
Act, as amended.

(Date)

(Signature)

Note: Federal Law subjects anyone who
falsely makes or uses this certification to a
fine and imprisonment under SWDA, 18
U.S.C. 1001 and 18 U.S.C. 1341.

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