The 1984 RCRA Amendments: Congress as a Regulatory Agency

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The Hazardous and Solid Waste Amendments of 1984,[1] signed by President Reagan on November 8, 1984, is the only major piece of environmental legislation to emerge from the four years of the 97th and 98th Congresses. Since the enactment of the National Environmental Policy Act[2] in 1969, which in many respects marked the federal government's aggressive entry into the field of environmental protection and regulation, no comparable hiatus of congressional action in the environmental arena has occurred.

This is not to suggest that for the last four years Congress has ignored environmental issues. Efforts have been underway since 1981 to revise the Clean Air and Water Acts, revisions of RCRA and CERCLA[3] have been considered throughout the last two years, and there has been extensive congressional inquiry into events at the Environmental Protection Agency ("EPA") during the first three years of the Reagan administration. Nevertheless, the political consensus necessary to actually pass a major new piece of environmental legislation was apparently missing until quite recently.

Part of the content of the 1984 RCRA Amendments can be seen as normal "mid-course" adjustments or technical fine-tuning

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1. Pub. L. No. 98-616, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3221 (amending the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6987 (1982)). The Hazardous and Solid Waste Amendments of will hereinafter be referred to as "the RCRA Amendments" or simply "the Amendments."

2. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a (1982)).

3. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982).

of a law which has now been in effect for eight years, and the implementation of which has been underway for four years.[4] For example, as will be illustrated later, ambiguities which have become apparent during the last four years relating to the scope of EPA's enforcement authority under section 3008 of RCRA have been cleared up, additional criminal acts have been defined, sanctions have been augmented, and the scope of EPA's imminent hazard enforcement authority under section 7003 of RCRA has been clarified. In this regard, Congress was acting no differently than it did when it passed the Clean Air Act Amendments of 1977,[5] when it closed a few loopholes which it had intentionally or inadvertently left open in earlier Amendments.[6]

But the RCRA Amendments go well beyond what would normally be expected from a mid-course correction or a set of technical adjustments. In the breadth of their coverage, and their extraordinary detail, these revisions read in many places more like a package of new regulations issued by an executive agency than a piece of legislation. Many of the provisions of the Amendments are nearly indistinguishable from the regulations which they require (as if in afterthought) the Administrator of the EPA to subsequently promulgate. For example, specific hazardous waste control technologies are imposed upon regulated facilities; precise time schedules for the submission of permit applications and the issuance of permits are spelled out for EPA and the regulated community alike; and lists of particular chemicals are specified for inclusion as regulated hazardous wastes. Perhaps of even greater significance, in many instances the new statutory provisions are self-effectuating. Congress chose not to wait for imple-

4. Regulations implementing the requirements of Subtitle C of RCRA—the portion of the statute which mandates that EPA promulgate regulations governing the handling of hazardous wastes—were finally promulgated by EPA on May 19, 1980. 40 C.F.R. §§ 124, 260-267, 270-271 (1984).

5. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified in scattered sections of 42 U.S.C. and 15 U.S.C. § 792 (1982)). For example, Congress added authority for the collection of civil penalties, which had previously been missing from the statute. *Id.* § 111(b), 91 Stat. 704 (codified at 42 U.S.C. § 7413(b)). Congress also ratified with relatively minor adjustments a controversial set of EPA regulations concerning the Prevention of Significant Deterioration of Air Quality. *Id.* § 127, 91 Stat. 731-42 (codified at 42 U.S.C. §§ 7460-7464 (1982)).

6. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified prior to 1977 Amendments in scattered sections of 42 U.S.C.) was essentially the first major piece of federal environmental regulatory legislation and, *inter alia*, created the EPA. The 1977 Amendments also provided EPA with some additional enforcement authority, and endorsed certain regulatory initiatives which EPA had engaged in during the preceding few years.

menting regulations to be promulgated by EPA before its revisions to the RCRA statute and regulations would come into force.

One can conclude from the form and substance of these Amendments only that Congress was unwilling to trust EPA with the traditional task of the regulatory executive agency—the interpretation and specification of comparatively vague congressional intentions expressed in statutes. Historically, Congress has left the nitty-gritty work of writing regulations to the technical expertise of its creature agencies; here Congress declined to do that.[7]

There are a number of possible explanations for this unusual departure from the traditional roles of the legislative and executive branches. The most obvious, and probably correct conclusion is that between 1980 and 1983, Congress came to perceive EPA as an agency unwilling or unable to fulfill its mandate of environmental protection. Almost every section of the RCRA Amendments might be read as expressing a sense of frustration over the pace and scope of EPA action. For these reasons Congress elected to act, in effect, as its own regulatory agency.

While one ought not to overstate the significance of the regulatory style of the Amendments, there are unmistakable deviations here from Congress' approach to other environmental legislation in recent years. Unquestionably, the hazardous waste area is among the most complex and difficult areas yet tackled by the federal government, and public awareness of and concern over the problem may be greater than for any other type of environmental problem.[8] These reasons alone may be sufficient to explain the

7. This might be seen as something of a vindication for Justice Rehnquist's view that Congress, in recent years, has sometimes improperly delegated to the executive branch its own constitutional responsibility to make legislative decisions. *See, e.g.*, Industrial Union Dept., AFL-CIO, v. American Petroleum Inst., 448 U.S. 607 (1979) (Rehnquist, J., concurring) (obligations imposed by Congress upon the Occupational Safety & Health Administration). Among other things, the promulgation of regulations called for by Congress required some very delicate balancing of competing economic and occupational health interests. Rehnquist wrote, "Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court." *Id.* at 672. Rehnquist discusses at some length the nondelegation doctrine, citing as its primary purpose that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Id.* at 685.

8. If the content of television programming is any indication of public awareness, then the problem of toxic wastes has become paramount in the public's eye. In a recent episode of the popular television series, "The A-Team," the heroes spent their action-filled hour chasing an ornery group of midnight dumpers of toxic wastes. [Ed.]

unusual structure of the RCRA Amendments. Nevertheless, it is not difficult to discern in the legislative history and in the statute itself a more fundamental concern with the agency which will be implementing this law.

In this article, we will examine some of the more important changes to RCRA wrought by the Amendments, and consider a number of issues of interpretation which will likely be items of major discussion in the months and years to come. In describing these changes, we will attempt to identify instances which demonstrate Congress' changing role in standard setting and detailed rulemaking.

Having explained our purpose in writing this article, several caveats are in order. It is not our intention to provide a comprehensive compendium of the changes to RCRA, nor should it be relied upon as such. Opinions expressed about the likely course of future events in any given subject area are exclusively those of the authors themselves, and do not purport to derive from special knowledge about the thinking of EPA policymakers.[9] Finally, readers are reminded that events may overtake the writing and publication of this article, and they are encouraged to research current publications and seek current advice if faced with the need for statutory or regulatory guidance.

I. SMALL QUANTITY GENERATORS

One of the most important provisions of the RCRA Amendments is section 221, which adds section 3001(d) to RCRA.[10] Under EPA's interpretation of the original RCRA scheme, a small quantity generator exemption excluded from regulation all hazardous wastes generated in quantities of less than 1000 kilograms per month.[11] (For acutely toxic waste, the level was 1 kilogram per month). Congress objected to the extent of the exclusion, stating:

9. In fact, many of the questions of interpretation raised by the Amendments will be answered by EPA itself in its "codification" rule, to be promulgated early in 1985. This "interim final rulemaking" will codify in the federal RCRA regulations all those elements of the Amendments which are self-effectuating. The preamble to this codification will include statements of EPA's intentions with respect to important questions of interpretation, and will, in some instances, request public comment before a final Agency position is developed.

10. Pub. L. No. 98-616, § 221, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3248-51 (to be codified at 42 U.S.C. § 6921(d)).

11. 40 C.F.R. § 261.5 (1984).

> The Agency estimates that only one percent of total hazardous waste escape coverage, yet, the Office of Technology Assessment has estimated that an amount up to 10 percent of the 40 million metric tons of hazardous waste that are currently regulated under the Act may be escaping proper controls through this [small quantity generator] exclusion.[12]

Ordinarily, Congress would not have intruded into the essentially regulatory function of establishing standards. In this instance, however, Congress felt that the 1000 kilogram per month cut-off level exempted too great a volume of hazardous waste regulation, and chose to establish a lower level which would insure that much more waste would be disposed of at RCRA-regulated facilities.[13]

The language of the old regulations specifically addressed itself to wastes generated by small quantity generators, exempting the waste from regulation, but not creating any new category of generator. The Amendments depart from this practice, and define a small quantity generator as any person who generates between 100 and 1000 kilograms of hazardous waste during a calendar month. The Agency is charged with promulgating standards governing wastes generated by small quantity generators by March 31, 1986. The statute sets forth specific requirements to govern the interim period.[14]

Considerable attention was paid to small quantity generators in the Amendments, yielding new requirements which are very much like regulations in their detail and complexity. Unfortunately, these changes are not likely to make it easier to enforce the small quantity generator rules. The Amendments require that EPA establish different on-site accumulation rules for small quantity generators than which apply to other generators.[15] Formerly, a generator was authorized to accumulate waste on site for up to ninety days without needing a storage permit pursuant to

12. H.R. REP. No. 198, 98th Cong., 1st Sess. 25-26 (1983).

13. 40 C.F.R. § 261.5 exempted from regulation waste produced by a small quantity generator if the waste was disposed of on-site or at a permitted treatment, storage or disposal facility or a permitted municipal landfill.

14. For example, the Amendments mandate use of the standards contained in the Uniform Hazardous Waste Manifest during the interim period. Originally, a manifest consisted of any piece of paper containing the information required by 40 C.F.R. § 262.20. The differing requirements imposed by the several states finally convinced the Agency to promulgate a national Uniform Hazardous Waste Manifest form. 49 Fed. Reg. 10,500 (1984).

15. 40 C.F.R. § 262.34 (1984).

section 3005 of the Act. Small quantity generators came within this limit whenever their waste became subject to regulation, *i.e.*, on the day that the total amount accumulated exceeded 1000 kilograms, or at the moment that they exceeded 1000 kilograms of hazardous waste generated in a single calendar month. An enforcement problem was created because it was unclear which on-site accumulation rule should apply in some situations. For example, it was unclear when to begin counting the ninety days if a previously exempt generator became subject to regulation.[16]

Another huge problem was created by EPA's classification of the failure to date accumulated drums as a "minor" violation, not subject to penalties.[17] The regulated community realized that a facility which exceeded the ninety-day accumulation limit could avoid being charged with storing without a permit (a very serious violation) by merely neglecting to date its drums of waste. Without such dates, it was very difficult for EPA to prove that the ninety-day accumulation period had been exceeded.

The enforcement problem described above pales in comparison to what we can anticipate from the new statute. Section 3001(d)(6) requires that the Agency's regulations authorize accumulation by a small quantity generator for up to 180 days, instead of the ninety days allowed for other generators. As though this dichotomy were not sufficient, a further exemption is offered for generators that must transport their wastes more than 200 miles. These generators are allowed to accumulate not more than 6000 kilograms of hazardous waste for up to 270 days without a storage permit.

As before, a generator that fails to date the drums is likely to escape any formal sanctions. The Agency has in the past four years initiated very few actions for this violation; it is unlikely that prosecution for exceeding the accumulation time limits will be a high priority item in the future. Since dating the drums may turn out to be the exception rather than the rule, only an intensive investigation would enable the Agency to identify small quantity

16. As another example, a generator that submitted a Part A application and therefore qualified for interim status as a storage facility would be subject to the TSD standards set forth at 40 C.F.R. § 265 when it stored wastes for more than ninety days. After having shipped off old wastes, however, the same generator's new wastes might have been subject only to the accumulation standards of 40 C.F.R. § 262.34 until the new wastes had accumulated for more than ninety days.

17. 40 C.F.R. § 262.34 (1984).

generators that exceed the accumulation time limitations. In all likelihood, the necessary resources will be devoted to more serious violations.

An ironic result of the new and detailed small quantity generator provisions is that for certain small quantity generators, Congress has actually relaxed the otherwise applicable standards. Under the old regulations, a person who generated less than 1000 kilograms a month would have had to ship the waste off within four months, or become subject to the Treatment, Storage and Disposal ("TSD") requirements.[18] Under the new statute, the same generator will be able to accumulate for up to six months (or in some cases nine) without requiring a permit.[19]

II. Minimum Technological Standards

It is apparent from the detail in which the Amendments regulate the operation of landfills, surface impoundments[20] and waste piles,[21] that Congress was unwilling to entrust complete responsibility to EPA for regulating the storage and disposal methodologies that are most likely to result in the release of hazardous waste or hazardous waste constituents. Similarly, Congress created specific operational standards, a function that ordinarily is left to the regulatory agency.

A. *Permitted Facilities*

Among the detailed provisions contained in the Amendments is a requirement[22] that permits for land facilities issued after the

18. *Id.* The terms "treatment," "storage" and "disposal" are defined at 40 C.F.R. § 260.10 as follows: "Treatment" results in chemical, physical and biological changes to the character of the waste, *e.g.*, evaporation or corrosive neutralization. "Storage" is the temporary holding of waste, usually in containers (drums) or tanks. "Disposal" means the placing of waste into or on land or water, and includes activities such as landfilling or surface impoundments. TSD activities are subject to *either* the interim status requirements found at 40 CFR Part 265 *or*, after a final permit is issued, the permitting standards set forth at 40 CFR Part 264. (For a further discussion of interim status and the permit issuance process, *see infra*, note 27.

19. Pub. L. No. 98-616, § 221, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3249 (to be codified at 42 U.S.C. § 6921(d)).

20. Pits into which liquid wastes are placed, usually for temporary storage. 40 C.F.R. § 260.10 (1984).

21. As defined at 40 C.F.R. § 260.10, "any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage."

22. Pub. L. No. 98-616, § 202, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3233 (to be codified at 42 U.S.C. § 6924(o)).

date of enactment mandate the installation of two or more liners and a leachate collection system[23] above and (in the case of a landfill) between each liner. Permits must also require groundwater monitoring.[24] Within two years, the Administrator must promulgate regulations or issue guidance documents that incorporate the same requirements.[25]

The Amendments specify that the technological standards described above apply to permits issued to new landfills or surface impoundments, new landfill or surface impoundment units at existing facilities, replacements of existing landfill or surface impoundment units, and lateral expansions of existing landfill or surface impoundment units, "for which an application for a final determination regarding issuance of a permit under section 3005(c) is received after the date of enactment . . . ."[26] This ambiguous phrase refers to the submission of a final Part B permit application.[27]

Again, as with regulation of small quantity generators, Congress' new attention to detail has not eliminated enforcement difficulties. The Amendments allow for a variance from the storage and disposal procedures if the owner or operator of the facility can demonstrate "that alternative design and operating practices, together with location characteristics, will prevent the migration of hazardous wastes into the ground water [sic] or surface at least

23. Systems where the water that percolates through a landfill, acquiring contaminants, is collected.

24. Pub. L. No. 98-616, § 202, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3233 (to be codified at 42 U.S.C. § 6924(o)).

25. Pub. L. No. 98-616, § 202, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3233 (to be codified at 42 U.S.C. § 6924(o)).

26. Pub. L. No. 98-616, § 202, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3233 (to be codified at 42 U.S.C. § 6924(o)(A)).

27. The permit process as established by the Act and the regulations require the owner or operator of a TSD facility to submit a Part A permit application as a prerequisite to obtaining interim status to commence operation. (This was a "grandfather" provision allowing existing facilities to continue in operation prior to receiving a final permit.) The Part A contained a minimal description of the facility (*e.g.*, drum storage, tank storage), its location and operating procedures. Facilities that filed the Part A on time (and met the other requirements of section 3005 (e)) achieved interim status and were subject to the general facility standards set forth in 40 C.F.R. § 264. Interim status was a temporary solution, allowing facilities to continue in operation while meeting minimal operational requirements. Subsequent to the Agency promulgating standards for permits, 40 C.F.R. § 265, the TSD facility could be required to submit a Part B permit application, which describes in detail how the facility would operate to handle the hazardous wastes it receives (*e.g.*, materials used in tank construction, permeability of underlying soil). It is on the basis of the Part B that the decision to issue or deny the permit is actually made.

as effectively as such liners and leachate collection systems."[28] This provision is analogous to the alternate groundwater monitoring provision that presently exists in the regulations,[29] which has proved to be difficult for the Agency to enforce. The Regional offices have historically lacked the necessary technical expertise to fully assess the validity of alternative plans proposed by facility operators. Although the Agency has, through the use of consultants, reviewed some of the alternative plans, many plans have probably not been subjected to the rigorous scrutiny that is necessary. It remains to be seen whether EPA's review of waiver applications under this section will prove to be any more thorough.

B. *Interim Status Facilities*

Acknowledging that many land facilities will not receive final permits in the near future, Congress added an entirely new section to RCRA applying the minimum technological standards to interim status facilities as well. Section 243 of the Amendments establishes a new section 3015[30] of RCRA which requires that interim status landfills and surface impoundments which place waste into new units, replacements of existing units, and lateral expansions of existing units after six months from the date of enactment must comply with the minimum technological standards set forth at section 3004(o). The provision requires that the owner or operator notify EPA at least sixty days prior to placing waste in the unit, and orders EPA to require the submission of the Part B application within six months of receiving the notice.[31]

The key terms in the new section are "new unit," "replacement unit," and "lateral expansion of an existing unit." By including the term "new unit" in a provision for interim status facilities, Congress created a category of land facility that would receive

28. Pub. L. No. 98-616, § 202, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3233 (to be codified at 42 U.S.C. § 6924(o)).

29. 40 C.F.R. § 265.90(d) (1984).

30. Pub. L. No. 98-616, § 243(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3260 (to be codified at 42 U.S.C. § 6936).

31. Pub. L. No. 98-616, § 243(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3260 (to be codified at 42 U.S.C. § 6936(b)(2)). 40 C.F.R. § 270.10(e)(4) presently requires that the facility shall be provided *at least* six months from the date of EPA's request to submit its Part B application. This would seem to require EPA to be prepared to issue a call-in immediately upon receipt of the sixty-day notice, or amend its regulations to provide for a shorter call-in period.

waste for the first time but would not be subject to the new facility permit application requirements.[32] Such a unit would exist at a facility that, in its Part A application, identified itself as an existing facility land area which had not yet received any hazardous waste. Congress chose to require that such units, which are functionally new even though they have achieved interim status, comply with the double liner and leachate collection system standards in recognition that such requirements would not pose an intolerable burden on facilities that had not yet begun placing waste in the units.[33]

"Replacement of an existing unit" is the functional equivalent of a new unit installed under interim status except that it presumes that the justification for the operation of the new unit under interim status is that the operation of a previously existing unit will be terminated.

The final key term in this section is the "lateral expansion of an existing unit." Presumably, Congress intended this provision to include the contiguous surface area of a land unit that has not yet received any waste. It is this interpretation that may give rise to difficulties for the Agency. The concept of lateral expansion implies that Congress does not expect a facility to retrofit with double liners, *etc.*, an area where waste has already been disposed of, but that the minimum technological standards should apply to areas which have not yet received waste. Yet this interpretation may serve to do little more than to encourage existing facilities to begin spreading out, and disposing waste on as large a land surface area as possible within six months of the date of enactment, since areas so covered will not be considered a lateral expansion subject to the minimum technical requirements.[34]

A negative aspect of these disposal provisions is that in some cases they may create a disincentive to use more advanced disposal technologies. For example, a facility that operates via the use of a "cell" system (opening a cell of limited land surface area, filling it, covering it over, and moving on to the next cell)[35] will be

32. 40 C.F.R. § 270.10(f) (1984).

33. *Id.*

34. Pub. L. No. 98-616, § 243(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3260 (to be codified at 42 U.S.C. § 6936).

35. Landfills are usually operated by a series of discrete "cells" that are excavated, filled with waste materials, and covered over before moving on to the next cell. Each of these cells could be regarded as a "new unit."

at a tremendous disadvantage. Even if the facility achieves interim status for its unopened cells, the "new unit" definition will require the implementation of the minimum technological standards, while a facility that uses less advanced methods of disposal, (similar to that employed by sanitary landfills) will be able to avoid the requirement by "spreading out" until May 8, 1985, the date after which the new requirements must be implemented.

Congress recognized that the imposition of these requirements on interim status facilities could entail a degree of hardship when the owners and operators eventually submit their Part B permit applications. By requiring the immediate installation (*i.e.*, within six months) of double liners and leachate collection, an interim status facility might expend large amounts of money on a system which might not be in full compliance with the regulations that the Agency promulgates two years later pursuant to section 3004(o).[36] In order to alleviate this burden, Congress created the so-called "good faith" exception, which states that facilities which install double liners and leachate collection systems in good faith compliance with section 3004(o) will not be required to meet any more stringent requirements contained in the regulations as part of the final permit process unless there is evidence that the facility is leaking.[37]

Once again, despite Congress' seemingly detailed provisions, implementation of RCRA will depend largely upon EPA's interpretation of a key term contained in the Amendments. EPA's definition of good faith compliance will give rise to problems similar to those discussed above relating to the groundwater monitoring waivers.

Notwithstanding good faith compliance, the Agency is not precluded from requiring the installation of a new liner if the Administrator has reason to believe a liner installed pursuant to section 3004(o) is leaking. While the leachate collection system in between the liners will greatly facilitate this determination, present evidence indicates that groundwater contamination, commonly presumed to be evidence of a release from a particular facility, may not be sufficient to meet the standard set forth in the statute. Experience teaches that groundwater contamination can have

36. A permitted facility will not have the same difficulties, as it will be subject only to the requirements in the permit.

37. Pub. L. No. 98-616, § 243(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3260 (to be codified at 42 U.S.C. § 6936(b)(3)).

many theoretical sources, and comprehensive studies may be necessary before the Agency will be able to pinpoint a specific facility or unit as the source of a leak. This may actually delay the issuance of a final permit, and extend the time during which a facility will operate under the (less stringent) interim status standards.

III. CORRECTIVE ACTION AND CONTINUING RELEASES

As we noted above, some of the Amendments close loopholes in the Agency's implementation of RCRA. Congress was especially concerned with certain hazardous waste problems that were not being addressed under either RCRA or CERCLA. Appropriately, EPA's efforts under CERCLA were focused on the most severe environmental problems, often large abandoned disposal sites where the residue of decades of unregulated dumping was contaminating the environment. Under RCRA, EPA concentrated on insuring compliance with regulatory standards so that new and existing facilities were operated properly. However, closed units at active RCRA facilities were sometimes not addressed by either program— they were not considered high priority under CERCLA, and the regulatory standards under RCRA did not provide authority for cleaning up old sites.

In recognition of this problem, Congress amended section 3004 of the Act to address continuing releases at permitted facilities, adding a new subsection (u) which mandates that "any permit issued after the date of enactment [of the Amendments] require corrective action for *all releases* of any hazardous waste or constituents from *any solid waste management unit* at a treatment, storage, or disposal facility seeking a permit under this subtitle, *regardless of the time* at which the waste was placed in such unit."[38] The Amendments also require that the regulations promulgated pursuant to section 3004 be amended to include an identical provision, and that where the corrective action for the continuing re-

38. Pub. L. No. 98-616, § 206, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3239 (to be codified at 42 U.S.C. § 6924) (emphasis added). This is in contrast to the original language of section 3004, which simply directed the Administrator "to promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment." 42 U.S.C. § 6924 (1982) *amended by* Pub. L. No. 98-616, 206, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3239 (1984). Congress clearly decided that it had provided the Agency with insufficient guidance on how to craft a permit program, and it took this opportunity to set more stringent requirements.

lease cannot be completed prior to issuance of a permit, a compliance schedule must be included in the permit. Finally, the new section requires a permittee to demonstrate that it has the financial resources to complete the required corrective action.[39] In crafting these new requirements, Congress opted to confer upon EPA the broadest possible authority for dealing with closed units at active RCRA facilities. First, the prerequisite for requiring corrective action is the release of a hazardous waste *or constituent*. It is often the case that a release, particularly leachate released to the groundwater, does not meet the RCRA definition of hazardous waste, and therefore falls outside the scope of the regulatory program. By including releases of hazardous constituents, Congress greatly expanded the universe of units subject to the requirement.

An even greater expansion of EPA's authority is presented by requiring corrective action at all solid waste management units, a far greater scope of regulation than if it were limited to only hazardous waste management units. Under this new provision, permits will require corrective action not only for old landfills and surface impoundments, but also at presently nonregulated activities, such as recycling operations or "empty" drum storage areas.[40]

A third expansion of EPA's authority conferred by section 3004(u) applies the requirement for corrective action to solid waste management units regardless of *when* the waste was actually placed in the unit. This is the first time RCRA regulations will be broadened to address the results of activities that occurred prior to November 19, 1980.

A potentially disruptive provision of this section is the requirement that a facility demonstrate its financial capability to carry out the corrective action required by the permit. While large hazardous waste facilities may not find this unduly onerous, smaller, marginal storage facilities may be forced out of business, since the requirement applies to any solid waste management unit at a per-

39. Pub. L. No. 98-616, § 206, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3239 (to be codified at 42 U.S.C. § 6924(u)).

40. Certain recycling activities are presently exempt from many regulatory requirements pursuant to 40 C.F.R. § 261.6. While such facilities do not require permits, they still qualify as solid waste management units, and therefore would be subject to the requirements of section 3004. Likewise, the storage of hazardous waste remaining in "empty" containers (as defined in 40 C.F.R. § 261.7), while exempt from other regulatory requirements, would still be defined as a solid waste management unit.

mitted TSD facility. A small company with an on-site, fifty drum storage facility could conceivably be required to establish financial assurance of its ability to carry out corrective action for a large abandoned landfill on its property.

The simple language of this new provision belies the complex issues that EPA will be forced to address as it is being implemented. Of particular concern is the Agency's interpretation of the word "release." Although this term has been defined in section 101(22) of CERCLA,[41] early drafts of Agency RCRA guidelines contemplated the definitions that were not identical. Any dichotomy between the definitions under the two statutes will inevitably lead to litigation, as the regulated community will seek to have the more limited definition adopted universally.

Congress' decision to require corrective action for all continuing releases at permitted facilities, and not only those which the EPA finds endanger the environment, is curious given its inclusion of just such a standard in another closely related section of the Amendments. As will be seen below, corrective action *beyond* a facility's boundary may be required only where necessary to protect human health and the environment.[42] Requiring corrective action for all continuing releases on-site, through the permit process, could present a considerable problem for both EPA and the regulated community, because even *de minimis* releases from otherwise properly operated facilities apparently must be corrected. There is a great likelihood, in fact, that almost every disposal facility used prior to 1976, the date RCRA was originally signed into law, will eventually release some level of hazardous constituents, even if those facilities were "capped" and closed in accordance with then existing state-of-the-art technology.

Congress apparently regarded the limitation of the RCRA regulatory program to on-site activities as another shortcoming. As noted above, Congress altered this limitation by directing that standards promulgated pursuant to section 3004 require that corrective action be taken beyond the facility boundary where neces-

41. 42 U.S.C. § 9601(22) (1982).

42. The dichotomy between the on-site and off-site corrective action requirements is not without precedent in environmental statutes. Under the Clean Air Act implementing regulations, "ambient air" (which is subject to regulation) is defined as "that portion of the atmosphere, *external to buildings, to which the general public has access*." 40 C.F.R. § 50.1(e) (1984) (emphasis added). Air emissions from a source which adversely affect the quality of the ambient air must be controlled; emissions which affect only the property on which the source is located are beyond the jurisdiction of the Act.

sary to protect human health and the environment.[43] Off-site corrective action will not be limited to only those facilities that receive a permit, but will also include interim status landfills, surface impoundments, and waste piles that receive hazardous waste after July 26, 1982.[44] Pending EPA promulgation of the regulations implementing this section, the Administrator is authorized to issue orders for corrective action to be taken beyond the facility boundary on a case-by-case basis. Section 3008(h)[45] furthermore authorizes EPA to issue corrective action orders to any interim status facility where the Administrator determines that there is or has been a release from such a facility requiring such action as is necessary to protect human health or the environment.

Several policy issues confront EPA in its implementation of corrective action provisions. The most imminent concern is how the Agency will integrate these requirements into the permit program, which has already fallen behind schedule. The new provisions require that permits issued after the date of enactment address both on- and off-site releases. Thus, EPA will be required to withhold the issuance of any permits that are presently pending while the Agency determines what further information is necessary. At a minimum, we can expect that EPA will require applicants to identify all previous on-site disposal areas, and submit, where appropriate, monitoring data for groundwater conditions for the entire site, rather than just the regulated units.

The Agency will also have to establish guidelines for use of the appropriate corrective mechanism for particular factual circumstances[46] because there is substantial overlap between CERCLA and RCRA. It will be important for EPA to signal to the regulated community that it has a clear sense of which problems are best addressed under each statute.

43. Pub. L. No. 98-616, § 207, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3239 (to be codified at 42 U.S.C. § 6924(v)).

44. *Id.* July 26, 1982 was the effective date of the final standards promulgated pursuant to section 3004.

45. 42 U.S.C. 6928(h). In the alternative, EPA may choose to commence an action for appropriate relief in United States district court.

46. For example, EPA has developed a structured approach to determining what, if any, remedial action must be taken at CERCLA sites. This approach includes performance of an elaborate Remedial Investigation and Feasibility Study. 40 C.F.R. § 300 *et seq.* (1984). The Agency would do well to draw on its CERCLA experience in developing the guidelines for RCRA corrective actions.

IV. EXPOSURE INFORMATION AND HEALTH ASSESSMENTS

Congress has added a new section 3019 to RCRA[47] that requires that permit applications for landfills or surface impoundments include information on the potential for public exposure to hazardous wastes or constituents released from the unit. In particular, the information must address reasonably foreseeable releases from operations of the unit (including accidents), and transportation to and from the unit, and potential routes and the magnitude and nature of the exposure. The requirement applies to all Part B applications submitted after August 8, 1985. Facilities with surface impoundments or landfills that applied for permits prior to the date of enactment have until August 8 to supplement their application. Although the statute makes no mention of facilities that submit applications between the date of enactment and August 8, it seems reasonable for EPA to allow those facilities nine months from the date that the application is called in or from the date of the Amendments, whichever is later. (This grace period is equivalent to the nine-month period from the date of enactment to August 8.)

The key factor in the Agency's implementation of this provision will be the extent of information required to be submitted. Once again, EPA is confronted with a situation where the definition of "release" will have a profound effect on the regulated community. In this instance, the concept of release contemplated by Congress probably includes spills, and may also encompass air emissions and food chain contamination.

A second major issue is defining the geographic area subject to these requirements. The statute speaks to releases associated with transportation to and from the unit, but Congress has not otherwise limited the area to be considered. As a result, EPA has the option of requiring that the information submitted by the owner or operator be limited to just on-site transportation, or, in the alternative, requiring that it be expanded to include the effects of transportation to and from the facility as well. There is some basis for adopting the latter interpretation; congressional intent, as expressed in the legislative history, favors providing as

47. Pub. L. No. 98-616, § 247(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3265 (to be codified at 42 U.S.C. § 6939).

much information as possible to persons residing along transportation routes.[48]

As noted above, owners and operators must identify potential pathways of exposure, in addition to estimating the magnitude and nature of the potential exposure. This affords EPA the opportunity to require full-scale studies of the potential effects of a land disposal facility.

Once the required information has been received by EPA or an authorized state, the Agency or state must determine whether the operation of the unit presents a "substantial potential risk to human health."[49] If it does, the Agency may request the Administrator of the Agency for Toxic Substances and Disease Registry ("ATSDR") to conduct a health assessment of the facility's operation *if* EPA provides funding, the Administrator of ATSDR is required to carry out the assessment.[50]

The statute provides no guidance as to the extent of the health assessment. Presumably, EPA and ATSDR will be expected to conduct a comprehensive study of the potential risks associated with the operation of the site.[51] What is not clear is how these risks will be factored into eventual permit decisions. The statute does not mandate a particular health standard for EPA to apply when determining whether to issue a permit. Indeed, the study required by this section could establish that risks to human health do exist, and EPA could still decide to proceed with permit issuance. To be realistic, however, EPA's decisions will in all likelihood be based less on the statutory language, than on the public's response to the conclusions reached in the assessments.

Public awareness and involvement in the permitting process poses particularly difficult problems for the Agency.[52] While the legislative history states that "the requirement for health risk information to accompany permit applications is not intended to delay—and should not delay—the permitting process,"[53] it is un-

48. *See, e.g.*, 130 CONG. REC. S9186 (daily ed., July 25, 1984) (statement of Sen. Humphrey).

49. Pub. L. No. 98-616, § 247(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3265 (to be codified at 42 U.S.C. § 6939(b)(2)).

50. Pub. L. No. 98-616, § 247(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3266 (to be codified at 42 U.S.C. § 6939(b)(2)).

51. 130 CONG. REC. S9186 (daily ed., July 25, 1984).

52. The requirement for public participation in the permit process is set forth at 40 C.F.R. § 124.11.

53. 130 CONG. REC. S9187 (daily ed., July 25, 1984) (statement of Sen. Cranston).

realistic to expect that public concern will allow EPA to issue permits prior to completion of health assessments. In some quarters, EPA is already laboring under the burden of public distrust. A final question regarding health assessment and delay in the permitting process is whether health assessment information will be considered as part of the completeness determination performed by EPA on Part B submissions. To date, this question goes unanswered.[54]

V. INTERIM STATUS

Section 213 of the Amendments includes several changes to section 3005(e) of RCRA which governs interim status for existing facilities.[55] One important revision provides that not only facilities in existence on November 19, 1980 can achieve interim status, but also any facility in existence on the effective date of any statutory or regulatory changes which render that facility subject to a RCRA permit requirement.

Of greater interest, however, are several provisions which specify that, under certain circumstances, facilities which have achieved interim status pursuant to section 3005(e) of RCRA will automatically lose that status. These detailed statutory provisions are self-effectuating, requiring no further rulemaking by EPA. As such, they are another example of Congress' exercise of what is normally considered a regulatory role.

A. *Compliance Certification*

Section 213(a) of the Amendments incorporates a new section 3005(e)(2) into RCRA, which is applicable to land disposal facilities which have "been granted [sic][56] interim status under this subsection" before the date of enactment. Section 3005(e)(3), a similar section, is applicable to existing land disposal facilities

54. A "completeness determination" performed by the permitting authority (EPA or an authorized state) assesses whether the permit submission contains all of the information required by 40 C.F.R. § 270.

55. Pub. L. No. 98-616, § 213, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3241 (to be codified at 42 U.S.C. § 6925(e)).

56. These subsections use the phrase "granted interim status under this subsection" to describe the facilities to which the new provisions apply. This is technically incorrect: facilities are not *granted* interim status; rather, they can (if they fulfill the necessary statutory and regulatory requirements) *achieve* interim status.

which, because of statutory or regulatory changes under the Amendments, have been "granted"[57] interim status.

As to both groups of facilities, the Amendments provide that their interim status "shall terminate on the date twelve months after the date [of enactment] unless the owner or operator of the facility" fulfills two important and potentially burdensome requirements:

1. Such person must submit his Part B RCRA permit application within twelve months after the date of enactment whether or not EPA has as yet "called in" the Part B; *and*

2. Such person must by the same date certify that his facility "is in compliance with all applicable groundwater monitoring and financial responsibility requirements."[58]

Compliance with the ground water monitoring requirements can be especially difficult to achieve and/or ascertain. Failure to fulfill either obligation automatically results in the permanent termination of interim status.

Many questions are unanswered: must the Part B permit application be "complete," or is a good faith effort sufficient?[59] Must the compliance certification be objectively accurate, or is a good faith self-assessment sufficient? Can EPA allow a facility which has lost its interim status pursuant to this provision to continue operating under an enforcement agreement containing a schedule for achieving compliance?

EPA expects to answer a number of these questions in its interim final rule on the codification of the self-implementing statutory provisions. It is possible that good faith efforts for both the permit application and the compliance certification will be

57. *See supra* note 56.

58. Pub. L. No. 98-616, § 213(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3241 (to be codified at 42 U.S.C. § 6925(e)(2)-(3)).

59. The "completeness" of a permit application is not something which can be easily determined by measurement against precise, objective standards. In fact, only EPA (or an authorized state) can determine the completeness of an application, and only after a careful, usually time-consuming, review. It may be that EPA will have to engage in some delicate line-drawing in interpreting these statutory provisions: a permit application, timely filed, which is utterly inadequate, might be viewed by EPA as tantamount to no application at all, thus causing the termination of interim status. On the other hand, an application which, after review by EPA, is found to be deficient in only some minor detail, may be construed as fulfilling the statutory obligation to file a facility's application by the specified date, and thus preserve its interim status.

deemed sufficient to prevent the automatic loss of interim status.[60]

The most important question which the amendment raises is the practical effect of an owner's or operator's inability to certify that its facility is in compliance. EPA's current compliance data suggest there may be a significant number of TSD facilities around the country which will not, in fact, have achieved compliance with the specified regulatory requirements by the newly-mandated filing deadlines. EPA is now deciding how it will deal with these facilities, which will automatically lose their interim status upon the passing of the compliance deadlines. This is a matter of considerable concern, because the sudden closing of a large fraction of America's hazardous waste handling facilities could leave an inadequate number of open facilities remaining to handle the great volume of hazardous waste which our society generates daily. In evaluating its options, EPA will undoubtedly be analyzing the statutory language in light of the real-world impacts of any decision it reaches.

One option for the EPA is to use a similar approach to the one it took after the original period for attainment of interim status had expired in November, 1980. At that time, EPA exercised its enforcement discretion across the board by deciding that any person who was *substantively* entitled to interim status (*i.e.*, who owned or operated a facility which was in existence on November 19, 1980), but who had failed to achieve such status merely because he had failed to fulfill procedural requirements,[61] would be treated by EPA *as if* he had indeed attained interim status.

Under EPA's policy, such person received either an Interim Status Compliance Letter ("ISCL") or an Interim Status Compliance Order ("ISCO"), under section 3008 of RCRA,[62] which recited the person's failure to achieve interim status but allowed the continued operation of the facility as if it had interim status. These mechanisms did not actually "grant" interim status nor did they insulate the facility from possible citizen suits for operating

60. However, facility owners and operators must be cautious to avoid making carelessly inaccurate compliance certifications, since that might shade over into the realm of intentional filing of a false statement, a criminal offense. 18 U.S.C. § 1001 (1982).

61. *See* 45 Fed. Reg. 76630, 76632-33 (1980). The relevant procedural requirements are submission of a Notification form by August 19, 1980 and filing a Part A permit application by November 19, 1980.

62. 42 U.S.C. § 6928 (1982).

without a permit. They did, however, serve their intended function—to avoid the severe economic disruptions and environmentally unsound disposal practices which would likely have accompanied the wholesale shutting down of many of the nation's hazardous waste handling facilities.

As noted above, similar problems might accompany facility shut-downs resulting from loss of interim status under the new subsections 3005(e)(2) and (3) of RCRA. EPA presumably has authority to afford the same sort of discretion as it afforded in 1980, to facilities which are unable to timely fulfill either the Part B permit application or the compliance certification requirements. It remains to be seen whether and under what circumstances the Agency will choose to exercise that discretion.

One difference from the 1980 ISCL/ISCO approach which we are likely to see in 1985 is that any violator who seeks to remain in operation despite his statutory loss of interim status would certainly be asked by EPA to pay a significant noncompliance penalty as part of any arrangement with the Agency; most recipients of ISCLs or ISCOs four years ago were not required to pay any penalty. In addition, facilities would be expected to commit to strict schedules for ultimately achieving compliance.[63]

B. *Filing and Issuance of Part B Permit Applications*

Congress has expressed displeasure over the relatively slow pace at which the Agency has been calling in Part B permit applications and issuing final permits. Section 213(c) of the Amendments revises section 3005(c) of RCRA[64] to address this problem. In this amendment, Congress created a detailed schedule for when TSD facilities must submit their Part B permit applications.

63. Both the penalty and compliance schedule can be imposed under section 3008 of RCRA. Use of such an order reflects EPA's standard response to noncompliance: to allow the continued operation of a noncomplying facility but under strict conditions. Admittedly, it can be argued that the statutory loss of interim status is not a standard instance of noncompliance, and therefore warrants a nontypical enforcement response. One might argue further that Congress intended that all facilities which lose their interim status by operation of these provisions must promptly close down until they can apply for and receive a final RCRA permit. While not an implausible reading of congressional intent, the practical effects of such a reading (as discussed in the text above) may necessitate that EPA exercise its enforcement discretion to allow continued operation of facilities in appropriate cases.

64. Pub. L. No. 98-616, § 213(c), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3242 (to be codified at 42 U.S.C. § 6925(c)).

This amendment also establishes a schedule for EPA issuance of final permits.

Congress has further provided that when a facility fails to submit its Part B application by the scheduled date,[65] and if EPA has not issued a final permit for the facility by the date scheduled for that action, the facility will automatically lose its interim status. In other words, EPA's failure to adhere to its permit issuance schedule will not result in termination of interim status unless the permit application was also submitted behind schedule. This is fair since only the *filing* of the application is within the control of the facility and it should not be penalized for EPA's lack of diligence.

Once again, we must ask whether the Part B applications which those facilities must file need be "complete" by the statutory deadline in order to stave off the potential loss of interim status, or whether a facility's good faith effort to submit a satisfactory application is sufficient.

VI. USED OIL

The Amendments include several provisions that address the reclamation and burning of various types of used oil. Used oil is defined in section 1004(36) of RCRA[66] as "any oil which has been (A) refined from crude oil, (B) used and, (C) as a result of such use, been contaminated by physical or chemical impurities." Increasingly, used oils are being collected, treated to some extent, and then sold for use as fuel in combustion installations. Used oils can come from a variety of sources, and with varying degrees of contamination. Often this contamination is from substances which are considered hazardous wastes under RCRA. In addition, it is widely believed by law enforcement officials that hazardous wastes are intentionally being blended into (or "cocktailed" with) waste oil streams. The presence of hazardous wastes in fuel oil poses an environmental danger when the fuel is burned in

65. With respect to the same land disposal facilities which are required to submit their Part B permit applications along with their compliance certification within twelve months of the date of enactment, EPA is obligated to issue the final permits for these facilities no later than November 9, 1988.

Incinerator facilities must file their Part B applications within two years of the date of enactment or they will lose their interim status by November 9, 1989 if EPA has not issued the final permits by that date. All other facilities must submit their Part B applications by November 1988, or they will lose their interim status if EPA has not issued the final permit by November 1992.

66. 42 U.S.C. § 6903(36) (1982).

combustion facilities, particularly those in densely populated areas, which are not able adequately to destroy the contaminants.

For a number of reasons, it has proved difficult for EPA to take effective enforcement action against distributors of contaminated fuel oil.[67] For example, the "recycling exemption" formerly contained in federal regulations excluded any hazardous waste which "is being beneficially used or reused or legitimately recycled or reclaimed" from many (or,in some cases, all) of the Subtitle C regulatory requirements.[68] Waste oil handlers asserted that the use of hazardous contaminants in fuel oil represents beneficial use or reuse, or legitimate recycling, at least where the contaminants are burnable. Terms such as "beneficial" or "legitimate" are subjective and difficult to define; in choosing them, EPA created considerable problems of enforceability.

EPA, on more than one occasion, proposed regulations to address the waste oil problem,[69] although no final rules have yet been promulgated. Indeed, the Used Oil Recycling Act of 1980[70] amended RCRA to require EPA to promulgate regulations on the recycling of used oil by 1981, provided that the regulations do not inhibit recycling.[71] Presumably dissatisfied with EPA's failure to finalize such regulations, Congress has now included in RCRA a number of provisions which impose quite specific obligations upon EPA to regulate used oil.

First of all, the Amendments direct that while the regulations should not discourage the recycling of used oil, such regulation must nevertheless be "consistent with the protection of human health or the environment."[72] Congress has thus given EPA useful and direct guidance for the difficult balancing test between

67. For a more detailed discussion of the waste oil problem, and the limitations on presently available statutory and regulatory tools to deal with it, *see* AIR POLLUTION CONTROL ASSOCIATION, RCRA AND THE CLEAN AIR ACT 55 (1983).

68. 40 C.F.R. § 261.6 (1984). This regulation was significantly revised in EPA's January 4, 1985 Final Rule on the definition of "Solid Waste." Subtitle C of RCRA directed EPA to promulgate regulations identifying hazardous wastes; controlling the generation, transport, treatment, storage and disposal of such wastes; governing interim status facilities; and creating the RCRA permit program.

69. *See, e.g.*, 43 Fed. Reg. 18506-12 (1978); 43 Fed. Reg. 29908-18 (1978); 43 Fed. Reg. 58946-59028 (1978); 48 Fed. Reg. 14472 (1983).

70. Pub. L. No. 96-463, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 2055 (codified in scattered sections of 42 U.S.C.).

71. 42 U.S.C. § 6932 (1982).

72. Pub. L. No. 98-616, § 242, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3260 (to be codified at 42 U.S.C. § 6935).

economic and environmental considerations which will inevitably be involved in any regulatory action on this subject: the protection of public health and environmental interests should be paramount.

Unlike the above, the following provisions reveal Congress' decision to exercise some of the detailed decisionmaking functions it has often in the past left to executive agencies.

A. *Listing of Used Oil as a Hazardous Waste*

Section 241 of the Amendments adds a number of important substantive provisions to section 3014 of RCRA, further directing EPA's regulatory strategy. Within twelve months of the date of enactment EPA must propose whether or not to include used automobile and truck crankcase oil as a hazardous waste under section 3001. (These are the most common sources of used oil; EPA, however, has considered also listing additional forms of used oil as hazardous wastes.) Within twenty-four months of the date of enactment EPA must render a final determination on whether or not to carry out such listings.[73]

Even if EPA lists used oil as a hazardous waste pursuant to section 3014(b), Congress has specified that persons who generate and transport such used oil are exempt from the normal regulatory provisions applicable to generators and transporters of hazardous wastes (promulgated pursuant to sections 3001(d), 3002 and 3003 of the law), provided such oil is actually recycled.[74] Instead, within twenty-four months of the date of enactment, EPA must promulgate special rules applicable to such used oil generators and transporters, as necessary to protect human health and the environment. Expressing some concern that rigorous regulation might impair the viability of the legitimate recycling industry, Congress specifically directed EPA to "take into account the effect of such regulations on environmentally acceptable types of used oil recycling and the effect of such regulations on small quantity generators and generators which are small businesses . . . ."[75]

73. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3258 (to be codified at 42 U.S.C. § 6934(b)).

74. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3258 (to be codified at 42 U.S.C. § 6934(c)(1)).

75. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3258-59 (to be codified at 42 U.S.C. § 6934(c)(2)(A)).

If EPA does decide to list used oil as a hazardous waste, Congress has provided some limited relief for the used oil industry from the rigors of full compliance with all of the Subtitle C hazardous waste regulations. The special regulations may not impose any manifest requirement or associated record keeping or reporting obligations upon used oil generators who recycle their wastes, provided they (*i*) send such oil only to a "permitted" recycling facility; (*ii*) do not mix the oil with any other hazardous wastes; and (*iii*) maintain such records relating to the used oil as EPA may deem necessary to protect the public health and the environment.[76] In addition, EPA is authorized to establish other standards applicable to used oil generators and transporters as necessary to protect public health and the environment.[77]

"Permitted" facilities include not only a treatment, storage or disposal facility which has a permit (or interim status) under section 3005 of RCRA, but also a new class of oil recycling facilities which will be *deemed* to hold such a permit.[78] This "permit-by-rule" applies to persons who treat or recycle used oil, provided that they in fact conform to the regulatory standards promulgated by EPA pursuant to section 3004.[79] However, EPA may require such oil recyclers to obtain individual permits under section 3005(c) of RCRA, if necessary to protect public health and the environment.[80] Such a requirement may only be imposed after EPA has established regulatory standards under section 3004 specifically applicable to such oil recycling operations.

76. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3259 (to be codified at 42 U.S.C. § 6934(c)(2)(B)).

77. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3259 (to be codified at 42 U.S.C. § 6934(c)(3)).

78. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3259 (to be codified at 42 U.S.C. § 6934(d)).

79. EPA has promulgated two sets of standards under the authority of section 3004 of RCRA: the "interim status standards" found at 40 C.F.R. § 265, applicable to TSD facilities which achieved interim status under section 3005(e) of RCRA; and the standards for new or permitted TSD facilities, found at 40 C.F.R. § 264. Although the two sets of standards are nearly identical, especially with respect to drums and tanks (which recyclers would be most concerned with) there may be some minor differences. Congress did not specify which set of standards promulgated pursuant to section 3004 must be complied with by oil recyclers in order to qualify for the "permit-by-rule" established under section 3014(d). In the absence of such specification, we would assume that the 40 C.F.R. § 264 standards, applicable to other permitted TSD facilities, will apply to oil recyclers who wish to be deemed to hold a permit under section 3014(d).

80. Pub. L. No. 98-616, § 241(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3259 (to be codified at 42 U.S.C. § 6934(d)).

EPA has already started to prepare a new regulatory proposal which would satisfy many of the obligations imposed by the new Amendments, described above. It is possible, therefore, that the Agency will be able to complete these actions in advance of the deadlines established in the statute.

B. *Used Oil Burned as a Fuel*

There are two other provisions of the Amendments which may have a profound impact upon the used or waste oil industry. As noted above, much of this oil is given some, though often only minimal, treatment, and then sold for use as heating or other fuel oil. Either because of the circumstances of its original use, and/or because of intentional cocktailing, much of this oil is believed by governmental authorities to be contaminated by hazardous waste constituents.

1. Notification By Producers, Marketers and Users

Section 204 of the Amendments deals with the burning and blending of hazardous wastes. Section 204(a) amended section 3010 of RCRA,[81] and requires persons who produce, use or market fuel made from or containing hazardous waste or *any* used oil, to notify EPA or an authorized state of that fact within fifteen months of the date of enactment. The notification must, at a minimum, identify the location of, and describe the operations at, the facility at which such production or use takes place. EPA may waive notification from certain users of such fuels if sufficient information concerning their practices is already known.[82] Congress' imposition of notification requirements not only on persons who produce and market but also on those who use fuel derived from waste oil, whether or not EPA lists used oil as a hazardous waste, is likely to have profound effects on the fuel oil industry. Many end-users, and perhaps even transporters of fuel oil, may not be aware that their fuel was made from or contains used oil or other hazardous wastes. Should such substances be detected in their fuel through an EPA compliance inspection, however, they could be found in violation of this notification requirement and would be subject to civil penalties notwithstanding

81. Pub. L. No. 98-616, § 204(a)(1), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3235-38 (to be codified at 42 U.S.C. § 6930).

82. Pub. L. No. 98-616, § 204(a)(1), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3235-36 (to be codified at 42 U.S.C. § 6930).

their ignorance. Should the EPA or the states conduct vigorous inspection programs to detect instances of the marketing of contaminated fuel oil, numerous victims of what is essentially a consumer fraud could become the subject of enforcement actions. These victims, who had been kept unaware by their suppliers of the true nature of the product they were receiving, might be inclined to discontinue business relations with those suppliers. This could have a serious dislocating effect upon some elements of the waste oil industry, rendering less lucrative the sort of free-style commerce in contaminated or cocktailed fuel which many authorities believe now exists. Such an alteration of existing market incentives for unscrupulous behavior may be precisely what Congress intended.

2. Standards for Production, Marketing and Use

Another provision which may have an important effect upon the industry is section 241(b) of the Amendments, which added subsections 3004(q) and (r) to RCRA. The former provides that within two years from the date of enactment EPA must promulgate regulations establishing standards governing the production, use and marketing of fuel which is made from, or which contains, a hazardous waste. Thus, if used oil is ultimately listed by EPA as a hazardous waste, these standards will apply to the production, use and marketing of fuel derived from any used oil.[83]

Of more immediate importance to the used oil industry, however, is the new section 3004(r). This provision became effective ninety days after the date of enactment (*i.e.*, on February 8, 1985), and remains in effect until the EPA promulgates regulations under section 3004(q) which specifically supercede this statutory requirement. The subsection mandates that any person who is required to notify pursuant to the new provisions of section 3010 (described above) must, if he distributes or markets any fuel which "is produced from any hazardous waste . . . or any fuel which otherwise contains any hazardous waste," include on the invoice or bill of sale the following statement: "WARNING: THIS FUEL CONTAINS HAZARDOUS WASTES." In addition, he must include a listing of the particular hazardous wastes contained in the fuel being distributed or marketed.

83. EPA is, however, permitted to allow certain minor exemptions from these standards.

Both of these new statutory provisions applicable to the production, marketing and use of fuels made from or containing hazardous waste beg the question: How do we determine whether a contaminant in a fuel is, indeed, a hazardous waste (as that term is defined in the law and regulations)? These provisions will pose two of the many definitional difficulties which have affected EPA enforcement efforts in the past and which have not been eliminated or even reduced by the Amendments. The mere presence in a fuel of a substance which is hazardous does *not* necessarily mean that such substance is a "hazardous waste." For example, the way in which a contaminant found its way into a fuel may prove to be significant in determining whether or not that contaminant is properly classified a hazardous waste.[84] This difficulty in identifying hazardous waste contaminants in fuel oil will continue to confront EPA unless the Agency lists used oil, itself, as a hazardous waste.

Given the prevalence of hazardous waste constituents in most waste oils, and since any person who distributes or markets a fuel made from or containing waste oil is subject to this labeling requirement, it is probable that most sales of waste oil-derived fuels will have to be accompanied by the warning and listing of hazardous constituents. As a marketing consideration, the announcement of the presence of hazardous waste in a fuel product may disturb many customers, and thus depress the market for used oil. As a practical consideration, the need to test before sale all used oil in order to comply with the constituent listing obligation may

84. EPA chose to identify hazardous wastes in two different ways. 40 C.F.R. § 261.20 - .24 establishes four sets of criteria which, if met by a waste, classify it as "hazardous." For example, if its flashpoint is low enough, a waste is "ignitable" and therefore hazardous. EPA lists specific wastes as hazardous at 40 C.F.R. § 261.30 - .33. Some of the lists in these regulations identify generic types of wastes, such as wastes from certain industries or manufacturing processes. Other lists name particular chemicals which are considered hazardous if, *e.g.*, they are "discarded commercial chemical products." Because of this approach, it can be crucial to know the source of a waste material in order to determine whether it is properly classified as "hazardous" under the EPA regulations.

The authors believe that at least one class of contaminants commonly found in used oil can always be presumed to be a hazardous waste. A variety of solvents are listed as hazardous wastes pursuant to 40 C.F.R. § 261.31 once they are "spent." We believe the mere presence of such solvents in a fuel indicates that, whatever their source, they can be presumed to be spent, and are therefore properly designated hazardous wastes. Some other wastes, by contrast, are classified as "hazardous" under EPA regulations only if their source can be identified, or if the manner in which they became wastes is known. *See* 40 C.F.R. § 261.32- .33 (1984). Such specifics would, of course, be difficult to prove in an enforcement action.

be so costly and time-consuming as to affect the profitability of the industry. We can therefore assume that there will be widespread noncompliance with the labeling provision immediately after the February 8, 1985 effective date. EPA may wish to consider a prompt enforcement program to address such noncompliance.

A final consideration with respect to these new provisions is whether or not EPA—or the courts, in the context of enforcement actions—will consider as permitted a *de minimis* level of contamination by hazardous substances before the labeling or reporting requirements are triggered. With sophisticated (and expensive) analytical devices, we can now identify hazardous contaminants in very low concentrations. It may not be a particularly cost-effective use of EPA's limited resources to pursue cases in which only a trace quantity of a hazardous contaminant was found in a fuel. At what precise concentration any such *de minimis* level would be established will, of course, be the key question, and might best be left to the discretion of the officials who will actually be bringing the enforcement cases.

VII. Underground Storage Tanks

Title VI of the Amendments creates a new Subtitle I of RCRA, sections 9001 through 9010, for the management of underground storage tanks which contain certain regulated substances. Undetected leaks from such tanks into the soil and groundwater, heretofore unsupervised by the federal government, are now viewed as a serious environmental threat.[85]

An extremely large number of tanks will be subject to regulation pursuant to this new statutory provision. There are an estimated two million affected tanks nationwide, of which some 75,000 to 100,000 are now leaking and some 350,000 more may develop leaks within the next five years.[86] In turn, thousands of small businesses will be among those affected by the new requirements. This new law will therefore have an enormous impact upon the governmental agencies charged with its implementation, upon the regulated community, and ultimately, upon society in general.

85. A recent initiative to use "RUST," or "regulated underground storage tanks," was mercifully derailed. The EPA will risk public censure, and will retain the more exciting acronym "LUST."

86. *See* 130 Cong. Rec. H11,140 (daily ed. Oct. 3, 1984).

Section 9001 of RCRA, as amended, defines the scope of regulation under the new statute. A tank is covered if it is used to contain an accumulation of regulated substances, and if its volume is ten percent or more underground. There are certain limited exceptions, including noncommercial tanks used in farms or homes, various pipeline systems, and flow-through process tanks.[87]

Regulated substances include any substances defined as hazardous under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund"),[88] with the exception of any substance regulated as a hazardous waste under RCRA itself. Such hazardous wastes are presumed already to be satisfactorily controlled under the RCRA law and regulations. Regulated substances also include petroleum crude oil and distillate fractions, a notable deviation from the ambit of CERCLA regulation.

Pursuant to section 9002 of RCRA, as amended, the owner of all regulated underground storage tanks must notify the designated state agency of the age, size, type, location and uses of such tanks within eighteen months of the date of enactment. Owners of tanks which are no longer in service, but which were taken out of service after January 1, 1974, must nevertheless notify the state government; tanks taken out of service before that time are exempt from notice requirements. Owners of new tanks must notify the state within thirty days of the existence of the unit. The governors of the states are required to designate, within six months of the date of enactment, the agency which will receive the notifications; EPA is to prescribe the form of notification within twelve months.

Under section 9003 of RCRA, EPA is required within twenty-seven months of the date of enactment to promulgate "Release

87. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3277 (to be codified at 42 U.S.C. § 6991(1)).

88. 42 U.S.C. §§ 9601-9657 (1982). Pursuant to section 101(14) of CERCLA, the term "hazardous substance" is defined by reference to several other federal environmental statutes as follows: (A) substances regulated under section 311(b)(2)(A) of the Federal Water Pollution Control Act (now called the Clean Water Act); (B) substances specifically designated as hazardous through regulations promulgated pursuant to section 102 of CERCLA itself; (C) hazardous wastes identified or listed pursuant to RCRA; (D) toxic pollutants listed under section 306(a) of the Federal Water Pollution Control Act; (E) hazardous air pollutants listed pursuant to section 112 of the Clean Air Act; and (F) imminently hazardous chemical substances or mixtures which EPA has regulated under section 7 of the Toxic Substances Control Act. Petroleum and its distillate fractions are specifically exempted.

Detection, Prevention and Correction" ("RDPC") regulations for regulated underground storage tanks. EPA is permitted to make certain rational distinctions between various classes of tanks in establishing these rules. At a minimum, however, the regulations must include:

1. Provisions requiring the maintenance of leak detection systems (or comparable systems such as inventory control in conjunction with tank testing);

2. Provisions requiring maintenance of a leak monitoring record, reporting of releases, and corrective action in response to releases; and

3. Provisions requiring the proper closure of tanks once they are taken out of service, to prevent further leaking.[89]

EPA may also promulgate regulations imposing financial responsibility obligations upon tank owners, as EPA has done for RCRA TSD facilities.[90] EPA must issue regulations establishing performance standards for new tanks brought into service after such promulgation.[91]

All of these RDPC regulations must become effective no later than thirty months after the date of enactment, except the new tank standards, which must become effective after no more than thirty-six months. EPA has a full forty-eight months to issue rules for tanks storing CERCLA hazardous substances which are not also RCRA hazardous wastes.[92]

As an interim protection measure pending EPA's promulgation of these RDPC rules, Congress has required that any new underground storage tank used to store regulated substances which is installed after 180 days from the date of enactment, must: (a) prevent leaks due to corrosion or structural failure for the useful life of such tank; and (b) be cathodically protected against corrosion, or be constructed of, or clad with, noncorrosive material, or be otherwise designed to "prevent the release or threatened release of any stored substance;" (c) and must have a lining compat-

89. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3279-80 (to be codified at 42 U.S.C. § 6991b(a)-(c)).

90. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3280-81 (to be codified at 42 U.S.C. § 6991b(d)). Financial responsiblity provisions regarding RCRA TSD facilities can be found at 40 C.F.R. § 264.

91. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3281 (to be codified at 42 U.S.C. § 6991b(e)).

92. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3281 (to be codified at 42 U.S.C. § 6991b(f)).

ible with the stored substance.[93] These rather general design requirements may prove to be as difficult to enforce as the "good faith compliance" provision for the minimum technological requirements, discussed above in Section II.

Section 9004 provides for authorization of state programs which are no less stringent than the corresponding EPA regulations. A procedure compatible to RCRA Interim Authorization is also provided for interim approval of less stringent state programs.[94] Depending on whether additional regulatory or legislative action is needed to render the state program as stringent as the federal rules, this interim approval period may be from one to three years long.

Sections 9005 and 9006 of RCRA establish a complete enforcement program for leaking underground storage tanks distinct and separate from the regular RCRA enforcement authorities contained in Subtitle C. Section 9005 authorizes EPA to inspect tank facilities, require monitoring by tank owners or operators, and require submission of information.[95] Section 9006 authorizes EPA to issue compliance orders, or to initiate civil actions, when violations are discovered.[96] Administrative orders may, after opportunity for a hearing,[97] include compliance schedules and assess a civil penalty of up to $10,000 per tank, per day of violation. The same sanctions are available through civil actions.[98] Knowing failure to file the required notification, or knowing filing of false information leads to *civil* liability only. A civil penalty of $10,000 is available for this infraction.[99]

93. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3281 (to be codified at 42 U.S.C. § 6991b(g)(1)). There is provision for deviation from the corrosion protection requirement if certain technical soil specifications are satisfied. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3281 (to be codified at 42 U.S.C. § 6911(g)(2)).

94. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3282-83 (to be codified at 42 U.S.C. § 6911c(b)(2)).

95. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3285 (to be codified at 42 U.S.C. § 6911d(a)).

96. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3285 (to be codified at 42 U.S.C. § 6911e(a)(1)).

97. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3285 (to be codified at 42 U.S.C. § 6911e(b)).

98. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3286 (to be codified at 42 U.S.C. § 6911e(d)(2)).

99. Pub. L. No. 98-616, § 601(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3285 (to be codified at 42 U.S.C. § 6911e(d)(1)). The criminal sanctions for knowingly filing a false

Section 9007 of RCRA provides that all federal facilities must comply with federal, state and local LUST rules. Immunity from enforcement actions is *not* available, at least with respect to injunctive relief.[100] It would appear from the language of section 9007(a) that Congress may have rendered federal facilities immune from civil liability for violations of the LUST rules. The President may also exempt federal underground storage tanks from being subject to LUST rules if he determines that to do so is in "the paramount interest" of the country.[101]

Section 9008 preserves state authority to regulate underground storage tanks more stringently than does the EPA. Section 9009 requires EPA to complete comprehensive studies of the LUST problem within twelve months of the date of enactment for tanks storing petroleum products,[102] and within thirty-six months for other regulated tanks.[103] The studies must also also evaluate the number and location of certain tanks exempted from regulation by the Amendments,[104] presumably so that Congress can consider the expansion of statutory coverage to some or all of these tanks.

VIII. Inspections, Enforcement and Citizen Suits

A. *Mandatory Inspections*

Sections 229 through 231 of the Amendments add three new subsections to section 3007 of RCRA, each of which impose certain mandatory inspection obligations upon EPA. New section 3007(d)[105] requires that, within twelve months of the date of enactment, EPA or an authorized state must commence a program of annual "thorough" compliance inspections of all federally

statement with the federal government, 18 U.S.C. § 1001, presumably continue to apply notwithstanding this section of RCRA.

100. Pub. L. No. 98-616, § 601(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3286 (to be codified at 42 U.S.C. § 6911f(a)).

101. Pub. L. No. 98-616, § 601(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3286 (to be codified at 42 U.S.C. § 6911f(b)).

102. Pub. L. No. 98-616, § 601(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3287 (to be codified at 42 U.S.C. § 6911h(a)).

103. Pub. L. No. 98-616, § 601(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3287 (to be codified at 42 U.S.C. § 6911h(b)).

104. Pub. L. No. 98-616, § 601(a), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3287 (to be codified at 42 U.S.C. § 6911h(c)).

105. Pub. L. No. 98-616, § 230, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3255 (to be codified at 42 U.S.C. § 6927(d)).

owned and operated TSD facilities. Section 3007(d) imposes a similar requirement upon EPA alone with respect to state owned or operated TSD facilities.

Section 3007(e)[106] requires that EPA or an authorized state commence, within twelve months of enactment, a program for the inspection of all other TSD facilities at least once every two years. EPA must promulgate regulations governing the frequency and manner of such inspections, including any ancillary record keeping requirements.[107]

Finally, section 3007(e)(2)[108] requires that, within six months of the date of enactment, EPA report to Congress on the feasibility of using nongovernmental inspectors as a supplement to the available workforce of the EPA and the states.

B. *Enforcement*

Congress included a number of technical amendments to section 3008 of RCRA augmenting EPA's enforcement authorities. Section 403(d) of the Amendments[109] revised the language of section 3008(a)(1) to remove any lingering ambiguity about the scope of EPA's administrative authority. The new language endorses what has long been EPA's position: that administrative orders issued by the Agency may assess civil penalties (as well as compel compliance), and may be issued for past or present violations.[110]

Section 3008(a)(3) and section 3008(c) were similarly revised to remove doubts about the scope of EPA's administrative enforcement authority. The former section now clearly enunciates EPA's

106. Pub. L. No. 98-616, § 231, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3256 (to be codified at 42 U.S.C. § 6927(e)).

107. This new statutory provision may lend further support to the view that TSD facilities are "pervasively regulated" industries with no expectation of privacy. The courts have held in some such circumstances that enforcement agencies need not procure a warrant before visiting such establishments. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981), in which the Supreme Court upheld warrantless inspection provisions of the Federal Mine Safety and Health Act of 1977.

108. Pub. L. No. 98-616, § 231, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3256 (to be codified at 42 U.S.C. § 6927(e)(2)).

109. Pub. L. No. 98-616, § 403(d), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3272 (to be codified at 42 U.S.C. § 6928(a)(1)).

110. Some violators have asserted, in the context of adjudicatory hearings arising from administrative enforcement actions, that EPA was without authority to assess civil penalties in administrative orders. These statutory revisions serve to eliminate any basis for what was, at best, a very weak argument.

power to assess civil penalties of up to $25,000 per day of noncompliance through the vehicle of an administrative order; furthermore, such orders may be used to revoke or suspend any permit. The latter section provides essentially the same authorities for cases where a person violates a previous administrative order.

C. *Criminal Enforcement*

In section 232 of the Amendments Congress revised subsections 3008(d) and (e) of RCRA relating to criminal sanctions.[111] All crimes enumerated in the law are now felonies. A number of additional acts have been identified as crimes, including knowing violations of interim status standards; transporting or causing the transportation of hazardous wastes to an unpermitted facility; and—an entirely new concept—exporting hazardous wastes to a foreign country (*i*) without the consent of the receiving country, or (*ii*) in a manner which does not conform with procedures for the transportation, treatment, storage or disposal of hazardous wastes where there exists an international agreement between the United States and the foreign country establishing such procedures.

D. *Citizen Suits*

In section 401 of the Amendments Congress enacted several revisions to section 7002 concerning citizen suits.[112] Of great significance is a new provision, section 7002(a)(1)(B), allowing citizens to sue virtually any person (including the United States government) who, because of past *or present* activities involving hazardous wastes, has contributed or is contributing to a situation which may present an imminent and substantial endangerment to public health, welfare or the environment.

This new cause of action is analogous to the existing imminent hazard provisions of section 7003 authorizing EPA to bring suit to abate an imminent hazard. The citizen suit authority, although

111. Pub. L. No. 98-616, § 232, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3256-57 (to be codified at 42 U.S.C. § 6928). These include such acts as knowingly making a false material statement in various official RCRA documents such as manifests; and knowingly destroying, altering or concealing any pertinent records required to be maintained pursuant to RCRA.

112. Pub. L. No. 98-616, § 401, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3268-70 (to be codified at 42 U.S.C. § 6972).

an impressive new weapon in the arsenal of citizen enforcement of environmental laws is, however, not without some significant limitations.

The prospective citizen plaintiffs must provide at least ninety days prior notice of their intent to sue the EPA, the relevant state, and any other prospective private defendants. Moreover, the citizen suit is barred if the EPA has already commenced and is diligently prosecuting an action under section 7003 of RCRA or section 106 of CERCLA, or has initiated a response action under CERCLA; or if the state has itself already initiated a citizen suit under this section, or has started a CERCLA response. Interestingly, a state enforcement action brought under other authority (*e.g.*, state law) will not operate to bar a citizen suit under this provision.

E. *Federal Imminent Hazard Actions*

Congress also amended section 7003 of RCRA, through sections 402 and 403 of the Amendments.[113] The new provisions remove an existing legal ambiguity about the scope of the imminent hazard authority provided to EPA by RCRA.[114] It is now completely clear that the law applies to past acts of hazardous waste management as well as present acts, and that it is applicable to past owners and operators of a TSD facility, and past generators and transporters, as well as persons presently involved with the site.[115] The only significant class of persons now exempt from a section 7003 action are common carriers, where the imminent hazard arose from conditions occurring after a carrier had delivered the hazardous wastes to his consignee. (Similar protection for common carriers was added to the citizen suit provisions of section 7002.)

113. Pub. L. No. 98-616, §§ 402, 403, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3271-73 (to be codified at 42 U.S.C. § 6973).

114. This section authorizes EPA to initiate a civil action or issue an administrative order for the purpose of abating, by any necessary actions, conditions involving solid or hazardous waste handling which "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973 (1982).

115. Questions as to whether or not section 7003, as it originally existed, applied to past acts were the subject of spirited legal debate. *See, e.g.*, United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), holding *inter alia* that section 7003 does not impose liability on past nonnegligent, off-site generators. The opposite view has been adopted in most later cases, *e.g.*, United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983).

Where EPA determines that a site does, indeed, pose an imminent and substantial endangerment to human health or the environment, the Agency must immediately provide notice of such determination to appropriate local officials, and it must post prominent signs at the site warning of the hazard.[116]

Finally, where the United States proposes to settle any section 7003 action, it must provide for prior citizen participation through a public meeting and an opportunity to comment on the proposed settlement. The Agency's decision to settle a case is subject to judicial review.[117]

IX. Authorization

Section 3006 of RCRA[118] requires the Administrator to promulgate guidelines to assist states in the development of hazardous waste programs. In particular, a state with equivalent statutory and regulatory authority can be authorized "to carry out such program in lieu of the Federal program under this subchapter in such state and to issue and enforce permits for the storage, treatment and disposal of hazardous waste . . . ."[119] In addition, section 3006(c) provides for temporary interim authorization of state programs which are "substantially equivalent."[120] Such interim authorizations last, however, only until twenty-four months following the date six months after the Agency promulgates regulations under sections 3002 through 3005.[121]

Perhaps the single most important change wrought by the Amendments, and possibly a crucial reason that they were passed by Congress and signed by the President, concerns the one-year extension of the date for final authorization of state hazardous waste programs to January 31, 1986.[122] While twenty-five states

116. Pub. L. No. 98-616, § 403, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3271 (to be codified at 42 U.S.C. § 6973(c)).

117. Pub. L. No. 98-616, § 404, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3273 (to be codified at 42 U.S.C. § 6973(d)).

118. 42 U.S.C. § 6926 (1982).

119. *Id.* § 6926(b).

120. *Id.* § 6926(c).

121. Pub. L. No. 98-616, § 227, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3254 (to be codified at 42 U.S.C. § 6926). Without the extension, interim authorization would have expired on January 26, 1985.

122. Pub. L. No. 98-616, § 227, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3254 (to be codified at 42 U.S.C. § 6926(c)(1)).

received final authorization by February 7, 1985,[123] the remaining states had no hopes of receiving final authorization any time soon. Senators and representatives from these states were encouraged by their respective state governments to extend the deadline and thereby prevent reversion of the program to EPA, which would occur automatically by statute. Anticipating that reversion would make for considerable confusion, Congress extended the time frame within which final authorization could be granted. In addition, the Amendments provide that "[t]he Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection."[124] EPA is interpreting this provision to apply only to interim authorization for the new requirements. EPA intends to propose a 1992 date for the expiration of interim authorization for the Amendments.

The twenty-five states that have already received final authorization are not immediately affected by the Amendments. While those states will be required eventually to amend their statutes and regulations in order to achieve final authorization for the full program created pursuant to these Amendments, the 1992 deadline should be possible to meet. States that have applied for but not yet received final authorization may continue to pursue their applications even though the programs are not equivalent to the new statutory language. EPA will continue to process those applications on existing schedules while establishing new schedules for authorization of the additional requirements.

States may submit applications for authorization under the new RCRA requirements immediately upon the date of enactment. The Amendments also create a new interim authorization program for the new provisions, which can also be applied for as of the date of enactment. Congress apparently recognized that many states already have some statutory and regulatory authorities that are equivalent to the Amendments. Rather than requiring those states to wait until they have all of the equivalent requirements, Congress will allow them to receive interim authorization for certain portions of their programs. In reality, how-

123. The twenty-five states are Delaware, Mississippi, Montana, Georgia, North Dakota, Utah, Colorado, South Dakota, Virginia, Texas, North Carolina, New Hampshire, Oklahoma, Vermont, Arkansas, New Mexico, Kentucky, Tennessee, Massachusetts, Nebraska, Louisiana, Maryland, Minnesota, Florida and New Jersey.

124. Pub. L. No. 98-616, § 227, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3254 (to be codified at 42 U.S.C. § 6926(c)(2)).

ever, this segregation will be confusing, because a state could have final authorization for one portion of the program, interim authorization for a second portion, and none at all for a third. In light of this potential for confusion, and in light of the fact that final authorization must be achieved by January of 1986, we can anticipate that EPA will focus its efforts on final authorization rather than on any interim steps.

The Amendments include a new section 3006(g)[125] which provides that all of the new requirements applicable to the generation, transportation, treatment, storage and disposal of hazardous waste will take effect in authorized states (interim or or final) at the same time as in nonauthorized states. Thus, EPA will retain authority to implement provisions of the Amendments concurrently while the states operate authorized portions of their programs.

The overlap in the authorization process as now created by Congress will have its most profound effect in the permitting of TSD facilities. Permits were previously issued by the state, if it had Phase II or final authorization, or by EPA, if the state was authorized for only Phase I.[126] Under the new Amendments, this procedure is altered. Section 3006(c)(4)[127] provides EPA with the authority to issue permits that incorporate the new statutory requirements. Since certain of the requirements must be incorporated into permits issued after the date of enactment (*e.g.* the minimum technological standards in section 3005) EPA will be forced to excercise this authority, and issue joint permits with the states.

EPA will have several options in its implementation of the permitting requirements. EPA can join a state and issue a single permit signed by both EPA and the state agency, or each agency can issue a separate document which jointly will constitute the permit. Either of these options will require a high degree of coordination between the respective agencies during the call-in process, the

125. Pub. L. No. 98-616, § 228, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3255 (to be codified at 42 U.S.C. § 6926(g)).

126. The Agency divided the authorization process into different phases: states that were able to demonstrate substantial regulatory equivalence to 40 C.F.R. Part 265 were able to obtain Phase I interim authorization, while Phase II required regulations that were substantially equivalent to 40 C.F.R. §§ 264 & 270. Fully equivalent statutory and regulatory authority was the basis for final authorization.

127. Pub. L. No. 98-616, § 227, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3254-55 (to be codified at 42 U.S.C. § 6926(c)(4)).

preparation of Notices of Deficiency ("NODs") and completeness determinations. We can anticipate that the need for increased consultation and coordination will further delay the permit issuance process.

CONCLUSION

Predictably, the RCRA Amendments have raised as many new questions as they have answered. While a large number of gaps in the regulatory framework were filled by Congress, often with an uncharacteristic amount of detail, there remain many areas where difficult interpretations will have to be rendered by EPA and, undoubtedly, by the courts.

The Amendments have, in addition, dramatically increased the scope of federal regulation in the hazardous waste field, with the necessary expansion into such areas as leaking underground storage tanks, the commerce in waste oil, and corrective action requirements for inactive units of active facilities. Thousands of businesses previously unaffected by RCRA will now be subject to its requirements, including the vastly increased number of small quantity waste generators which were exempt under the old law.

Congress and the nation will undoubtedly be observing carefully the impacts of these changes upon the pace and efficiency of regulation. After the original enactment of RCRA in 1976, it took EPA four years to promulgate its initial regulations. This time, in marked contrast, EPA appears to have hit the ground running in its efforts to promptly grapple with some of the more immediate questions raised by the Amendments.

It will be interesting to monitor Congress' response if the Agency is successful in translating the new law into competent and comprehensive action. On the one hand, Congress may congratulate itself upon a job well done, and it may choose to continue its new course of "regulation by statute" when other environmental laws come up for reauthorization in the next few years. On the other hand, an effective job by EPA in implementing these Amendments may reassure Congress of the Agency's ability and willingness to carry out its mandate properly, allowing a return to more traditional statutory draftsmanship.