

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 22**

[FRL-5426-7]

Hazardous Waste: Technical Revision for the Federal Facility Compliance Act of 1992 Amendments**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating 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 rule 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.

EFFECTIVE DATE: This rule is effective on March 18, 1996.

ADDRESSES: The public docket for this rule is in room M2616, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Call 202-260-9327 for an appointment to review docket materials.

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 rule, contact Sally Dalzell or Melanie Garvey, Federal Facilities Enforcement Office (2261A), Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, 202-564-2510.

SUPPLEMENTARY INFORMATION: EPA is today finalizing a rule that revises 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) also establishes 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 contents of today's preamble are listed in the following outline:

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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), Pub. L. 102-386, 42 U.S.C. 6912 and 6961(b).

II. Effective Date

This rule will be effective on March 18, 1996.

III. 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, whichever 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 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.

IV. Final Rule

The rule revises 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 Appeals 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 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 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 rule.

V. Response to Comments

EPA received three sets of comments on the March 22, 1995 proposed rule. First, one commenter suggested that regarding to the conference with the Administrator, "there is no indication that such a conference will be put on hold pending action on a request for reconsideration submitted within the 10 day time frame to the Board." EPA believes it has addressed this concern in the preamble to the proposed rule. In the proposal, EPA stated that "the Administrator can always take into account a motion for reconsideration filed with the Environmental Appeals Board (EAB), when scheduling a requested conference." 60 FR 15209. Moreover, if the Administrator feels a conference would be useful prior to the EAB's ruling, the conference should be able to proceed. EPA suggests, however, that a request for a conference should note that a motion for reconsideration has been filed and indicate a preference as to the timing of the conference either prior to or after the EAB's ruling on the motion for reconsideration. We believe this approach preserves the Administrator's discretion while at the same time minimizing the possibility that a conference is held prematurely. Therefore, the Agency has decided not to make the suggested change in the final rule.

Another commenter suggested that "in instances where a dispute involves a policy concern, the litigation-oriented procedures of Part 22 are at best inappropriate, and may in fact prevent both EPA and other federal agencies from addressing in a timely manner the real issues in dispute." To solve this issue, the commenter suggests that the informal settlement provisions of 40 CFR 22.18(a) be amended to provide timely access to the Administrator to resolve policy questions. EPA does not believe that such an amendment is warranted or appropriate. It is often difficult to separate a policy dispute from a question of law or fact. EPA envisions that the Part 22 hearing will clearly define the issues in dispute such that, if a conference is necessary, the issues potentially before the Administrator will be fully ripe for her participation. Otherwise, issues may reach her prematurely. In addition, adopting the commenter's approach would inevitably lead to disagreements

over whether a dispute presents a policy issue which undoubtedly would cause delays in resolving the dispute. Therefore, the Agency has decided not to adopt the commenter's approach.

Two commenters suggested that the rule prohibit the Administrator from delegating the duty to confer to any other EPA employee. One of the two commenters would allow such delegation with the express consent of the affected agency. EPA does not interpret the statute as prohibiting the Administration from delegating the duty to confer to any other EPA employee. However, in EPA's July 1993 "Final Enforcement Guidance on Implementation of The Federal Facility Compliance Act," EPA determined that, as a matter of policy, the conference should be at the Administrator's level. This policy is further reflected in the rule.

Another comment received suggested that EPA measure the time period by when a Federal agency must request a conference with the Administrator from the date the Federal respondent receives service as evidenced by the receipt from certified mail. 40 CFR 22.06 indicates that copies of all Environmental Appeals Board rulings, decisions, or orders "shall be served personally or by certified mail, return receipt requested upon all parties. * * *" EPA believes the current time period provisions are sufficient and need not be changed. Therefore, EPA will begin the clock depending on the method of service. If the service shall be certified mail, return receipt requested, EPA will begin counting the thirty days 5 days from the date of mailing as provided in 40 CFR 22.07. However, if the ruling, decision, or order is served personally, EPA will begin counting the thirty days from the date of service.

Another comment suggested that contractor operators be given the same opportunity to confer with the Administrator as is given to a Federal agency. The opportunity to confer is given to a Federal agency in order to preserve the President's ability to resolve disputes within the Executive Branch. There is no similar concern with contractor operators. EPA issued on January 7, 1994 its "EPA Enforcement Policy for GOCO Facilities." In that guidance EPA considers contractors that meet the statutory definition of operators to be separate from the Federal government. As a result, EPA may pursue an enforcement action against the Federal agency, the contractor operator, or both.

One comment suggested that EPA address the impact of the rule and the Federal Facility Compliance Act

enforcement process on state authorized programs. Neither EPA's issuance of orders to Federal agencies nor the opportunity to confer apply to anyone other than to other Federal agencies. Again, the purpose of the conference is to preserve the President's ability to resolve disputes within the Executive Branch. Disputes between states and Federal agencies do not present this concern.

Finally, a commenter suggested that the Administrator consult with OMB and her counterpart in the Federal agency as part of the conference. As the conference is with the Administrator's counterpart in the affected agency, a change to the rule requiring consultation is not necessary. In addition, the Administrator is not prohibited from consulting with anyone of her choosing in making her decision. To mandate consultation with OMB on all issues is overly restrictive and may cause delays unnecessarily. Therefore, EPA will not amend the rule to require the Administrator's inclusion of OMB in the conference.

VI. Regulatory Analysis

A. Executive Order No. 12866

Under Executive Order 12866 [58 FR 51,735 (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 entitlements, 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.

Because the rule is merely a technical amendment to the Part 22 procedures and adds no economic burdens, 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. 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.*

D. 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 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 to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When a written statement is needed for an EPA rule, 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, giving them meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The rule imposes no enforceable duties on any of these governmental entities or the private sector.

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 12, 1996.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, 40 CFR part 22 is 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 a 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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