

CHAPTER 11

AUTHORIZING STATES TO IMPLEMENT RCRA

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In order for a state to assume the regulatory lead as the implementing agency, it must be authorized by EPA to do so. RCRA requires authorization to ensure state programs are at least equivalent to and consistent with the federal rules. Through state authorization, EPA establishes minimum federal standards to prevent overlapping or duplicative state regulatory programs. A state that has received final authorization, known as an **authorized state**, implements and enforces its hazardous waste regulations. Authorized state regulations act “in lieu of” federal regulations.

DEVELOPING A STATE HAZARDOUS WASTE PROGRAM

Under RCRA, as enacted in 1976, states had two options for assuming the responsibility to administer the RCRA Subtitle C program: final or interim authorization.

OVERVIEW

When RCRA was written, it was Congress’ intent for the states to assume primary responsibility for implementing the hazardous waste regulations, with oversight from the federal government. Congress felt the states’ familiarity with the regulated community, and state and local needs would allow them to administer the hazardous waste program in the most effective manner.



■ Final Authorization

For a state to receive **final authorization**, it must be fully equivalent to, no less stringent than, and consistent with the federal program. However, states may impose requirements that are more stringent or broader in scope than the federal requirements. Some examples of rules that are more stringent are the decision by some states to not recognize the CESQG exemption, or to require annual (rather than biennial) reports. An example of a rule that is broader in scope is the regulation of antifreeze as a listed waste in some states. In addition, the state's program must provide adequate enforcement authority to carry out its provisions, provide for public notice and hearing in the permitting process, and provide for public availability of information in "substantially the same manner and to the same degree" as the federal program.

As an initial step toward obtaining final authorization, a state typically adopts the federal rules in some manner. Adopting the federal program means either incorporating federal rules into the state's rules, or creating state rules that are equivalent to federal rules. Many states simply incorporate the federal rules by reference (this is known as **incorporation by reference**). This is when the regulatory language in a state's regulations actually cites, or refers to, the federal regulations. A state may also choose to create an analogous set of state regulations through the state legislative process. Even though a state may have adopted the federal program and its hazardous waste program is similar or identical to the federal program, it still does not have primacy for implementing and enforcing the hazardous waste regulations. To assume this role, the state must first be granted final authorization. As of June 2002, all states, with the

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exception of Alaska and Iowa, are authorized to implement the RCRA hazardous waste program.

Any state that seeks final authorization for its hazardous waste program must submit an application to the EPA Administrator containing the following elements:

- A letter from the governor requesting program authorization
- A complete description of the state hazardous waste program
- An attorney general's statement
- A memorandum of agreement (MOA)
- Copies of all applicable state statutes and regulations, including those governing state administrative procedures
- Documentation of public participation activities.

Governor's Letter

This is simply a letter, signed by the governor, formally requesting the EPA Administrator to authorize the state's hazardous waste program which will be implemented in lieu of the federal program.

Program Description

The program description describes how the state intends to administer the hazardous waste program in place of the federal program. It includes the following:

- A narrative description of the scope, structure, coverage, and processes of the state program
- A description of the state agency or agencies responsible for running the program, including a description of state-level staff who will carry out the program
- A description of applicable state procedures, including permitting procedures and any state administrative or judicial review procedures
- A description of the state's manifest tracking system

- Copies of any forms used to administer the program under state law
- A complete description of the state’s compliance tracking and enforcement program.

In addition, the program description must include estimates of:

- Costs involved in running the program and an itemization of the sources and amounts of funding available to support the program’s operation
- The number of generators, transporters, and on-site and off-site disposal facilities (along with a brief description of the types of facilities and an indication of the permit status of these facilities)
- The annual quantities of hazardous waste generated within the state, transported into and out of the state, and stored, treated, or disposed of within the state (if available).

If the state chooses to develop a program that is more stringent or broader in scope (or both) than the one required by federal law, the program description should address those parts of the program that go above and beyond what is required under RCRA Subtitle C.

Attorney General’s Statement

The attorney general’s statement identifies the legal authorities — statutes, regulations, and where appropriate, case law — upon which the state is relying to demonstrate equivalence with the federal program. The statement must include citations to specific statutes, administrative regulations, and judicial decisions which demonstrate adequate authority. When differences from federal authorities exist in the state’s program, the statement provides an explanation. The statement must be signed by the attorney general or an independent legal counsel authorized to represent the state agency in court. State statutes and regulations cited in the attorney general’s statement must be lawfully adopted and fully effective at the time the program is authorized.

Memorandum of Agreement

Although a state with an authorized program assumes primary responsibility for administering Subtitle C hazardous waste regulations, EPA still retains enforcement authority and oversight responsibilities. In these instances, since the authorized state and EPA both possess regulatory authority to administer the regulations, there is a potential for problems or conflicts, such as dual permitting or dual enforcement of the regulations. The **memorandum of agreement** between the state Director and the EPA Regional Administrator outlines the nature of these responsibilities and oversight powers, and defines the level of coordination between the state and the EPA in implementing the program. While each MOA will contain provisions unique to each individual state’s program, several provisions are common to all MOAs. These include provisions for:

- Establishing state procedures for assigning EPA identification numbers
- Specifying the frequency and content of reports that the state must submit to EPA
- Coordinating compliance monitoring and enforcement activities between the state and EPA

SAMPLE MEMORANDUM OF AGREEMENT

This memorandum of agreement (hereinafter “Agreement”) establishes policies, responsibilities, and procedures pursuant to 40 CFR §271.8 for the State of _____ Hazardous Waste Program (hereinafter “State Program”) authorized under Section 3006 of the Resource Conservation and Recovery Act (hereinafter “RCRA” or “the Act”) of 1976 (Public Law 94-580, 42 USC §6901 *et seq.*) and the United States Environmental Protection Agency (hereinafter EPA) Regional Office for Region _____. This Agreement further sets forth the manner in which the State and EPA will coordinate in the State’s administration of the State program.

- Allowing EPA to conduct compliance inspections of the regulated community in the authorized state
- Joint processing of permits for those facilities that require a permit from both the state and EPA
- Specifying the types of permit applications that will be sent to the EPA Regional Administrator for review and comment
- Transferring permitting responsibilities upon authorization.

State Statutes and Regulations

The state must submit copies of its statutes and regulations that are expected to act in lieu of the federal RCRA regulations. Where states adopt the federal regulations by reference, a document may be included outlining where in the state rules the federal rules are incorporated.

Documentation of Public Participation

A state must demonstrate that the public was allowed to participate in the state's decision to seek final authorization. Prior to submitting the application to the Administrator, a state must have given public notice of its intent to apply for authorization. Public notice must take the form of publishing the announcement in major newspapers, sending information to individuals on the state agency mailing list, and allowing for a 30-day comment period. Proof of public participation may include copies of comments submitted by the public during the comment period, and transcripts, recordings, or summaries of any public hearings concerning state authorization.

■ Interim Authorization

Some states are not able to receive final authorization immediately because their programs do not meet the minimum federal requirements. As a result, these states can obtain **interim authorization**. Interim authorization is a temporary mechanism that is intended to promote continued state participation in hazardous waste management while encouraging states to develop programs that

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are fully equivalent to the federal program and that will qualify for final authorization. A state may receive interim authorization if its hazardous waste program is substantially equivalent to the federal program. Interim authorization is intended to allow a state with its own hazardous waste program in place to continue implementing its current program until final authorization can be achieved. Under RCRA, interim authorization expired on January 31, 1986. HSWA introduced a new interim authorization period for any requirement promulgated pursuant to HSWA authority. HSWA interim authorization expires January 1, 2003, except for the January 22, 2002, CAMU amendments rule.

REVIEW OF THE PROPOSED STATE PROGRAM

Once the state has submitted a complete application for final authorization to EPA, the EPA Regional Administrator determines whether or not the state's program should be authorized.

The EPA Regional Administrator makes this determination according to the following steps:

- Tentative determination — The EPA Regional Administrator must tentatively approve or disapprove the state's application. The tentative determination is published in the *Federal Register*.
- Public comment — The public is given an opportunity to comment on the state's application and the EPA Regional Administrator's tentative determination. The Agency places a newspaper notice to inform the public of this opportunity, and a public hearing

will be held after the notice of the tentative determination is published in the *Federal Register*.

- Final determination — After the notice of the tentative determination is published in the *Federal Register*, the EPA Regional Administrator must decide whether or not to authorize the state's program, taking into account all comments submitted. This final determination is then published in the *Federal Register*.

REVISING AUTHORIZED STATE PROGRAMS

Once a state has gained final authorization, it must continually amend and revise its program to maintain its authorized status. As RCRA continues to evolve through new federal rulemakings, an authorized state is required to revise its program to reflect the changes in the federal program. An authorized state may also have to revise its program in order to incorporate any state statutory or regulatory changes that affect the state's hazardous waste program. Most of the authorization activity now involves revisions to authorized state programs rather than the authorization of new states.

All program revisions may be initiated by either EPA or the authorized state. To revise its authorized program, a state must submit copies of its regulations and may submit a modified program description, attorney general's statement, MOA, or other documents deemed necessary by EPA. The EPA Administrator reviews the state's proposed modifications applying the same standards used to review the state's initial program application. The state's program revisions are effective once approved by EPA. Notice of all state program revisions are then published in the *Federal Register*.

A state with final authorization must modify its program on a yearly basis to reflect changes to the federal program resulting from the promulgation of new rules. New federal rules are grouped into annual clusters, and a state revises its program by adopting and becoming authorized for the entire cluster. A cluster begins on July 1 of each year and

ends on June 30 of the following year. By July 1 of each year, an authorized state must adopt the cluster, which includes all changes to the federal program, that occurred during the 12 months preceding the previous July 1 (e.g., states must modify their programs by July 1, 2003, to reflect all changes made between July 1, 2001 and June 30, 2002). The deadlines for program modifications may also be extended for one year if state statutory amendments are necessary.

■ Withdrawing State Program Authorization

Authorized state programs are continually subject to review. If the EPA Administrator determines that a state's authorized program no longer complies with the appropriate regulatory requirements and the state fails to amend its program accordingly, authorization may be withdrawn. An authorized state's program may be considered out of compliance for many reasons. One reason could be failure to promulgate or enact required regulations, leaving the state without the legal authority to implement or enforce its program. Also, the state legislature could limit or strike down the state's authority to enforce its program. A state could also be out of compliance by failing to issue required permits, or by continually issuing bad permits. If an authorized state fails to enforce its authorized program properly, does not act on violations, fails to assess proper penalties or fines, or fails to inspect and monitor properly, it may also be considered out of compliance. Finally, if the state fails to comply with the requirements of the MOA, the EPA Administrator may determine the state is out of compliance and may begin program withdrawal procedures. If program authorization is withdrawn, responsibility for administering and enforcing RCRA Subtitle C reverts back to EPA.

Although EPA can withdraw hazardous waste program authorization for a state that fails to enforce its authorized program properly or take timely and appropriate action, the Agency can take other action without officially withdrawing authorization. In such instances, EPA may take independent enforcement action by **overfiling**, or enforcing a provision for which a particular state has

authorization. EPA may also overfile if the state requests EPA to do so and provides justification based on unique, case-specific circumstances, or if a case could establish a legal precedent. In order to overfile, EPA must notify the state 30 days prior to issuing a compliance order or starting a civil action within that state.

■ Transferring Program Responsibility Back to EPA

A state with an authorized program may voluntarily transfer the program back to EPA. To do this, the state must give the EPA Administrator 180 days notice and submit a plan for the orderly transfer to EPA of all relevant program information necessary for administering the program (e.g., permits and permit files, compliance records, permit applications, reports).

GRANTS AND OVERSIGHT

While authorized states bear the primary responsibility for implementing the RCRA Subtitle C program, federal EPA still plays a role by offering financial assistance to states to help them develop and implement their hazardous waste programs, establishing broad national priorities, and ensuring that states properly carry out the RCRA program.

■ State Grants

EPA offers grants to states to assist them in developing or implementing authorized hazardous waste management programs. Each EPA Regional Office receives an allotment based upon multiple factors, such as population and the amounts and types of hazardous waste generated in the EPA Region. States then submit proposed work plans that outline planned activities in the upcoming year, including permitting, enforcement, and program management. EPA Regions then negotiate with each state over the specific work to be accomplished with these grant funds.

■ Priority Setting

EPA also sets RCRA national goals and priority program activities on an annual basis. Each year, EPA identifies the national priorities for implementing all of its programs, including the RCRA Subtitle C and D programs. These priorities form the basis for EPA Regional and state workload negotiations for the upcoming year.

■ State Oversight

Ensuring that states properly implement their hazardous waste management programs is also an important EPA responsibility. As a result, EPA Regional staff have oversight responsibilities to:

- Promote national consistency in RCRA implementation
- Encourage coordination and agreement between EPA and states on technical and management issues
- Ensure proper enforcement by the state
- Ensure appropriate expenditure of federal grant funds.

INFORMATION MANAGEMENT

Several RCRA provisions require the regulated community to report hazardous waste management information to EPA and states. For example, biennial reporting provisions require large quantity generators and TSDFs to submit waste management information to EPA by March 1 of every even-numbered year. EPA and states, in turn, collect and track such information to ensure that the hazardous waste program is adequately managed at the EPA Headquarters, EPA Regional, and state levels, and to provide accurate and up-to-date information to both Congress and the general public. In order to achieve this goal, EPA compiles such data in the RCRAInfo

database. EPA also maintains the State Authorization Tracking System (StATS), which it uses to track whether states have been authorized to implement or have adopted federal hazardous waste rulemakings.

■ RCRAInfo

In September 2000, EPA began managing data



supporting the Subtitle C program in its information system known as **RCRAInfo**. RCRAInfo consolidated EPA's former information systems, RCRIS and BRS, into one national system. RCRAInfo is a national program management and inventory system of RCRA hazardous waste handlers, including generators, transporters, and TSDFs. The information system captures identification, regulatory compliance status and cleanup activity data for all handlers, and tracks the permit and closure status of TSDFs. Additionally, RCRAInfo tracks state-collected data on the generation and management of RCRA hazardous waste from LQGs and TSDFs.

■ State Authorization Tracking System

The **State Authorization Tracking System** (StATS) is a tool used by EPA to chart the states that have been authorized to implement the RCRA hazardous waste program. By looking at StATS reports, an individual can determine if a particular state has been authorized to implement a specific rule. The reports also list the *Federal Register* citations for final authorization decisions for each state and rule.

SUMMARY

Congress intended states to assume responsibility for implementing RCRA, with oversight from the federal government. In order for a state to receive authorization to implement and enforce the hazardous waste regulations in lieu of federal EPA, the state must demonstrate that its program:

- Is equivalent to, no less stringent than, and consistent with the federal program (state requirements may be more stringent or broader in scope)
- Provides adequate enforcement authority
- Provides for public availability of information in substantially the same manner and to the same degree as the federal program.

Any state that seeks final authorization for its hazardous waste program must submit an application to the EPA Administrator containing the following elements:

- A letter from the governor requesting program authorization
- A complete program description
- An attorney general's statement
- An MOA
- Copies of all applicable state statutes and regulations
- Documentation of public participation activities.

Once a state's program has been authorized, it must revise its program, on an annual basis, to reflect both changes in the federal program, and state statutory or regulatory changes. State programs are also subject to review by EPA, and a state's authorized status can be withdrawn if the program does not comply with appropriate regulatory requirements. Without officially withdrawing authorization, EPA may take independent enforcement action by overfiling, or enforcing a provision for which a particular state has authorization. States may also choose to transfer program responsibility back to EPA.

EPA works closely with states in implementing the hazardous waste management program by offering grants to states, setting national goals and priorities, and providing program oversight.

EPA Headquarters, EPA Regions, and states collect, compile, and track information on the RCRA hazardous waste program through RCRAInfo.