

US EPA ARCHIVE DOCUMENT



Introduction to RCRA State Authorization

February 4, 2016

Purpose of Training

- Authorization Overview
- Statutory and Regulatory Overview
- Authorization Process
- Rule Checklists
- Program Description
- Memorandum of Agreement
- Attorney General's Statement
- Express Authorization
- State Authorization Withdrawal and Codification

Authorization Overview

- RCRA was designed by Congress to be administered by States “in lieu of” EPA. See RCRA §3006 and 40 CFR part 271.
- RCRA provides for federal oversight and enforcement of authorized state regulations.
- The EPA Region approves a State’s program with a Federal Register Notice (FRN).
- The RCRA hazardous waste program is administered by EPA in unauthorized states and territories – Alaska, Iowa, Puerto Rico, etc.

Basic State Authorization Requirements

- Authorized state programs/regulations must:
 - Be “equivalent to” and “no less stringent than” the federal program/regulations. 3006(b) and 3009.
 - Have adequate enforcement authority (3006(b)).
 - Provide for public participation (7004(b)) and the availability of information (3006(f)).
 - Be consistent with the federal program and programs in other states (3006(b), 40 CFR 271.4).

More Stringent and Broader in Scope Regulations

- RCRA §3009 bars states from having less stringent regulations, and allows states to be more stringent.
- State regulations which are broader in scope are not part of a state's authorized program, and thus, EPA cannot enforce them. However, states can enforce such regulations.
- On December 23, 2014, EPA issued a guidance memo to the regions regarding how to determine whether a state regulation was either more stringent or broader in scope than the federal regulations. The memo supersedes a previous policy dated May 21, 1984.
- The memo retains the existing two part test from 1984, but modifies the language. The state provision must meet both parts of the test to be considered more stringent.

Examples of More Stringent and Broader in Scope Provisions

- More stringent provisions:
 - Additional requirements regarding SQGs and CESQGs.
 - Permit term shorter than 10 years.
 - Fewer financial assurance options for closure.
- Broader in scope provisions:
 - State fee requirements.
 - Licensing of transporters.
 - Regulation of household hazardous waste.

HSWA's Effect on State Authorization

- Prior to the Hazardous and Solid Waste Amendments (HSWA) of 1984, new RCRA regulations took effect only in states that were not authorized for the base program and only came into effect in authorized states once the state was authorized (see §3006(g)).
- EPA implements HSWA requirements until the states are authorized.
- The preamble to each federal rule indicates whether it is promulgated pursuant to HSWA or pre-HSWA authority. Some rules are promulgated under both authorities.
- See Table 1 in 40 CFR 271.1 and tables in the authorization website for lists of rules promulgated under HSWA.

Where do you find which Federal Rules to Adopt?

- States can subscribe to the Federal Register and receive a daily e-mail notification
- Regulations.gov
- RCRA State Authorization Website
<http://www3.epa.gov/epawaste/laws-regs/state/index.htm>

The Authorization Process Step-by-Step

- Today, most authorization work involves state program revisions for new EPA rules. Also known as state program modification.
- States can also initiate their own changes to their rules.
- The process generally consists of application preparation and submission by the state, then review, comment, and approval by EPA.
- The process is sequential in nature and subject to delays if key staff are not available.
- The last step is a FRN issued by the EPA region which outlines the federal rules for which a state is now authorized.
- This FRN is subject to public comment, generally 30 days, and an effective date 60 days from publication.
- There are deadlines for submittal of state applications in 40 CFR 271.21(e). Most states are not able to follow these deadlines.

State Application Components

- The authorization application package submitted by the state generally consists of the following parts:
 - Draft or final state rules.
 - Rule checklists (produced by EPA HQ for every rule), if necessary.
 - Revised Program Description, if necessary.
 - Revised Memorandum of Agreement (MOA), if necessary.
 - Revised Attorney General's (AG) Statement or certification.

EPA Review

- EPA Regions have the lead in reviewing state applications. EPA Regions can and should consult with HQ when nationally significant issues arise.
- The regional review team includes program staff, Regional Counsel staff and technical experts, if necessary.
- EPA strongly recommends that states submit draft or proposed rules to the EPA region for review since it is much easier to make changes before state promulgation.
- Thus, EPA regional review is often concurrent with a state's development of rules and application components.

EPA Review

- The difficulty of the EPA review is affected by the state's method of adoption, the number and scope of the state's rules, and other factors such as limitations on the state's enforcement authority.
- About half the states adopt federal regulations through incorporation by reference, while others adopt rule language verbatim, and some rewrite the federal regulations.
- States which incorporate the federal rules by reference are much easier to review than states which rewrite the rules.
- Some states have a statute or policy which prevents their rules from being more stringent than the EPA rules.

What is a Rule Checklist?

- A rule checklist is a tool that outlines every new, amended, or deleted provision a federal rule.
- For each new rule, a rule checklist and summary are developed. The most recent checklist is number 235 (the Coal Combustion Residuals rule).
- The rule checklists provide a valuable crosswalk for both authorization and enforcement staff.
- Otherwise, it is sometimes difficult to locate the state provision comparable to the federal provision.

Sample Revision Checklist

SPA 27

RCRA REVISION CHECKLIST 212

NESHAP: Final Standards for Hazardous Waste Combustors
(Phase I Final Replacement Standards and Phase II)

70 FR 59402-59579

October 12, 2005

(RCRA Cluster XVI, HSWA/Non-HSWA)

NOTE: EPA does not consider these provisions to be either more or less stringent than the pre-existing federal program, since they simply make explicit an authority that has been and remains available under the omnibus authority and its implementing regulations. Thus, states with authorized equivalents to the federal omnibus authority will not be required to adopt these provisions, so long as they interpret their omnibus authority broadly enough to require risk assessments where necessary.

Name of State: _____

State Statutory Authority: _____

Title of Regulations: _____ Effective Date: _____

Date Checklist Completed: _____

FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOG IS:					
			EQUIV- ALENT	LESS STRIN- GENT	MORE STRIN- GENT	BROADER IN SCOPE		
PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL								
SUBPART B DEFINITIONS								
REFERENCES								
replace "270" with "268"	260.11(a)							
remove "270.24, 270.25" from the end of the provision	260.11(c)(1)							
PART 264—STANDARDS FOR OWNERS AND OPERATORS								
OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES								
SUBPART O INCINERATORS								
APPLICABILITY								
in the first sentence: replace " (b)(3), and (b)(4)" with "through (b)(5)"; insert "do not apply to a new hazardous waste incineration unit that becomes subject to RCRA permit requirements after October 12, 2005; or" before " no longer apply"; insert "of an existing hazardous waste incineration unit" before "demonstrates compliance"; replace "63.1210(b)" with "63.1210(d)"	264.340(b)(1)							

Checklist 212
[Printed: 11/2/07]

Sample Revision Checklist (cont'd)

SPA 27

RCRA REVISION CHECKLIST 212: NESHAP Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II) (cont'd)

FEDERAL REQUIREMENTS	FEDERAL RCRA CITATION	ANALOGOUS STATE CITATION	STATE ANALOGIS:			
			EQUIV- ALENT	LESS STRIN- GENT	MORE STRIN- GENT	BROADER IN SCOPE
add new subparagraph (b)(5): The particulate matter standard of § 264.343(c) remains in effect for incinerators that elect to comply with the alternative to the articulate matter standard of §§ 63.1206(b)(14) and 63.1219(e) of this chapter.	264.340(b)(5)					
PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES						
SUBPART O INCINERATORS						
APPLICABILITY						
replace “63.1210(b)” with “63.1210(d)”	265.340(b)(1)					
PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES						
SUBPART H HAZARDOUS WASTE BURNED IN BOILERS AND INDUSTRIAL FURNACES						
APPLICABILITY						
in the first sentence: after “(b)(2)” insert “, (b)(3), and (b)(4)”; after “the standards of this part” insert “do not apply to a new hazardous waste boiler or industrial furnace unit that becomes subject to RCRA permit requirements after October 12, 2005; or”; replace “affected source” with “an owner or operator of an existing hazardous waste boiler or industrial furnace unit”; replace “63.1210(b)” with “63.1210(d)”	266.100(b)(1)					

Checklist 212
[Printed: 11/2/07]

Checklist Summary

SPA 27

Revision Checklist 212 Summary

Rule Title:	National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II)
Checklist Title:	NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II)
Reference:	70 FR 59402-59579
Promulgation Date:	October 12, 2005
Effective Date:	December 12, 2005
Cluster:	RCRA Cluster XVI
Provision Type:	HSWA/Non-HSWA
Linkage:	182, 188, 197, 198, 202
Optional:	Yes

Summary: Today's rule finalizes national emission standards (NESHAP) for hazardous air pollutants for hazardous waste combustors (HWCs): hazardous waste burning incinerators, cement kilns, lightweight aggregate kilns, industrial/commercial/institutional boilers and process heaters, and hydrochloric acid production furnaces. EPA has identified HWCs as major sources of hazardous air pollutant (HAP) emissions. These standards implement section 112(d) of the Clean Air Act (CAA) by requiring hazardous waste combustors to meet HAP emission standards reflecting the performance of the maximum achievable control technology (MACT).

State Authorization: This rule is placed in RCRA Cluster XVI. The State modification deadline is July 1, 2007 (or July 1, 2008 if a State statutory change is necessary).

This rule is promulgated pursuant to HSWA and non-HSWA authority. EPA does not consider these provisions to be either more or less stringent than the pre-existing federal program, since they simply make explicit an authority that has been and remains available under the omnibus authority and its implementing regulations. Thus, states with authorized equivalents to the federal omnibus authority will not be required to adopt these provisions, so long as they interpret their omnibus authority broadly enough to require risk assessments where necessary.

Attorney General (AG) Certification Guidance: Specific AG certification of statutory authority may not be required for this checklist as long as the AG has previously demonstrated authority for interim status, permitting, and air emissions standards..

Program Description (PD) Guidance: A State seeking authorization for this checklist should determine whether the revisions impact the program described in the Program Description.

Incorporation by Reference Guidance: Note that CL 212 references provisions from 40 CFR 63. States may either directly reference the provisions in Part 63, or incorporate the provisions into its regulations and reference the provisions within its regulations. If the first approach is used, the State must make sure that its Administrative Procedures Act allows the State to reference the Federal regulations. See IBR guidance for more information.

Clusters and SPAs

- **Cluster of Rules:** Grouping of Rules that EPA promulgates from July 1 of one year to June 30 of the following year.
- “Clusters” follow the CFR update calendar.
- EPA created clusters to reduce the number of state applications once we realized how many rules we would be promulgating.
- As of July 1, 2015, EPA is up to cluster RCRA XXV.
 - State Program Advisory (SPA) 36 will also start on this date.
- In the 1980’s, EPA also created HSWA and non-HSWA clusters.

Program Description (PD)

- The program description explains how the State will implement the authorized revisions.
- Describes the division of responsibilities for program implementation among State agencies.
- Discusses differences between State and Federal programs.
- Revisions describe impacts on program and updates information.
- The regulatory citation is 40 CFR 271.6.

When Should the Program Description be Updated?

- When the state is authorized for a part of the federal program that adds significant new responsibilities – e.g. corrective action.
- When there is a significant change to the state's budget.
- When there is an internal agency reorganization.
- When there is a change in the responsibilities among state agencies.

Program Description Review Checklist

Designed to ensure that the Program Description:

- Describes the organization and management of the State program.
- Discusses difference between the State and the Federal program.
- Describes how the State will administer and enforce its program.
- Demonstrates that the State program meets the tests for final authorization.

What is the Memorandum of Agreement (MOA)?

- Defines the roles and responsibilities of EPA and the State.
- Outlines coordination and cooperation between EPA and the State.
- The MOA can be seen as a contract between EPA and the authorized State which describes the roles and responsibilities of each party.
- The regulatory citation is 40 CFR 271.8.

When is the MOA Required?

- The authorization regulations require the MOA to be reviewed each year, and updated as necessary.
- EPA has created a Model MOA, which provides the basic framework for all required elements. It is currently being updated.
- There is also a MOA Review Checklist, which both EPA and the states can use.

MOA Regulatory Requirements

- Procedures for sharing and transferring permitting responsibility.
- Framework for EPA oversight of state program administration and enforcement.
- Provisions for exchange of information.

Common MOA Deficiencies

- Limitations on EPA's oversight authority
- Inconsistencies within the MOA
- Outdated language
- Inappropriate use as a substitute for state regulatory requirements
- Omissions
 - joint permitting references
 - Section 3006(f) agreements
 - Signatures

The Attorney General's (AG) Statement

- Identifies State legal authorities;
- Interprets State law; and
- Certifies equivalence.
- Required for initial program authorization.
- Should be reviewed and updated if necessary for each program revision.
- The regulatory citation is 271.7.

Attorney General's Statement

- Requirements of the AG Statement:
 - Certification made by the AG or authorized attorney.
 - Citations of State laws and regulations.
 - Date of enactment of laws and regulations.
 - State laws and regulations must be fully adopted and in full force and effect as of the date authorization is effect.
- EPA reviewers should confirm that all components are correct.

Express Authorization

- Streamlined approach to the AG Statement.
- Intended to reduce the time and cost needed to prepare the application.
- States can prepare and submit a one page AG Statement, primarily consisting of a certification.
- The regulatory requirement that States document their statutory authority is addressed by a **Statutory Checklist**.
- The Statutory Checklist model is much shorter than the former AGS model, and would generally not be amended by every subsequent state revision application.

RCRA Statutory Checklist

- Includes statutory provisions listed on the original State Legislation Checklist; and a HSWA Statutory Checklist.
- Is an evaluation tool and helps EPA to understand the State's enabling authority.
- Assists States in the review of all their existing statutory and regulatory authority before deciding whether statutory or regulatory changes are necessary as a result of HSWA.

Authorization of State Statutory Provisions

- Although EPA does not authorize provisions in State statutes which provide authority for the State's authorized regulations, or which provide enforcement authority, some States use statutory provisions instead of regulatory provisions as part of the state hazardous waste management program that operates in lieu of the federal program.
- In this latter situation, the AGS should include a reference to such statutory provisions.

Withdrawal of State Authorization

Criteria for withdrawing approval of State programs:

- State program no longer complies with the requirements of this subpart, and the state fails to take corrective action.
- State's legal authority no longer meets the requirements, including:
 - Failure of the State to promulgate or enact new authorities
 - Action by a State legislature or court striking down or limiting State authorities. §§271.22-.23).
- States may also voluntarily transfer the program back to EPA (40 CFR §§271.23).

Codification

- Codification is the process of incorporating by reference state regulations into the CFR.
- Codified state regulations are located in 40 CFR Part 272, which identifies the specific elements of the state program that EPA has approved as RCRA Subtitle C requirements.
- Codification provides an opportunity for EPA to look at a state's program as a whole, rather than on the checklist-by-checklist basis.
- It often reveals issues requiring resolution that were not discovered during program revision reviews.