IN RE WASTE TECHNOLOGIES INDUSTRIES

RCRA Appeal No. 93-11

ORDER DENYING REVIEW

Decided January 23, 1995

Syllabus

The City of Pittsburgh, Pennsylvania, challenges a decision by U.S. EPA Region V modifying the RCRA permit for the Waste Technologies Industries hazardous waste incinerator in East Liverpool, Ohio. The Region's decision resulted in the addition of Von Roll (Ohio), Inc. ("VRO") as an additional permittee authorized to operate the facility. The Region framed its permit action as a decision authorized under EPA regulations governing "Class 1" modifications of RCRA permits, and the Region urges us to uphold the decision on that basis. Pittsburgh, however, submitted comments challenging the Region's characterization of its proposed action as a Class 1 permit modification, and it continues to challenge that characterization in its appeal. Thus, although Pittsburgh's comments included no substantive objection to the addition of VRO as a facility operator, Pittsburgh argued in its comments—and continues to maintain on appeal—that the Region erred by effectuating that change through a Class 1 permit modification procedure.

More particularly, Pittsburgh contends that, because the facility owner allowed VRO to function as an operator before the permit was modified, and did not obtain prior EPA approval to do so, the Region's use of any kind of permit modification procedure to add VRO to the permit was unlawful. Pittsburgh contends that Region V was required, instead, to utilize the procedure of "revocation and reissuance" for purposes of adding VRO to the permit.

Held: The Board has jurisdiction to consider Pittsburgh's appeal despite the absence of any regulatory provision for administrative review of "Class 1" permit modification decisions. Although the appeal is cast in the form of a challenge to a Class 1 permit modification, the substance of Pittsburgh's argument is that the Region erred by refusing to employ revocation and reissuance procedures in the circumstances of this case. The appeal thus challenges the Region's denial of a request for revocation and reissuance of a RCRA permit, and such a denial is appealable to the Environmental Appeals Board pursuant to 40 C.F.R. § 124.5.

On the merits, Pittsburgh's challenge to the Region's permit action is rejected because the challenge is based on an erroneous reading of 40 C.F.R. § 270.40(a), governing RCRA permit "transfers." Pittsburgh reads the regulation to authorize the addition of a new permittee to an existing RCRA permit only by means of (1) a preapproved, permittee-requested modification of the permit, or (2) revocation and reissuance of the permit; in the absence of preapproval, Pittsburgh asserts, revocation and reissuance is the only permissible option. The Board concludes, however, that 40 C.F.R. § 270.40(a) also contemplates a third alternative method of adding a new permittee to an existing RCRA permit: through a non-

preapproved, EPA-initiated permit modification for "cause," as described in 40 C.F.R. § 270.41(b)(2).

The Board recognizes that Region V has not cited section 270.41(b) as authority for its decision. The Board concludes, however, that the Region in fact employed in a slightly, but not materially, abbreviated form the procedures for Agency-initiated RCRA permit modifications when it added VRO to this permit. Of equal importance, Pittsburgh apparently agrees that the Region's action fits comfortably within the procedural framework established in 40 C.F.R. § 270.41(b) for Agency-initiated modifications (insisting, meanwhile, that *no* modification procedure was permissible in the circumstances of this case). Therefore, with Pittsburgh having interposed no substantive objection to the addition of VRO as an operator and no procedural objection alleging noncompliance with 40 C.F.R. § 270.41(b), the Board upholds the Region's action as a permissible exercise of its authority under section 270.41(b). Pittsburgh's contention that the Region was required to utilize revocation and reissuance procedures, instead of modification procedures, is rejected as grounded in an erroneous reading of sections 270.40(a) and 270.41(b).

Finally, the Board rejects Pittsburgh's contention that RCRA § 3005(d) should be read to require permit revocation in every instance of RCRA "noncompliance" by a permittee, thereby nullifying the broad discretion granted to the EPA Administrator in RCRA § 3008 and provided in the Agency's RCRA permitting regulations at 40 C.F.R. part 270.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone, in which Judge Reich joined. Judge McCallum filed a separate opinion concurring in the judgment, post p. 27:

In this appeal, the City of Pittsburgh, Pennsylvania, challenges an August 24, 1993 permit modification decision by U.S. EPA Region V. The Region approved a "Class 1" permit modification naming Von Roll (Ohio), Inc. ("VRO") as an additional permittee authorized to operate the Waste Technologies Industries hazardous waste incinerator in East Liverpool, Ohio, under RCRA Permit No. OHD 980 613 541. Pittsburgh contends that because VRO began to function as an operator of the facility before the permit was modified, the modification is unlawful and the permit must, as a matter of law, be revoked: "[T]he modification," Pittsburgh states, "violates the RCRA requirement that a permit be revoked and reissued for such an after-the-fact [*i.e.*, non-preapproved] transfer." Petition for Review, at 1. We conclude that there is no such RCRA requirement, and we therefore deny Pittsburgh's petition for review.

I. *BACKGROUND*

A.

The permit involved in this appeal became effective in January 1985, for an initial period of ten years. Although the issuance of the

permit was never challenged in court, Pittsburgh and other facility opponents have, in the years following the issuance of the permit, pressed a series of legal challenges seeking to prevent or to halt the facility's operation on a variety of grounds.

Two of those challenges have previously come before the Environmental Appeals Board. *See In re Waste Technologies Industries*, RCRA Appeal Nos. 92-7, 10, 11, 12, 13, 15, and 16 (EAB, July 24, 1992) (permit modification upheld in part and remanded in part); *In re Waste Technologies Industries*, RCRA Appeal Nos. 93-7 & 93-9 (EAB, June 21, 1993) (appeals dismissed for lack of jurisdiction). Two other challenges have been brought in the form of RCRA citizen suits, in two different jurisdictions. *See Palumbo v. Waste Technologies Industries*, 989 F.2d 156 (4th Cir. 1993) (action dismissed for lack of subject matter jurisdiction); *Greenpeace, Inc. v. Waste Technologies Industries*, 9 F.3d 1174 (6th Cir. 1993) (action dismissed for lack of subject matter jurisdiction). Another challenge to the facility's operation—brought by Pittsburgh and several other petitioners and involving, among other issues, this Board's dismissal of RCRA Appeal Nos. 93-7 and 93-9—was recently dismissed by the U.S. Court of Appeals for the District of Columbia Circuit for lack of jurisdiction. *See Greenpeace, Inc. v. EPA*, Nos. 93-1458, 93-1682, and 93-1683 (D.C. Cir. Jan. 13, 1995).[1]

Of immediate relevance to the present proceeding is the following series of events. In September 1990, Waste Technologies Industries ("WTI")—the partnership that owns the East Liverpool incinerator—contractually engaged one of its corporate general partners, VRO, to perform a variety of operational and maintenance activities at the facility. The execution of that contract was neither reported to nor approved by the EPA. After learning of the existence of the contract and examining related documents and information obtained pursuant to his RCRA investigative authority, the Regional Administrator for EPA Region V concluded in September 1992 that the contractual arrangement rendered VRO an additional statutory "operator" of the facility, along with the partnership itself, for purposes of the permit requirement set forth in RCRA section 3005(a), 42 U.S.C. § 6925(a).

RCRA section 3005(a) required EPA to promulgate regulations "requiring each person owning *or operating* [a hazardous waste treatment, storage or disposal] facility * * * to have a permit." In accordance

[1] In addition, Region V has brought to our attention a September 9, 1994 report by the United States General Accounting Office — titled *Hazardous Waste: Issues Pertaining to an Incinerator in East Liverpool, Ohio* — in which EPA's permitting decisions regarding this facility are examined in detail. The GAO report does not, however, constitute part of the administrative record for the permit modification under review, and we therefore place no reliance on its findings.

with that section, EPA's RCRA implementing regulations provide, at 40 C.F.R. § 270.1(c), that "[o]wners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit." Although the issue has never been adjudicated, it is assumed for present purposes that, between September 1990 and August 1993, VRO functioned as an "operator" of a RCRA facility but did not have a RCRA permit.

B.

EPA regulations provide a mechanism for enforcing the RCRA § 3005(a) permit requirement not only against a facility owner or operator who fails to obtain a permit, but also against a RCRA permit holder who allows a non-permitted entity to function as a "new owner or operator" of a RCRA facility without prior EPA approval. The regulations address the latter situation as a permit "transfer," as to which 40 C.F.R. § 270.40(a) provides:

> A permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued (under § 270.40(b) or § 270.41(b)(2)) to identify the new permittee and incorporate such other requirements as may be necessary under the appropriate Act.

Importantly, 40 C.F.R. § 270.30(*l*)(3) requires all RCRA permits to include, among their reporting requirements, a condition that effectively prohibits transfer of the permit without prior approval of the permit-issuing authority:

> The following conditions apply to all RCRA permits, and shall be incorporated * * * either expressly or by reference.
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> * * * * * * *
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> (*l*) *Reporting requirements.* * * * * (3) *Transfers.* This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under RCRA. (See § 270.40)

Although here, too, the issues have never been adjudicated, it is assumed for present purposes that by assigning operational responsibili-

ties to VRO in September 1990, the WTI partnership effected a permit "transfer" without prior EPA approval, in violation of 40 C.F.R. § 270.40(a) and the reporting requirement incorporated into its permit from 40 C.F.R. § 270.30(*l*)(3).

C.

Having reached the conclusions described above regarding the effect of the September 1990 contract between WTI and VRO, Region V responded in two ways. First, the Region commenced an administrative enforcement action seeking a $64,900 civil penalty against the WTI partnership for its unapproved assignment of "substantial independent operational discretion and control to VRO." Response to Petition for Review, Exh. B, at 11.[2] Second, the Region directed WTI to submit a request for a permit modification—which the Regional Administrator characterized as a "Class 1" modification[3]—to add VRO's name to the permit as an additional permittee. Petition for Review, Exh. B, at 1.[4] After issuing public notice of the proposed modification, accepting comments from interested members of the public for a period of thirty days, and preparing a response to those comments, on August 24, 1993, the Region approved a permit modification authorizing VRO to function as an additional permitted "operator" of the facility.

D.

Pittsburgh appeals from the Region's approval of the permit modification proposal, based on comments that Pittsburgh submitted during the public comment period applicable to that proposal.[5] In its

[2] The record before us does not indicate the outcome, if any, of the administrative civil penalty proceedings.

[3] The meaning and significance of the "Class 1" designation are discussed at length later in this opinion.

[4] Strictly speaking, it appears that such a modification was initially requested by WTI in June 1992, shortly after Region V learned of the existence of the WTI-VRO contract and reached its initial, "tentative" conclusion that VRO had been functioning as an operator. The June 1992 modification request document was apparently unsigned, for reasons that are not clear from the record. After further investigation, the Region finalized its determination regarding VRO's status as an operator in September 1992, and directed WTI to submit a signed version of the modification request. It appears that the signed request was then submitted to Region V during November 1992. This particular aspect of the modification chronology has no bearing on the questions before us on appeal; all that matters for purposes of the appeal is that the (1992) modification request post-dates the (1990) WTI-VRO contract.

[5] The City of Pittsburgh actually submitted two sets of comments on the proposed modification: one set dated October 28, 1992 (within the comment period established by Region V), and a second set dated July 7, 1993.

comments, Pittsburgh raised no substantive objection concerning VRO's qualification to hold a RCRA permit. Rather, Pittsburgh objected that, notwithstanding the Region's characterization of the proposed change as a "Class 1" modification, EPA's "Class 1" modification procedures did not, in fact, authorize the addition of VRO as a permitted operator because prior EPA approval for the change had not been obtained. In particular, Pittsburgh stated:

> [T]he change in operator proposed here is not a Class 1 modification, and there is no authority for US EPA to handle the change under the procedures established for such a modification. To the contrary, WTI and Von Roll (Ohio), Inc. have violated the requirements both of 40 CFR 270.40 and 42 USC 6925, such that revocation of the permit and re-application by the current owners and operators is the only legally appropriate scenario for the US EPA to pursue.

Petition for Review, Exh. C, at 2.[6] Pittsburgh repeats that argument in its appeal before the Board, arguing that the Region was legally required, instead of modifying the permit by naming VRO as an additional permitted operator, to revoke the permit and close the facility while WTI and VRO filed a new permit application and proceeded anew through the entire permit issuance process. Pittsburgh's appeal requests, accordingly, that we invalidate the permit modification and order Region V to revoke the entire WTI permit. To properly assess Pittsburgh's argument, it is necessary to examine in some detail the regulatory provisions governing RCRA permit modifications, and those provisions immediately present us with a threshold question concerning our jurisdiction to decide this appeal.

II. *JURISDICTION*

The jurisdictional issue, much like the underlying dispute, arises from the Region's characterization of the challenged permit action as a "Class 1" modification. EPA regulations at 40 C.F.R. §§ 270.41 and 270.42 divide the universe of RCRA permit modifications into two broad categories: (1) permittee-requested modifications, and (2) all

[6] In its second set of comments, dated July 7, 1993, Pittsburgh simply reiterated the same objection: "The changes in ownership and operational control at issue here, however, occurred before any requests were made to approve them. Accordingly, they cannot be processed as Class 1 modifications, and there is no authority for the US EPA to handle the changes under the procedures established for such modifications. The changes can only be processed, as section 270.40(a) indicates, under the procedures for revocation and reissuance under 40 CFR 270.41(b)(2)." Petition for Review, Exh. D, at 2.

other modifications.[7] According to section 270.41, all Agency-initiated modifications are appealable to the Environmental Appeals Board.[8] Under section 270.42, however, permittee-requested modifications are further divided into three separate "classes" according to the substance of the requested change. Modifications classified under section 270.42 as "Class 2" or "Class 3" require prior notice to the public, an opportunity for public comment, and a public meeting, whereas "Class 1" modifications involve less-significant changes and may therefore be implemented without prior public notice. In addition, modifications classified under section 270.42 as "Class 2" or "Class 3" are appealable to the Environmental Appeals Board, but "Class 1" modifications are not. *Compare* 40 C.F.R. § 270.42(f)(2) ("The Director's decision to grant or deny a Class 2 or 3 permit modification request under this section may be appealed under the permit appeal procedures of 40 CFR 124.19.") *with id.* § 270.42(a)(1)(iii) (authorizing the "Director" [*i.e.*, the EPA Regional Administrator] to consider objections to Class 1 modifications, but making no provision for further administrative review).

On its face, Pittsburgh's petition claims to challenge a decision by Region V approving a (non-appealable) "Class 1" permittee-requested modification. We therefore directed Pittsburgh and the Region, in an order dated September 24, 1993, to submit briefs addressing the appealability of the Region's decision and our jurisdiction to consider the appeal. In a subsequent order dated June 10, 1994, we concluded that, because the jurisdictional question appeared substantially inextricable from the merits of the dispute, resolution of the jurisdictional issue would be deferred pending full briefing by the parties of the merits of the appeal. Having examined the relevant regulations and the submissions of the parties addressing both the jurisdictional question and the merits of the underlying dispute, we conclude for the following reasons that the appeal is properly before us.

It is undisputed that EPA's regulations provide for no administrative appeal to challenge the approval of a Class 1 permit modification. Region V, therefore, having characterized its action as a Class 1 modification, argues that we lack jurisdiction to consider this appeal. Pitts-

[7] For lack of a more precise term, in the following discussion we refer to the second of these categories as "Agency-initiated" modifications; by that we mean, however, any modification other than one requested by a permittee pursuant to the procedures described in 40 C.F.R. § 270.42.

[8] Specifically, section 270.41 states that in order for EPA to effectuate a permit modification other than one requested by the permittee, "a draft permit must be prepared and other procedures in part 124 * * * followed." Part 124, in turn, states that a "RCRA * * * final permit decision" is appealable to the Environmental Appeals Board (§ 124.19(a)), and that a "final permit decision" includes a final decision to modify a RCRA permit (§ 124.15(b)).

burgh, on the other hand, asserts that the appeal is properly before us because:

> The issue here is not primarily whether the Region should, based upon the merits of the proposed change, have approved the modification at issue. The issue is whether the action should have been classified as a Class 1 modification.

Petitioner's Brief on the Question of Jurisdiction, at 4.[9]

Pittsburgh's emphasis on the classification issue does not overcome its jurisdictional problem, because classification decisions are no more appealable to the Board than are the merits of Class 1 modification decisions. *See Permit Modifications for Hazardous Waste Management Facilities* (Preamble), 53 Fed. Reg. 37,912, 37,921 (1988) ("For Class 1 modifications, temporary authorizations, *and classification determinations*, the appeal procedures of Part 124 do not apply * * * .") (emphasis added). Thus, if Pittsburgh were merely asserting that the addition of VRO as a permittee should have proceeded through Class 2 or Class 3 modification procedures—with greater opportunity for public participation than the Class 1 procedures ordinarily entail[10]—we would not have jurisdiction to address that contention.

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[9] Pittsburgh also argues that the Region's decision is appealable because the Region pressed WTI to submit its modification request and then employed procedures tantamount to those associated with Agency-initiated permit modifications under 40 C.F.R. § 270.41, which are uniformly appealable to the Board. This argument is discussed in detail *infra*.

[10] We emphasize "ordinarily" because a Regional office can always offer more procedural safeguards than it is legally obligated to provide. Here, for instance, the Region was free to utilize (as it did) procedures more detailed than the typical Class 1 procedures when addressing WTI's modification request, despite the Region's own conclusion that only Class 1 procedures were legally required. There is nothing unusual or noteworthy about providing such extra "process" for a permit modification, as a general matter; the classification of a proposed change under 40 C.F.R. § 270.42 fixes only the minimum procedures that are required for approval or disapproval of the change.

As discussed below, however, we do find it noteworthy that in this case the Region expressly refused to make a determination on the proposed change until *after* receiving and evaluating comments from the public. *See* Petition for Review, Exh. B (September 30, 1992 letter from the Regional Administrator to WTI), at 2 (stating that "[a]fter the close of the public comment period and preparation of a formal Response to Comments, U.S. EPA will make a final determination on the addition of VRO to the permit as an operator"). The central and distinctive feature of the Class 1 process is that any necessary regulatory approval occurs without prior notice to the public. *See* 40 C.F.R. § 270.42(a)(ii) ("For the Class I changes that require prior Director approval, the notification [of persons on the facility mailing list and of appropriate State and local governments] must be made within 90 calendar days after the Director approves the request."). Only after a Class 1 change wins initial regulatory approval (where required) does the public have an opportunity to urge that the change be reviewed and rejected.

Pittsburgh's contention, however, is somewhat different. Despite what its own jurisdictional brief implies, Pittsburgh does not, in fact, offer any argument to the effect that Region V made a prejudicially erroneous choice between alternative "classes" of permit modification procedures. Pittsburgh does not, for example, argue that the Region committed reversible error by providing only thirty days for public comment rather than sixty days (as would be required for a Class 2 or Class 3 modification), or by failing to hold a public meeting. Rather, Pittsburgh's argument, as we understand it, is that: (1) the RCRA regulations generally allow a choice between a "Class 1" permit modification, on the one hand, and a procedure called "revocation and reissuance," on the other, as a means of addressing the proposed addition of a new owner or operator to an existing RCRA permit; but (2) in this case, modification was not a permissible option, because the permittee failed to obtain prior EPA approval for the addition of the new operator; therefore (3) the Region committed reversible error when it employed a modification procedure instead of a revocation and reissuance procedure.

As we read it, therefore, Pittsburgh's appeal does not challenge the merits of the Region's permit modification decision. Nor does it challenge the Region's choice of the Class 1 modification procedure over some other type of modification procedure. Instead, Pittsburgh challenges the Region's decision not to employ the procedure of revocation and reissuance.[11] That challenge is not inconsequential because, according to 40 C.F.R. § 270.41, revocation and reissuance proceedings are considerably broader in scope than modification proceedings:

> When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. (See 40 CFR 124.5(c)(2).)

Section 124.5(c)(2) offers somewhat greater detail:

> In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened

[11] *See* Petition for Review, at 27 (arguing that the Region has "ignored" its authority under 40 C.F.R. § 124.5 to revoke and reissue a permit for cause, either on its own initiative or at the request of any interested person).

> just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

Thus, if the addition of VRO to this permit can be accomplished only through revocation and reissuance, the entire permit—including provisions wholly unrelated to the suitability of VRO as a facility operator—will be reopened and will potentially be subject to a new round of challenges at the administrative level.[12]

The contention that Region V erred by electing not to revoke and reissue this permit is one that we have jurisdiction to review. Although a decision to classify a proposed modification as a Class 1 change is not appealable, and a decision to approve such a modification is not appealable, the denial of a request for revocation and reissuance is, under 40 C.F.R. § 124.5(b), "informally" appealable to this Board.[13] Accordingly, we conclude that we have jurisdiction to consider whether Region V was required to commence proceedings to revoke and reissue this permit, based on the permittee's unapproved transfer of operational responsibilities to a non-permitted affiliate.

II. *THE MERITS*

All of Pittsburgh's arguments on the merits relate to a single procedural claim, namely, that the Region was legally required to utilize revocation and reissuance procedures, instead of modification procedures, to accomplish the addition of VRO to this permit. Importantly, Pittsburgh's comments to the Region identified no substantive objec-

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[12] Use of the revocation and reissuance procedure would not, however, require the permitted facility to shut down as Pittsburgh appears to assume. As the quoted portion of section 124.5 makes clear, during revocation and reissuance proceedings the conditions of the existing permit continue in effect.

[13] Section 124.5 provides that the denial of a request for revocation and reissuance "may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts."

> The appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it. This informal appeal is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of EPA action in denying a request for * * * revocation and reissuance * * * .

The Board has never had occasion to consider what type of "action" on such an appeal is needed to keep the appeal alive beyond the sixtieth day. We have no difficulty concluding, however, that our September 24, 1993 order for supplemental briefing on the question of our jurisdiction was sufficient for that purpose in the circumstances of this case.

tion to the addition of VRO; they focused, instead, solely upon Pittsburgh's claimed procedural right, under the RCRA permitting scheme, to demand the institution of permit revocation and reissuance proceedings. That right, according to Pittsburgh, emanates both from the RCRA regulations and from the statute itself. Pittsburgh's arguments touch on a number of interrelated regulatory and statutory provisions that the Board feels compelled, in the interest of clarity, to address at some length. We embark first on an examination of Pittsburgh's arguments concerning the RCRA regulations, and then conclude by analyzing Pittsburgh's argument based on the statutory text.

A. *The Regulations*

In support of its contention that revocation and reissuance is legally required, Pittsburgh offers two arguments based on the text of the RCRA implementing regulations. The first, essentially, is that WTI's modification request was submitted too late, *i.e.*, after VRO had already assumed operational responsibilities under the September 1990 contract. The second is that, even if the lateness of the modification request were excusable, the request itself was a nullity because the party making the request is not the party to whom this permit was originally issued. The latter argument relies on an underlying contention by Pittsburgh that, as a matter of Ohio partnership law, the WTI partnership as presently constituted is a different legal entity than the WTI partnership originally named on the RCRA permit; if so, Pittsburgh reasons, then the original permittee no longer exists and there is no one who is eligible to request a modification of the permit.[14] Both of Pittsburgh's arguments assume that (1) an existing RCRA permit cannot be modified to add the name of a new operator in the absence of a prior modification request by the permittee, because (2) EPA itself

[14] In its argument based on Ohio partnership law, Pittsburgh alleges that three of the four original WTI partners have been replaced by other corporate entities and that the original partnership has consequently dissolved by operation of law. According to the record before us, these allegations have been closely examined by Region V and by EPA's Office of General Counsel, who have concluded that the allegations implicate only "technical issues of state business association law"; that the identity of the permittee for RCRA purposes (*i.e.*, the "person owning" the facility under RCRA § 3005) has not changed; and that the requirements of the permit are fully enforceable against all current owners and operators of the facility. Response to Petition for Review, Exh. B, at 10. Moreover, in order to eliminate any public concern over issues of enforceability, the Region is currently processing a separate permit modification that would add a company called Von Roll America, Inc. — the ultimate parent of each of the WTI partners — to the permit as an additional permittee. According to that modification proposal, WTI has indicated that it will transfer exclusive ownership and operational control of the facility to Von Roll America, Inc. once that company has been named as a permittee; when that transfer occurs, WTI and VRO are expected to be deleted from the permit entirely. *See* Response to Petition for Review, Exh. D, at 1.

is powerless to implement such a modification on its own initiative. We conclude that those two premises are erroneous, and we therefore reject both of Pittsburgh's arguments based on the text of the RCRA regulations.

Pittsburgh's argument for revocation and reissuance based on the alleged untimeliness of WTI's modification request is succinctly set forth in Pittsburgh's comments to Region V. We repeat the argument here in full, quoting Pittsburgh's October 28, 1992 comment letter to the Region's Waste Management Division:

> Your October 1, 1992 notice indicates that the addition of Von Roll (Ohio), Inc. to the RCRA permit as an operator will be accomplished as a Class 1 modification. Appendix I to section 270.42 of the RCRA regulations (40 CFR 270.42, Appendix I) lists "changes in ownership or operation[al] control of a facility" as a Class I modification "provided the procedures of section 270.40(b) are followed." The procedures in section 270.40(b) require the submission of a revised permit application "no later than 90 days prior to the scheduled change" and the written approval of the Director before the change takes place. It also requires the submission of a written agreement containing a specific date for transfer of permit responsibility.
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> The permit change proposed here, however, is being processed after the fact. The September 21, 1990 agreement between Von Roll (Ohio), Inc. and WTI indicates that the change in operators occurred at that time. Accordingly, the change in operator proposed here is not a Class 1 modification, and there is no authority for US EPA to handle the change under the procedures established for such a modification. To the contrary, WTI and Von Roll (Ohio), Inc. have violated the requirements both of 40 CFR 270.40 and 42 USC 6925, such that revocation of the permit and re-application by the current owners and operators is the only legally appropriate scenario for the US EPA to pursue.

Petition for Review, Exh. C, at 2.

Although Region V agrees that prior EPA approval for the addition of a new operator is ordinarily required under Class 1 procedures, the Region insists that the prior approval requirement can be waived. In

particular, Region V asserts that prior approval is essentially a procedural device to facilitate the orderly administration of the RCRA permit program, that it can be granted by EPA without notice to the public, and that it can therefore be waived by the Agency in appropriate circumstances. Region V further argues that this case presented a compelling occasion for waiver of the prior approval requirement because, after comment was invited from the public, commenters raised no substantive objections concerning VRO's qualification to act as a RCRA facility "operator"[15]; the overriding environmental policy goal was, therefore, to add VRO to the existing permit so as to maximize VRO's accountability for compliance with all applicable laws, regulations and permit conditions.[16] In substance, the Region contends that it is not sensible to reject a late modification request out of hand in the absence of any substantive objection to the merits of the requested modification, at least where consideration of the late request is consistent with the objectives of the RCRA permit program.

We find it unnecessary to address the Region's claim of discretion to accept a late or otherwise defective permit modification request. Although the parties hotly dispute the Region's claimed authority to "waive" prior approval for a Class 1 permit modification that would ordinarily require such approval, we find that dispute to be largely beside the point. We do not find it necessary to consider whether the Region *could have* utilized Class 1 modification procedures despite WTI's failure to obtain prior Regional approval, because we conclude (for reasons detailed below) that the Region did not, in fact, utilize Class 1 modification procedures after it decided that VRO was functioning as an "operator" of the WTI facility. What we must consider, therefore, is whether the RCRA regulations authorized Region V to add VRO to this permit through the kind of modification procedures that

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[15] In its petition for review, Pittsburgh belatedly asserts that Region V does not have adequate information with which to assess the resources, liabilities, expertise, or "responsibility" of VRO. Petition for Review, at 12. Pittsburgh did not, however, raise any such objection in its comments on this modification proposal, and it has therefore waived the objection. It is well settled that where, as here, a proposed permit decision is issued in draft form with an opportunity for public comment, any objection that is not timely brought to the Region's attention during the comment period is waived, and will not thereafter be considered on appeal. *See* 40 C.F.R. § 124.13 (commenters are obligated to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period"); *id.* § 124.19(a) (requiring, on appeal of a Regional permit decision to this Board, "a demonstration than any issues being raised were raised during the public comment period").

[16] *See* Response to Petition for Review, at 16 (although "*de facto*" owners and operators who have not obtained permits are fully liable for any RCRA noncompliance, "EPA requires all owners and operators to be identified on permits to ensure maximum enforceability and to ensure that all owners and operators are familiar with the nature and scope of operations at the facility").

the Region actually followed.[17] The regulations, we conclude, unmistakably provide an affirmative answer.

In brief, we find that Pittsburgh's entire argument in opposition to the modification procedures utilized by Region V is based on an erroneous reading of 40 C.F.R. § 270.40(a). The regulation states:

> A permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued (under § 270.40(b) or § 270.41(b)(2)) to identify the new permittee and incorporate such other requirements as may be necessary under the appropriate Act.

Pittsburgh reads this regulation as establishing two, and only two, permissible methods of adding a new permittee to an existing RCRA permit: through a "Class 1" permittee-requested modification of the kind described in section 270.40(b), or through revocation and reissuance proceedings of the kind referred to in section 270.41(b)(2). In other words, Pittsburgh reads the regulation as if it stated that a new permittee may be added "only if the permit has been modified (under § 270.40(b)) or revoked and reissued (under § 270.41(b)(2))."[18]

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[17] We do not lightly set aside, or look beyond, the Region's characterization of this modification as a Class 1 modification, but several considerations have persuaded us to do so in this instance. Most obviously, as explained in the text that follows, the procedures actually employed by Region V simply do not match the Class 1 process described in section 270.42 of the regulations. In such circumstances, we think it prudent to provide (much as the Region itself appears to have done by augmenting the usual Class 1 process in significant respects) the same type of review that would have applied if the Region had labeled its action as a section 270.41(b)(2) modification. Moreover, while we do not necessarily disagree with the substance of our colleague's separate opinion on the "waiver" issue, we cannot agree that that issue is, in fact, squarely raised by this appeal: Here Region V did not simply "waive" prior approval of a change in operational control. This case might well be different if the Region, upon learning of the change in operational control, "waived" the prior violation, approved the change prospectively, and instituted the Class 1 procedures. But that is not what occurred here. Rather, the Region withheld its approval of the change pending completion of a formal notice-and-comment procedure, and its action in so doing is simply not recognizable as part of a Class 1 modification process. Finally, from a practical standpoint, we believe that by addressing Pittsburgh's appeal on the merits despite any lingering jurisdictional ambiguity, we can provide Pittsburgh with the full measure of administrative process to which it could conceivably be entitled. Doing so prejudices neither the Region (since we find no fault with its actions) nor Pittsburgh (since it is free to pursue the same judicial remedies available had we denied review for lack of jurisdiction).

[18] In its petition for review, Pittsburgh cites section 270.40(a) for the following proposition: "The RCRA regulations provide for the entry of new owners and operators in two ways — (i) by modification pursuant to 40 CFR 270.40(b) or (ii) by revocation and re-issuance pursuant to 40 CFR 270.41(b)(2)." Petition for Review, at 2. According to Pittsburgh, "[s]ection 270.40(a) of the RCRA regulations states that transfers of permits are allowed only by modification under the prior approval procedures established in 40 CFR 270.40(b) or by revocation and reissuance under the procedures of 40 CFR 270.41(b)(2)." *Id.* at 24.

Section 270.40(a) does not say what Pittsburgh claims that it says, however. Although section 270.40(a) mentions only two generic procedures (modification or revocation and reissuance) for adding a new permittee, it does not say that revocation and reissuance is the only alternative to a "Class 1" permittee-requested modification of the kind referred to in section 270.40(b). To the contrary, section 270.40(a) expressly allows the addition of a new permittee through the procedures described in section 270.41(b)(2), and the latter provision addresses not only permit revocation and reissuance but also Agency-initiated permit modifications for "cause."[19]

In particular, section 270.41(b)(2) makes clear that when EPA discovers the addition of a new owner or operator at a RCRA facility, EPA may respond to the "transfer" on its own initiative in either of two ways: by commencing an Agency-initiated permit modification, or by commencing revocation and reissuance proceedings. Specifically, section 270.41 states:

> When the Director receives any information * * * , he or she may determine whether one or more of the causes listed in paragraphs (a) and (b) of this section for modification, or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit accordingly * * * .
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> * * * * * * *
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> (b) *Causes for modification or revocation and reissuance.* The following are causes to modify, or, al-

[19] The regulation was even more explicit in this regard before it was amended, in October 1988, to conform to other regulatory changes whereby permittee-requested modifications were to be classified into three separate categories (Class 1, 2, and 3) instead of two ("major" and "minor" modifications). Before the new terminology for permittee-requested changes was introduced, section 270.40 — then titled "Transfers by Modification" — stated:

> A permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued (under § 270.41(b)(2)), or a minor modification made (under § 270.42(d)), to identify the new permittee and incorporate such other requirements as may be necessary under the appropriate Act.

What was then section 270.42(d), authorizing a "minor" permittee-requested modification to add a new operator to an existing permit, is now section 270.40(b), which authorizes a "Class 1" permittee-requested modification — essentially the same procedure — for that purpose. Then, as now, the availability of the permittee-requested modification procedure presupposed that EPA had approved the change in advance. But then, as now, the permittee-requested modification procedure was not the only available alternative to the cumbersome "revocation and reissuance" procedure. A third alternative, namely an Agency-initiated permit modification, was and remains entirely proper.

> ternatively, revoke and reissue a permit: * * * * (2) The Director has received notification (as required in the permit, see § 270.30(*l*)(3)) of a proposed transfer of the permit.

We think section 270.41(b)(2) aptly describes what transpired in this case.[20] The Regional Administrator received "information" of the kind described in the regulation when he learned of the existence of the WTI-VRO contract and conducted an investigation of the surrounding circumstances. Having concluded that "cause" existed for modification or revocation and reissuance of the permit, the Regional Administrator was thereupon authorized by the regulation to "modify or revoke and reissue the permit accordingly."[21]

It does not, therefore, suffice for Pittsburgh to argue that this permit should be revoked because the RCRA regulations say that it must. The RCRA regulations say no such thing. The regulations allow the Regional Administrator either to modify the permit to reflect the addition of a new operator, or to revoke and reissue the permit for that purpose. We conclude that the Regional Administrator's modification of this permit was validly accomplished pursuant to the permit modification provisions of 40 C.F.R. § 270.41(b)(2). Region V has not characterized its decision as a modification undertaken pursuant to section 270.41(b)(2), but no other characterization accurately reflects the degree to which key elements of the process were in fact orchestrated and controlled by the Region. In sharp contrast to the usual Class 1 modification procedures, here it was the Region, not the permittee, that provided public notice of the proposed change, and it was the Region, not the permittee, that solicited comments on the proposed change. Most importantly, in a major departure from the usual Class 1 procedures, the Region also made clear that it would not in any way lend its approval to the proposed change until after considering comments submitted by the public. Those actions, while strikingly at vari-

[20] To be distinguished is a situation such as that in *In re Waste Technologies Industries*, RCRA Appeal No. 92-7 (EAB, July 24, 1992), where the EPA Regional office's attempt to modify a RCRA permit on its own initiative could not be sustained because, as the Region itself acknowledged, there did not exist any of the "causes" for an Agency-initiated modification that are enumerated in section 270.41.

[21] Although section 270.41(b)(2) refers to notification of a "proposed transfer," Pittsburgh itself acknowledges — and we agree — that the "transfer" mentioned in the regulation is most plausibly understood to refer to the transfer of the *permit*, through substitution or addition of a new permittee, not the underlying transfer of *ownership or operational control*. *See* Pittsburgh's Reply Brief, at 7-8 (July 20, 1994); Pittsburgh's Response to Notice of GAO Determination, at 5 (Nov. 16, 1994). Thus, we find nothing in the language of section 270.41(b)(2) that would bar the Region's initiation of permit modification proceedings (or revocation and reissuance proceedings) for "cause" when the Region learns that a change in ownership or operational control has already been completed.

ance with the typical Class 1 procedures, are wholly consistent with an Agency-initiated modification for cause under section 270.41(b)(2). *See* 40 C.F.R. §§ 124.10 *et seq.*[22] Indeed, Pittsburgh itself recognizes that "[a]lthough the Region has characterized the change at issue here as a Class 1 modification made at the request of the permittee, the action could as easily be characterized as a permit modification made at the direction of the Agency pursuant to 40 C.F.R. 270.41. * * * * [T]he procedures used by the Region to process the request were essentially those that would be used for an agency-directed modification. * * * * A Fact Sheet was prepared, and a thirty-day public comment period was established. A final decision was issued on August 24, 1993, and a formal Response to Comments document was prepared." Petitioner's Brief on the Question of Jurisdiction, at 11, 14-15.[23]

Moreover, we find that the Regional Administrator adequately justified his decision to utilize the modification procedure instead of the revocation and reissuance procedure in his response to Pittsburgh's comments on the modification proposal, stating quite simply that "[t]he technical change in operational control that occurred here does not warrant reopening the entire WTI permit and processing an entirely new permit application, as would be the case in a revocation and reissuance proceeding. Nothing in U.S. EPA's regulations requires the Agency to initiate time- and resource-intensive procedures that are unnecessary given the narrow scope of issues raised by the change in

[22] We do not suggest, however, that whenever an EPA Regional office recommends the submission of a permit modification request (or exceeds the minimal procedural requirements prescribed by regulation for processing the request), the Board will treat the resulting modification as if it were an Agency-initiated modification. Our decision to treat the modification at issue here as an Agency-initiated modification under section 270.41(b)(2) results from the unique facts of this case, and today's opinion should not be construed as announcing a generally applicable rule. Indeed, a Regional office recommendation to a permittee to submit a permit modification request would never, by itself, suffice to transform the permittee-requested modification into an Agency-initiated modification reviewable by this Board.

[23] In this connection we note that, in one of its own briefs on appeal, Region V discusses the ways in which it departed from the usual procedures for an Agency-initiated modification: most significantly, by accepting comments for 30 days rather than 45 days (*see* 40 C.F.R. § 124.10(b)). Region V Brief in Response to Jurisdictional Question, at 13 (Oct. 27, 1993). The fifteen-day discrepancy is of no consequence. As the Region correctly points out, Pittsburgh "has had a full opportunity to comment on all issues and facts relevant to the change in operational control in this instance." Response to Petition for Review, at 18. Indeed, the record indicates that Pittsburgh submitted two sets of comments on this modification proposal, and that the second set, which was prepared approximately nine months after the Region's notice requesting comments on the proposal, was in any event considered. *See id.* Exh. C, at 3 n.2.

question." Petition for Review, Exh. E, at 2.[24] Pittsburgh has never articulated any substantive basis for concluding that the Regional Administrator should have exercised his discretion to reopen this entire permit instead of employing a modification procedure that the regulations expressly allow.[25] We conclude, therefore, that the Region committed no error by deciding not to employ revocation and reissuance.

We further conclude that Pittsburgh's alternative argument, to the effect that revocation and reissuance was the Region's only option because the WTI partnership named on the permit no longer exists, is completely irrelevant to the issue before us. The status of the WTI partnership could conceivably have some relevance if a request by an existing "permittee" were actually a prerequisite for the kind of permit action undertaken here. But because the permit action before us is properly regarded as an Agency-initiated modification, no request from any source was needed. Region V was fully authorized to add VRO to this permit by modification on its own initiative, and the alleged changes in the structure of the WTI partnership do not in any way limit the Region's authority.[26] Pittsburgh's objection to the addition of VRO to

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[24] In addition, as the Region points out in its briefs on appeal, the entire WTI permit will in any event be reopened shortly at the State level. Since this permit was originally issued, the State of Ohio has become authorized, pursuant to RCRA § 3006(b), to administer the RCRA Subtitle C program in lieu of EPA. When the permit expires in January 1995, proceedings for reissuance of the permit will be conducted at the State level. As the Region explains:

> [T]he WTI permit expires in January 1995 * * * and WTI is scheduled to submit its permit renewal application before the end of [July 1994]. Accordingly, the process that would be set in motion by a revocation and reissuance proceeding is already, in effect, underway. The only consequence of following the revocation and reissuance procedure * * * would be that the WTI facility would continue to operate without VRO on the permit, rather than with VRO, while the facility's permit application is processed.

Response to Petition for Review, at 18-19.

[25] As discussed above, Pittsburgh's comments to the Region raised a purely legal argument, based on 40 C.F.R. § 270.40(a), concerning the alleged necessity to employ revocation and reissuance procedures instead of modification procedures to address the non-preapproved addition of a new facility operator. Our careful review of the record shows that Pittsburgh raised no substantive objection whatsoever concerning VRO's qualifications to serve as a RCRA facility operator. Pittsburgh's petition for review belatedly suggests that there may be permit enforceability problems due to VRO's financial and technical capabilities, Petition for Review, at 12, but Pittsburgh even now alleges no facts in support of that untimely suggestion.

[26] As we have previously observed, *see supra* note 14, separate permit modification proceedings are currently pending before Region V involving the proposed addition of Von Roll America, Inc. (the ultimate parent of each of the WTI partners) to this permit as a facility owner and operator.

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this permit, based on alleged changes in facility ownership that are unrelated to the addition of VRO, must therefore be rejected.

B. *The Statute*

Pittsburgh also cites the text of RCRA itself for the view that permit revocation is a mandatory response to any violation of a RCRA permit, leaving no room whatsoever for Agency discretion. As authority for that contention, Pittsburgh points to RCRA section 3005(d), 42 U.S.C. § 6925(d), which states in relevant part:

> Upon a determination by the Administrator * * * of noncompliance by a facility having a permit under this title with the requirements of this section or section 3004 [42 U.S.C. § 6924], the Administrator * * * shall revoke such permit.

Pittsburgh contends that by its unapproved transfer of operational responsibility to VRO, the WTI partnership committed an act of "noncompliance" with RCRA such that, in response, the statute mandates that "the Administrator * * * shall revoke" WTI's permit.

Pittsburgh's reading of section 3005(d) must be rejected. As a preliminary matter, EPA itself has never adopted such an extreme interpretation of RCRA. The Agency's RCRA regulations have always made clear that permit termination, revocation and reissuance, and modification procedures need not be employed indiscriminately whenever there is legally adequate cause to employ those procedures. Since its promulgation, 40 C.F.R. § 270.41 (originally promulgated as 40 C.F.R. §

Region V has indicated that it will review various issues relating to facility ownership in the context of those separate proceedings. Specifically, the Region explains:

> The Ohio EPA has requested that WTI modify its permit to add Von Roll America, Inc. as an additional owner and operator of the WTI facility. WTI has complied with the request * * *. Therefore, since WTI is requesting that [Von Roll America] be listed as owner and operator of the Facility, * * * the U.S. EPA will not be responding to comments related to the ownership of the WTI facility at this time. * * * * [T]he U.S. EPA will respond to all comments relating to the ownership issue after it has had the opportunity to complete its review of all the comments on the proposed [Von Roll America] transfer.

Response to Petition for Review, Exh. C, at 1. The proposed addition of Von Roll America appears to represent, at least in part, a response to alleged changes in the organization of the WTI partnership such as those of which Pittsburgh complains. Because that proposal is not before us, we express no view concerning the sufficiency of the proposed modification as a response to Pittsburgh's concerns, and we express no view as to whether any response to those concerns is necessary.

122.16) has provided that when adequate cause is determined to exist EPA *may*, but need not, commence proceedings to modify or revoke and reissue a RCRA permit; and, likewise, that when sufficient cause exists to terminate a RCRA permit, it is within EPA's discretion to conclude that a less drastic permit action would be more "appropriate." *See* 40 C.F.R. § 270.41(b)(1).

According to the published regulatory history, no argument was ever made to the Agency, in a rulemaking context, to the effect that section 270.41 improperly treats violators more leniently than the RCRA statute itself requires. To the contrary, the concern expressed by commenters was that EPA might be tempted, notwithstanding section 270.41, to terminate RCRA permits without regard to the circumstances surrounding a violation. EPA addressed those concerns by explaining that as a practical matter other, less resource-intensive enforcement mechanisms would often make more sense than a full-scale effort to close down a permitted facility in response to any given instance of RCRA noncompliance:

> The Director of a permit program must carefully exercise discretion in allocating scarce "enforcement" resources. Because of these limitations on resources, it makes no sense to enforce against trivial infractions when unremedied substantial infractions exist. This alone in most cases should prevent the Director from reading the termination causes too broadly. It should also be clear that in most cases less drastic actions, such as permit modifications, are available. * * * * This does not mean, however, that if termination is not chosen, modification is mandatory. In some cases neither termination nor modification may be appropriate.

Consolidated Permit Regulations (Preamble), 45 Fed. Reg. 33,289, 33,316 (1980). To the extent that Pittsburgh disagreed with that interpretation of RCRA section 3005(d), the proper time to have challenged the interpretation was during the ninety-day period immediately after section 270.41 was promulgated. *See* RCRA § 7006(a), 42 U.S.C. § 6976(a). This Board has no authority, in the context of a RCRA permit appeal, to entertain collateral challenges to the validity of regulations that expressly give the Administrator authority *not* to revoke a RCRA permit despite evidence of "noncompliance." *See In re Suckla Farms, Inc.*, UIC Appeal No. 92-7, at 15 (EAB, June 7, 1993); *In re Ford Motor Co.*, RCRA Appeal No. 90-9, at 8 n.2 (Adm'r, Oct. 2, 1991).

In this regard, we note that the Agency's interpretation is fully consistent with the contemporaneously enacted "Federal Enforcement" provisions of RCRA section 3008. In particular, section 3008 authorizes—but quite explicitly does *not* require—the Administrator to suspend or revoke a RCRA permit in response to a RCRA violation, or to commence any of several other types of (administrative or judicial) enforcement proceedings. All of the enforcement options in section 3008 are phrased in permissive language, and the entire statutory enforcement scheme commits the decision whether to commence an enforcement action (and, if so, in what form) to the Administrator's sound discretion:

> Except [in a RCRA-authorized State], whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, *the Administrator may issue an order* assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, *or the Administrator may commence a civil action* in the United States district court * * * for appropriate relief, including a temporary or permanent injunction.
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> * * * * * * *
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> Any order issued pursuant to this subsection *may include a suspension or revocation of any permit* issued by the Administrator or a State under this subtitle * * * .

RCRA § 3008(a), 42 U.S.C. § 6928(a) (emphasis added). *See also id.* § 3008(c) ("the Administrator *may* suspend or revoke any permit" in response to the permittee's violation of a compliance order issued under subsection (a)) (emphasis added).

We can think of no reason—particularly given the existence of a citizen-suit mechanism allowing private persons to bring an action directly against a RCRA permit violator—for reading the statute in a manner that would nullify the Administrator's discretion under § 3005 as well as § 3008 by demanding that the Administrator institute permit revocation proceedings in response to any permit violation, no matter how trivial. The courts, moreover, have consistently held, under analogous provisions of the other federal environmental statutes, that the decision whether and how to respond to permit violations lies within the sound discretion of the permit-issuing authority—even where the statutory enforcement scheme

is phrased in apparently mandatory language. *See Sierra Club v. Train*, 557 F.2d 485, 491 (5th Cir. 1977) (despite apparently mandatory language, enforcement under Clean Water Act § 309 is discretionary and cannot be compelled through a citizen suit against the Administrator); *Dubois v. Thomas*, 820 F.2d 943, 950-51 (8th Cir. 1987) (same); *City of Seabrook v. Costle*, 659 F.2d 1371, 1374-75 & n.3 (5th Cir. 1981) (same, under Clean Air Act § 113); *Missouri Coalition for the Environment v. Corps of Engineers*, 866 F.2d 1025, 1032 n.10 (8th Cir.) ("a decision not to modify, suspend or revoke a [Clean Water Act] Section 404 permit is one committed to the Corps' absolute discretion"), *cert. denied*, 493 U.S. 820 (1989); *see also Harmon Cove Condominium Ass'n v. Marsh*, 815 F.2d 949, 953 (3d Cir. 1987) (Army Secretary's enforcement of compliance with a section 404 permit "is committed exclusively to his discretion," and cannot be compelled by mandamus). For all of these reasons, we reject Pittsburgh's statutory argument. We decline to interpret RCRA § 3005(d) in a manner that would eliminate the broad discretion conferred upon the Administrator to respond to permit violations under the statute.

IV. *CONCLUSION*

For the reasons discussed herein, we conclude that we have jurisdiction to decide whether the Regional Administrator was required, by the RCRA statute or the Agency's implementing regulations, to revoke the WTI permit at Pittsburgh's request upon concluding that a transfer of operational responsibilities to a non-permitted entity had occurred without prior Agency approval. We further conclude, on the merits, that neither the statute nor the regulations required the Regional Administrator to take such action. Accordingly, the petition for review submitted by the City of Pittsburgh is hereby denied.

So ordered.

Opinion of Judge McCallum, concurring in the judgment:

In my view, the Board's opinion unnecessarily reaches out to address issues that are not properly before us, while unfortunately declining to address the principal issue that is legitimately presented in this case.[27] Specifically, I believe our analysis of the merits of

[27] The Board also reaches out unnecessarily to assume jurisdiction over this case. During the course of the comment period on the Class 1 modification proposal, Pittsburgh objected to the modification on the grounds that lack of prior notification prevents the permittee and the Region from utilizing the Class 1 modification procedures to effect the modification. Pittsburgh also asserted that the correct procedure for the Region to follow under the circumstances is to revoke and reissue the permit under 40 C.F.R. § 270.41. The majority regards the latter assertion as the functional

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Pittsburgh's appeal should begin and end with the question whether the prior Regional approval requirement that attaches to certain Class 1 RCRA permit modifications—including, pursuant to 40 C.F.R. § 270.42 Appendix I, the addition of a new operator to an existing RCRA permit—is one that the Regional Administrator may waive in appropriate circumstances. If the Region's prior approval is waivable, then the Region's decision in this case should simply be upheld as a Class 1 modification. Only if the Region's prior approval is not waivable does there arise any need to examine the propriety of the Region's action in this case as an Agency-initiated modification.

I conclude that waiver of prior approval for this Class 1 modification was indeed permissible as an exercise of the Regional Administrator's discretion, for precisely the reasons cited by the Region in its response to Pittsburgh's comments. The Region undertook a fact-specific analysis of the circumstances surrounding WTI's untimely submission of its modification request, and concluded, for reasons carefully explained by the Region and never seriously disputed by Pittsburgh, that the late-filed request should be accepted for consideration. In the crucial portion of its analysis, the Region explained:

> The 90-day prior notification and other requirements of 40 CFR § 270.40(b) are primarily procedural requirements designed to ensure sufficient time for the U.S. EPA to evaluate proposed changes in ownership or operational control prior to their occurrence. These requirements do not confer procedural benefits on individuals, since the regulations do not provide for notice or comment during the 90-day period; rather, they provide for notice of the change 90 days following its approval, with an opportunity to request that the U.S. EPA

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equivalent of a request under 40 C.F.R. § 124.5(a) to revoke and reissue the permit, even though Pittsburgh never styled its comments in this manner or otherwise specifically relied on § 124.5. The majority also regards the Region's decision to implement the Class 1 modification as the Region's denial of Pittsburgh's request, rather than a straightforward rejection of a commenter's remarks on the Class 1 modification proposal. Based on these attenuated recharacterizations of the facts, the Board then asserts that it has jurisdiction under § 124.5(b) to review Pittsburgh's "informal appeal" of the Region's denial of Pittsburgh's request to revoke and reissue the permit. Were it not for this recharacterization of the facts, the Board would not have jurisdiction to review Pittsburgh's appeal, for appeals to the Board from Class 1 modification decisions are clearly disallowed. *See ante*, at 8. Such reaching out to find a jurisdictional basis to address the merits of Pittsburgh's appeal is not necessary in any strict jurisprudential sense. Nevertheless, I do not oppose this assumption of jurisdiction under 40 C.F.R. § 124.5(b), provided it is understood that the Board is not also assuming jurisdiction under 40 C.F.R. § 124.19(a). To the extent that footnote 17 of the Board's opinion can be construed to suggest reliance on section 124.19 as an alternative source of our jurisdiction over this appeal, I specifically disagree with any such suggestion.

> review and reject the change. 40 CFR § 270.42(a)(1). In addition, the commenters were not prejudiced by WTI's failure to submit a timely permit modification request. The U.S. EPA provided notice of its analysis of the operational control change and a formal opportunity to comment prior to approving the change, which is more opportunity for public participation than would have been afforded under the standard Class 1 permit modification procedures. Moreover, VRO is functioning as an *additional* operator rather than as a substitute operator, and VRO had authority to participate in decision-making with respect to the incinerator as a member of WTI regardless of its status as an independent operator. Under these circumstances, it is appropriate and permissible for the U.S. EPA to process WTI's modification request.

Region V Response to Comments (Petition for Review, Exhibit E), at 3 (emphasis in original; footnote omitted).

Like the Region, I think it clear that consideration of WTI's untimely modification request could not and did not prejudice Pittsburgh or any other interested party. The regulations entitle no one, other than the Region itself, to prior notice of the addition of a new RCRA facility operator. It is frankly nonsensical to argue that a failure of timely notice to the Region should turn the entire decisionmaking sequence on its head, by allowing parties such as Pittsburgh—otherwise entitled to submit comments only after the permit has been changed—to wrest control over the modification process and to veto a Class 1 change, despite the Region's own considered judgment that an immediate change would enhance its ability to ensure compliance with the permit.

In its only argument against the waivability of prior Regional approval for the addition of a new RCRA facility operator, Pittsburgh attempts to equate a waiver of prior Regional approval with a waiver of the statutory permit requirement. The facts of this case demonstrate the fallacy of such reasoning. Here the Region, far from "waiving" the RCRA permit requirement found to have been violated by these permittees, acted vigorously to enforce that very requirement through administrative civil penalty proceedings that, as the Board's opinion demonstrates, the Region was under no statutory obligation to prosecute. No substantive obligations imposed by statute or regulation need be considered "waived" in order to sustain the Region's permit action, in its entirety, as a Class 1 permittee-requested modification.

Because I would uphold the Region's action as a valid Class 1 modification, I do not join that portion of the majority opinion addressing the merits of Pittsburgh's appeal. Although I agree with the Board that Pittsburgh's appeal should be denied, I arrive at this result for entirely different reasons.