United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

DIRECTIVE NUMBER: 9540.00-9A

TITLE: State Authorization Manual (SAM) Volumes I and II

APPROVAL DATE: November 9, 1990

EFFECTIVE DATE: November 9, 1990

ORIGINATING OFFICE: Office of Solid Waste

[X] **FINAL**

[ ] **DRAFT**

STATUS:
- [ ] **A - Pending OMB Approval**
- [ ] **B - Pending AA-OSWER Approval**

REFERENCE (Other Documents):

Updates SCRAM (9540.00-9)

OSWER DIRECTIVE **OSWER DIRECTIVE** **OSWER DIRECTIVE** **OSWER DIRECTIVE**

United States Environmental Protection Agency
Washington, DC 20460

EPA OSWER Directive Initiation Request

1 Directive Number: 9540.00-9A

2. Originator Information

Name of Contact Person	Mail Code	Office	Telephone Code
Susan Brugler Jones	OS-342	OSWER/OSW/PSPD/SPB	(202) 475-9857

3 Title
State Authorization Manual (Volumes I and II: Appendices)

4 Summary of Directive (include brief statement of purpose)
The State Authorization Manual (SAM) provides guidance for States on preparing applications for revisions to their RCRA authorized programs. The SAM updates and expands the State Consolidated Authorization Manual (SCRAM) published in 1988.

5 Keywords
State Program, State Authorization, State/EPA Coordination

6a. Does This Directive Supersede Previous Directive(s)? [X] No [ ] Yes What directive (number, title)

b Does It Supplement Previous Directive(s)? [ ] No [X] Yes What directive (number title) 9540.00-9 (SCRAM)

7 Draft Level
[ ] A - Signed by AA/DAA [X] B - Signed by Office Director [ ] C - For Review & Comment [ ] D - In Development

8. Document to be distributed to States by Headquarters? [X] Yes [ ] No

This Request Meets OSWER Directives System Format Standards.

9 Signature of Lead Office Directives Coordinator	Date
Lynn J. Hansen	12/17/90
10 Name and Title of Approving Official: Sylvia K. Lowrance, Director, Office of Solid Waste	Date: 11/9/90

EPA Form 1315-17 (Rev. 5-87) Previous editions are obsolete

OSWER OSWER OSWER O
VE DIRECTIVE DIRECTIVE DIRECTIVE

United States
Environmental Protection
Agency

Office of Solid Waste
Washington, DC 20460

OSWER Directive
9540.00-9A
October 1990

EPA

State Authorization Manual

Volume I

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

OSWER Directive #9540.00-9A

NOV 9 1990

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: State Authorization Manual (SAM)

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

TO: Waste Management Division Directors

The attached State Authorization Manual (SAM) provides guidance for States applying for program revisions to their authorized RCRA State program. The SAM is an updated version of the 1988 State Consolidated RCRA Authorization Manual (SCRAM). It focuses on program revision applications rather than initial applications since most States have received initial authorization for the RCRA program. (The SCRAM should continue to be used to assist States not yet authorized under the RCRA program.)

The SAM features a new step-by-step or cookbook format which makes it easy to use. New instructions and examples on how to complete the application components should ensure quality applications. In keeping with my promise to you to make the State authorization process easier, we are providing computer versions of the checklists, the Attorney General's Statement, the Memorandum of Agreement and the current Code of Federal Regulations. Further efforts to computerize the application process are underway. One such effort is to create a system that customizes the application to include only those provisions being applied for by any State.

The SAM is divided into two volumes. The first volume emphasizes the program revision process. However, it also provides background on the RCRA State authorization program and distinguishes between interim and final authorization processes. The second volume consists of appendices that contain checklists; it includes a new consolidated checklist for unauthorized States and authorization models and recent or relevant policy statements. The SAM is left unbound so that new materials can be easily added to it.

Like the SCRAM, the SAM will be updated through the State Program Advisories (SPAs) beginning with SPA 8. SPA 1 through 7 reflecting program changes from January 1, 1986 - July 30, 1989 are

already incorporated into SAM. The SPAs alert Regions and States of Federal program changes which include new regulations, and self-implementing statutory provisions every six months. The SAM will also be updated to reflect any future changes that are made to the authorization process as a result of the RCRA Implementation Study recommendations.

I would like to take this opportunity to thank all the Headquarters, Regional and State representatives that made valuable contributions to the development and review of the SAM. I look forward to a close working relationship between EPA and the States in the nineties and beyond. I also anticipate that the process and guidelines established in the SAM will lead to the successful implementation of the RCRA program. If you have any questions on the use of the manual please call Alex Wolfe, State Programs Branch (FTS 382-2210 or (202) 382-2210).

Attachments

cc: Dev Barnes, OSW
Lisa Friedman, OGC
Mary Jean Osborne, OWPE
Authorization Section Chiefs, Regions I-X
Regional Counsels, Regions I-X

Executive Summary

INTRODUCTION

EPA is publishing this guidance manual to provide clearer direction to States on developing applications for revisions to their authorized State programs. It also sets forth the internal procedures that EPA will use to process these applications. The authorization procedures in this manual are essentially the same as those published by EPA in 1988 in the State Consolidated RCRA Authorization Manual (SCRAM) (OSWER Directive No.: 9540.00-9). However, it has been renamed, updated, and reformatted for better understanding and easier use. Although this manual is primarily intended to address revisions for States that have already been authorized, it also provides background on the entire RCRA State authorization program. States that have yet to receive any authorization should refer to the 1988 SCRAM for detailed guidance on application procedures for the basic Resource Conservation and Recovery Act (RCRA) program.

This manual consists of two volumes. Volume I contains substantive guidance on preparing and reviewing a revision application. Volume II consists of appendices that provide checklists, models, and working tools to aid in the authorization process. Note that the guidance manual can be put in a looseleaf binder so that updated and new materials can be added as the program continues to change.

The following is a brief description of the State Authorization Manual (SAM).

CHAPTER ONE: OVERVIEW OF THE AUTHORIZATION PROGRAM

Chapter One provides an overview of the RCRA State authorization program. RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), provides for authorization of State hazardous waste programs under Subtitle C. It was Congress' intent that the entire Subtitle C program would eventually be administered by the States in lieu of the Federal government. This is because the States are closer to, and more familiar with, the regulated community and would be in a better position to administer the programs and respond to local needs effectively. EPA's goal is to approve as many qualified States for final authorization as possible and to maintain their authorization through the revision process.

For a State program to receive final authorization, RCRA requires the State program to be equivalent to, no less stringent than, and consistent with the Federal program, as well as other State programs. EPA further interpreted these statutory requirements by promulgating regulations at 40 CFR Part 271. The regulations provide detailed requirements that State programs must meet in order to be authorized. The rules also set forth the form and content of the State's application for final authorization.

CHAPTER TWO: PROGRAM REVISION TRIGGERS

State authorization for hazardous waste management programs does not end when a State obtains final authorization; States must continue to maintain equivalency to the Federal program. Therefore, modifications to the Federal program may necessitate subsequent modifications to authorized State programs. Also, States independently modifying their own programs must have

these modifications reviewed by EPA to ensure that the programs continue to meet Federal authorization requirements. Chapter Two discusses the types of State-and Federally-initiated program modifications, State program revision requirements, and the timeframe for submitting program modifications and revision applications.

Prior to 1986, Federal regulations required States to revise their programs as each new RCRA regulation was promulgated. After the enactment of HSWA, EPA established the "cluster system", which applies to State modifications that are necessary because of changes to the Federal program. This system allows States to group together, in one application, a number of Federally-required modifications promulgated during a specified time period. In addition to Federally-initiated program modifications, State-initiated program modifications must be submitted to EPA to determine whether a revision application will be necessary.

CHAPTER THREE: THE PROGRAM REVISION APPLICATION

Chapter Three provides a discussion of the components of an application for State program revisions, including a detailed description of the requirements for each component. It also discusses the Capability Assessment, which the EPA Regional Office prepares to accompany an application. Examples and models of these components are contained in the appendices.

The nature and extent of documentation needed in a State's application for a program revision will vary, depending on the type and extent of the modification and its impact on program implementation. However, the following components will be required in virtually all program revision applications: a letter from the State Director transmitting the revision; an Attorney General's Statement; copies of State statutes, regulations, or other legal authorities upon which the State is relying to show equivalence; and completed regulatory and/or statutory checklists. In some cases, other authorization documents may also need to be revised, e.g., Program Description and Memorandum of Agreement.

CHAPTER FOUR: THE PROGRAM REVISION PROCESS

Review of authorization applications is conducted by EPA Headquarters and the Regional Offices. The process entails a concurrent review, with the Regions serving as the primary contact with the States. Chapter Four describes the steps in the revision process and explains the roles of Headquarters and the Regions in the various stages of the review process. The process described in the chapter is that which is currently in use. The review process for program revisions is currently under discussion within EPA.

Communication is crucial in a program as complex as the RCRA Subtitle C program. EPA Regional and Headquarters staff will emphasize informal day-to-day interactions with their State and Regional counterparts, respectively, and will be available for formal consultation whenever necessary. Exchange of ideas, as well as problems, is encouraged in order to improve the State authorization process. EPA Headquarters, Regional, and State staff are encouraged to work as a team to resolve authorization issues as they arise so that program revision authorization may be granted to each qualified State in a timely manner.

The first step in the review process is pre-application consultation. Early consultation with EPA is encouraged when a State is planning to modify its program, especially if those changes modify the State's legal authorities. The purpose of this consultation is to provide the State with an early indication of potential authorization problems, at a point in the process when they may be more easily corrected. For State-initiated modifications, the Region will also determine whether a program revision application is required.

The next step is the draft application review. Although a draft application is not required, States

are encouraged to submit a draft, which facilitates resolution of problems prior to adoption of final State regulations. Review of the draft application will involve both Regional and Headquarters offices. All appropriate program, legal, and enforcement offices will participate in the review to ensure that EPA concerns are identified at the draft stage.

The final step in the review process is the official application review and decisionmaking. After a State receives EPA's comments on its draft application, it should begin to address those comments in its official application. EPA Headquarters and the Region will independently review the official application. After resolving any outstanding issues, the Region will make a tentative determination to approve or disapprove the program revision. The Region will choose from one of two methods to notify the public of its decision: standard rulemaking or immediate final rulemaking. Standard rulemaking allows EPA to review public comments on the revision and respond to them in a final rule approving or disapproving the revision. The immediate final rulemaking option is designed to streamline the revision approval process. In most cases, one Federal Register notice will be published indicating that the State revision is approved or disapproved in 60 days unless EPA receives an adverse comment within the 30 day comment period. However, if an adverse comment is received, one or more subsequent notices will be needed.

Table of Contents

List of Exhibits

Chapter One

Overview of the Authorization Program

INTRODUCTION

The Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), provides for authorization of State hazardous waste programs under Subtitle C. In fact, Congress designed RCRA so that the entire Subtitle C program would eventually be administered by the States in lieu of the Federal Government. This is because the States are closer to, and more familiar with, the regulated community and therefore are in a better position to administer the programs and respond to local needs effectively.

This guidance manual has been developed to provide direction to States in preparing applications for revisions to State authorization programs, as well as to set forth the internal procedures that EPA will use to process these applications. Although this manual is primarily intended to address revisions to authorized State programs, this chapter provides background on the entire State authorization process for hazardous waste programs and outlines key attributes of interim and final authorization. (For States that have not yet received authorization, refer to the State Consolidated RCRA Authorization Manual (SCRAM) for guidance on developing applications.)

RCRA, as enacted in 1976, gave the States two options for assuming responsibility to administer the Subtitle C program; i.e., States could apply for either interim or final authorization. Under interim authorization, a State could implement a program that was "substantially equivalent" to the Federal program (§3006(c)). For a State program to receive final authorization, however, RCRA required the program to be "equivalent to, no less stringent than, and consistent with" the Federal program, as well as other State programs. The term "final authorization" is applied both to base program authorization as well as program revision authorization. Final authorization connotes the type of authorization received (i.e., interim vs final), rather than the status of a State's authorization (i.e., base vs. program revision authorization). It is important to note that a State may make its program more stringent or broader in scope than the Federal program and still be eligible for authorization (§3009), unless in doing so the State's program becomes inconsistent with the Federal program.

The remainder of this chapter provides a detailed description of interim and final

KEY TERMS USED IN THIS MANUAL

Certain terms are often used interchangeably or are confused in the RCRA program. Several key terms are defined here to avoid confusion later as you read and use this manual.

RCRA – The Resource Conservation and Recovery Act of 1976, and all amendments to that Act.

Non-HSWA or Pre-HSWA Provisions – Elements of the Federal RCRA program that are implemented pursuant to statutory authority that predates the 1984 HSWA Amendments.

HSWA Provisions – Elements of the Federal RCRA program that are implemented pursuant to HSWA, i.e., regulations promulgated to implement the Hazardous and Solid Waste Amendments of 1984.

Final Authorization – Granted to State programs that are equivalent to, no less stringent than, and consistent with the Federal program, as well as other State programs. Final authorization allows for the implementation of the authorized State's regulations in lieu of the Federal RCRA regulations in that State.

Base Program Authorization – The RCRA program initially made available for final authorization, reflecting Federal regulations as of July 28, 1982.

HSWA Authorization – Authorization for those elements of the Federal RCRA program that are implemented pursuant to HSWA.

authorization, and introduces the revision process.

FINAL AUTHORIZATION

RCRA establishes the basic standards that a State hazardous waste program must meet in order to qualify for final authorization. These standards are equally applicable to States seeking authorization for program revisions. The program:

- Must be "equivalent" to the Federal program;
- May not impose any requirements "less stringent" than the Federal requirements;
- May, however, impose requirements which are "more stringent" than those imposed by Federal regulations;
- Must be "consistent" with the Federal program and other State programs;
- Must follow specific procedures for public "notice and hearing" in the permitting process;
- Must "provide adequate enforcement;" and
- Must provide for the public availability of information "in substantially the same manner, and to the same degree" as the Federal program.

EPA further interpreted these statutory requirements by promulgating regulations at 40 CFR Part 271. The regulations provide detailed requirements that State programs must meet in order to be authorized. The rules also set forth the form, content, and timing for submission of the State's application for final authorization. In reviewing State applications, EPA is required to determine whether States satisfy these statutory and regulatory standards.

Exhibit 1 summarizes the RCRA statutory standards that State programs must meet for final authorization, identifies the corresponding EPA regulations, and indicates the appropriate sections of the State's application where the State should demonstrate that it satisfies each RCRA requirement.

The following discussion and examples briefly illustrate how EPA will apply the final authorization tests to State program revisions.

Equivalent Program

RCRA §3006(b) requires that authorized State programs be "equivalent" to the Federal program. This does not mean that States must have programs identical to the Federal program. However, States must regulate at least the same universe of handlers (i.e., generators, transporters, and facilities) as EPA, and each aspect of a State's regulation must be as stringent as EPA's regulations. (See "no less stringent" discussion on page 1-4.)

While EPA recognizes that State programs may be broader in scope than the Federal program and still meet the test for final authorization, the Agency will not approve any change in the State's authorized program which decreases the scope of the State program relative to the Federal program. EPA approval is not required for State program changes that are beyond the scope of the Federally-approved program. Two simple examples of the "broader in scope" principle are when a State lists additional wastes as hazardous which are not in the Federal universe of wastes or when the State does not provide for the small quantity generator exemption.

Generally, States demonstrate equivalence through legal authorities in their statutes and regulations. In two instances, however, the Memorandum of Agreement (MOA) may be used to demonstrate equivalence:

- To impose certain procedural requirements on the authorized State agency; or
- To impose limitations on the exercise of waiver or variance authority by the authorized State agency.

In both cases, the MOA is used in lieu of certain specific State procedural requirements. This approach cannot be used to impose restrictions or standards on the regulated community. The

EXHIBIT 1

REQUIREMENTS FOR FINAL AUTHORIZATION

RCRA Standard	EPA Regulations (40 CFR)	State Application
1. Equivalent Program §3006(b)	271.9 - .13	Program Description, AG Statement, and MOA
2. No Less Stringent Program §3009	271.9 - .14	Program Description, AG Statement, and MOA
3. Consistent Program §3006(b)	271.4	Program Description and AG Statement
4. More Stringent Program §3009	271.1(i)	Program Description and AG Statement
5. Adequate Enforcement §3006(b); §7004(b)(1)	271.15 - .16	Program Description, AG Statement
6 Notice and Hearing in the Permit Process §§7004(b)(1) and (2)	271.14	Program Description, AG Statement, and MOA
7. Availability of Information §3006(f)	271.17	Program Description, AG Statement, and MOA

use of the MOA in this manner must be accompanied by a certification by the Attorney General in his or her statement accompanying the application that nothing in the State's statutes or regulations precludes its use. (See page 3-10 for further discussion and examples of the use of the MOA in lieu of procedural regulations.)

No Less Stringent Program

RCRA §3009 prohibits States from imposing requirements which are "less stringent" than the Federal requirements. EPA will not approve any change in the State's authorized program which makes the State's program less stringent than the Federal program. In some cases, EPA has promulgated new requirements that are less stringent than the existing Federal requirements. Examples of new Federal requirements that are less stringent than previous Federal requirements are:

- Research, development, and demonstration (RD&D) permits; and
- Treatability studies sample exemptions.

States may modify their programs to adopt such less stringent requirements, but are not required to do so. If a State chooses to modify its program, the State may not adopt requirements that are less stringent than the corresponding Federal requirement.

A State may, however, impose requirements which provide more rigorous control of hazardous waste activities than EPA's regulations, as long as they are consistent with Federal or State programs applicable in other States (consistency is discussed in more detail below).

Examples of more stringent State requirements are:

- Limited financial assurance options for facility closure (e.g., a State may choose to allow only one of the six options that the Federal program allows);
- Submittal of an annual rather than a biennial report for generators; and
- Expiration of permits after five years instead of ten years.

Since EPA has the authority to enforce the more stringent provisions of RCRA-authorized program revisions, the Agency has a corresponding responsibility to provide oversight for those aspects of State programs that are more stringent.

Consistent Program

40 CFR 271.4 states that, to obtain approval, a State program must be consistent with the Federal program and authorized State programs applicable in other States. Section 271.4 defines an inconsistent State program as:

- Any aspect of the State program which unreasonably restricts the transport of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program;
- Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage, or disposal of hazardous waste in the State; or
- A State manifest system that does not meet Federal requirements.

Consistency decisions are made on a case-by-case basis taking into account a variety of factors. States should discuss questionable aspects of State law or regulations with EPA.

Adequate Enforcement

RCRA §3006(b) requires that authorized State programs "provide adequate enforcement of compliance with the requirements of" RCRA Subtitle C. Because Congress explicitly emphasizes the adequacy of State enforcement programs, EPA must pay special attention to the review of State enforcement authority. EPA will examine the inspection, enforcement remedy, and penalty authorities of State programs in light of the provisions of RCRA §3007 and 40 CFR §§ 271.15 and 271.16.

EPA will disapprove a State's modification to its enforcement program if the modification would result in a State program that no longer meets the requirements of §§271.15 and 271.16. Examples include:

- Reductions in civil or criminal penalties below the levels specified in §271.16(a)(3);
- Restrictions in the types of enforcement authorities provided to the State (e.g., if mental state is an element of proof of civil violations); and
- Restrictions on public participation in the enforcement process that are in conflict with §271.16(d).

EPA is reviewing the enforcement requirements for authorization. Proposals such as increasing the penalty levels, delegating corrective action order authority under RCRA §3008(h), and requiring administrative penalty authority are under consideration. Any such changes would be proposed for public comment in the Federal Register and promulgated as final rules before they would take effect.

Notice and Hearing in the Permit Process

RCRA §7004(b)(2) stipulates that no State permit program may be authorized unless it:

- Provides notice of its intent to issue a permit though publication in "major local newspapers of general circulation;"
- Broadcasts such notice over local radio stations;
- Provides written notice to certain State and local government agencies;
- Provides for at least a 45-day public comment period; and
- Holds an informal public hearing if one is requested during the comment period.

EPA cannot approve State modifications to the permitting notice and hearing procedures if the modifications would be in conflict with §7004(b)(2). Modifications that would cause particular concern include:

- Shortening the duration of the comment period so that it is less than the 45-day minimum period required by statute;
- Limiting public access to permit information;
- Limiting distribution of notices (e.g., removing the requirement for the newspaper or radio notice for permits); and
- Limiting the opportunity for a public hearing (e.g., establishing a threshold of public interest necessary before a hearing should be held).

State Availability of Information

RCRA §3006(f), as amended by HSWA, provides that no State program may be authorized unless:

- The program provides for the public availability of information obtained by the State regarding facilities and sites for treatment, storage, and disposal of hazardous waste; and
- Such information is available to the public in substantially the same manner, and to the same degree, as it would be under the Federal program.

EPA has interpreted the criterion that information be available "in substantially the same manner" to refer to the procedures EPA uses in disclosing or withholding information under the Freedom of Information Act (FOIA). The criterion that information be available "to the same degree" refers to the type and quantity of information available under FOIA and EPA's FOIA regulations (40 CFR Part 2, Subparts A and B). The Agency also has concluded that information regarding facilities and sites would at least cover information relating to permitting, compliance and

enforcement, and information gathered under RCRA §3007(a)(1) (or a State analogue). Further, because much or all of the information obtained by States could have been obtained by EPA and would be subject to the disclaimer provision of RCRA §3007(b)(4), EPA has also relied on this provision in determining what requirements States must meet to satisfy §3006(f).

A State will need to demonstrate that its requirements address much of the substance of 40 CFR Part 2, Subparts A and B, in order to meet the standards of §3006(f).

In developing an analogue to §3006(f), EPA expects States generally to enact laws or adopt regulations. However, States may use the Memorandum of Agreement (MOA) to satisfy certain procedural requirements of §3006(f). For a further discussion of the availability of information requirements, please refer to Appendix N.

INTERIM AUTHORIZATION

Congress provided for interim authorization as a temporary mechanism to enable States to continue to participate in the Federal hazardous waste management program while they developed stronger or more comprehensive programs that were fully equivalent to the Federal program, thereby qualifying for final authorization.

Interim authorization for pre-HSWA provisions expired January 31, 1986. However, HSWA provided a new interim authorization period for HSWA regulations (§3006(g)). Interim authorization for HSWA provisions expires January 1, 1993 (40 CFR 271.24). The first State to receive HSWA interim authorization was Idaho, for its corrective action program (55 FR 11015, March 26, 1990).

Any State with HSWA interim authorization must obtain final authorization by January 1, 1993, otherwise the interim authorized HSWA program will revert to EPA. In addition, EPA may initiate withdrawal proceedings for the entire program if the State fails to revise its program and obtain authorization by the deadlines in 40 CFR 271.21. Program revision procedures apply to applications for HSWA interim authorization and subsequent applications for final authorization.

IMPLEMENTATION IN AUTHORIZED STATES

As discussed earlier, authorized State programs operate in lieu of the Federal program. However, HSWA brought about a fundamental change in the manner in which the Federal hazardous waste program is implemented in authorized States, particularly concerning program revisions. Prior to the passage of HSWA, new RCRA regulations promulgated by EPA took effect only in unauthorized States. The regulations became effective in authorized States only after a State adopted equivalent requirements. EPA could not enforce the requirements until the State applied for and received program approval from EPA. In contrast, HSWA §3006(g) provides that Federal HSWA requirements or prohibitions, with the exception of §3006(f), are effective in all States, including authorized States, and can be enforced by EPA. Section 3006(f) is not enforceable by EPA in authorized States because it is a prerequisite to State authorization, not a requirement or prohibition of the Act. States must modify their programs to pick up both RCRA and HSWA Federal program changes by certain "cluster" deadlines, which are discussed in Chapter Two.

Chapter Two

Program Revision Triggers

INTRODUCTION

As discussed in Chapter One, State authorization for hazardous waste management programs does not end when a State first obtains final authorization. RCRA §3006(b) requires authorized States to maintain equivalency to the Federal program; that is, authorized State programs must remain at least as stringent as the Federal program. Therefore, modifications to the Federal program, due to statutory and regulatory changes, usually necessitate subsequent modifications to authorized State programs.

KEY TERMS

Modification – A State's actions to change its statute, rules, and/or other program elements. Also, the actual change itself.

Revision – The process of submitting an application and obtaining EPA review and approval of State program modifications.

Every change that makes the Federal RCRA program more stringent or increases its scope will trigger State program modifications. States may, but are not required, however, to modify their programs to correspond to Federal changes that are less stringent or that reduce the scope of the existing Federal RCRA program. While States may independently modify their own programs, EPA must review such modifications to ensure that they allow the State's program to continue to meet Federal authorization requirements.

In order to accommodate modifications made to State programs, EPA promulgated rules containing procedures for revisions (40 CFR 271.21).

This chapter will discuss the types of State-and Federally-initiated program modifications, State program revision requirements, and the timeframe for submitting program modifications and revision applications.

STATE-INITIATED PROGRAM MODIFICATIONS

Three primary types of program modifications can be initiated by the State: statutory, regulatory, and administrative. In addition, legal challenges can result in State modifications.

State Statutory Changes

A State legislature may enact new legislation that affects a State's authority to implement its authorized program. A State should submit draft legislation to the EPA Regional Office as early as possible for Agency review and comment regarding the potential effects, if any, on the authorized program.

State Regulatory Amendments

Pursuant to State statutory requirements, or on its own initiative, the State agency may choose to amend its regulations. Again, copies of such proposed regulations should be submitted to the EPA Regional Office as early as possible (i.e., at the draft stage) for review and comment.

State Administrative Changes

Plans for State agency reorganization, program changes that would alter the agreements established in the MOA (e.g., a State may decide it wants to start receiving notification forms instead of having EPA receive them), changes to forms or priorities, and other similar administrative changes should be submitted to EPA for review. It is important that the State keep EPA informed of all pending State program administrative changes so that EPA can determine if a revision will be necessary.

The transfer of all or part of the State program from the authorized State agency to any other State agency must be approved by EPA as a program revision. Until such approval, the new State agency is not authorized to implement the program (see §271.21(c)). If a major shift of responsibilities is made to an unapproved State agency, EPA may withdraw the State's authorization until the program revision is approved. However, changes within the internal structure of the approved State agency, with no changes in the overall authority of the agency, do not require EPA approval.

Legal Challenges

Legal challenges to State regulations or legislation are not technically considered to be State-initiated modifications for reporting purposes under §271.21(a). However, such legal challenges may result in decisions that render authorized State requirements invalid, requiring the State to initiate modifications. Consequently, it may be desirable for States to notify EPA when legal challenges arise. States must inform EPA when judicial decisions are rendered so that the Agency can determine whether a program revision application is necessary.

FEDERALLY-INITIATED PROGRAM CHANGES

There are three Federal activities that can trigger State program modifications: Federal statutory amendments, Federal regulatory changes, and interpretation of Federal legal authorities by EPA or the courts.

Federal Statutory Amendments

Amendments to Federal statutes may require legislative and/or regulatory modifications to State programs. Statutory amendments may impose requirements directly. For example, HSWA mandated that liquids could no longer be disposed of in landfills. This self-implementing prohibition was effective on the date of enactment of HSWA. Statutory amendments can also take the form of directives to EPA to promulgate new regulations. For example, HSWA directed EPA to promulgate regulations establishing treatment standards wastes must meet prior to land disposal (the "land disposal restrictions"). Both of these types of statutory changes will trigger State program modifications. However, as explained in the next section, different deadlines for modifying State programs and submitting applications will apply.

Federal Regulatory Changes

Most changes to 40 CFR Parts 124, 260 through 266, 268, 270, or 271 will trigger a State program modification. Some Federal regulatory changes may be made in response to statutory amendments; others may be changes to technical or administrative requirements. In the preamble to EPA regulatory actions published in the Federal Register, EPA alerts States to the need for conforming State program modifications. In addition, supplements to this manual (in the form of State Program Advisories (SPAs)) will continue to be issued to provide detailed guidance concerning Federal changes.

Interpretation of Federal Legal Authorities

On occasion, an interpretation of EPA's legal authorities will require a State program modification. In such a case neither the Federal statute nor the regulations are amended. Rather, a Federal Register notice is issued explaining the legal interpretation. Examples of this include the interpretation of the statutory exclusion of source, special nuclear and byproduct material in RCRA §1004(27) (51 FR 24504, July 3, 1986), and the interpretation of the applicability of the Federal interim status requirements in 40 CFR 265.1 to hazardous waste treatment, storage, or disposal facilities (50 FR 28702, July 15, 1985). If the State Attorney General is able to interpret the State's existing authorities in an equivalent manner, the State does not need to amend its legal authorities in order to receive authorization. The State must, however, submit an application with an appropriate Attorney General certification and whatever additional documentation may be required for the specific program revision.

PROGRAM REVISION REQUIREMENTS

When a Revision is Required

Federal program changes which are more stringent or broader in scope than the existing Federal program will always trigger the need for State program revision applications and Agency approval. However, a State will not always need to modify its legal authorities in response to a Federal program change.

For example, a State may have a requirement which was more stringent or broader in scope than the Federal program when the State was initially authorized, and which the State believes to be equivalent to one of the new Federal requirements. However, EPA needs to review the State's requirement to ensure that it does meet the tests for authorization. Further, RCRA §3006(g) requires submission of an application even where the State has an existing requirement. Therefore, while the State may not need to amend its statute or regulations, the State is not automatically authorized for the new requirements and must submit a program revision application to EPA. Specifically:

- The State's requirements must be evaluated by EPA with respect to the new Federal requirements;
- The State's Attorney General must certify equivalence (for final authorization) or substantial equivalence (for interim authorization) with respect to the new Federal requirement; and
- The public must be given the opportunity to comment on the State's program with respect to the new Federal requirement.

For these reasons, such a State must obtain authorization for that requirement, even though no modification was necessary.

All State-initiated modifications must be submitted to and reviewed by EPA to determine:

- Their effect on the State's authorized program; and
- Whether a revision application must be submitted.

It is important that the State consult with EPA as early as possible when the State is considering any State-initiated program modification, particularly a modification to statutory and regulatory authority which will affect the authorized program.

State Modification Deadlines

Prior to 1986, Federal regulations required States to revise their programs as each new RCRA regulation was promulgated. After enactment of HSWA, however, EPA recognized that there would be numerous additional Federal program modifications and amended 40 CFR 271.21 in 1986 to establish the "cluster system." The cluster system was intended to improve the efficiency of program revision submittals and to reduce the rulemaking burden to States (§271.21(e)(2)). Rules promulgated between July 27, 1982, and June 30, 1984 (Checklists 1-8), predate this amendment and are not covered by the cluster system. The cluster system applies only to State modifications that are necessary because of changes to the Federal program after June 30, 1984, i.e., it does not apply to State-initiated modifications. For further information on the history of the cluster system, refer to Appendix G.

Exhibit 2 outlines the cluster period, State modification and revision application deadlines, and program areas affected for each cluster.

Non-HSWA Clusters. EPA created an annual cluster system for Federal non-HSWA program modifications occurring after June 1984. These clusters encompass all Federal requirements promulgated in a twelve-month period from July 1 of one year to June 30 of the next year. States must modify their programs by July 1 of the year following the closing date of the cluster for regulatory changes and by July 1 two years later for any provisions requiring a statutory change. For example, non-HSWA Cluster I encompasses the period from July 1, 1984, to June 30, 1985. The State modification deadline is July 1, 1986, for regulatory changes, or July 1, 1987, if a State statutory change is necessary.

EXHIBIT 2

THE CLUSTER SYSTEM*

	Cluster Number	Cluster Period	State Modification Deadline**	State Revision Application Deadline	Program Areas Affected
Non-HSWA Clusters	I	July 1, 1984 to June 30, 1985	July 1, 1986	September 1, 1986	Non-HSWA Rules HSWA Section 3006(f)
	II	July 1, 1985 to June 30, 1986	July 1, 1987	September 1, 1987	Non-HSWA Rules
	III . . . VI	July 1, 1986 to June 30, 1987, etc.	July 1, 1988, etc.	September 1, 1988, etc.	Non-HSWA Rules
HSWA Clusters	I	November 8, 1984 to June 30, 1987	July 1, 1989	September 1, 1989	HSWA Provisions
	II	July 1, 1987 to June 30, 1990	July 1, 1991	September 1, 1991	HSWA Provisions
RCRA Clusters	I	July 1, 1990 to June 30, 1991	July 1, 1992	September 1, 1992	All HSWA and Non-HSWA Provisions
	II	July 1, 1991 to June 30, 1992	July 1, 1993	September 1, 1993	All HSWA and Non-HSWA Provisions
	III . . .	July 1, 1992 to June 30, 1993, etc.	July 1, 1994, etc.	September 1, 1994, etc.	All HSWA and Non-HSWA Provisions

* Checklists 1-8 were issued prior to establishment of the cluster system. State modification deadlines for these rules are 1 year from the promulgation date of each rule, or 2 years if a statutory change is required.

** 1 additional year provided if statutory change is needed. Can be extended by up to 18 months (see Section 271.21(e) and (g)).

HSWA Clusters. For HSWA provisions, multi-year clusters were created. The first cluster encompasses HSWA regulations promulgated between November 8, 1984, and June 30, 1987. This cluster period was chosen because EPA expected the bulk of the HSWA changes to the Federal program to occur prior to June 1987. This cluster includes the majority of the facility standards. States must have adopted these regulations by July 1, 1989. In order to ease the States' administrative burdens in making program modifications, another multi-year cluster was created for HSWA provisions promulgated between July 1, 1987, and June 30, 1990. Since many of the HSWA land disposal restrictions become effective during this period, EPA thought that, from an administrative standpoint, it made sense to cluster these requirements together. States must modify their programs for the second HSWA cluster by July 1, 1991. States may have an additional year for any cluster provision requiring a statutory modification.

RCRA Clusters. All Federal HSWA and non-HSWA modifications occurring after June 30, 1990, will be combined in annual RCRA clusters with the State modification deadlines occurring one year (or two years for statutory modification) after the closing date.

Extensions to State Modification Deadlines. The Regional Administrator may extend the State modification deadline for each cluster by up to six months on a case-by-case basis. To receive this extension, the State must demonstrate that, although it has made a good faith effort to meet the deadline, its legislative or rulemaking procedures have caused it to miss the deadline (see §271.21(e)(3)). If the State is unable to modify its program within the extended six-month period, the Regional Administrator may place the State on a schedule of compliance (see §271.21(g)). As a prerequisite to being placed on a schedule of compliance, the State must have:

- Made a good faith effort to meet the deadlines in §271.21(e);
- Been granted a six-month extension pursuant to §271.21(e)(3); and
- Made diligent efforts to modify its program during the extension.

Schedules of compliance are limited to a duration of one year from the extension deadline and must be published in the Federal Register. If a State fails to comply with the schedule of compliance, the Regional Administrator may take action (see §271.21 (g)(2)). (See Appendix M for an example of a model FR notice for a schedule of compliance)

TIMEFRAME FOR SUBMITTAL OF PROGRAM MODIFICATIONS AND REVISION APPLICATIONS

States must inform EPA of all proposed modifications to their authorized RCRA programs. EPA will review State-initiated modifications to determine whether a program revision application is required. Within 30 days of modifying its program, a State must submit to the Region a copy of the program modification and a schedule indicating when the State intends to seek approval of the modification. This requirement applies to modifications the State undertakes in response to Federal program changes as well as to State-initiated modifications for which EPA determines a revision application is required

For Federally-initiated modifications the State must submit a draft of its revision application to EPA no later than 60 days after the State modification deadline in order to satisfy §271.21(e)(4)(ii). States are not required to apply for all the cluster provisions at one time A State may apply for any Federal requirement at any time (either alone or in combination with other requirements). However, the State must have applied for all provisions in a cluster no later than 60 days after the State modification deadline for that cluster. For State-initiated modifications for which EPA determines an application is necessary, the deadlines in §271.211(e)(4) are not applicable. The Region and State should determine an appropriate schedule for submitting a program revision application.

Usually, a RCRA final rule is promulgated months in advance of its effective date. Similarly, the content of a self-implementing

Timeframe for Submitting Program Modifications and Revision Applications

Program Modifications

Applies to all program modifications

- States inform EPA of proposed modifications immediately

Applies to State-initiated modifications

- EPA determines whether State-initiated modification requires a program revision application

Applies to all program modifications requiring a revision application

- Within 30 days of modifying its program, a State must submit to the Region:
  - A copy of the program modification
  - A schedule of when the State intends to seek approval of modification

Revision Applications

Applies to Federally-initiated modifications

- Within 60 days of program modification deadline, State must submit to the Region a draft revision application

Applies to State-initiated modifications requiring a revision application

- State submits draft revision application within the agreed-upon timeframe

HSWA provision is often known in advance of its effective date. In such cases, a State may modify its program and submit its revision application to EPA prior to the effective date. EPA will review the revision based on the final rule or self-implementing statutory provision. EPA may publish the approval of the State program revision before the effective date of the Federal requirement; however, the authorization can only become effective on or after the Federal requirement's effective date. For example, if a waste listing is published in January and becomes effective the following July, EPA could review and approve the State's corresponding waste listing during the January-July period, but the State's authorization could not become effective until the July effective date for the waste listing.

States should be careful not to try to anticipate the content of future Federal requirements. Under no circumstances will EPA grant authorization to a State based on proposed Federal requirements. In addition to the practical consideration that there may be unanticipated changes to such provisions before they are finalized, such proposed regulations do not exist as Federal requirements. Federal program changes are defined in 40 CFR 271.21(e)(2) as promulgated amendments to 40 CFR Parts 124, 270, 260-266, or 268 and any self-implementing statutory provisions (i.e., those taking effect without prior implementing regulations) which are listed as State program requirements in this subpart.

LESS STRINGENT PROVISIONS

As explained earlier, States may, but are not required, to modify their programs to adopt analogues to less stringent Federal program changes. All less stringent requirements are identified in the revision checklists as optional.

Effect of Less Stringent HSWA Requirements

There is one exception to the general principle that HSWA requirements take effect in authorized States at the same time they take effect in nonauthorized States. This exception is for less stringent HSWA provisions. RCRA §3009 provides that a State may impose more stringent requirements. Thus, any authorized State or local requirement that is more stringent than a HSWA requirement that is less stringent than the Federal program for which the State was authorized remains authorized and in effect under State or local law. An example of this situation is RCRA §3004(p) (codified at 40 CFR 264.90(b)), which allows for variances from the ground-water monitoring requirements, in certain circumstances. EPA cannot implement this requirement if the authorized State does not allow for variances under similar circumstances; i.e., if the State has more stringent requirements. The universe of more stringent provisions in the authorized State program and the Federal HSWA program

defines the applicable requirements in an authorized State (see 50 FR 28729 and 28730, July 15, 1985).

State Adoption of Less Stringent RCRA Requirements

When a State adopts an analogue to a less stringent Federal requirement, it goes into effect under State law. In some cases, adoption of less stringent Federal requirements can affect other provisions for which a State is applying for authorization. For example, requirements for research, development, and demonstration (RD&D) permits are less stringent requirements than the previous Federal program before HSWA Cluster I. RD&D requirements are found in 40 CFR Part 270 and affect closure, post-closure, financial responsibility, tanks, and Part B information requirements. If a State adopted RD&D provisions and subsequently sought authorization for closure, tank, or Part B program revisions (without applying for authorization of the RD&D provision), the State's program could be found to be less stringent than the corresponding Federal program evaluated for authorization purposes. (See Table G-1, in Appendix G, which identifies all of the changes that are less stringent than existing Federal code.)

There are two solutions to this problem, with the first being preferable:

1. Apply for authorization for less stringent Federal provisions as soon as possible. This way less stringent provisions will be unauthorized for as short a time as possible. In addition, the State will not be precluded from receiving authorization for other affected program revisions.

2. Do not seek authorization for any program revision affected by a less stringent rule, unless simultaneously seeking authorization for that less stringent rule. This is not the preferred approach because it may delay authorization for some program revisions.

Chapter Three

The Program Revision Application

INTRODUCTION

The revision process is applicable to States that have previously obtained authorization and must revise their programs to maintain equivalency with the Federal standards (see §271.21(e)). This chapter provides a discussion of the components of an application for State program revisions, including a detailed description of the requirements for each component. It also discusses the Capability Assessment, which accompanies an application. Examples and models of these components are contained in Appendices B, E, and L. A brief discussion of authorization application components for States that are not authorized is presented at the end of this chapter.

APPLICATION COMPONENTS

To evaluate a State's application for a program revision, EPA must have information which allows it to:

- Understand the substance of the program modification; and
- Evaluate the impact the program modification has on the State's ability to continue to meet the statutory requirements for authorization.

The nature and extent of documentation needed from the State to provide this information will vary, depending on the type and extent of the modification and its impact on program implementation. However, the following components will be required in virtually all program revision applications:

- A letter from the State Director transmitting the revision;
- An Attorney General's Statement, including completed regulatory and/or statutory checklists (See Appendix J); and
- Copies of State statutes, regulations, or other legal authorities upon which the State is relying to show equivalence.

In some cases, other authorization documents may also need to be revised (e.g., Program Description, Memorandum of Agreement). The State should work with the EPA Regional Office to determine what specific documentation should be included in the revision application for a particular State program modification.

The following sections provide descriptions of the major application components that may need to be included in the revision application: the Attorney General's Statement, as well as the regulatory and statutory checklists; the Program Description; and the Memorandum of Agreement.

Each section will explain the purpose of the documentation, state when the component is required, describe the elements of the component, and describe how the component will be reviewed. A brief description of the State agency transmittal letter is also provided. For those components for which models are provided, EPA will make computer diskettes available to States to enable them to tailor the models quickly and efficiently to specific State needs. (See Appendix O for instructions on the use of model formats.)

> Familiarity with how EPA will review each component may be helpful to the State in preparing its documentation. This review can serve as a check for the State before it submits its documentation to EPA.

State Agency Transmittal Letter

The State's revision application should be transmitted to EPA by a letter from the Director of the State's hazardous waste program. The letter should include a clear statement of the nature of the State modifications contained in the application. For example, the letter may reference the checklists included in the application. For HSWA requirements, the Director should also indicate whether the State is seeking interim or final authorization. In most cases, the State Agency letter will be less than one page long.

Attorney General's Statement (AG Statement)

Purpose. The AG Statement is a central part of a State's revision application and has three basic purposes:

- Identifies legal authorities;
- Interprets State law; and
- Certifies equivalency.

The AG Statement identifies the State's legal authorities and how these authorities are equivalent to the Federal standards. Because EPA attorneys may not be familiar with the State's law, it is important that the AG Statement be as clear and detailed as possible, both in identifying and interpreting State legal authority, and explaining, in narrative form, how the Attorney General believes the program modification is equivalent to the Federal requirement. This is especially important when the State has adopted regulatory language or a regulatory structure that looks significantly different from the Federal language or structure.

The Attorney General also should explain how the new AG Statement relates to previous Statements. The Statement should specify whether it is an addendum or amendment to previous statements.

When Required. The AG Statement is required for any State- or Federally-initiated change that modifies the legal authorities of a State's authorized program. An AG Statement may not be required for State-initiated changes that do not modify the State's legal authorities, e.g., a reorganization of the authorized State agency, a change to a form used by the State, or a change in administrative procedures. However, an AG Statement would be required when the State's hazardous waste program is transferred from one State agency to another. A State should consult with the EPA Regional Office to determine whether an application for a State-initiated change will require an AG Statement. Revision applications for Federally-initiated changes will always require an AG Statement.

Elements. Requirements for the AG Statement are specified in 40 CFR 271.7. Appendix E provides a model format for the Revision AG Statement. The model AG Statement should be used as a supplement to the AG Statement submitted by the State when it initially sought base program authorization. Appendix D provides a consolidated model for States seeking authorization for the first time. When a State submits a program revision application, the revised AG Statement should include only those provisions for which the State is seeking authorization. The AG Statement has five basic elements:

- The Attorney General's Certification;
- Citations of State laws and regulations;
- Dates of enactment of State laws and regulations;
- Analysis of authorities; and
- Checklists.

Certification. The AG Statement must contain a general statement certifying, in narrative form, that State law provides adequate authority to carry out the program revision. The Statement must be signed by the State Attorney General or an attorney authorized to independently represent the State agency in court on all matters pertaining to the State program.

Citations. The Model provides the Federal authority for each Federal program requirement. For each Federal requirement for which the State is seeking authorization, the Attorney General must cite the specific statutory and

regulatory authorities upon which the State is relying to assert equivalence. It is critical that the State have the Attorney General cite specific statutory authority for the State hazardous waste management regulations. Citations to general enabling laws authorizing the State agency to promulgate hazardous waste management regulations may be insufficient to demonstrate equivalence. The State should also be careful not to rescind any existing regulations until the State is actually authorized for new regulations.

REPLACING A PROGRAM WITH INCORPORATION BY REFERENCE

A State that has been developing its own regulations may subsequently decide to replace them by incorporating the Federal regulations by reference. The State must apply for authorization for its recodified State program. States that incorporate all or a portion of the Federal regulations by reference may still add specific provisions that are more stringent or broader in scope than the Federal regulations.

Date of Enactment. The date of enactment of laws and regulations must be included in the AG Statement in order to satisfy the requirement under 40 CFR 271.7 that all regulations be adopted at the time the Statement is signed and fully effective by the time authorization is granted.

Analysis of Authorities. For each Federal requirement for which the State is seeking authorization, the Attorney General should analyze, in narrative form, whether and how the cited State authority is equivalent to the relevant program requirements. The analysis should reference and describe legislative history, State case law, or rules of construction where appropriate. (It may also be necessary to provide analysis of the legal authority for commitments made in the Memorandum of Agreement – see discussion on MOA.) Any differences, problems, or peculiarities in State authority should be fully explained. Generally, a narrative analysis of authorities is not required if the State adopts the Federal regulation by reference or verbatim, or if the legal authorities cited are clearly equivalent.

Where a State has incorporated by reference any Federal regulations, the Attorney General must demonstrate, by citing the appropriate legal authorities, that the State has the authority to adopt State regulations in this manner. If the State's incorporation by reference is intended to include any EPA revisions that may occur in the future (this is known as prospective incorporation by reference), the Attorney General must cite State authority that enables it both to promulgate and enforce regulations in this manner.

AUTHORITY FOR INCORPORATION BY REFERENCE

State Attorneys General should note that a number of State Supreme Court cases hold that State statutes which adopt prospective Federal legislation or regulations constitute an unconstitutional delegation of legislative authority. See, eg., State of North Dakota v. Julson, 202 N.W.2d 145 (1972); Dawson v. Hamilton, 314 S.W.2d 532 (1958); Cheney v. St. Louis Southwestern Railway Co., 239 Ark. 870, 394 S.W.2d 731 (1965); State of West Virginia v. Ginstead, 157 W. Va. 1001, 206 S.E.2d 912 (1974); Schryver v. Schirmer, 84 S.D. 352, 171 N.W.2d 634 (1969); State v. Johnson, 84 S.D. 536, 173 N.W. 2d 894 (1970).

Checklists. The Model Revision AG Statement contains references to the revision checklists. The checklists are intended to assist the Attorney General in citing specific State analogues to the Federal requirements. The checklists include a column to indicate whether the State requirement is equivalent to, more stringent, or broader in scope than the analogous Federal requirement. The Attorney General, in developing the Statement, may choose to reference the checklists as part of the Statement or merely to use them as a guide. If the checklists are not referenced, the analogous State authorities must be cited in the body of the AG Statement.

The Revision Checklists are presented and numbered in chronological order by date of promulgation and are grouped by Cluster (see the table provided in Appendix G). As new regulations are promulgated and new Clusters established, checklists will be developed and distributed to States through the SPA system, typically on a semiannual basis.

To the extent that the State incorporates by reference entire Parts or Subparts of the Federal regulations (e.g., 40 CFR Part 264, Subpart A), there is no need to identify each provision of the incorporated Part or Subpart on the Checklist. Rather, it is sufficient to enter a single citation that references the entire Part or Subpart. Where only certain sections of a Part or Subpart are incorporated, citations to the specific Parts or Subparts must be noted. A simplified form for adoption by reference is provided in Appendix I.

A Checklist Linkage Table is provided in Appendix H to show which revision checklists affect similar sections of the Federal code. For example, Revision Checklists 32, 39, 50, 62, and 63 are considered "linked" as they all address the land disposal restrictions. Similarly, Revision Checklists 17A, 23, 42, and 47 all affect small quantity generators. Knowing these linkages can help States more effectively update their regulations. For example, if a State were updating its code to reflect Revision Checklist 23, which made major changes to small quantity generator requirements, it might also want to include changes contained in Revision Checklists 42 and 47 as well. States should be aware of these linkages because, in some cases, changes in later checklists supersede earlier changes.

Appendix K contains consolidated checklists for all RCRA regulations through June 30, 1989. Consolidated checklists were developed to help States meet the requirement of RCRA §3006(b) and 40 CFR 271.3(f) that a State applying for final authorization for the first time must address all provisions of the Federal Code that were in effect one year prior to application submission. The consolidated checklists will be updated through the SPA system to address changes to the RCRA program for each annual period from July 1 through June 30.

Review. A detailed reviewer's checklist for the AG Statement is provided in Appendix F. The following discussion, however, provides a description of how EPA reviews each AG Statement.

AG STATEMENT REVIEW PROCEDURE

(1) Check for Completeness

(2) Review the Narrative

(3) Prepare Comments

Checking for Completeness. After receiving an AG Statement, the EPA reviewer first reviews the Statement to determine its completeness. The reviewer checks to see if all provisions for which the State is seeking authorization are included in the Statement and looks for errors such as missing citations or citations in the Statement that do not match the checklist. Finally, the Statement is checked to ensure that it is signed by the proper authority.

Reviewing the Narrative. After the completeness check, EPA reviews the narrative Statement. The explanations of differences between State and Federal requirements are the main focus during this stage of the review. The clearer and more complete the State's explanation of differences, the easier and faster the review. The reviewer reads the State's statutes and regulations to ensure that there is no conflict between the two, the interpretation of the State's authority is clear, and that they are equivalent to Federal requirements. The reviewer also checks the dates of enactment of the State statutes and regulations, citations to authority for incorporation of Federal regulations by reference, State claims of jurisdiction over Indian lands, and use of the MOA for procedural requirements or variances and waivers, when applicable.

Preparing Comments. The EPA reviewer's comments on a draft application must be specific enough for the State to have a clear understanding of what is expected of the State when developing its official application. Comments must state the problem or question clearly, with citations to the State and Federal

authorities at issue. In commenting, EPA may request the AG to:

- Clarify procedural or completeness questions (e.g., citations, dates, signatures, etc.);
- Explain or clarify the meaning of State laws or regulations;
- Provide more specific or better explanations of authority; or
- Amend State laws or regulations if a satisfactory explanation cannot be provided.

COMMON AG STATEMENT DEFICIENCIES

- General format deficiencies:
  - Omitted or unauthorized signature
  - Omission of Federal and State statutory and regulatory authorities
  - Conflicting citations in checklists and Statement
  - Failure to state relationship to prior AG Statements
- Substantive deficiencies:
  - Less stringent regulations
  - Regulations not in effect
  - Insufficient explanation of apparent differences in Federal and State regulations
  - Inadequate authority in statute to promulgate specific regulations

For the most part, EPA will defer to the State on interpretation of State law. Because each State's laws are unique, EPA believes that the State Attorney General is the appropriate person to interpret them properly. However, EPA does not defer to States on interpretation of Federal law, including determining equivalency. The Agency interprets its rules in the preambles, and through the issuance of specific policy and guidance.

Program Description

Purpose. The Program Description (PD) is an important element of a State's revision application since it describes how the State intends to implement the provisions for which it is seeking authorization. The PD provides the State with the opportunity to:

- Describe how a specific requirement will be implemented and its impact on the State's authorized program;
- Discuss differences, if any, between the State and Federal programs; and
- Describe the division of responsibilities for program implementation among the State agencies.

When Required. In general, a State will need to revise its PD if there is:

- A large increase in the regulated community;
- A need for significant additional resources or different expertise;
- A significant modification to the State's tracking system;
- A change in interaction or formal grant agreements with other State agencies; or
- A reordering of authorized program priorities, such as conducting more land disposal restriction (LDR) inspections at the expense of ground-water monitoring inspections.

States should work with the EPA Regional Office to determine whether a PD revision is required for a specific State modification. EPA has, however, identified six specific revisions for which a State must include a PD in its revision application: (1) corrective action; (2) land disposal restrictions; (3) small quantity generators; (4) radioactive mixed waste; (5) waste as fuel; and (6) used oil.

Elements. The State has the option of modifying its existing Program Description on file with EPA in one of three ways:

(1) *Addendum to Initial Application* -- An addendum should identify the appropriate sections of the existing PD to be deleted, modified, and/or expanded. In some cases, a State program revision may be simple enough to be addressed in the State's revision application transmittal letter. An addendum of this type should be clearly identified as such, in order to facilitate codification in 40 CFR Part 272.

(2) *Updated Page Inserts* -- Page inserts may be used to update specific portions of the original Program Description. All new pages should be clearly marked with a revision date and page numbers should correspond to the original text with alpha designations used where necessary (e.g., 11, 11-a, 11-b, etc.). The changed portions should be clearly marked. A copy of an original page with partially lined-out text can be used, if appropriate.

(3) *New Program Description* -- In those cases where program revisions require extensive changes to numerous elements of the PD, the State may wish to revise its existing PD and submit the new PD as a replacement for the current PD on file.

The elements to be included in the PD are specified in §271.6 and are briefly described below in the context of program revisions.

Program Scope, Structure, and Coverage (§271.6(a)). In this section of the PD, the State must describe the scope of the program revisions being applied for. The State must clearly explain whether the revision application addresses a complete cluster or only certain provisions of a cluster. The PD must show, in narrative terms, how the State provides the coverage corresponding to the amended regulatory provisions of the RCRA program. Differences in coverage between the State and Federal programs should be discussed.

State Agency Responsibilities (§271.6(b)). The State agency responsible for administering program revisions must be identified in the PD. If the authorized State agency is responsible for administering the revisions, no further explanation is required. If a different agency is responsible, the PD must describe its relationship with the authorized State agency. This section of the PD may also describe the division of responsibility between the State and EPA. This is especially important for the regulated community which will be dependent on the application for a clear statement of State or Federal lead on permitting and enforcement activities for each HSWA requirement. A listing or matrix of the HSWA and non-HSWA activities may be maintained as part of the PD to provide a concise, definitive statement of which program areas the State has (or is seeking) authorization for, as well as the program areas for which EPA remains responsible. As subsequent authorizations occur, the matrix will become more and more complete until the State obtains authorization for all of the RCRA authority available.

Staffing and Funding Resources (§271.6(b)). This section of the PD must address the State agency's resources to carry out the activities that are the subject of the program revision. This section must distinguish between new resources and existing resources being assigned to the new responsibilities and explain the impact on the existing authorized program. The State should discuss changes that have occurred since the State first received authorization, such as a reduction in the size of the regulated community or program changes that affect the agency's efficiency, where impacts on existing program resources are significant. The PD must contain information regarding personnel and funding (i.e., estimated program and technical support costs, as well as the source and amounts of funding available) for each agency involved. To provide a comprehensive picture of the resources available to conduct the activities proposed in the State's application, the State should provide information projected for at least two years following the approval of the State's revision.

State Procedures (§271.6(c)). As appropriate, this section should describe any State procedures (i.e., permitting, certification, notification, compliance monitoring, enforcement, etc.) which will be used to implement the program revision. Where there are no changes from the procedures described in prior applications, no further explanation is required.

Compliance Tracking and Enforcement (§271.6(e)). The State's PD must demonstrate how the State's compliance monitoring and enforcement program will operate to ensure compliance with standards and permits by all hazardous waste management facilities, generators, and transporters. If the revision affects the compliance monitoring and enforcement program for which the State is already authorized, then such impacts need to be discussed. The following sections provide more detail on enforcement information that should be included in a revised Program Description.

1. *Newly Regulated Handlers* – Many of the new HSWA provisions have the potential to significantly increase the size of the RCRA universe, particularly the new requirements regarding:

- Small quantity generators;
- Dioxin listing;
- Producers, marketers, blenders and burners of hazardous waste and used oil fuels; and
- Newly listed or characteristic wastes.

COMPLIANCE MONITORING AND ENFORCEMENT ISSUES

- Newly regulated handlers
- Inspection and analysis workload
- Data management
- Compliance monitoring resources
- Enforcement process

The State's strategy and methods for identifying new members of the regulated community (generators; transporters; and treatment, storage, and disposal facilities (TSDFs)) should be discussed. The State needs to describe how it will implement any notification activities and identify and follow up on non-notifiers if these procedures differ or amend those described in the State's most recent authorization application.

2. *Inspection and Analysis Workload* – The new HSWA provisions will also significantly increase the inspection workload. Hazardous waste fuel handlers will need to be inspected to ensure proper management of hazardous waste fuels and to confirm the material's shipment to authorized burners. Additional generator inspections will be necessary to ensure that generators of restricted wastes are complying with the land disposal restrictions (LDRs) and related recordkeeping requirements. Increased inspections may also be necessary to oversee corrective action activities conducted by owner/operators of RCRA TSDFs to confirm facility compliance with schedules of compliance in permits and in orders.

In addition to the increased inspection workload, the inspections themselves may require more sampling and analysis than those conducted under the existing authorized program. For example, some LDR inspections may require that inspectors sample wastes to determine whether facilities are meeting required treatment levels for restricted wastes. Inspections to monitor compliance with hazardous waste fuel regulations may require sampling of used oil to determine whether it is on- or off-specification. Many corrective action inspections will also require waste analysis and will require inspectors to take ground-water, soil, surface water, sediment and other samples to determine whether there are releases at RCRA facilities. Consequently, the Program Description should include:

- A general description of how the State plans to handle any increased inspection and analytical workload associated with a HSWA provision;
- A discussion of how these new activities will be combined with existing generator and TSDF inspection efforts; and
- A description of State inspection priorities after integration with existing program priorities. (Note that the Agency Operating Guidance addresses inspection priorities to be negotiated annually

between the State and EPA as part of the annual grant process.)

3. *Data Management* – Many of the new HSWA requirements may require expanded information management activities. The increased number of generators in the system and the nature of some new requirements may necessitate tracking systems to support program management and analysis. The PD should describe any modifications to the manifest tracking system or other data management activities.

4. *Compliance Monitoring Resources* – Additional resources may be needed to monitor compliance with the new program activities while continuing to monitor compliance with the existing program. In particular, inspection sampling may require increased technical expertise and additional laboratory support may be needed to perform newly required analyses. Laboratory support for new program areas such as hazardous waste fuels, land disposal restrictions, and corrective action programs will be critical. The PD should address the level and mix of resources that the State has available to handle new responsibilities, including as appropriate:

- Plans for training staff;
- Plans for hiring additional staff (describe skill area of personnel being sought);
- Agreements with other State agencies (include copies of interagency agreements); and
- State plans to use contractor assistance.

5. *Enforcement Process* – HSWA introduced a number of provisions that are likely to require the use of enforcement processes or authorities that differ from those used in the existing authorized program. For example, the new corrective action authorities are broad and essentially allow EPA and the States to require corrective action for most types of releases at a RCRA facility. The States will need to discuss how they will ensure the enforcement of corrective action conditions in operating permits and post-closure permits. Several HSWA requirements are likely to result in increased criminal activity among waste handlers, including the land disposal restrictions and the used oil recycling and waste-as-fuel requirements. The discussion of criminal enforcement procedures in earlier PDs may need to be supplemented to address fully the impacts of these new requirements.

In light of HSWA impacts, a State's PD should address the following policies and processes where they differ from or amend those described in the State's most recent authorization application:

- The State's enforcement response policy (i.e., violation classification, response timeframe, informal and formal enforcement process);
- The State's civil enforcement process, use of administrative and/or judicial actions, and processes that may result in penalties; and
- The State's criminal enforcement process.

Estimated Regulated Activities (§§271.6(g) and (h)). The State must provide the best numerical estimates, based on existing data, of hazardous waste activities in the identified categories covered by the application (e.g., estimates of annual quantities of newly identified wastes generated within the State). A table is generally sufficient to convey this information, along with a brief narrative explanation of the estimates.

Copies of State Forms and Coordination with Other Agencies (§§271.6(d) and (f)). For most program revisions, States will not need to provide copies of State forms or additional discussion of how the State coordinates its activities with other State and Federal agencies. This required information is contained in the State's first application for final authorization. However, if the State's forms or coordination activities have been significantly modified, or if the State's program revision involves the use of new State forms or affects intergovernmental coordination, then the State's revised PD should contain appropriate discussion and copies of forms. For example, the revision application for mixed waste should include a discussion of coordination activities with the

U.S. Department of Energy or the Nuclear Regulatory Commission (or the NRC Agreement State agency). (For a further discussion on mixed waste authorization, please refer to Appendix N.)

COMMON PD DEFICIENCIES

- Unclear statement of what revision is being applied for
- Failure to update a previously submitted PD to explain the effect of the revision on the existing program (e.g., resources)
- Insufficient explanation of how the program revisions will be administered and enforced

Review. A detailed reviewer's checklist for the Program Description is provided in Appendix A. It can also be used by the State to assist in development of the PD. Since there is no model PD and, therefore, no specific format requirements, the checklist provides a means by which the State and the EPA review team can ensure that the basic components are included. The checklist consists of three parts, and is designed to ensure that the PD adequately describes the organization and management of the State program, discusses the differences between the State and Federal programs, describes how the State will administer and enforce its program, and demonstrates that the State program meets the tests for final authorization.

Memorandum of Agreement

Purpose. The Memorandum of Agreement (MOA) is the vehicle for specifying areas of coordination and cooperation and defining the respective roles and responsibilities of EPA and the authorized State; consequently, MOAs are State-specific – no two are exactly alike. This agreement is signed by the Director of the State hazardous waste program and the EPA Regional Administrator.

In developing the MOA, the State and Region must be careful to adhere to certain principles stated in §271.8:

- The MOA may not restrict EPA's statutory oversight responsibility;
- The MOA may not limit the number of oversight compliance inspections EPA may conduct; and
- The MOA must allow EPA to review routinely the State's records, reports, and files.

When Required. The MOA is a dynamic instrument that should be reviewed at least annually and revised, as necessary, to accommodate any changes in the maturing State-EPA relationship. The MOA should also be revised, as necessary, to reflect changes that occur due to State- and Federally-initiated revisions to the authorized program.

Elements. A model MOA is provided in Appendix B to be used as a guide to meeting the requirements of 40 CFR 271.8. The model is a complete MOA and supersedes the model provided in Chapter Two of the SCRAM. It can be used to completely replace an existing MOA Several areas where the Region and State may need or want to expand the basic framework of the model are noted in brackets. Many MOAs contain State-specific provisions that have been negotiated over several years. In such cases, the State and Region may prefer to amend the existing agreement instead of replacing it.

At a minimum, a complete MOA should contain the following:

- Procedures for sharing and transferring permitting responsibility;
- Framework for EPA overview of program administration and enforcement;
- Agreements for providing technical expertise or assistance;
- Provisions for exchange of information (including any program changes in accordance with §271.21(c));

- Reference to other State-EPA agreements relevant to implementing the hazardous waste program (e.g., enforcement or joint permitting agreements); and

- Signatures of the State Director and Regional Administrator.

Where the Directors of two or more State agencies share substantive responsibility and resources for the functions described in the MOA, each Director must sign the MOA. The MOA must clearly indicate the specific responsibilities assumed by each of the State Directors and must describe how they will share and coordinate implementation of those areas which involve more than one State agency. This may be done in a separate section of the MOA or by designating specific State agency responsibilities throughout the text of the MOA. Note that where the divergence of responsibility involves solely enforcement authority, agreement among the State agencies would be allowed as an alternative to having each enforcement arm sign the MOA. For example, the State AG will generally not be a party to the MOA, even though he or she may be responsible for certain enforcement functions. Agreements with enforcement agencies of local units of government are not required.

Under certain circumstances, an MOA commitment may be used in place of promulgating State regulations. This is allowable only for State procedural requirements and cannot be used for restrictions or standards imposed on the regulated community. If a State lacks the adequate regulatory provisions, the State may be able to agree in its MOA to carry out the procedure in accordance with the requirements for final authorization. In order for this approach to be acceptable, the State Attorney General must review the terms and conditions of the MOA and certify that (1) the State has the authority to enter into the agreement, (2) the State has the authority to carry out the agreement, and (3) no applicable State statute (including the State Administrative Procedure Act) requires that the procedure be promulgated as a rule in order to be binding. The MOA must then contain an unequivocal State commitment to apply the procedures, and to notify the public of these procedures. For example, if the State included a provision for permitting in its MOA that was not specified in its regulations, notice of each draft permit must inform the public that the procedures to be followed in processing the permit are derived from the MOA as well as directly from State laws and regulations. The State must agree in the MOA to include this information in each notice.

The degree to which this approach may be legally acceptable will vary by State, depending on the State's legal authorities in the areas of hazardous waste regulation and administrative procedures. The State may not use the MOA to adopt procedures which directly conflict with State laws or regulations. For example, a State could not agree to provide for a 45-day public comment period if the State's regulations set a maximum 30-day comment period. A State could, however, agree to a 45-day comment period if its regulations specify a period of at least 30 days.

COMMON MOA DEFICIENCIES

- Omissions:
  - Joint permitting references
  - §3006(f) agreements
  - Major signatories
- Inconsistencies within the MOA (e.g., different frequency of reports for the same item)
- Limitations on EPA's oversight authority
- Outdated language (e.g., not using the latest MOA model or not incorporating HSWA requirements)
- Inappropriate use as a substitute for regulatory requirements

State statutory and regulatory waivers may also need to be discussed in the MOA. If the State's variance or waiver authority is broader than that of the Federal program (i.e., it allows greater deviation from the State's regulations than the Federal program allows from Federal regulations), it may still be acceptable under some circumstances. If the State's provision is

such that it can be invoked only at the discretion of the State agency, the State could agree in its MOA not to use the waiver or variance so that it would result in the imposition of any requirement less stringent than comparable Federal program requirements. In addition to the MOA commitment, the Attorney General must certify that State law allows the State agency to agree to limit its use of the waiver provision in this fashion. The State must also agree in the MOA to inform EPA of the issuance of any variance or wavier. If, however, the State's variance or waiver authority is not discretionary, that is, the State's statute or regulation would require the granting of variances in certain situations that would render the State program less stringent, this option would not be available.

Review. A detailed reviewer's checklist for the Memorandum of Agreement is provided in Appendix C. The checklist is designed to ensure that the regulatory requirements of §271.8 are covered in the MOA and follow the model outline.

The Capability Assessment

> Note that the capability assessment review process is currently under EPA review. If EPA initiates process changes, this section of the manual will be revised.

Purpose. The capability assessment is a document, prepared by the Regional Office, which will accompany many authorization applications. The capability assessment is intended to ensure that State programs are capable and functioning effectively. Capability assessments provide EPA with a continuing mechanism through the authorization process to assess how effectively a State is implementing the program for which it is already authorized. The capability assessment also identifies areas of State programs that warrant enhancement and establishes the EPA and State actions necessary to strengthen the programs, as well as describes how the State may implement additional program areas. In general, States should demonstrate the ability to capably implement their existing authorized programs as well as the additional elements for which they are seeking authorization.

When Required. A capability assessment must be prepared for any application that includes elements that significantly affect the State's workload. This includes applications covering all or most of HSWA Cluster I or HSWA Cluster II, and any application for corrective action (a HSWA Cluster I component). There is not a comprehensive list of provisions which require a capability assessment. Many provisions, if applied for alone, would not require a capability assessment. The combined workload from several provisions, however, may be significant enough to warrant an assessment. The Regions should consult early with the Headquarters Regional liaisons to determine whether a capability assessment will be necessary for a particular application.

Draft capability assessments should be submitted with draft authorization applications, in order to identify and resolve problems as early as possible. The capability assessment will need to be updated if a long period of time passes between the draft and official applications.

Elements. Capability assessments are composed of two parts: a checklist and a narrative (Appendix L). The checklist provides a brief indication of whether the State's program is "Satisfactory" or "Needs Improvement" in four program areas:

- Enforcement;
- Permits and closure plans;
- Corrective action; and
- Management.

To the extent that existing information is adequate, the checklist should be completed based on available information such as State program evaluations (e.g., quarterly, mid-year, or end-of-year reports), monthly State reports, routine contacts with the State and other reporting. If available information is not sufficient, however, additional information should be compiled.

A check in the "Satisfactory" column indicates that the State is operating or can operate its authorized program without substantial

dependence on the Region. "Needs Improvement" means that some level of improvement is needed, which could be either long-term or short-term. Short-term corrective measures, however, need not delay authorization.

Substantial dependence is a subjective evaluation that considers the unique situation of each State. While EPA is responsible for overseeing State programs and providing technical assistance and support, a State must be capable of managing its authorized program without reliance on EPA. However, acceptance of joint responsibilities may be appropriate in some cases. For example, a State may conduct quality inspections but may not have the resources to do all the required inspections. In this case, EPA may agree to conduct independent inspections of Federal, State, and local facilities, rather than require the State to accompany EPA. This may also be appropriate when EPA has developed a special expertise that a State does not have, or does not need full-time.

The narrative should explain the checklist in more detail. Each "Needs Improvement" should be discussed, describing the issues and recommending solutions. State experience or problems in any new program areas should also be discussed.

Review. Headquarters will review capability assessments in order to ensure consistency among Regional approaches to examining capability. The Headquarters reviewer will also ensure that the Region provides documentation to support its checklist ratings. No additional narrative is necessary if the Region submits current documentation that explains why the performance is satisfactory.

Where a Region identifies an area as needing improvement, an action plan must be developed. The action plan should contain specific activities and milestones to correct the problems identified in the capability assessment. Except for minor problems needing short-term improvements (e.g., timely submission of reports), any authorization decision should be postponed until improvement is evident. Regions should develop action plans in consultation with Office of Solid Waste and Office of Waste Programs Enforcement staff.

COMMON CAPABILITY ASSESSMENT DEFICIENCIES

- Discrepancies between HWDMS data and the assessment
- Incomplete or no explanation of changing assessments
- No narrative to explain "Needs Improvement"
- No action plan addressing discrepancies
- Internal discrepancies in documentation (e.g., a problem is identified in the mid-year review but is indicated as "Satisfactory" on the checklist)

APPLICATION COMPONENTS FOR UNAUTHORIZED STATES

An unauthorized State seeking authorization must submit to EPA an official application for review. This application must address <u>all</u> provisions of the Federal program which were in effect one year prior to submission of the official application (see 40 CFR 271.3(f)). To assist unauthorized States in meeting these requirements, EPA has revised the checklists to consolidate all changes to the RCRA program through June 30, 1989 (see Appendix K). Consequently, when a State uses these consolidated checklists, it will be applying for all requirements that are part of the Federal program as of June 1989. This is analogous to the State submitting Consolidated Checklists 1A through V plus Revision Checklists 1 through 63. EPA plans to update the "Consolidated Checklists" annually through the State Program Advisory (SPA) system.

If a State has authority equivalent to Federal program elements which became effective within the year prior to the State's application,

then, to the extent possible, the State's application should demonstrate such authority. This will enable EPA to grant authorization for the State's equivalent program elements. Although the State is not required to have a counterpart for any Federal provision that became effective during the year preceding its application, the State will subsequently need to modify its program to incorporate such changes in accordance with 40 CFR 271.21(f).
An unauthorized State's application for authorization must contain the following elements:

- A Governor's letter requesting State program approval;
- A Program Description which explains the program the State proposes to administer, together with any forms used to administer the program under State law;
- A Statement from the State Attorney General (or the attorney for those State agencies which have independent legal counsel) which identifies the legal authorities upon which the State is relying to implement the program it proposes to administer;
- A Memorandum of Agreement that provides for coordination and cooperation between the State Director and the EPA Regional Administrator regarding the administration and enforcement of the authorized State program;
- Copies of all applicable State statutes and regulations, including those governing State administrative procedures, as well as the consolidated checklists; and
- Documentation of public participation activities (i.e., notice and opportunities for comment on the State program prior to submission of the application to EPA).

The Federal requirements governing the content of State final authorization applications are in 40 CFR Part 271, Subpart A. Although not a requirement of 40 CFR Part 271, EPA usually requests that States submit appropriate checklists. Chapters One and Two of the SCRAM provide guidance, example documents, and models for these authorization application elements.

Chapter Four

The Program Revision Process

INTRODUCTION

Review of program revision authorization applications is conducted by EPA Headquarters and the Regional Offices. The process entails a concurrent review, with the Regions serving as the primary contact with the States. The culmination of the authorization process is to codify the decision in the CFR.

STEPS IN THE REVISION PROCESS

- Pre-application consultation
- Draft application review
- Official application review and decisionmaking

This chapter explains the purpose of codification, describes the steps in the revision process, and explains the roles of Headquarters and the Regions in the various stages of the review process.

Note that the review process for program revision applications is currently under discussion within EPA. The process described in this chapter is that which is currently in use. If and when the process is revised, this chapter will also be revised to reflect the new review process.

CODIFICATION

Codification is the process of placing a rule in the Code of Federal Regulations (CFR). Rather than relying solely on a Federal Register notice to make EPA's authorization decision formal, the CFR identifies the specific elements of the State program that EPA has approved as RCRA Subtitle C requirements. This is useful for the regulated community and the public, as they can see what elements of the RCRA program a State administers. In addition, it clarifies EPA's enforcement authority in the event EPA decides to take an enforcement action in an authorized State, since EPA can only enforce the authorized program requirements. Finally, it identifies the provisions of the State program EPA cannot enforce because they are "broader in scope" than the Federal program.

Codifying State programs is accomplished by "incorporating by reference" State statutes and regulations. Other authorization documents, such as the AG Statement, MOA, and PD are codified by referencing the title and date, but are not incorporated by reference. Incorporation by reference has the same legal effect as if the incorporated material were published in full in the CFR. The incorporated materials are kept on file in the Office of the Federal Register, as well as in EPA offices, and are available to the public.

There are a number of States that have not yet codified their base programs. Previously authorized State programs should be codified as soon as practicable. In most cases, the State's original base program has been modified to incorporate subsequent program revisions. In these cases, the State's current program should be codified rather than trying to reconstruct the original base program. The consolidated checklists (Appendix K) can be used to facilitate codification of previously-authorized State programs. EPA may codify previously-authorized State programs as separate actions, or as part of authorizing a program revision. By consolidating these actions, however, EPA can avoid having to publish two separate Federal Register notices.

After the authorized program is initially codified, changes to any of the codified elements of a State program will be reviewed and approved by EPA as part of the State program revision

process. The Federal Register publication pertaining to the revision will codify the new or amended State document. If there is a change to an authorization document that is not part of the revision process (e.g., the MOA is amended pursuant to joint permitting agreements), then the codification should be corrected when the next revision is published in the Federal Register.

Actions required to codify a program revision are described below in the appropriate steps of the program revision process.

PRE-APPLICATION CONSULTATION

Early consultation with EPA is encouraged when a State is planning to modify its hazardous waste program, especially if those changes modify the State's legal authorities. When a State begins drafting program changes it should contact the Regional Office so that EPA can assist the State by arranging for the review of draft regulations, bills, policies, or other materials. On request, Headquarters may assist the Region in the review of draft modifications. The purpose of this review is to provide the State with an early indication of potential authorization problems, at a point in the process when they may be more easily corrected.

Within 30 days after a State has completed a State program modification, the State must submit to EPA its program change (§271.21(e)(4)). The State must also submit a schedule indicating when the State intends to submit an application for the program revision. At that point, EPA will review the schedule to ensure that it complies with the applicable deadline and determine the type and extent of documentation the State will need to submit with its revision application.

DRAFT APPLICATION REVIEW

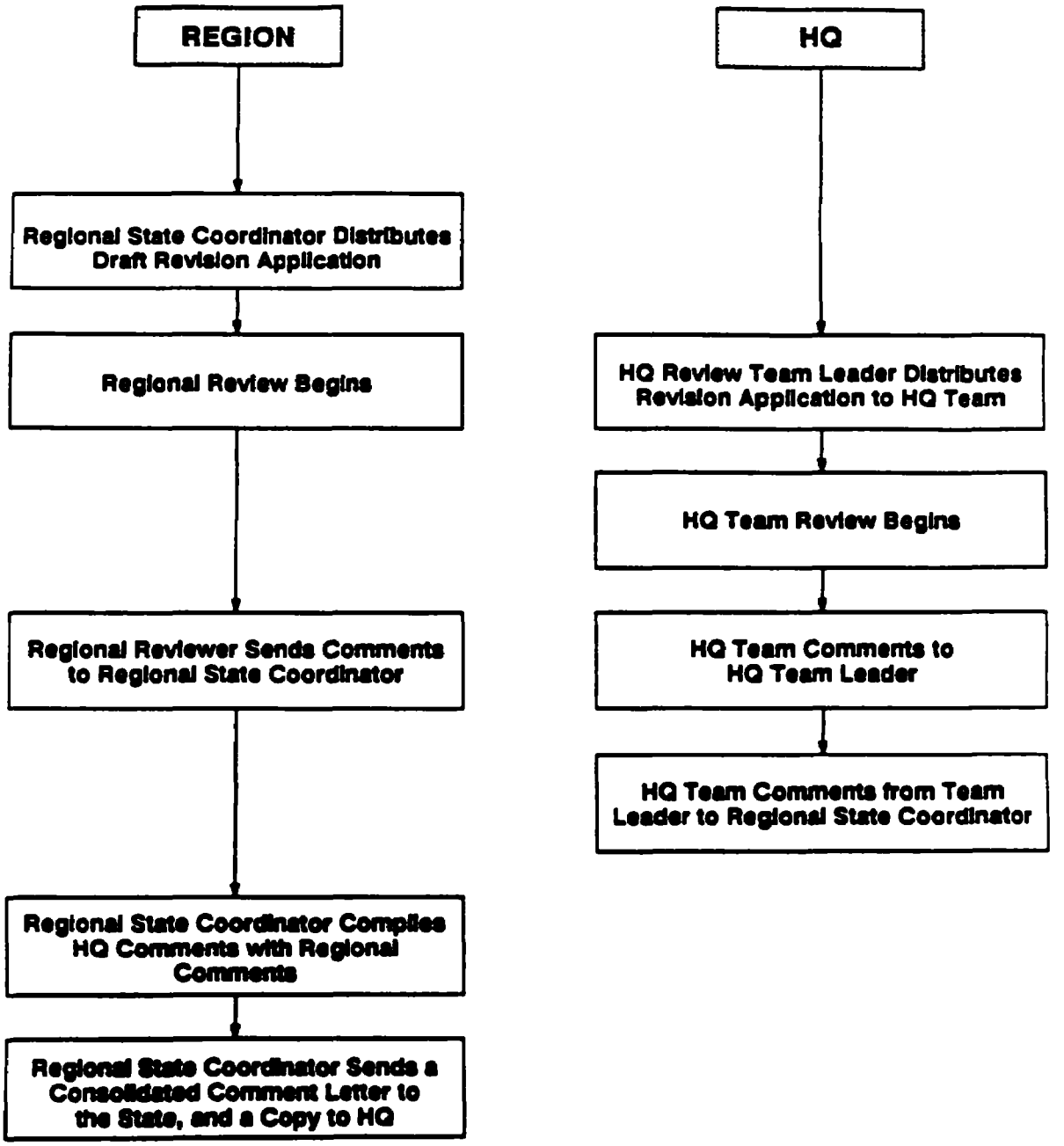
After EPA determines the type of documentation that is required in a program revision application, the State is encouraged, but not required, to prepare its draft application. In many cases, the State may be able to develop a draft of its revision application concurrently with its program modifications, especially when the State consulted with EPA early to identify potential problems and determine the type of documentation required. The State would then be prepared to submit its final, official revision application soon after it completes the program changes. The State must submit a draft of its revision application to EPA no later than 60 days after the cluster deadline or other applicable deadline in order to satisfy §271.21(e)(4)(ii). The State should check with the EPA Regional Office to determine how many copies of the revision application it should submit. (See page 2-5 for a summary of deadlines for submitting program revision applications.)

Review of the draft application will involve both Regional and Headquarters offices. The appropriate program, legal, and enforcement offices in the Region and Headquarters will participate in the review to ensure that all EPA concerns are identified at the draft stage. The timeliness of EPA's review will depend on the complexity of the application and the number of EPA offices that are involved in the review, and whether the application is clear and complete. If critical elements (e.g., AG Statement, regulatory checklists) are missing or inadequate, then the review period may be terminated and another draft revision application may be warranted.

The first step in the review process is for the Regional State Coordinator to distribute the draft revision application to Headquarters and to the Regional reviewers. The Regional and Headquarters Teams concurrently review the package. The Headquarters Team members send their comments to the Regional Liaison who prepares Team comments to send to the Region. If the Region does not agree with or understand Headquarters' comments, these differences must be resolved before consolidated comments are sent to the State. The Regional State Coordinator compiles these comments with comments from within the Region and sends the State aconsolidated comment letter. A copy of this letter should be sent to the appropriate Regional Liaison in Headquarters' State Programs Branch.

EXHIBIT 3

Review of Draft Revision Packages



OFFICIAL APPLICATION REVIEW AND DECISIONMAKING

Addressing EPA's Comments

After a State receives EPA's comments on its draft program revision application, it should begin to address those comments in its official application. Communication between EPA and the State during this time is vital to ensure that the official application review process will go smoothly and that all comments are addressed satisfactorily in the official application. When the State submits its official application, it should ensure that clean photocopies of the statutes and regulations that will be incorporated by reference and the front page of the cited State statute books and regulation codes are included. The Office of the Federal Register requires clean copies for codification. The State should also work with the Office of the Regional Counsel to provide the legal citations for the incorporation of State statutes and regulations in the Federal Register notice.

As with the review of the draft application, Headquarters and the Region will independently review the official application. In reviewing the official application EPA will generally refer to the comments on the draft application to ensure that they were satisfactorily addressed. It is very helpful for all involved if the State explicitly responds to each EPA comment. This can be done by repeating each EPA comment and either providing the response or referencing where the response can be found in the application. If there are any issues that are either not addressed satisfactorily or not addressed at all, the Region will prepare consolidated comments to the State and attempt to resolve the issues with the State.

Exhibit 4 depicts the initial steps in the process to review the official program revision application. Comments are turned into the Regional State Coordinator for consolidation and transmittal to the State. As a general rule, no further comments will be sent after this date unless significant issues require the attention of top Office of Solid Waste and Emergency Response (OSWER) or Office of the General Counsel (OGC) management. If it is necessary to send further comments to the State, the review process will likely be delayed. Significant changes to the State's application may result in beginning a new review.

EPA will not normally raise new issues during the official application review. In certain circumstances, however, EPA may need to raise a new issue if it overlooked something in the draft application or if the State added to or amended the draft application in a manner that raises questions not previously identified. In such a case, the new issues must be resolved before proceeding to an authorization determination.

Making the Tentative Determination

After reviewing the official application and resolving any outstanding issues, the Region will make a tentative determination to approve or disapprove the program revision. A Federal Register notice is published announcing EPA's intention either to approve or disapprove the State's program revisions (see Model D in Appendix M). Unlike authorization decisions for States seeking authorization for the first time, Headquarters concurrence is not required. However, there is a ten-day Headquarters consultation period established in EPA Delegation 8-7. During this period the Headquarters Team will review the decision documents submitted by the Region. The Assistant Administrator for OSWER and the General Counsel are informed that the Regional Office has recommended approval or disapproval of a program revision application; however, their concurrence is not required.

Rulemaking Options

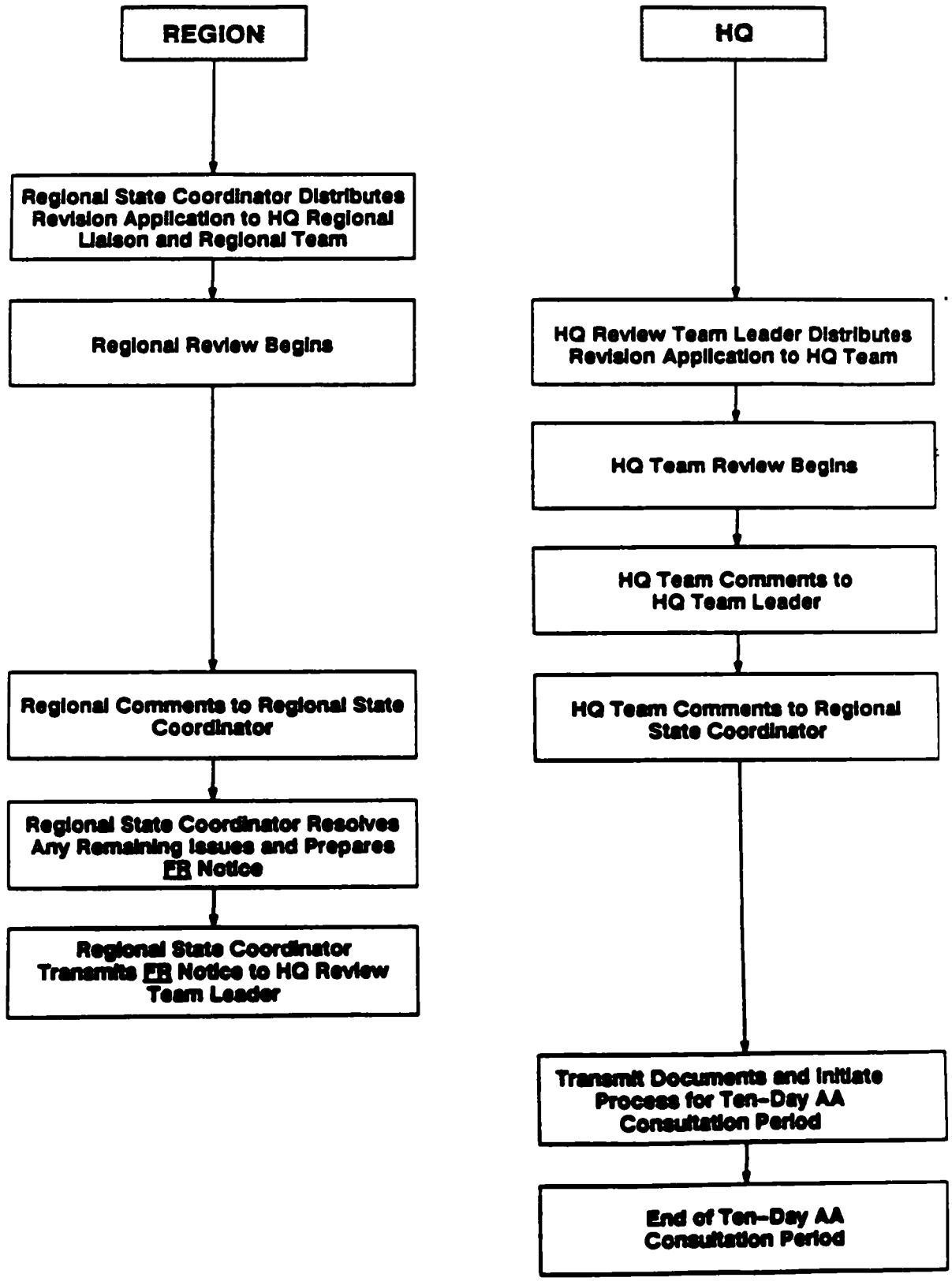
After making its tentative decision to approve or disapprove an application, the Region will choose from one of two methods to notify the public of its decision:

- Standard rulemaking (§271.21(b)(4)); or
- Immediate final rulemaking (§271.21(b)(3)).

Standard rulemaking involves publishing a tentative rule decision to approve or disapprove a program revision in the Federal Register. The public has 30 days in which to comment on that rule decision. EPA then reviews the public

EXHIBIT 4

Review of Official Program Revision Application



PUBLIC PARTICIPATION IN THE REVISION PROCESS

Unlike a State's first authorization application, a public comment period is not required prior to submittal of a revision application. However, a public comment period is required by Federal law before EPA approves or disapproves the proposed revisions. Therefore, if a State decides to initiate a public comment period prior to submission of its proposed changes, EPA must still meet the Federal requirements for public participation. In such a case, the public would have two opportunities to comment on the revisions.

It is the Regions' responsibility to:

- Make sure the notice is published in appropriate State newspapers
- Arrange the 30-day public comment period
- Send the notice of tentative determination to persons on the State's mailing list

comments and responds to them in a final rule approving or disapproving the revision.

The immediate final rulemaking option is designed to streamline the standard rulemaking procedure. In most cases this approach should result in only one Federal Register notice indicating that the State revision is approved (or disapproved) in 60 days unless EPA receives an adverse comment within the 30 day comment period. However, if an adverse comment is received, one or more subsequent Federal Register notices will be needed. In choosing which option to use, the Region should consider whether the State has a history of little or no public interest in previous authorization decisions and whether the authorization process is expected to go smoothly. If so, EPA will probably choose to employ the immediate final approach. For example, if no comments were received on the State's initial application for base program authorization or on recent program revisions, then subsequent revisions would ordinarily be processed using the immediate final rulemaking process.

In circumstances where the process is expected to be more complex or controversial, the Agency is more likely to use the standard rulemaking procedure. For example, if a State submitted a program revision application for a large number of changes at the same time and the Agency expects the revision to generate public interest (e.g., there is a history of public comments on authorization decisions affecting the State), EPA would follow standard rulemaking procedures. Also, if the Agency were planning to disapprove a State program revision it would use standard rulemaking procedures since more public comment would probably result.

Processing the Tentative Determination

After the Region determines the appropriate process to use, the Regional State Coordinator should prepare the following documents and transmit them to the Headquarters Review Team Leader:

- Transmittal memo;
- Federal Register Typesetting Request (SF 2340-15); and
- Federal Register notice.

If the program revision is to be codified, the FR notice must contain the appropriate legal citations for incorporation by reference (see Appendix M to select the correct model notice). If the revision will not be codified at the time of authorization, the notice should include a list of Federal citations and the analogous State citations covered by the revision application. In addition, if the program revision is to be codified, the Region must also prepare:

- Letter to the Office of the Federal Register requesting incorporation by reference; and
- Clean photocopies of State statutes and regulations (if not previously submitted).

During the ten-day comment period, the Headquarters Team will review the transmittal

memorandum and Federal Register notice. Note that this transmittal memo is less formal than the Action Memo which is used for authorization decisions on base applications for unauthorized States since Assistant Administrator and General Counsel concurrence is not required. The transmittal memo does not need to provide for Headquarters signatures; instead it should merely request appropriate consultation prior to publishing the decision.

At the end of the consultation period, the Headquarters Regional Liaison will submit to the Office of the Federal Register the Federal Register notice for publication. Headquarters will also submit the letter requesting incorporation by reference and photocopies of State statutes and regulations. If, however, Headquarters disagrees with the Regional decision, the Assistant Administrator for OSWER must prepare a written response to the Regional Administrator within the ten-day consultation period. If there is still disagreement, more time will be provided for consideration prior to publishing the notice.

Making the Final Determination

Immediate Final Rulemaking. Exhibit 5 illustrates the immediate final rulemaking process. The Region will publish the Federal Register (see Appendix M) and newspaper notices announcing the tentative decision and initiating public comment periods. If no adverse comments are received on the notice, the revision will become effective on the sixtieth day after the Federal Register notice was published.

Adverse Comments. If EPA receives one or more adverse public comments, the Regional Administrator must notify the State that such comment has been received. If the immediate final rule is to be withdrawn or otherwise changed, the Regional Administrator should also notify Headquarters immediately. A subsequent Federal Register notice must appear before the immediate final rule effective date, otherwise codification will occur automatically. The Regional Administrator has the following four options when responding to adverse comments:

1. If the Regional Administrator disagrees with the public comments, he or she may publish a second Federal Register notice prior to the effective date of the decision. This notice will identify the issues raised, respond to the comments and affirm that the immediate final rule will take effect as scheduled.

2. If the Regional Administrator agrees with the public comments and decides to reverse the decision, he or she may publish a final rule before the effective date of this decision, reflecting the reasoning for this changed position.

3. If the Regional Administrator agrees with the comments and decides to reverse his or her decision but believes the change in position warrants a new round of public comment, he or she may withdraw the immediate final rule prior to its effective date and simultaneously announce his or her new decision. The new decision may either be a proposal (under the standard rulemaking process) or an immediate final rule.

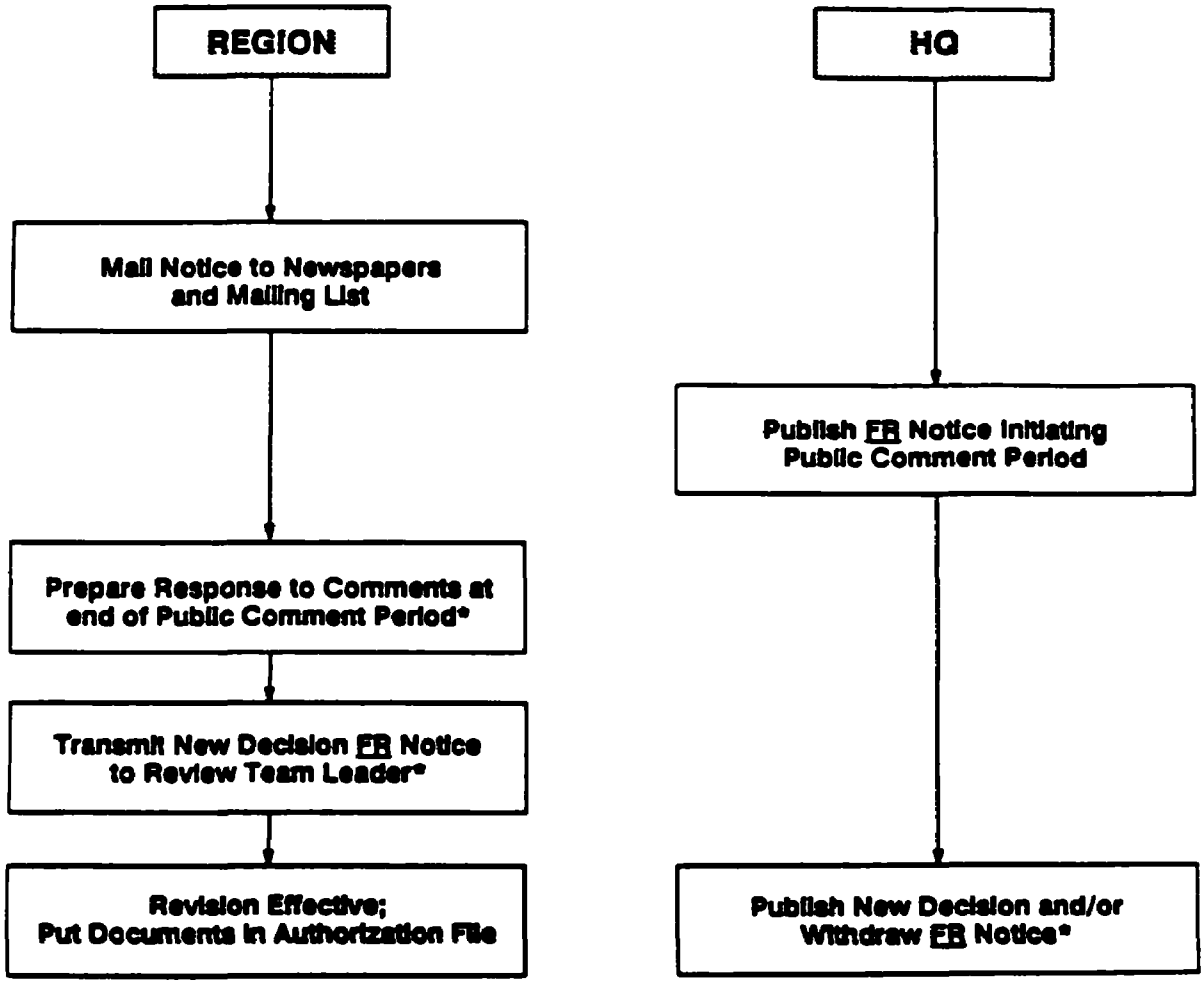
4. If the comments raise issues that the Regional Administrator cannot resolve before the effective date of the immediate final rule, he or she must withdraw the rule before it takes effect. If time allows, the withdrawal notice should provide a specific discussion regarding reasons for the withdrawal and what State changes may be required, if any. At a later date, the Regional Administrator may publish a proposed (or immediate final) rule which provides for a new comment period. This option assures that EPA will have whatever amount of time is necessary to consider all comments fully.

Whenever a second Federal Register notice is required, the Regional Administrator will forward the notice to the Headquarters Regional Team Leader (see Model F in Appendix M). In an abbreviated consultation period of five work days, Headquarters will ensure that the necessary consultation is provided and that the Federal Register notice is published. In some cases, a commenter may submit a comment which causes EPA to reconsider its position on

EXHIBIT 5

Decisionmaking Procedures: Program Revision Authorization

Immediate Final Rulemaking



* Only in the event that adverse comments are received.

an issue. If the Regional Administrator and Headquarters cannot reach agreement on the issue, then the Regional Administrator may take Headquarters' position into account, when making the decision on whether to finalize or withdraw the rule. However, where the comment raises a new issue that the Regional Administrator and Headquarters had not previously addressed, then the Regional Administrator should withdraw the rule until such time as the issue is resolved.

Note that if an adverse public comment is not applicable to the State's revision, EPA does not have to respond to it in a second Federal Register notice. For example, if the adverse comment concerned the State's land disposal program whereas the program revision concerned incineration requirements, a response to such a comment would not be necessary. Similarly, EPA would not publish a response if a person objected to EPA's decision but gave no reason. The Regional State Coordinator should consult with the Regional Counsel when it is not clear whether a response is required.

Standard Rulemaking. The standard rulemaking procedure requires the Region to prepare a proposed rule that announces the availability of the State's program revision for public review and comment, summarizes the proposed revisions, and discusses EPA's proposed approval or disapproval of the revisions (see Model D in Appendix M). The proposal must provide for a comment period of at least 30 days beginning on the date of publication in the Federal Register (see Exhibit 6). Once Headquarters consultation is complete, the Headquarters Regional Liaison will submit the Federal Register notice (see Appendix M) for publication.

When the public comment period closes, the Region will review the public comments and develop a response to those comments. Headquarters will review those responses and transmit to the Regions any comments it may have before the Region prepares the final Federal Register notice. The Regional Administrator will then transmit to the Headquarters Review Team the Federal Register notice containing his approval or disapproval. Unless there are issues identified in the proposal that remain unresolved, Headquarters will deliver the final notice to the Federal Register for publication. If Headquarters disagrees with the final Regional decision, the Assistant Administrator for OSWER must prepare a written response to the Regional Administrator within the ten work-day consultation period.

Revision Disapproval

Whether a State program revision goes through the immediate final rulemaking process or the standard rulemaking process, any disapproval action of a revision should:

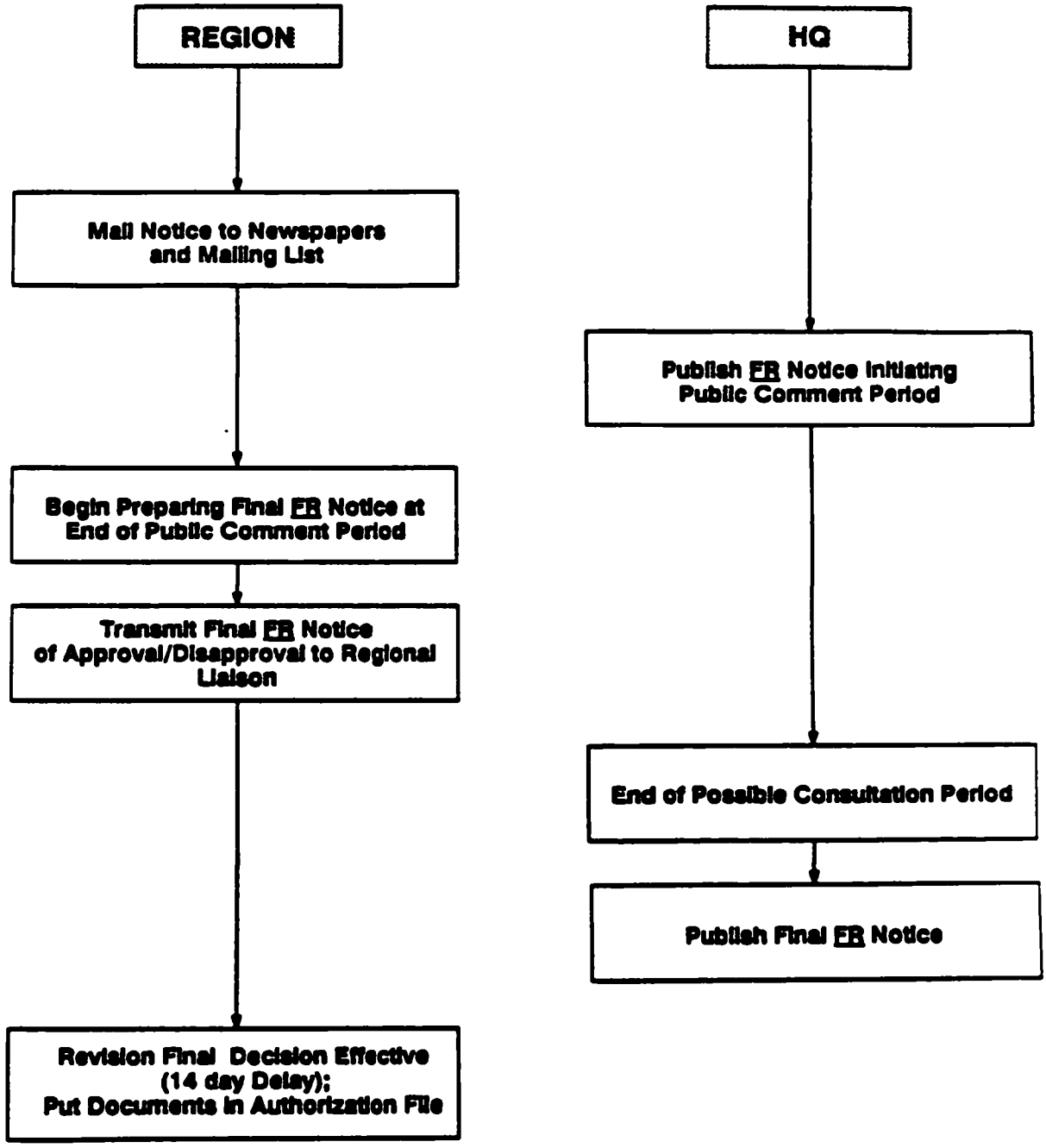
- Clearly state the reasons for disapproval;
- Discuss the implications of disapproval for the authorized program;
- Recommend an acceptable alternative course of action; and
- Include firm, explicit commitments to specific measures EPA will take to help the State overcome the problems identified, and the timeframe for EPA's assistance.

The discussion of the specific measures EPA intends to take in assisting the State should appear in the Regional Administrator's transmittal memorandum and in the Federal Register notice announcing EPA's disapproval.

EXHIBIT 6

Decisionmaking Procedures: Program Revision Authorization

Standard Rulemaking



Glossary

Action Memorandum – A memorandum prepared by the EPA Regional Office for the purpose of obtaining signatures from the appropriate concurring EPA Headquarters offices. An action memorandum typically contains a summary and description of the action, a discussion of the issues and how they were resolved, and a recommendation. (Note: This formal memorandum is needed only for States seeking authorization for the first time.)

Administrative Procedures Act (APA) – Procedural standards which ensure that the public is informed about the actions of Federal and State government agencies, and that the public's interests are properly protected.

Annual State Grant Work Program – An agreement negotiated annually between the State and EPA Regional Office delineating the work activities to be completed by the State as a condition of the RCRA grant for that year.

Application Approval Process – The procedure by which authorization applications are reviewed and determinations made within each Regional Office and Headquarters.

Attorney General's Statement – An element of the authorization application. A statement prepared by the State Attorney General (or the attorney for the State agencies which have independent legal counsel) that identifies and interprets State legal authorities, and explains how these authorities are equivalent to the Federal standards.

Base Program – The RCRA program initially made available for final authorization, reflecting Federal regulations as of July 26, 1982.

Cluster System – A system EPA established to improve the efficiency of program revision submittals and to reduce the burden on the States in preparing program revision applications. Under the cluster system, States with authorization are required to modify their programs on an annual basis to adopt new Federal requirements promulgated during the previous year (see 40 CFR 271.21(e)).

Code of Federal Regulations (CFR) – A codification of final rules published in the Federal Register by the Executive departments and agencies of the Federal government.

Complete Application – The State's official authorization application that has been determined by EPA to be complete, i.e., all necessary components are included.

Draft Application – A preliminary version of the official authorization application.

Federal Register – A document published daily by the Federal government that contains proposed and final regulations and notices. Tentative and final authorization decisions are published in the Federal Register.

Final Authorization – Granted to State programs that are equivalent to and no less stringent than the Federal program, and consistent with the Federal program, as well as other State programs. Final authorization allows for the implementation of the authorized State's regulations in lieu of the Federal RCRA regulations in that State.

Hazardous and Solid Waste Amendments of 1984 (HSWA) – Amendments to the Resource Conservation and Recovery Act.

Headquarters Review Team – An established group of EPA staff representing the consulting

Headquarters offices (i.e., Office of Solid Waste, Office of General Counsel, and Office of Waste Programs Enforcement) responsible for reviewing authorization applications.

Headquarters Review Team Leader -- The State Programs Branch Regional liaison responsible for coordinating the efforts of the Headquarters Review Team and coordinating the transmittal of a single set of written review comments to the Region.

HSWA Program or HSWA Provisions -- Elements of the Federal RCRA program that are implemented pursuant to the Hazardous and Solid Waste Amendments of 1984.

Interim Authorization -- Granted to State programs that are "substantially equivalent" to the Federal Program (§3006(c) and (g)).

Memorandum of Agreement (MOA) -- An element of the authorization application. The MOA provides for coordination and cooperation between the State Director and the EPA Regional Administrator regarding the administration and enforcement of the authorized State program.

Modification -- A State's actions to change its statute, rules, or other program elements. The term "modification" also means the actual change itself.

Non-HSWA or Pre-HSWA Program or Provisions -- Elements of the Federal RCRA program that are implemented pursuant to statutory authority that predates the 1984 HSWA.

Official Application -- The formal State authorization application submitted to EPA by the Governor. (Note: A revision application may be submitted by the State Agency Director instead of the Governor.)

Pre-Application Statutory Review -- An optional EPA review of State statutes prior to the State's submission of a draft or official application.

Program Description (PD) -- An element of the authorization application. The PD explains the program the State proposes to administer, together with any forms used to administer the program under State law.

Program Revision -- The process of submitting an application and obtaining EPA review and approval of State program modifications.

Regional Liaison -- The Headquarters Review Team member in the State Programs Branch that is designated to review and coordinate comments for State applications from a particular Region. The Regional Liaison should maintain day-to-day contact with the State Coordinator in the Regional Office.

Resource Conservation and Recovery Act of 1976 (RCRA) -- RCRA is an amendment to the first Federal solid waste statute -- the Solid Waste Disposal Act of 1965. References to "RCRA" or the "statute" include amendments to RCRA.

State Consolidated RCRA Authorization Manual (SCRAM) -- A manual that provides background information on the entire RCRA State authorization program and outlines the authorization process.

State Program Advisories (SPA) -- Supplements to the SCRAM and the RCRA State Authorization Manual that provide regulatory checklists and guidance concerning Federal program changes. SPAs cover a six-month period.

Subtitle C Program -- The program outlined in Subtitle C of RCRA, which establishes a system for controlling hazardous waste from the time it is generated until its ultimate disposal in a manner that protects human health and the environment.

Index

United States
Environmental Protection
Agency

Office of Solid Waste
Washington, DC 20460

OSWER Directive
9540.00-9A-1
October 1990

EPA

State Authorization Manual

Volume II: Appendices

LIST OF APPENDICES