



Environmental Guidance Regulatory Bulletin

Office of Environmental Policy and Assistance - RCRA/CERCLA Division (EH-413)

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Public Participation

RCRA Expanded Public Participation Final Rule Issued

BACKGROUND

Section 7004(b) of the Resource Conservation and Recovery Act (RCRA) requires EPA to provide for, encourage, and assist public participation in the development of programs under the Act. The RCRA permit rules for hazardous waste treatment, storage, and disposal facilities, which include public participation provisions, were originally developed in the early 1980s (see 45 FR 33066; May 19, 1980 and 47 FR 32274; July 26, 1982). Recent EPA experience showed that stakeholders were dissatisfied with the public participation process because:

- It did not involve the public at an early stage (when changes are more easily incorporated into facility planning).
- It did not provide adequate information.
- It did not provide an equitable opportunity to participate (see 60 FR 63418; December 11, 1995).

To respond to these concerns, EPA proposed to expand public participation in RCRA permitting on June 2, 1994 (59 FR 28680). The final rule was published on December 11, 1995 (60 FR 63417). It became effective on June 11, 1996.

There are two major differences between the proposed and final rule. First, the proposed rule addressed changes to combustion permitting regulations in addition to expanded public participation. The final rule only addresses expanded

public participation. EPA decided to defer promulgating combustion permitting changes because:

- Commenters were more favorable towards the expanded public participation changes, and EPA did not want the combustion permitting changes to delay publication of the expanded public participation final rule.
- EPA expected to propose a rule on standards for combustion facilities under RCRA and the Clean Air Act in 1996 and decided to address combustion permitting in the new rulemaking (60 FR 63419).

Second, the proposed rule contained very general regulatory provisions and requested comment on how these provisions could best be implemented. In the final rule, EPA followed a strategy suggested by commenters. This strategy involved amending regulatory requirements to make specific changes in the timing of public participation, and to improve the ability of the public to access information regarding permitting. Various approaches to make public participation more equitable are included as guidance and are described in the preamble to the regulation. To further assist the regulated community, EPA updated its public participation guidance to reflect the specific changes made in the final rule and the different approaches described in the preamble.

In comments on the proposed rule, DOE expressed reservations as to whether the rule would achieve the goal of streamlining the permitting process and urged EPA to promulgate more flexible requirements (United States Department of Energy *Comments on RCRA Expanded Public Participation and Revisions to Combustion Permitting Procedures, Proposed Rule* (59 FR 28680), August 1, 1994 (see EH-41 Website at [HTTP://www.eh.doe.gov/oepa](http://www.eh.doe.gov/oepa))). In particular, DOE requested that the final rule be drafted to avoid duplication of the public participation activities that were performed to comply with the site treatment plan (STP) requirements of the Federal Facility Compliance Act (FFCAct). (The FFCAct, which amended RCRA in 1992, required DOE facilities to

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work closely with stakeholders in the development of STPs for the treatment of mixed waste.)

As a result of responding to comments received from DOE and others, EPA's final rule appears to be better suited to achieving the goals of enhancing site-specific flexibility and avoiding duplication of effort. For example, the rule is flexible in the following situations where facility-specific considerations should be considered.

- The rule does not prescribe the topics that must be discussed at public meetings held before a RCRA Part B permit application is submitted.
- The rule does not require that an information repository be set up by all permit applicants; the regulator must assess the need for a repository considering public interest and the availability of information to the public.
- The rule does not specify which documents must be placed in an information repository. (See the Information Brief on "The Information Repository" prepared by the OEPA RCRA/CERCLA Division (EH-431), formerly the Office of Environmental Guidance, RCRA/CERCLA Division (EH-231) (EH-231-009/1291) (see the EH-41 Website at <HTTP://www.eh.doe.gov/oepa>.)

The balance of this regulatory bulletin describes the changes made by the final rule to existing regulations, guidance provided by EPA in the preamble and in the revised RCRA Public Participation Manual (EPA 530-R-96-009, September 1996), the relationship between public participation and environmental justice, and DOE's recent public participation and environmental justice initiatives.

CHANGES MADE BY THE FINAL RULE TO EXISTING REQUIREMENTS

The final rule promulgates changes and additions to Title 40, Parts 124 and 270 in the Code of Federal Regulations (CFR). These changes and additions are summarized on the following table.

As shown on the table, the 40 CFR 124 changes and the changes in 40 CFR 270.2, 270.14, and 270.30 apply to every facility that is:

- Seeking an initial RCRA permit; or
- Seeking a RCRA Part B permit renewal, if the application proposes a significant change in facility operations.

A significant change in facility operations is a change that is equivalent to a class 3 permit modification in 40 CFR 270.42, that is a change where operating conditions change significantly (40 CFR 124.31(a)).

The rule, however, does not require facilities that are already involved in the permitting process to step back in the process to comply with the new requirements. Instead, the rule applies to a facility according the stage of the process the facility is in when the rule becomes effective. For example, if a facility submitted its part B permit application before the effective date of the rule, then the rule does not require the facility to hold a pre-application meeting under 40 CFR 124.31 (60 ER 63419; December 11, 1995).

The 40 CFR 124 and 270.2, 270.14, and 270.30 changes are not applicable to:

- Facilities applying for permit modifications under 40 CFR 270.42, or
- Facilities submitting permit applications for the sole purpose of conducting post-closure activities or post-closure activities and corrective action (40 CFR 125.31(a)).

The changes to 40 CFR 270.19(c), 270.22(a)(6), 270.62 and 270.66 apply only to combustion facilities.

DOE's comments on the proposed rule also expressed concerns regarding EPA's proposed revision of the conditions under which owners/operators of incinerators and BIFs could submit data in lieu of a trial burn under 40 CFR 270.19(c) for incinerators and 40 CFR 270.22(a)(6) for BIFs. (EPA proposed to require incinerators and BIFs to be located at the same facility for trial burn data from one unit to serve as the basis for another unit's trial burn waiver.) DOE pointed out that this change would discourage the permitting of mobile incineration units. EPA did not revise these waiver conditions in the final rule.

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PROVISIONS OF THE RCRA EXPANDED PUBLIC PARTICIPATION FINAL RULE

Type of Provision	Citation(s)	Regulatory Requirements and Guidance
Applicability of Pre-Application Public Notice, Meeting, and Information Repository Requirements	40 CFR 124.31(a)	<p>The 40 CFR 124, 270.2, 270.14, and 270.30 provisions in the final rule are applicable to facility owners/operators who have not submitted RCRA Part B permit applications, or who make a "significant" change at permit renewal after the effective date of the rule (June 11, 1996). A significant change is a change that is equivalent to a class 3 permit modification in 40 CFR 270.42, that is a change where operating conditions change significantly (40 CFR 124.31(a)).</p> <p>These provisions of the final rule are not applicable to owners/operators submitting permit applications for the sole purpose of conducting post-closure activities or post-closure activities and corrective action.</p>
Hold Pre-Application Public Meeting	40 CFR 124.31(b)	Permit applicants must hold at least one public meeting before submitting a RCRA Part B permit application. (The purpose of the meeting is for the applicant to solicit questions from the community and inform the community of proposed hazardous waste management activities.)
Track Attendees at Public Meeting	40 CFR 124.31(b)	The permit applicant is required to post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.
Topics for Public Meeting	60 FR 63422-63423	The rule does not contain a list of topics that permit applicants must address at the meeting. However, the preamble encourages them to address the following topics: type of facility, the location, the general processes involved, the types of wastes generated and managed, and implementation of waste minimization and pollution control measures, transportation routes to be used by waste transporters, and planned procedures and equipment for preventing or responding to accidents or releases.
Submit Summary of Public Meeting with Permit Application	40 CFR 124.31(c), 270.2, and 270.14(b)(22)	Permit applicants must submit an accurate summary of the public meeting and listing of attendees with the Part B permit application. The purpose of this requirement is to alert the permitting agency to important community concerns, areas of potential conflict, and other issues that may be relevant to agency permitting decisions. The permitting agency may use the list of meeting attendees to help generate a representative mailing list of interested citizens for public notices under 40 CFR 124.10 (60 FR 63423).
Provide Notice of Public Meeting	40 CFR 124.31(d)	Permit applicants must provide notice of the pre-application meeting to the public at least 30 days prior to the meeting. Additionally, applicants must keep documentation of the public notice and provide the documentation to the permitting agency on request.

PROVISIONS OF THE RCRA EXPANDED PUBLIC PARTICIPATION FINAL RULE (continued)

Type of Provision	Citation(s)	Regulatory Requirements and Guidance
Forms for Public Meeting Notice	40 CFR 124.31(d)(1)(I)-(iv)	<p>The public notice must be provided in all of the following forms.</p> <p>Newspaper Advertisement - A display advertisement must be printed in a newspaper of general circulation in the community, including adjacent counties or equivalent jurisdictions.</p> <p>Broadcast Media Announcement - The applicant must broadcast a notice at least once on at least one local radio or television station.</p> <p>Visible and Accessible Sign - The applicant must post a notice on a clearly marked sign at or near the facility. If the sign is posted on the facility property, the sign must be large enough to be readable from the nearest point where the public would pass by the site.</p> <p>Notice to the Permitting Agency - The applicant must send a copy of the newspaper notice to the permitting agency and to appropriate State and local government units.</p>
Contents of Public Meeting Notice	40 CFR 124.31(d)(2)(I)-(v)	Each notice must include the date, time, and location of the meeting; a brief description of the purpose of the meeting; a brief description of the facility and the proposed operations, including the address or a map of the facility location; a statement encouraging people to contact the facility at least 72 hours before the meeting if they need special access to participate in the meeting; and the name, address, and telephone number of a contact person for the applicant.
Notice of Receipt of Permit Application by Permitting Agency	40 CFR 124.10(c)(1)(ix)-(x) 40 CFR 124.32(c)	<p>The permitting agency must provide public notice and notice to appropriate units of State and local government whenever an initial Part B permit application or part B permit application renewal is submitted and is available for review.</p> <p>Concurrent with the notice, the permitting agency must place the permit application and supporting documentation in a location accessible to the public in the vicinity of the facility or at the permitting agency's office.</p>
Publication of Notice of Receipt of Permit Application by Permitting Agency	40 CFR 124.32(b)(1)-(2)	The notice must be published within a reasonable period of time after the application is received and must include the name, address, and telephone number of a contact person for the applicant; the name and telephone number of the permitting agency's contact office, and a mailing address to which information, opinions, and inquiries may be directed throughout the permit review process; an address which people can use to request addition to the facility mailing list; the location where copies of the permit application and any supporting documentation can be viewed and copied; a brief description of the facility and the proposed operations, including the address or a map of the facility location on the front page of the notice; and the date that the application was submitted.

PROVISIONS OF THE RCRA EXPANDED PUBLIC PARTICIPATION FINAL RULE (continued)

Type of Provision	Citation(s)	Regulatory Requirements and Guidance
Information Repository	40 CFR 124.33(b) and 270.30(m)	The permitting agency may require a facility owner/operator to set up an information repository at any time during the permitting process. When assessing the need for an information repository, the permitting agency must consider a variety of factors including: level of public interest, type of facility, presence of an existing repository, and proximity to the nearest copy of the administrative record. (A similar provision allowing the permitting agency to require the permittee to establish and maintain an information repository at any time during the life of the permit is promulgated in 40 CFR 270.30(m)).
Information Repository Contents	40 CFR 124.33(c)	The information repository must contain all documents, reports, data and information that the permitting agency believes is necessary to fulfill the purpose for which the repository is established.
Information Repository Location	40 CFR 124.33(d)	The information repository must be located and maintained at a site chosen by the facility. If the permitting agency finds the site to be unsuitable, the permitting agency must specify a more appropriate site.
Notice of Establishment of Information Repository	40 CFR 124.33(e)	The permitting agency must specify requirements for informing the public about the information repository. At a minimum, the permitting agency must require the facility to provide a written notice about the repository to all individuals on the facility mailing list.
Maintaining and Updating Information Repository	40 CFR 124.44(f)	The facility owner/operator is responsible for maintaining and updating the information contained in the repository during the time of the repository's operation. The permitting agency may close the repository based on the level of public interest, the type of facility, the presence of an existing repository, and the proximity to the nearest copy of the administrative record.
Notice of Trial Burns for Incinerators and BIFs	40 CFR 124.10(c)(ix)-(x)	The permitting agency must send a notice to all persons on the facility mailing list and to the appropriate units of State and local government announcing the scheduled commencement and completion dates for trial burns for hazardous waste incinerators and BIFs.
Contents and Mailing of Trial Burn Notice	40 CFR 270.62(b)(6) (for incinerators) or 40 CFR 270.66(d)(3) (for BIFs)	The notice must contain the name and telephone number of the applicant's contact person, the name and telephone number of the permitting agency contact office, the location where the approved trial burn plan and any supporting documents can be reviewed and copied, and an expected time period for commencement and completion of the trial burn. It must be mailed within a reasonable time period before the trial burn.
Notice of Trial Burn for Interim Status Incinerators and BIFs	40 CFR 270.19(c) (for incinerators) or 40 CFR 270.22(a)(6) (for BIFs)	Permit applicants who own/operate interim status incinerators or BIFs must either prepare and submit a trial burn plan and perform a trial burn or request a trial burn waiver. The permitting agency must approve the trial burn plan and notify the public of the scheduled commencement and completion dates for trial burns. The notice requirements are the same as those listed above for incinerators and BIFs that are not in interim status.

EPA GUIDANCE PROVIDED IN THE PREAMBLE AND IN THE REVISED PUBLIC PARTICIPATION MANUAL

The preamble to the final rule identifies activities for facilities to solicit public participation, maintain open lines of communication, and increase public involvement with regard to trial burn plans at combustion facilities. To provide additional information, EPA published the *RCRA Public Participation Manual* (EPA 530-R-96-007) in September 1996 to accompany the final rule. (Contact the EPA RCRA Hotline at (703) 412-9810 to obtain a copy.) It is an updated and expanded version of the September 1993 *RCRA Public Involvement Manual* (EPA 530-R-93-006). Differences between the 1996 Public Participation Manual and the 1993 Public Involvement Manual are summarized in the table.

ENVIRONMENTAL JUSTICE AND RCRA PERMITTING

A number of challenges and administrative complaints regarding RCRA permits have recently been filed with EPA's Office of Civil Rights under Title VI of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000d *et seq.*). These challenges and complaints allege that permitting agencies grant permits in a manner which has caused disproportionate adverse impacts on minority populations. (Title VI of the Civil Rights Act prohibits any entity receiving federal financial assistance from being administered in a way that has the effect of discriminating against minority groups.) To address these challenges and complaints, EPA plans to issue guidelines or regulations delineating how Title VI of the Civil Rights Act should be administered by EPA and other entities (e.g., state environmental departments that handle permitting) receiving federal financial aid.

EPA recently submitted an *amicus curiae* (i.e., "Friend of the Court") brief with the Department of Justice (DOJ) in a case brought before the United States District Court for the Eastern District of Pennsylvania, filed by the Chester Residents Concerned for Quality Living, *et al.* The case involves a challenge to a RCRA solid waste permit on environmental justice grounds. The EPA/DOJ brief argues that the defendants' motion to dismiss the case because the permitting process was "race-neutral" should be rejected. The EPA/DOJ brief

states, "The question here is not whether the issuance of the permit is race-neutral, but rather whether the issuance of the permit will cause a discriminatory effect on minority residents" (see page 16 in the Brief of the United States as Amicus Curiae in

Differences Between the 1996 RCRA Public Participation Manual and the 1993 RCRA Public Involvement Manual

Type of Difference	1996 Public Participation Manual	1993 Public Involvement Manual
Role of the Public in RCRA Permitting	The guidance emphasizes the public's participatory role in RCRA permitting. Use of the term "public participation" reflects this emphasis.	The guidance assumes a less active role for the public in RCRA permitting. Use of the term "public involvement" reflects this assumption.
Environmental Justice	Environmental justice issues are discussed.	Environmental justice issues are not discussed.
Document Format	Examples of public participation tools, techniques, and processes are presented throughout the discussion of RCRA permitting.	The document provides one integrated discussion of a public involvement program designed for a specific community.
Supplementary Material	The document contains up-to-date contact lists, checklists, regulations, fact sheets, policy memoranda, and reference lists.	The document contains contact lists which are now out-of-date.

Opposition to Defendants' Motion to Dismiss, in *Chester Residents Concerned for Quality Living, et al., Plaintiffs, v. James M. Seif, et al., Defendants*, No. 96-CV 3960 (E.D.Pa. filed August 23, 1996)). EPA/DOJ did not express an opinion on the merits of the plaintiffs' argument that granting the permit violated Title VI of the Civil Rights Act.

EPA anticipates that the new permitting requirements will assist in addressing environmental justice concerns relating to the adverse disparate impacts of siting/permitting waste management facilities in low-income communities and communities of color.

DOE PUBLIC PARTICIPATION AND ENVIRONMENTAL JUSTICE INITIATIVES

The Department has found that the participation of state and local governments, regulatory agencies, Native American Tribes, and others has been instrumental in the development of compliance agreements addressing cleanup. For example, DOE facilities worked closely with stakeholders in the development of final STPs for the treatment of mixed waste as required by the FFCAct. Stakeholder meetings and activities conducted during the development of the site treatment plans are described in the *1995 Report to Congress on the Federal Facility Compliance Act* (United States Department of Energy, December 1995). Similarly, DOE's annual reports to Congress required under Section 120(e)(5) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) summarize and discuss public input into interagency agreements governing cleanup of DOE facilities (see DOE's *Ninth Annual Report to Congress: Fiscal Year 1995 Progress in Implementing Section 120 of the CERCLA*, United States Department of Energy, September 1996, DOE-EM-0301). (Contact the DOE Center for Environmental Management Information at (800) 736-3282 to obtain a copy.)

To assist DOE facilities in these and other public participation activities, the Department has published

guidance on the role of public participation in cleanup activities. This guidance includes: *Public Participation in Environmental Restoration Activities* (United States Department of Energy, November 1991, DOE/EH-0221) and *Site-Specific Advisory Board Guidance* (United States Department of Energy, Office of Environmental Management, January 18, 1996). DOE's Office of Environmental Management has also published a general reference book on public participation, *Public Participation Desk Reference* (United States Department of Energy, August 11, 1994). (Contact the DOE Center for Environmental Management Information to obtain a copy.)

DOE's Office of Economic Impact and Diversity has the lead for environmental justice activities in the Department (ED-1, (202) 586-8383). This office can provide additional information on DOE's environmental justice activities, including DOE's Environmental Justice Strategy. In May 1996, the *Progress Report to the President on Implementation of Environmental Justice Strategy, Executive Order 12898*, (United States Department of Energy, April 1996) described DOE's efforts to build credibility with stakeholders, improve communications with the public by including stakeholders early in the environmental justice decision-making process, and enhance community perceptions of DOE. Contact DOE's Environmental Justice Information Clearinghouse at (800) 586-3612 to obtain a copy of either document.

Please direct questions concerning the RCRA Expanded Public Participation Final Rule to:
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