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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

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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 ground-water 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.

G. 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.

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