United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

EPA

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TITLE: Application of 40 CFR 271.21 (e) ("Moving Target") to Recently Promulgated Regulations

APPROVAL DATE: 03/20/85

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ORIGINATING OFFICE: OSW

☒ **FINAL**

☐ **DRAFT**

STATUS:
[ ] A- Pending OMB approval
[ ] B- Pending AA-OSWER approval
[ ] C- For review &/or comment
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REFERENCE (other documents):

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Key Words: "Moving Target" Regulation, State Program, Changing Federal Regulations, Authorized States

Regulations: 40 CFR 271.21(e), 265.1(a) and (b), 262.34, 260, 261, 264, 265, 266, 270, 775

Subject: Application of 40 CFR 271.21(e) ("Moving Target") to Recently Promulgated Regulations

Addressee: Hazardous Waste Management Division Directors, Regions I-X

Originator: Bruce R. Weddle, Director, Permits and State Program Division

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Summary:

The "moving target" regulation [40 CFR 271.21(e)] requires revision to approved State programs when EPA changes Parts 124, 260-266, and 270. The State must act within one year of the date of promulgation of the regulation or two years if the State needs to amend or enact a statute in order to make the revision. The following process, which calls for concurrent Regional and Headquarters review, will be used to review program revision applications.

1. The State submits an application consisting of copies of applicable revised statutes and regulations, Attorney General's (AG) Statement, Program Description, and MOA, as appropriate.

2. While the Region conducts its review, HQ has 30 days after the receipt of the State package to send comments to the Region.

3. The Region makes a tentative decision and the appropriate HQ team has a 10-day consultation period to review the Region's Action Memorandum and FR Notice. AA and General Counsel concurrence on the Action Memorandum are not required.

4. There is a 30-day public comment period and an opportunity for public hearing after the tentative decision is made.

5. The Region makes a final decision and publishes it in the FR.

Application of the moving target regulations is discussed below in relation to the four rules recently promulgated.

disposal) or incineration (e.g., burning wastes or waste-derived fuel for energy). Materials that are used or reused are no longer automatically considered solid waste and therefore subject to RCRA.

A State has two options:

a) If it chooses to adopt the new concept in its entirety, it must submit amended regulations, an AG's statement certifying the changes with the statutory authority for the changes, and amendments to its program description describing how the State now defines solid waste and how it will regulate hazardous waste recycling activities. The State does not have to adopt the less stringent provisions of these rules.

b) It can show that current regulations are equivalent to and no less stringent than EPA's new regulations. The State must submit a certification from the AG explaining why that is so. MOA and program description amendments are not required.

HSWA Application - Since this rule was not promulgated pursuant to HSWA, interim authorization is not available.

MEMORANDUM

MAR 20 1985

SUBJECT: Application of 40 CFR 271.21(e) ("Moving Target") to Recently Promulgated Regulations

FROM: Bruce R. Weddle
Director
Permits and State Programs Division (WH-563)

TO: Hazardous Waste Management Division Directors, Regions I-X

EPA recently promulgated four rules which may require changes in authorized State programs. The "moving target" regulation (40 CFR 271.21(e)) requires revision to approved State programs when EPA changes Parts 124, 260-266 and 270. Revisions must be made within one year of the date of promulgation of the regulation. If the State must amend or enact a statute in order to make the revision, the State has two years in which to act. This memo describes the process to be used to review program revision applications and addresses the specific application requirements for each of the regulations.

Application Review Process

A future RCRA Reauthorization Statutory Interpretation, (the State Authorization R.S.I.), will discuss OSW's process for reviewing applications for program revisions. Briefly, the process calls for concurrent Regional and Headquarters review of these applications. The applications will consist of copies of applicable revised statutes and regulations, Attorney General's (A.G.) Statement, Program Description, and MOA, as appropriate. While the Region is conducting its review, Headquarters will have thirty days after receipt of the State package to send comments to the Region. After the Region has made a tentative decision, Headquarters will have a ten-day consultation period in which to review the Action Memorandum and FR notice. The appropriate Headquarters Team will conduct the review. AA and General Counsel concurrence on the Action Memorandum will not be required. The tentative decision will provide a 30-day public comment period and an opportunity for public hearing. When the Region has made a final decision, it can proceed directly to publish the decision in the FR.

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The four new rules are discussed in the following paragraphs. The discussion includes the promulgation date, a brief summary of each rule, the application of the moving target regulations to each rule, and the application of HSWA to each rule.

1. Technical Amendment to §265.1(a) and (b), 49 FR 46094.

Promulgation date: November 21, 1984.

Summary: This rule amends the definition of interim status to clarify that interim status continues until closure is certified or until any applicable post-closure activities are finished.

Moving Target: The preamble states that the regulation was changed only for clarification. However, this interpretation is more stringent than what may have existed when States were authorized. If the State A.G. concludes that a regulatory amendment is not needed, he only needs to certify that he interprets and enforces the definition in the same manner as EPA. If the State amends its rules, the State must submit the amended regulations and an A.G.'s Statement certifying the change, along with the statutory authority for the change. No MOA or Program Description amendments are required.

Official applications for final authorization submitted after November 21, 1985, must reflect this regulation.

HSWA Application: This rule was not promulgated pursuant to HSWA, therefore interim authorization is not available.

2. Satellite Accumulation, §262.34, 49 FR 49568.

Promulgation Date: December 20, 1984.

Summary: This rule allows generators to store up to 55 gallons of hazardous waste and one quart of acute hazardous waste at or near the point of generation subject to certain conditions. After three days of storage the amount in excess of the threshold levels must be managed in accordance with the requirements of the less than 90-day storage rule.

Moving Target: States are not required to adopt this rule since it is less stringent than the existing Federal program. However, if a State wishes to adopt equivalent requirements, the State must submit the amended regulations, an A.G.'s Statement certifying the change with the statutory authority for the change, and must amend its Program Description. The amended Program Description must include a discussion of how the State will regulate satellite accumulation areas. No MOA amendments are needed.

HSWA Application: This rule was not promulgated pursuant to HSWA, therefore interim authorization is not available.

3. Dioxin Listing, §§261, 264, 265, 270, and 775, 50 FR 1978.

Promulgation Date: January 14, 1985.

Summary: This regulation lists certain dioxin-containing wastes as acute hazardous wastes and establishes standards for managing those wastes.

Moving Target: States must submit amended regulations, an A.G.'s Statement certifying the change with the statutory authority for it, and amendments to the Program Description describing the State standards that will be used to manage the dioxin-containing wastes. No MOA amendments are required.

Official applications for final authorization submitted after January 14, 1986, must reflect this regulation.

HSWA Application: This rule was promulgated pursuant to HSWA, therefore States may apply for interim or final authorization. Until the State is authorized, the Federal rule applies.

4. Redefinition of Solid Waste, §§260, 261, 264, 265, and 266, 50 FR 614.

Promulgation Date: January 4, 1985.

Summary: This rule modifies the regulatory definition of solid waste to clarify which secondary materials being recycled are solid and hazardous wastes under Subtitle C. In addition, it establishes general and specific standards for various types of hazardous waste recycling activities.

Moving Target: This rule redefines solid waste and establishes regulations for controlling the various types of hazardous waste recycling activities. This new rule is based on a different concept of defining which secondary materials (when recycled) are solid and hazardous wastes under RCRA. The concept is different because EPA has abandoned the "sometimes discarded" test for determining whether EPA has jurisdiction under Subtitle C of RCRA over a material being recycled and substituted a test based on two factors: (1) what the material is and (2) how it is being managed.

Under this concept, EPA regulates virtually all hazardous wastes when they are recycled, instead of regulating only listed wastes and sludges when they are recycled. Commercial chemical products are also defined as wastes and regulated when they are recycled in ways that differ from their normal manner of use, namely, when they are used in a manner constituting disposal, when they are burned for energy recovery, or used to produce a fuel. Finally, although EPA usually does not regulate the actual recycling process, we will regulate those recycling practices

that are analogous to land disposal (i.e., use constituting disposal) or incineration (e.g., burning wastes or waste-derived fuel for energy). At the same time, materials that are used or reused are no longer automatically considered solid waste and therefore subject to RCRA.

A State must either adopt this new concept in its entirety or show through a revised A.G.'s Statement that its current regulations are equivalent to and no less stringent than EPA's new regulations. In either situation, the State Programs Branch, along with the Characterization and Assessment Division, will help the Regions in their analysis of these State regulations.

If a State chooses the first approach, it must submit amended regulations, an A.G.'s Statement certifying the changes with the statutory authority for the changes, and amendments to its Program Description describing how the State now defines solid waste and how it will regulate hazardous waste recycling activities. The State does not have to adopt the less stringent provisions of these rules. For example, the provisions creating variance procedures (§§260.30-32) are less stringent than the previous regulations, which did not have such provisions. A State has the option of being more stringent than EPA by not adopting these provisions.

If a State believes its present regulations are equivalent to and no less stringent than the new regulations, the State must submit a certification from the A.G. explaining why that is so. MOA and Program Description amendments are not required.

Official applications for final authorization submitted after January 4, 1986, must reflect this regulation.

HSWA Application: This rule was not promulgated pursuant to HSWA, therefore interim authorization is not available.