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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JAN 30 1992

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Release of New Capability Assessment Guidance

FROM: Sylvia K. Lowrance, Director  
Office of Solid Waste

Bruce M. Diamond, Director  
Office of Waste Programs Enforcement

TO: Addressees

We are pleased to announce the release of the long awaited Capability Assessment Guidance. As mentioned in the RCRA Implementation Study (RIS), one of EPA's goals is to assist the States in becoming authorized to implement the hazardous waste program. Problems in assessing a State's capability have caused tensions among Headquarters, Regional and State staff, as also identified in the RIS. However, we believe this document may help resolve some of the tensions in this process.

The current authorization process is under review and may be changed in the near future. The Capability Assessment will be a part of these discussions, and this Guidance may be revised appropriately. In the meantime, this Guidance will assist the Regional Offices in authorizing States until the revised procedure is finalized.

In addition to the Guidance, you will also find attached a Responsiveness Summary to comments that were received on the draft Guidance.

We are grateful to the many State, Regional and Headquarters personnel that assisted in producing this document. If you have any questions, please call Mike Flynn, Acting Chief, State and Regional Programs Branch at 202-260-2210 or Steve Heare at 202-260-2207.

Attachments

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WASHINGTON, D.C. 20460

OCT 25 1991

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Responsiveness Summary to Comments on the  
Draft Capability Assessment Guidance

FROM: Mary Jean Osborne, Chief *Mary Jean Osborne*  
Program Analysis and Coordination Section, OWPE

Richard LaShier, Chief *Rich LaShier*  
Regional Coordination and Implementation Section, OSW

TO: Addressees

We would like to thank each of you for providing comments on the final draft guidance. We reviewed all comments that were mailed or phoned in, and have revised the draft, as appropriate.

This memorandum addresses the significant comments that were not resolved by the Capability Assessment Guidance Workgroup. For each significant comment, we present a summary of the concern underlying the comment as well as our response to the comment.

1. Use of Capability Assessment Outside of an Authorization Decision

**Concern:** The guidance currently states that an assessment is performed in conjunction with an authorization decision. Several people felt that capability assessments are an on-going process and should be used whenever appropriate, not just when applying for additional parts of the program. However, others have stated the opposite. Can we expand the guidance to say that a capability assessment can also be "triggered" by any evidence of poor quality or performance, not necessarily related to an authorization decision?

**Response:** Yes. Although capability assessments are usually completed as part of an authorization decision, the capability of a State is an on-going concern. New language has been added to the guidance which states that a formal capability assessment may be completed at other times, when there is a strong basis for believing a State's capability is an issue.

However, we expect that the preparation of a capability assessment outside of the authorization process would be reserved for very exceptional cases.

2. Capability Assessments in Relation to Program Withdrawal

**Concern:** The guidance currently states that a State which exhibits one or more "unacceptable" criteria may not only be ineligible for authorization, but also may be incapable of implementing the currently authorized program. Thus the State may be a candidate for withdrawal of the program based on lack of capability, pursuant to Section 271.22.

One comment has been raised that capability assessments can only be used in an authorization context and that tying the assessment to withdrawal is not appropriate. However, another has mentioned linking an assessment to possible withdrawal as leverage that a State could use to enhance program capability. For instance, after a negative assessment, the State agency learns that EPA is considering withdrawal proceedings because of lack of resources. The State agency could use the possibility of withdrawal to leverage more resources from the State legislature.

Can the Capability Assessment be used in this context?

**Response:** Yes. Many of the program withdrawal criteria in Section 271.22 are directly related to the "unacceptable" criteria in this guidance document. To the extent that lack of acceptable capability can be linked to one of the Section 271.22 criteria, a capability assessment is appropriate in the context of program withdrawal. In these exceptional cases where EPA chooses to pursue program withdrawal, the capability assessment could be an important supporting document in the record of those proceedings.

To clarify, however, withdrawal proceedings are discretionary and extraordinary. Even if EPA were to document one or more "unacceptable" criteria in the capability assessment, there could be other compelling reasons why EPA would not undertake withdrawal. The guidance states this only as a possible action.

3. Capability of the State as a Whole

**Concern:** Historically, capability has usually involved only the State agency that is responsible for implementing the RCRA program. However, occasionally there are legislative or institutional barriers that affect the State's capability. Although the State agency may have made valiant



efforts to overcome these barriers, they have been unsuccessful. Can this serious weakness, attributable to this barrier, be a stopper for authorization?

**Response:** Yes. When a State is authorized for the RCRA program, the entire State, including such entities as the legislature and the Attorney General's Office, are also "authorized". If capability is unduly affected by the untimeliness of actions by a State Permits Board or lack of fiscal support by a legislature, then the implementation of the State's hazardous waste program may be seriously undermined, despite the best efforts of any one agency.

4. "Attitude" of State

**Concern:** Several commentators (both Region and State) felt that any reference to a State's "attitude" or willingness to work out differences with EPA was too subjective to measure and, therefore, not an appropriate criterion. However, others feel that objective (for instance, quantitative) criteria were not possible to define. The entire process is intrinsically subjective. Should the criteria in the guidance that references "attitude" be deleted?

**Response:** Yes. All references to attitude have been removed from the acceptable and unacceptable criteria. Where possible, measurable criteria have been added.

5. When to Perform a Capability Assessment

**Concern:** No specific rules, such as Corrective Action, are specifically required to have an Assessment completed in the draft guidance. Several comments were mentioned that because Corrective Action is such a significant part of the program, shouldn't an assessment be required?

**Response:** After discussing with Headquarters' and Regional Section Chiefs, a decision was made to include Corrective Action as a specific rule requiring a capability assessment.

While there may be cases where a small facility universe would mitigate the impact of the new authority on a State's program, this circumstance could be easily documented in the capability assessment.

Again, we would like to thank you for commenting on this document. Your suggestions have made this a better guidance document that will hopefully assist in the authorization process.

If you have any questions, feel free to call Zena Aldridge, co-chair of the Workgroup, at FTS or (202) 260-9656.

# RCRA State Authorization Capability Assessment Guidance

October 1991

STATE RCRA PROGRAM  
CAPABILITY ASSESSMENT GUIDANCE

	Page
I. Introduction	
A. History of Oversight and Evaluation of State RCRA Subtitle C Programs	2
1. National Program Criteria	
2. Program Evaluation Guidance	
3. HSWA Capability Assessment	
B. Purpose of the Capability Assessment	3
C. Scope of the Capability Assessment	3
II. Capability Assessment Process	
A. Roles of the Various Organizations	5
1. States	
2. Regional Offices	
3. Headquarters	
B. When to Perform Capability Assessments	6
III. Criteria	
A. Criteria for Identifying Acceptable State Capability	7
B. Examples of Criteria for Identifying Unacceptable Capability	9
C. Applying the Criteria	11
IV. Documentation of Authorization Decision Based on Capability	
A. What Decision Has Been Made	12
B. What Review Process Was Used	12
C. Certification by Regional Division Director	13



## **I. INTRODUCTION**

As the process of delegating RCRA program authority for Subtitle C to the States has evolved, EPA has developed and refined its policy regarding oversight and program evaluation on a number of occasions. This Capability Assessment Guidance is the most recent in a series of policy statements that attempts to define the attributes of a quality hazardous waste program to promote national consistency.

The Capability Assessment Guidance builds on existing guidance by further refining the oversight and evaluation function that EPA assumes with regard to State hazardous waste program authority. This guidance addresses more explicitly the practical questions of the purpose and scope of a capability assessment, the roles of EPA and the States, when an assessment is required, the criteria for assessing capability, and the documentation needed once an assessment has been made. It also seeks to focus the capability assessment on the overall, long-term performance of the State program and the expected future performance, acknowledging that the assessment is done at a single point in time, but that the review process is performed continuously. Crucial to an accurate, meaningful capability assessment, therefore, is the on-going review process, and how it is tailored by the Region to the State's program, using the National Criteria and the Program Evaluation Guide as they were intended to be used.

### **History of Oversight and Evaluation of State RCRA Subtitle C Programs**

In May, 1984, the Office of Solid Waste and Emergency Response (OSWER) published the "Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA" to set basic goals and performance expectations for the State and EPA in managing the RCRA program. These criteria have been widely used in defining program capabilities for the purpose of authorizing States for the RCRA hazardous waste program.

In July, 1986, OSWER issued the "National Criteria for a Quality Hazardous Waste Program under RCRA". This document contains criteria to be used by EPA Headquarters and Regions, and by the States, for assessing program performance, "to reach agreement on the steps necessary to build and sustain a quality program over time," and to "define consistent evaluation protocols for...overseeing the program on an on-going basis," among other things.

On April 8, 1987, OSWER Assistant Administrator J. Winston Porter signed a memo that described more fully OSWER policy regarding the evaluation of capability in the context of an

authorization decision for State program revisions. This memo stated that a capability assessment was needed when authorization will result in significant impacts on the State's workload and includes any application for HSWA Corrective Action. It also indicated that the Regional Office would consult with Headquarters to develop an action plan to identify what the State must do to upgrade its program.

In March, 1988, OSWER issued the RCRA Program Evaluation Guide to assist Regional Offices in conducting regular reviews of State programs. It incorporates the program goals of the 1986 National Criteria, and provides procedures, checklists, and questions that can be used to perform a tailored review of a State's program. While not intended as a mandatory procedures manual, the RCRA Program Evaluation Guide serves to ensure national consistency in fulfillment of the requirements of 40 CFR Section 35.150 relative to a process for evaluating a grant recipient's performance.

#### **Purpose of the Capability Assessment**

A capability assessment is typically performed in conjunction with a State's application for RCRA Subtitle C program authority or as part of the periodic program evaluation process. EPA assesses the ability of the State to implement provisions of the RCRA program for which the State is seeking authorization. In general, a capability assessment is required for base program authorization and for program revisions that involve major areas of the hazardous waste regulatory program. Examples of program revisions requiring assessments are HSWA Corrective Action and the Land Disposal Restrictions programs. This determination of State capability is based on the quality of the State's existing hazardous waste management program and the impact of additional RCRA authority on its program. EPA must be assured that the overall authorized hazardous waste program meets the criteria for acceptable State capability, and does not exhibit any of the criteria for an unacceptable program (see discussion below on Criteria). EPA, therefore, uses the capability assessment to predict whether future performance will remain acceptable.

#### **Scope of the Capability Assessment**

To determine a State's capability, EPA will evaluate the State's entire program, rather than concentrating only on specific aspects of the program, or only on quantifiable program elements (e.g., numbers of permits written, numbers of enforcement actions taken, etc.). Such a holistic approach will rely more on long-term effectiveness, long-term commitments, constant improvement over time, and consistency of performance, rather than on short-term problems or quantifiable measures only.

EPA will assess overall capability in light of the following characteristics:

Past Performance

- o Regular review of the State's performance by the Regional Office, including quantitative measures (i.e., how well did the State meet grant commitments), to determine the trend toward an increase or decrease in quality.
- o The level of quality evident in the conduct of the State's permitting, enforcement, and program management activities.

Resources and Skill Mix

- o The demonstrated ability of the State to bring sufficient and appropriate resources to the program, regardless of short-term vacancies, unpredictable legislative activities regarding current year appropriations, and competing demands for resources within the State agency for other priorities.

Training Program

- o The on-going commitment made to improving performance through professional development and training of staff, including support staff and managers.

Future Expectations

- o The anticipated effect of new RCRA authority on the State's performance, in light of relevant external factors in the State and the complexity of the new authority the State is seeking.

State's Commitment

- o Willingness of the State to resolve issues with EPA and the degree to which legislative, organizational, or institutional barriers to program implementation are effectively dealt with.

These characteristics reflect the overall State program, as evidenced over the course of several years or more. The assessment made at one point in time should reflect the long-term and thus must rely heavily the Region's experience in overseeing the State and the progress documented in oversight reviews.

## II. CAPABILITY ASSESSMENT PROCESS

### A. Roles of the Various Organizations

The capability assessment process primarily involves the State agency and the Regional Office, although Headquarters maintains a policy development oversight role.

#### State's Role:

The State is responsible for determining its overall needs for successfully managing the program for which it is authorized, and for which it is seeking authorization. The State must then demonstrate to EPA, through the authorization process, that it can adequately meet those needs. The State will base this demonstration on EPA guidance, such as the National Criteria for a Quality Hazardous Waste Program under RCRA, and the criteria contained in this guidance.

#### EPA Regional Office Role:

The Regional Office will review and evaluate the State's demonstration whenever an authorization decision is pending, based on the Criteria for Identifying Acceptable State Capability, and on the Region's experience in overseeing the State's overall performance. The Region will decide whether the State has adequately demonstrated capability, and will determine whether to authorize the State for the RCRA program authority sought. It is the Region's responsibility to determine when a capability assessment is needed, consistent with the criteria discussed in this section.

#### EPA Headquarters Role:

Headquarters will work to ensure national consistency of authorization decisions by providing national guidance and overseeing Regional performance. Headquarters staff will perform periodic reviews to identify issues or problems the Regions are facing with regard to Subtitle C authorization, including issues related to capability. Results of these reviews may be factored into the Regional Reviews performed by OSWER management. New guidance on Headquarters oversight responsibility is being prepared. This guidance will reflect the recent decision to delegate authority for authorization decisions to the Regional Offices on a pilot basis.

## **B. When to Perform Capability Assessments**

In general, a capability assessment is performed whenever a decision is pending on final authorization of a State's base hazardous waste program, or on major revisions to the base program as discussed below. For EPA to authorize a State for the base RCRA program there must be adequate assurance of the State's ability to implement the program. EPA will not authorize a State program where serious concerns exist regarding capability.

Since most States are authorized for the base program, a capability assessment will primarily be needed for certain program revision authorization decisions. Specifically, when a State is applying for Corrective Action authority, a capability assessment must be completed. Corrective Action is currently the only regulation specifically required to have an assessment. Generally, a capability assessment will be required when authorizing a State for new RCRA authority that has a major impact on the State's program. A decision on whether a capability assessment is needed for a particular authorization application will be made on a case-by-case basis, using the criteria listed below. The decision should be made by the RCRA Division Director responsible for State Authorization, State Program Development, or State Grants.

Major impacts on a State's program could include:

- New regulatory authority causes substantial increase in the State-wide regulated universe;
- New regulations require State staff with new technical training and skill;
- New regulations may require a greater commitment of resources to the State's hazardous waste program;
- Material, substantive changes in the State's organization, personnel system, or funding base that might have a significant adverse impact on long-term performance.

In some cases, authorization for a major new RCRA regulation may have minimal effect on the State's program. For example, a State that has been successfully implementing the Land Disposal Restrictions under State authority may be minimally affected by receiving authorization. On the other hand, a State that adopts and seeks authorization for a new waste listing may experience a major impact if listing the waste brings substantial numbers of new facilities into the State's regulated universe.

In addition, EPA Headquarters should also be consulted when deviating from national guidance, or when major issues are identified, to ensure national consistency.

### III. Criteria

In any capability assessment, regardless of the status of the currently authorized program in the State or the new authority being sought, consistent measures must be employed. For many critical aspects of a State's program, these measures are not readily quantifiable. Additionally, a holistic approach to assessing capability implies that trade-offs (i.e., a balancing of positive and negative aspects of a State's program at a single point in time) will routinely be made in arriving at an authorization decision based on capability. An assessment relying too heavily on quantifiable measures is not conducive to arriving at an authorization decision based on trade-offs involving criteria stated in non-quantifiable terms.

Following are two sets of criteria and a discussion of their use in a capability assessment. The first set of criteria consists of primarily non-quantifiable statements that describe an acceptable State hazardous waste program. The second set of examples of criteria identifies clearly unacceptable conditions. In basing a capability assessment on long-term performance and commitment to continual improvement, rather than focusing on short-term, correctable problems, these criteria allow EPA to factor in Regional experience with the State's on-going effort to build and improve upon its program's quality.

In describing these criteria, an arbitrary time period of three years is used. This three year period is considered to be a reasonable "rule-of-thumb" amount of time over which a trend can be discerned, and evidence of long-term improvement or lack of improvement can be justified. Three years is considered to be a sufficient period of time to allow a State to correct a serious problem, but not an unreasonably long period of time to allow a clearly unacceptable condition to remain unaddressed, as the State seeks added responsibility for its hazardous waste program.

#### A. CRITERIA FOR IDENTIFYING ACCEPTABLE STATE CAPABILITY (ACCEPTABLE CRITERIA)

Components to be considered by the Region:

##### 1. Permitting Program

The State has and uses a multi-year permitting strategy that addresses the most environmentally significant facilities and is consistent with current national priorities and guidances.

Permits are generally of good quality as established by current guidances, manuals and policies.

The State has consistently met the majority of permitting grant commitments, or is making significant improvements toward meeting commitments.

**2. Compliance Monitoring and Enforcement Program**

The State has and uses an Enforcement Strategy that is consistent with national priorities and guidances.

Inspections are of good quality and consistent with current guidances.

The State is generally able to identify violators and make reasonably rapid progress meeting prescribed timeframes in final enforcement orders according to current enforcement policy (e.g., Enforcement Response Policy).

The State has consistently met the majority of compliance monitoring and enforcement grant commitments, or has demonstrated a trend of significant improvements towards meeting commitments.

**3. Corrective Action Program**

The State has and uses a prioritization system which provides results consistent with national priorities to address the most environmentally significant sites first.

Corrective Action activities (interim measures, RFAs, RFIs, CMSSs, CMIs, etc.) are of good quality and are completed using current EPA guidances, manuals and policies. The State makes consistent progress toward completing cleanups.

The State has consistently met the majority of corrective action grant commitments, or is making significant improvements toward meeting commitments.

**4. Management Program**

- Resources and Skill Mix: The State has consistently devoted sufficient resources necessary to match the Federal Section 3011 grant funds, and has consistently maintained a staff that is large enough and has the technical skills



and experience necessary to effectively manage the existing program and the additional program responsibilities that the State is seeking.

- Training: The State ensures that all staff are adequately trained, commensurate with their program responsibilities and applicable order requirements (e.g., Order 3500.1 for inspectors).
- Information Management: The State has and effectively uses an appropriate data system (e.g., CARS, RCRIS, etc.) that provides timely and accurate information to the program and EPA.

## 5. Future Expectations

The State demonstrates that it has the necessary resources, experience and organizational structure to successfully implement the new provisions for which it is seeking authorization.

## B. EXAMPLES OF CRITERIA FOR IDENTIFYING UNACCEPTABLE STATE CAPABILITY (UNACCEPTABLE CRITERIA)

Components to be considered by the Region:

### 1. Permitting Program

The State agency has failed to make timely final permit determinations for facilities identified as a high environmental priority.

State-drafted permits are of poor quality and require substantial re-writing by the Region for technical or other deficiencies, and this condition has not appreciably improved over several years. The State is also non-responsive to appropriate comments.

### 2. Compliance Monitoring and Enforcement Program

The State agency consistently fails to impose and collect adequate penalties for clearly significant violations, based on current EPA policy.

State inspections are of poor quality. The inspection files are poorly organized and do not include proper documentation and verification.

The rate of timely and appropriate enforcement actions has continued in a declining trend or at a consistently low level for several years, and the majority of High Priority Violations are not being identified and/or reported by State inspectors.

The quality of enforcement actions, (e.g., administrative orders) is poor. They are not prepared according to prescribed guidance. Referrals to the Attorney General or to EPA are generally incomplete.

### 3. **Corrective Action Program**

The State's priority setting procedures for identifying and addressing environmentally significant facilities for corrective action are substantially inconsistent with the national program.

Corrective action activities are of poor quality, and have not been improving in quality, requiring increasing oversight and management by EPA.

The State is falling further behind in meeting corrective action grant commitments over a period of several years.

The State has failed to make substantial progress in cleaning up high priority facilities, over a period of three years.

### 4. **Management Program**

The State agency is significantly understaffed, and has been unable to correct this situation over a three year period.

There is a high turnover rate among State personnel that has resulted in poor quality work and the State's inability to implement an effective program. No serious improvement has been made by the State in reducing the turnover rate or in retaining qualified staff.

State authorization applications are consistently of poor quality, (i.e., are incomplete, internally inconsistent, or do not identify differences with the Federal program) and/or application commitments are consistently shifted over several fiscal years.

## 5. Future Expectations

The State agency is unwilling to make program revisions for non-HSWA program changes on a timely basis, consistent with Part 271.21 deadlines, in absence of any institutional barrier, or needed enactment of legislation.

Economic crisis in the State resulting in permanent or long-term erosion of the revenue base, casting doubt upon the State's ability to implement an effective expanded hazardous waste program.

The State legislature has set up boards, commissions, or other mechanisms that effectively block or cause veto of State agency decisions that are consistent with the authorized program. An example is a State with a siting board that approves or denies permits based on criteria that are inconsistent with the State's authorized hazardous waste program.

## C. Applying the Criteria

The Criteria for Identifying Acceptable State Capability are designed to be applied to a State's overall performance in a general way, allowing trade-offs to be routinely made, rather than establishing strict quantitative measures which must all be achieved in order to obtain a positive assessment of capability.

While each State should constantly strive to improve its hazardous waste program to achieve the highest level of excellence, the EPA Regional Office will determine that a State program has achieved an acceptable level of capability if the State has made a reasonable effort to meet the Acceptable Criteria, when viewing the program as a whole, over the course of several (3 or more) years. A consistent good faith effort to maintain a program that essentially meets these criteria, or is generally improving on aspects of the program that do not meet the criteria, should warrant a favorable capability assessment by the Region.

The Criteria for Identifying Unacceptable State Capability, however, are designed to identify conditions that are serious weaknesses in the State's program, which, if not corrected, indicate that the State is incapable of managing the hazardous waste program. In applying this second set of criteria, it is not appropriate to make trade-offs between positive and negative aspects of the overall program. If any of these unacceptable conditions exist, a negative assessment of capability is warranted.

Conditions described by the Criteria for Identifying Unacceptable State Capability, if allowed to exist beyond the short term (i.e., 3 years), clearly are unacceptable and will result in an unfavorable assessment of capability by the Region. In applying these criteria, there is an assumption that the problem has existed for some time with no trends that the State is resolving the problem, EPA has attempted to assist the State in correcting the problem, the State has had ample opportunity to correct the problem, and yet the problem remains unresolved. Such conditions could also form the basis for program withdrawal, pursuant to §271.22.

#### **IV. Documentation of Authorization Decision Based on Capability**

The capability assessment must support the decision to authorize, to deny or delay authorization, to grant interim authorization, or to withdraw authorization. The decision to authorize a State must be properly documented and supported by the results of on-going Regional oversight reviews. Minimal new supporting documentation will be required, provided that results of periodic Regional reviews are well-documented and support the capability assessment decision.

Documentation can follow the format of the April 8, 1987 HSWA Capability Assessment Checklist. Although not required for documenting capability, the checklist can serve as a guide for organizing the results of a series of periodic reviews of the State's performance. Regional staff may want to use the checklist to structure the capability assessment documentation, and may add narrative discussion on State capability as appropriate, rather than completing every line by checking a box on the checklist. Although the checklist is no longer required, the general policy regarding capability stated in the April 8, 1987 memorandum is still in effect.

The following describes the preparation of sufficient documentation of the Region's final assessment of State capability to support its authorization decision, and includes:

- I. A short narrative of the State's capabilities, in light of the Criteria for Acceptable/Unacceptable State Capability described above.
  - Reference can be made to reports or memos prepared to describe results of mid-year or end-of-year reviews, or other documents prepared in the normal course of Regional oversight of the State.

- Where a decision is made to deny or delay authorization due to the Region's concern over State capability, the weakness or deficiency in the State's program should be clearly stated, along with a discussion of what type of improvement would be necessary for authorization approval.
- Where a detailed State Authorization Corrective Action Plan (CAP) is prepared, the documentation should refer to and summarize the activities and milestones agreed to by the State.
- When the Region decides to grant interim authorization to the State, the documentation should include milestones and schedules for achieving final authorization.

II. A brief memorandum, signed by the Region's RCRA Division Director, stating the final authorization decision. The memorandum should also state that the decision was based upon a thorough, comprehensive review process, and that all significant aspects of the State's program were reviewed against the criteria contained in this guidance.

In performing a capability assessment, the Regional Office may determine that the State is not only incapable of implementing new program authority, but also is incapable of implementing the existing program for which it is currently authorized. If the Region decides to withdraw a State's program due to a capability assessment, the documentation should include a description of the deficiencies in the State's program, and why these deficiencies are serious and not likely to be corrected in the foreseeable future. The Region should also describe how it has assisted the State in attempting to correct its deficiencies.

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