United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

DIRECTIVE NUMBER: 9522.00-3

TITLE: Region X's Recommended Revision of 40 CFR §§ 270.4(a) and 270.32(b)(1)

APPROVAL DATE: November 13, 1987

EFFECTIVE DATE: November 13, 1987

ORIGINATING OFFICE: Office of Solid Waste

☒ **FINAL**

☐ **DRAFT**

STATUS:
[ ] A- Pending OMB approval
[ ] B- Pending AA-OSWER approval
[ ] C- For review &/or comment
[ ] D- In development or circulating headquarters

REFERENCE (other documents):

OSWER DIRECTIVE

OSWER DIRECTIVE OSWER DIRECTIVE

EPA

United States Environmental Protection Agency
Washington, DC 20460

OSWER Directive Initiation Request

1 Directive Number: 9522.00-3

2. Originator Information

Name of Contact Person	Mail Code	Office	Telephone Code
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3 Title

Region X's Recommended Revision of 40 CFR §§ 270.4(a) and 270.32(b)(1)

4 Summary of Directive (include brief statement of purpose)

This memorandum clarifies the 40 CFR Part 270.4 "permit shield" provision as it relates to self implementing regulations and statutes like 40 CFR Part 268 and gives sample permit language.

5 Keywords

Permit / Enforcement

6a Does This Directive Supersede Previous Directive(s)? [XX] No [ ] Yes What directive (number title)

b Does It Supplement Previous Directive(s)? [XX] No [ ] Yes What directive (number title)

7 Draft Level

[ ] A – Signed by AA/DAA [ ] B – Signed by Office Director [ ] C – For Review & Comment [ ] D – In Development

8. Document to be distributed to States by Headquarters? [ ] Yes [XXX] No.

This Request Meets OSWER Directives System Format Standards.

9 Signature of Lead Office Directives Coordinator: Jennifer A Barker, OSW — Date: 11/17/87

10 Name and Title of Approving Official: Marcia Williams, Director, Office of Solid Waste — Date: 11/13/87

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 13 1987

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Region X's Recommended Revision of 40 C.F.R. §§270.4(a) and 270.32(b)(1)

FROM: Gene Lucero, Director
Office of Waste Programs Enforcement

Marcia Williams, Director
Office of Solid Waste

TO: Charles E. Findley, Director
Hazardous Waste Division
Region X

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

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

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

of the permit is §262.10(f) which applies the Subtitle C Part 262 generator standards to permitted facilities that generate hazardous wastes.

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

The relation of the permit shield provision to Part 268 is more complex. As a result of HSWA, the self-implementing facility standards imposed by statute and the Part 268 land disposal restrictions apply to all permitted facilities despite the shield provision of §270.4(a), except in those cases where the self-implementing requirements have been incorporated into the permit. (See the March 28, 1986 proposed amendment to §270.4, 51 FR 10715.) Consequently, if the self-implementing RCRA provisions are incorporated into the permit, the permit will act as a shield from these self-implementing requirements. EPA maintains its position that it is generally preferable to incorporate the Part 268 and related statutory standards into new permits whenever possible. At the same time, the Agency must assure that the permittee is obligated to comply with new or amended self-implementing provisions that occur after permit issuance. Sample permit language is provided below to achieve that effect.

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

> Compliance with this permit during its term constitutes compliance, for purposes of enforcement, with 40 C.F.R. Parts 264 and 266 only for those management practices specifically authorized by this permit. The permittee is also required to comply with Parts 260, 261, 262, and 263 to the extent the requirements of those Parts are applicable.

In addition, one of the following conditions should be used to reflect the applicability of the statutory and Part 268 self-implementing provisions:

1. For permits that do not incorporate self-implementing requirements:

   The permittee must also comply with all applicable self-implementing provisions imposed by the RCRA statute or the Part 268 regulations.

2. For permits that incorporate self-implementing requirements:

   Compliance with this permit constitutes compliance, for purposes of enforcement, with Part 268 only for those management practices and related standards specifically authorized by this permit. The permittee must also comply with all applicable self-implementing provisions that take effect after issuance of this permit, whether they are imposed by the RCRA statute or the Part 268 regulations (including amendments).

You may also add a general provision which states that compliance with the permit does not constitute a defense against any action brought under law to protect human health or the environment, including other requirements not necessarily included in the permit.

Thank you for bringing this matter to our attention. We will continue to reexamine the entire permit shield issue to determine whether further changes to §270.4(a) are warranted. If you have additional questions or observations on this subject please contact Frank McAlister of the Office of Solid Waste (FTS 382-2223) or Susan Hodges of the Office of Waste Programs Enforcement (FTS 475-9315).

cc: Waste Management Division Directors, Regions I-IX
RCRA Branch Chiefs, Regions I-X
Regional Counsels, Regions I-X