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GUIDANCE ON DELEGATION OF AUTHORIZATION DECISIONS

Effective March 11, 1991, the Office of Solid Waste and Emergency Response (OSWER) delegated the responsibility for RCRA Subtitle C State program revision application reviews and authorization decisions to the Regions on a two-year pilot basis (see the March 11, 1991 memorandum). This document discusses the roles of the Regions and Headquarters during delegation, describes oversight of the pilot program, and provides guidance on nationally significant issues.

Former Authorization Application Review Process

Under the former program revision process, concurrent Headquarters and Regional review was required for draft applications, official applications, and Federal Register notices. This process is described thoroughly in the State Authorization Manual (SAM). The dual review process was set up to minimize the risks of authorizing deficient State programs and to ensure national consistency. These goals have been largely met but at a cost of considerable tension in relationships between Headquarters and Regions and Regions and States. Much of the tension stems from duplicative Headquarters and Regional application reviews and the Regions' inability to publish an authorization decision in the Federal Register without Headquarters' approval. Authorization problems resulting from duplicative reviews include:

1. Delays and inefficiencies in the authorization process.

2. New issues discovered after the first review of the application and revisiting previously resolved issues.

3. Headquarters' reviews perceived as second guessing of Regional decisions.

4. Headquarters' constraints on issuing timely authorization guidance because of time spent on detailed reviews.

5. Confusion over Headquarters' role during ten day consultation period and delays in publishing FR notices.

The RCRA Implementation Study (RIS) noted this tension and stimulated Don Clay's commitment to make the authorization process easier. Therefore, on March 11, 1991, Headquarters delegated to the Regions the responsibility for reviewing and authorizing State program revision applications on a pilot basis.

Two-Year Pilot Delegation

Scope

Regions are responsible for program revision review and authorization on a two-year pilot basis. Headquarters review and concurrence is still required, however, for States and Indian Tribes applying for base RCRA program authorization. The Regions are responsible for maintaining an effective authorization decision process, including explaining decisions to the public and oversight bodies. They will ensure national consistency in delegated decisions by raising and documenting the resolution of nationally significant issues as well as ensuring that all decisions adhere to national authorization regulations, guidance and policies.

Under the pilot delegation, Headquarters involvement in the application review process for program revisions is limited to a consultation role on nationally significant issues and to providing technical assistance to the Regions. Regions will send authorization Federal Register notices and charge back forms directly to the Regulation Management Branch at EPA Headquarters, with a copy of the Federal Register notice to the State and Regional Programs Branch (SPRB) in OSW.

National Authorization Goals

- Ensure the quality of State authorization decisions
- Encourage delegation of the hazardous waste program to the States by working with the States to adopt current hazardous waste regulations and enhance the States' capability
- Promote a consistent, effective RCRA program across the nation

Delegation Goals

- Streamline the authorization process
- Reduce duplication of effort by Headquarters and Regions in the authorization process
- Clarify roles and responsibilities of Headquarters and Regions
- Move authorization decisions closer to the source of the applications

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Role of EPA Regions During Pilot

The Regions will work with the States to enhance the States' capability for authorization and to develop State regulations and authorization applications. The following areas are especially significant.

Issues To Be Raised to Headquarters

The Regions may still consult with Headquarters on specific issues and obtain technical and legal assistance. The Regions will also provide certain information to Headquarters to maintain national authorization records. In addition, in order to maintain a nationally consistent authorization program, Regions will raise to Headquarters' attention issues of national significance. At the time of each authorization decision, the Regional Waste Management Division Director must certify that all nationally significant issues have been raised to Headquarters. This certification must accompany the Headquarters (SRPB) copy of the FR approval notice. The Office of Regional Counsel will provide assurances to the Regional Administrator that all legal issues have been reviewed and satisfactorily addressed. Attachment 1 contains guidance on nationally significant issues. Attachment 2 provides model Division Director certification language.

In addition to raising nationally significant issues, Regions need to inform Headquarters of:

- The discovery of problems which arise after the application is approved;
- A substantial change in a State's capability which brings into question its ability to implement an effective program;
- Actual or threatened lawsuits over approved State regulations or authorization decisions;
- Substantial public controversy over an aspect of the application; and
- Errors in Federal Register notices.

Timely Authorization of Qualified States

Another prime responsibility for the Regions is the timely authorization of qualified States. To achieve this Regions must:

- Work with the States to enhance their capabilities to maintain quality programs and assume additional responsibilities;

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- Ensure that qualified States submit authorization applications in accordance with established deadlines; and

- Recognize authorization problems and resolve them expeditiously.

State Enhancement and Authorization Plan

Each Region must also prepare and submit to Headquarters an annual "State Enhancement and Authorization Plan." The first plans are due to Headquarters as part of the Region's Beginning of Year Plan required by the FY 92 RCRA Implementation Plan. These plans are due to Headquarters by August 15, 1991. The State Plan will outline the Region's activities for building State capability and advancing authorization. These plans should indicate how work will be shared between the States and Regions and how this sharing will contribute to the States' ability to become authorized for the provisions subject to work sharing.

Regions should use these plans as a tool to encourage unauthorized States to become authorized and authorized States to adopt program revisions as quickly as possible. The plans should highlight those revisions such as corrective action and the land disposal restrictions that are fundamental to a comprehensive hazardous waste management program. They should further emphasize State adoption of non-HWSA requirements and those optional rules which would improve the operation of State programs. Two rules in particular which fit this category are the permit modification (53 FR 37912, 9/28/88) and the interim status changes rule (54 FR 9696, 3/7/89). These rules provide an improved process for assimilating the expanding hazardous waste universe (e.g., new waste listings, new processes) and will also expedite changes at facilities to provide new capacity and accommodate corrective action. In addition, adoption of the permit modification rule would make implementation of the new Toxicity Characteristic Rule easier by shortening the period of dual EPA/State regulation.

The State Plan should specifically address each individual State's progress in achieving authorization to date. The Plan should identify the problems (e.g., statutory/regulatory change issues, capability concerns) the State is having achieving authorization. Finally, the Plan should come up with a solution for getting each State authorized for all key components of the program as soon as possible (especially for the non-HSWA requirements). We encourage the Regions to be creative in working on the States' problems and developing solutions. Possibilities include: working to change a State's unwieldy permit approval process, developing capability or resolving problems blocking authorization (such as high staff turnover rates), using IPAs or SWAT teams, and providing additional training. Ranking of activities may be necessary where there are numerous authorization issues and problems.

State Oversight Tools and Sanctions

The Regions should employ the appropriate oversight tools and sanctions to achieve quality State performance and timely submission of authorization applications. EPA's Policy on Performance-Based Assistance, (May 31, 1985), establishes "differential oversight" as an

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effective tool for sanctions and rewards for State programs. Regional actions to address State problems may range from providing technical assistance, and increasing oversight frequency to using grant sanctions. Actions taken by the Regions should be appropriate to the nature and severity of the State's performance problem. For further guidance on Regional response actions, please see page 36 of the RCRA Program Evaluation Guide, (OSWER Directive 9545.00-6A).

Maintaining Authorization Administrative Records

Regions will be expected to maintain authorization administrative records that adequately document the basis of authorization decisions. Authorization administrative records should provide sufficient information to allow the Regions to respond fully and in a timely manner to inquiries from Congress or the public. These records will also serve as the basis of the Agency's defense if anyone challenges the Agency's authorization decision. In addition, these records must be readily accessible to Headquarters staff during reviews, and be easily transferable to new Regional staff.

Maintaining Regular Communication with Headquarters

Regions are also expected to maintain regular communication with Headquarters. Regions should provide brief write-ups of significant national and Regional authorization issues and steps taken to resolve them; actively participate in the monthly conference calls; and participate in and encourage new staff to attend Headquarters sponsored authorization training.

As in the past, the Regions must send copies of each State's grant work program to the Chief, SRPB, after negotiation and execution of the grant award document by the Region.

Authorization Tracking System

Accurate and frequent updating of the forthcoming authorization tracking system will be an important Regional function to not only ensure that Headquarters is fully aware of Regional activity, but to enable Headquarters to respond to inquiries from Congress and oversight agencies. Two types of data in particular will be required: first, regular authorization status information, and second, information on what regulations States have adopted but for which they have not yet been authorized. Regions will be expected to input data into a tracking system in a timely manner. Specific guidance on the tracking system will be provided in a future guidance document.

Role of EPA Headquarters in Pilot Delegation

The role of EPA Headquarters in the program revision process during the pilot delegation will include oversight and evaluation of the pilot, tracking authorization of States, training, and technical assistance.

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Headquarters will oversee the Regional authorization process in order to:

- Ensure national consistency
- Ensure the Region's ability to enhance authorization potential of States
- Ensure the Region's ability to authorize quality applications in a timely manner
- Provide the Regions with current national guidance

Headquarters oversight role includes working with the Regions to resolve nationally significant issues in a timely manner and keeping the Regions abreast of nationally significant issues in other Regions.

Evaluating Regional Performance

Headquarters reviews will evaluate Regional performance by:

- Conducting reviews of authorization programs (similar to permit quality reviews) at least once a year by interviewing Regional staff, reviewing the completeness of authorization files and selecting approved applications to review;
- Reviewing and evaluating the implementation of State Enhancement and Authorization Plans; and
- Attending end-of-year and mid-year State reviews as appropriate.

Tracking Authorization Status

Headquarters will track the status of authorization application reviews and Regional and State authorization decisions. The tracking system will be used to respond quickly to authorization inquiries from Congress and others. The FY 92 RIP includes a STARS measure requiring submission of information on authorization progress. This measure will provide a means to determine the relative progress of the States in achieving timely authorization, taking into account the States' status at the beginning of the pilot.

Providing Technical Assistance and Training

In addition, Headquarters will continue to conduct authorization training courses and provide technical assistance to the Regions and States. Regions may request assistance with developing regulations, preparing or reviewing application components, or conducting specialized training. Headquarters will continue to develop national policy and issue guidance on authorization and implementation issues, including regular updates to the State Authorization Manual, and to revise the authorization process based on recommendations

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from the RCRA Implementation Study (RIS). To the extent feasible, Headquarters will also provide a national contract vehicle which Regions may fund to assist Regions with regulation reviews.

Evaluation of Pilot Delegation

Headquarters will evaluate the pilot through on-site reviews, review of annual State Enhancement and Authorization Plans and accomplishments, and STARS data.

In evaluating Regional performance, Headquarters will look for specific indicators of high performance and low performance. Examples of high performance by a Region could include authorization of key components of the program; high quality State Plans that are effectively implemented; approved State applications address all Regional comments; and attempted to expeditiously correct any problems identified in authorization decisions. Low Regional performance examples could include lack of demonstrable progress quthorizing States for key components of the program (especially non-HWSA requirements); failure to develop or execute designs to improve State capability; and incomplete or disorderly Regional files.

Post-Pilot Program Options

At the end of the two-year pilot, Headquarters will decide, based on a review of each Region's authorization performance, whether the delegation should be continued/expanded, either in full, in part, or by extending the pilot, or decide whether an alternative authorization process should be developed.

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ATTACHMENT 1

ISSUES OF NATIONAL SIGNIFICANCE

Effective March 11, 1991, Headquarters delegated the responsibility for RCRA Subtitle C State program revision application review and authorization decisions to the Regions on a two year pilot basis. Delegation of this authorization responsibility to the Regions is, in part, contingent on Regional commitment to raise issues of national significance to Headquarters on a timely basis. Headquarters needs to be apprised of these issues to ensure national consistency in our authorization decisions. To that end, you will be certifying prior to the Regional Administrator approving an application that national issues have been brought to Headquarters' attention.

This memorandum broadly outlines potential issues of national significance to assist the Regions in identifying such issues. It should be noted, however, that this guidance cannot and does not attempt to present an inclusive list of nationally significant issues. Many of the issues that arise in a revision application are being seen for the first time and increased Regional alertness to the potential national impact of all issues is critical. Regions should err on the side of prudence in raising issues to Headquarters during the pilot period. In general, **Regions should consult with Headquarters prior to deviating from national authorization guidance, including that for capability assessments.** A list of recent major authorization guidance documents is attached.

The following issues should also be raised to Headquarters' attention:

Regulations, procedures or agreements that alter the fundamental relationship between EPA and the State. A recent example is an MOA proposed by a State which would have severely limited EPA's oversight and enforcement responsibilities.

Possible violations of Section 271.4 consistency criteria. Areas of concern include State laws, regulations or administrative actions which result in waste importation restrictions, facility siting restrictions, and bans on treatment, storage, and disposal methods. Note that these affect the continued authorization of a State as well as their ability to receive additional program approvals.

Questionable State Authority. The Region should alert Headquarters prior to approving revisions for which the underlying statutory authority is unclear.

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Lack of State capability which brings into question its ability or willingness to enforce its regulations. An example of this would be a State program which lacks the ability to effectively collect penalties, either administratively or judicially, for violations of its regulations.

Adoption of regulations that are not clearly equivalent or more stringent on their face. Headquarters should be consulted when a State adopts regulations that are not equivalent or more stringent on their face, and the Region proposes to authorize based on those regulations.

Substantial statutory/regulatory revisions that significantly change the State's existing hazardous waste program. This situation could occur when a State legislature or agency significantly revises the statutory or regulatory authority for the State's **currently authorized** hazardous waste regulations and those revisions would result in such substantial modifications to the State's authorized program that continued authorization of the State could be in jeopardy.

We have also encountered three specific program areas which raise difficult authorization issues that should be brought to Headquarters' attention:

o Mixed Waste. Guidance on Mixed Waste is found in Appendix N of Volume II of the State Authorization Manual (SAM). Approvals of provisions that deviate from that guidance should be brought to Headquarter's attention. The Regions should be especially careful in the following areas: ascertaining that the State has adequately documented (through an MOU) the roles and responsibilities of the State's hazardous waste and radiation protection agencies when sharing mixed waste inspection activities; ascertaining that the State does not attempt to regulate the radioactive component of mixed waste under its hazardous waste authority.

o 3006(f). Approvals of 3006(f) availability of information (FOIA) provisions that deviate from the guidance of July 23, 1986, and August 22, 1986 (OSWER DIRECTIVE #9541.00-1) should be brought to Headquarters' attention. Examples of problem areas are found in the March 8, 1990 Summary of RCRA 3006(f) Issues, which describes the difficult areas identified to date and explains how EPA has responded to the State FOIA provisions that deviate from the EPA guidance set out in the guidance documents noted above. All these documents are found in the SAM, Vol. II, Appendix N.

o Delisting. Delisting requires Headquarters consultation to facilitate national coordination of delisting procedures and petitions. The Region should notify OSW (Robert Kayser, Chief, Delisting Section, FTS 382-4770) if a State applies for

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authorization to administer the delisting program. This will also facilitate the transfer of all pending petitions to the newly authorized State for further action.

Again, the above list is not exhaustive. We will issue additional guidance as needed as we and the Regions gain experience with delegation.

STATE AUTHORIZATION GUIDANCE DOCUMENTS

State Consolidated RCRA Authorization Manual (SCRAM), (9540.00-9, 1988, as revised)

State Authorization Manual, Volumes I and II (SAM), (9540.00-9A, October 1990)

Capability Assessment Guidance (April 9, 1987-currently being revised)

Enforcement Response Policy (Revised December 21, 1987)

RCRA Program Evaluation Guide (Revised July 1988)

RCRA Quality Criteria (Revised July 1986)

Policy of Performance-Based Assistance (May 31, 1985)

Program Implementation Guidance:

PIG 84-1	5/21/84	No EPA enforcement in authorized States for broader in scope provisions
PIG 82-5	8/09/82	States may issue State permits
PIG 82-4	5/25/82	Delisting not required for State authorization
PIG 82-3	5/17/82	EPA enforces only those State regulations in effect at time of violation

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RCRA Reauthorization Statutory Interpretations

RSI #5	7/01/85	Joint Permitting in authorized States
RSI #4	5/16/85	Effect of HSWA on State delisting decisions

ATTACHMENT 2

CERTIFICATION

REGIONAL WASTE MANAGEMENT DIVISION DIRECTOR CERTIFICATION

I certify that all issues of national significance regarding (State X's) program revision authorization application for Checklist numbers ____ [Add non-checklisted provisions as well, if appropriate; for example, Mixed Waste, Availability of Information] have been raised to the appropriate officials at Headquarters.

_____

Regional Waste Management Division Director

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