

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 22

[FRL-5175-8]

Hazardous Waste: Technical Revision for the Federal Facility Compliance Act of 1992 Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is today proposing a rule in response to a requirement established by section 6001 of the Resource Conservation and Recovery Act (RCRA), as amended by the Federal Facility Compliance Act of 1992 (FFCA). The FFCA includes explicit authority to the Administrator of the EPA to commence administrative enforcement actions against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government that is in violation of requirements under RCRA. The FFCA further provides that no administrative enforcement order issued to a department, agency, or instrumentality of the Federal Government becomes final until the department, agency, or instrumentality has an opportunity to confer with the EPA Administrator. Today's proposal is a technical revision of the Agency's administrative rules of practice to provide a federal department, agency, or instrumentality which is the subject of an administrative enforcement order, with the opportunity to confer with the Administrator, as provided under the FFCA.

DATES: Comments on this proposed rule must be received on or before April 21, 1995.

ADDRESSES: Commenters must each send an original and two copies of their comments to EPA RCRA Docket (5305); Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Place the Docket Number F-95-TRFA-FFFFF on the comments. The docket is located in the EPA RCRA Docket Room M2616. The docket is open from 9 a.m. to 4 p.m., Monday through Friday except for public holidays. To review docket materials, make an appointment by calling 202-260-9327. The public may obtain copies of docket materials as provided for in 40 CFR part 2. There may be charges for copying services.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA/CERCLA Hotline at 1-800-424-9346 or in the Washington Metropolitan Area at 703-412-9810. For information on

specific aspects of this proposed rule, contact Sally Dalzell, Federal Facilities Enforcement Office (2261), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, 202-260-9808.

SUPPLEMENTARY INFORMATION:

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I. Statutory Authority

This regulation is issued under the authority of sections 2002 and 6001(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), as amended by the Federal Facility Compliance Act (FFCA), 42 U.S.C. 6912 and 6961(b).

II. Background

The FFCA clarified that EPA has explicit authority to issue administrative enforcement orders to other federal agencies that are in violation of RCRA. In the past, where EPA found RCRA violations at a federal facility, it primarily relied on a negotiated Federal Facility Compliance Agreement to bring the federal facility into compliance. The FFCA amended RCRA to expressly authorize the EPA Administrator to commence an administrative enforcement action against federal facilities pursuant to the Agency's RCRA enforcement authorities. RCRA section 6001(b)(1), 42 U.S.C. 6961(b)(1). Moreover, the FFCA requires the Administrator to initiate administrative enforcement actions against federal facilities "* * * in the same manner and under the same circumstances as an action would be initiated against another person." Id. The legislative history makes it clear that Congress intends that the Agency issue administrative complaints pursuant to RCRA section 3008(a) to federal facilities to address violations that are of the same types that are found at private companies or municipalities. H.R. No. 102-886, 102nd Cong. 2nd Sess. at 19 (1992). Finally, the FFCA provides that before any such administrative enforcement order issued to a federal facility becomes final, the recipient department, agency, or instrumentality must have the opportunity to confer with the Administrator. RCRA section 6001(b)(2), 42 U.S.C. 6961(b)(2).

The adjudication process for all administrative enforcement complaints issued pursuant to RCRA section 3008(a) is governed by the Agency's Consolidated Rules of Practice

Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR part 22, and the Supplemental Rules of Practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act, 40 CFR 22.37. Under current regulations, the initial decision of a Presiding Officer shall become the final order of the Environmental Appeals Board within 45 days after its service upon the parties and without further proceedings unless an appeal is taken to the Environmental Appeals Board or the Environmental Appeals Board elects, sua sponte, to review the initial decision. 40 CFR 22.27(c). If the Presiding Officer's initial decision is appealed to the Environmental Appeals Board or if the Environmental Appeals Board elects, sua sponte, to review the initial decision, then the Environmental Appeals Board issues a final order as soon as practicable after receiving the appellate briefs or oral argument, which ever is later. 40 CFR 22.31.

These rules currently have no provisions which accommodate the statutory requirement that no such administrative enforcement order issued to a federal facility shall become final until the recipient agency has had an opportunity to confer with the Administrator. The purpose of today's proposed rule is to revise 40 CFR part 22 to reflect a federal agency's right to an opportunity to confer with the Administrator before an administrative enforcement order issued to that agency becomes a final order.

III. Content of the Rule

The proposed rule would revise the supplemental practice rules for RCRA administrative orders, 40 CFR 22.37, by adding a new paragraph (g) in the nature of a technical amendment. Specifically, under new paragraph (g), an order issued by the Environmental Appeals Board to a federal agency for RCRA violations would not be a final order, if the recipient federal agency made a timely request for a conference with the Administrator. In that event, the decision by the Administrator would be the final order. New paragraph (g) would also establish the timing and procedure that a federal agency must follow to preserve its right to confer with the Administrator prior to an administrative enforcement order becoming final. The head of the recipient federal agency would have 30 days from the Environmental Appeal Board's service of an order or decision to request a conference with the Administrator in writing. The request must also be served upon all parties of

record. Finally, new paragraph (g) states that a motion for reconsideration filed under 40 CFR 22.32 does not toll the 30-day period for filing a request for a conference with the Administrator.

The Agency believes that placing the conference at the end of the administrative enforcement process will enable the Agency to proceed with an enforcement case against a Federal agency in the same manner as it would against a private party. This procedure also best assures that the Administrator will have a complete factual and legal record on which to base a decision. The Agency further believes that the 30-day request period, and the requirement that the request for a conference be in writing and served upon the parties of record, are fair and reasonable requirements necessary for the orderly administration of administrative enforcement actions against federal agencies.

The Agency also believes that not tolling the period for requesting a conference for the filing of motions for reconsideration with the Environmental Appeals Board is consistent with 40 CFR 22.32. That section provides that the filing of a motion for reconsideration does not stay the effective date of an Environmental Appeals Board final order. Moreover, the Agency sees no reason to build additional delay into the administrative enforcement process by automatically tolling the request period during the pendency of a motion for reconsideration before the Environmental Appeals Board. Under the proposed rule, the Environmental Appeals Board can grant a request to toll the time period for filing a request for a conference; in addition, the Administrator can always take into account a motion for reconsideration filed with the Environmental Appeals Board, when scheduling a requested conference.

Finally, the proposed rule is consistent with previously published Agency guidance issued by the Office of Federal Facilities Enforcement entitled: *Federal Facility Compliance Act: Enforcement Authorities Implementation*, dated July 6, 1993 (58 FR 49044, September 12, 1993). This guidance remains in effect for matters not covered by the proposed rule.

IV. Regulatory Analysis

A. Executive Order No. 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore

subject to Office of Management and Budget (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.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (Pub. L. 96-354), requires Federal regulatory agencies to consider the impact of rulemaking on "small entities." If a rulemaking will have a significant impact on small entities, agencies must consider regulatory alternatives that minimize economic impact.

Today's decision does not affect any small entity. Rather, it is merely a technical amendment to the part 22 procedures ensuring consistency between the regulatory procedures and the Federal Facility Compliance Act. Accordingly, this action will not add any economic burdens to any affected entities, small or large. Therefore, a regulatory flexibility analysis is not required. Pursuant to Section 605(b) of the RFA, 5 U.S.C. section 605(b), the Administrator certifies that this rule will not have a significant impact on small entities.

C. Paperwork Reduction Act

This rule does not contain any information collection requirements subject to review of the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, *et. seq.*

List of Subjects in 40 CFR Part 22

Environmental protection, Administrative practice and procedure,

Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Water pollution control, Federal facilities.

Dated: March 15, 1995.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, 40 CFR part 22 is proposed to be amended as follows:

PART 22—[AMENDED]

1. The authority citation for part 22 continues to read as follows:

Authority: 42 U.S.C. 6961.

2. Section 22.37 is amended by adding a new paragraph (g) to read as follows:

§ 22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act

* * * * *

(g) *Final Orders to Federal Agencies on Appeal.* (1) In the case of an administrative order or decision issued to a department, agency, or instrumentality of the United States, such order or decision shall become the final order for purposes of the Federal Facility Compliance Act, 42 U.S.C. 6961(b), in accordance with §§ 22.27(c) and 22.31 except as provided in paragraph (g)(2) of this section.

(2) In the case of an administrative order or decision issued by the Environmental Appeals Board, if the head of the affected department, agency, or instrumentality requests conference with the Administrator in writing and serves a copy of the request on the parties of record within thirty days of the Environmental Appeals Board's service of the order or decision, a decision by the Administrator (rather than the Environmental Appeals Board) shall be the final order for the purposes of the Federal Facility Compliance Act.

(3) In the event the department, agency, or instrumentality of the United States files a motion for reconsideration with the Environmental Appeals Board in accordance with § 22.32, filing such motion for reconsideration shall not toll the thirty-day period for filing the request with the Administrator for a conference unless specifically so ordered by the Environmental Appeals Board.

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