



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

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OFFICE OF  
SOLID WASTE AND  
EMERGENCY RESPONSE

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EMERGENCY MANAGEMENT

**MEMORANDUM**

**SUBJECT:** Survey of EPA Regions on Resource Conservation and Recovery Act (RCRA) State Authorization Issues

**FROM:** Barnes Johnson, Director  
Office of Resource Conservation and Recovery

A handwritten signature in blue ink that reads "Barnes Johnson".

**TO:** Regional RCRA Division Directors

I would like to provide you with the results of a survey of Regional RCRA state authorization staff pursuant to recent Office of Inspector General (OIG) recommendations. The OIG directed the Environmental Protection Agency (EPA) to implement four recommendations in its July 31, 2018, Final Report: "Incomplete Oversight of State Hazardous Waste Rule Authorization Creates Regulatory Gaps and Human Health and Environmental Risks." This memorandum addresses two of the four recommended corrective actions in the report. For the first corrective action, the Office of Resource Conservation and Recovery (ORCR) committed to work with the Regions to identify the reasons why states have not sought authorization for certain rules, track them, and then prioritize rules for authorization. For the second corrective action, ORCR collected data on the causes of authorization delays so EPA can determine how to improve the process.

**Plan for Rule Identification and Data Collection**

The OIG report included various reasons why states either have not pursued or have delayed authorization, based on interviews with several Regions. However, the report noted that EPA does not collect data regarding the rates at which these problems are encountered, although EPA collects data on state rule adoption and authorization in the State Authorization Tracking System (StATS). As part of the corrective actions to address these concerns, ORCR's plan was to analyze data from STATS on the states which are not authorized for a set of nine significant, more stringent rules that were promulgated between 1983, when the RCRA Base Program was established, and 2000 (between 2000 and 2015 the most significant rules are less stringent). These nine rules were promulgated at least in part under the authority of the Hazardous and Solid Waste Amendments of 1984 (HSWA), which provides for EPA enforcement prior to a state being authorized. ORCR then surveyed all ten Regional offices to examine and document the reasons why states have not pursued authorization for these nine specific rules, all other rules in general, and the causes of authorization delays. The results of this survey are outlined

below, and additional information from this Regional survey and the analysis of StATS data are at the end of this memorandum.

### **Regional Survey Methodology**

As part of ORCR's plan, we developed a Regional survey template with input from Regional authorization staff to collect the relevant data on state authorizations. This survey instrument was designed to identify the cause of delays and to make informed decisions on how to improve the process. The template was organized in table form. ORCR asked the Regions to review the current list of rules for which states are not yet authorized, and to respond to four questions regarding each state's: 1) reasons for rules not being authorized, 2) reasons for authorization delays, 3) effects on program implementation, and 4) adoption and authorization status, with respect to each of these rules. For questions one and two, the table provided a list of possible responses, while questions three and four allowed for open ended Regional responses.

After Regions completed the survey, ORCR conducted follow up interviews with RCRA authorization staff from every Regional office. During these interviews, the discussions provided additional detail on the Regional responses in the survey, including why states were not authorized for certain rules. The discussions also focused on the state rule adoption and authorization application activity the states are planning over the next two to three years, and state-specific difficulties with their rule adoption process.

### **Regional Survey Responses**

#### **I. Reasons why Authorization has not been Pursued by States for Certain Rules**

In the survey and discussions with ORCR, the most frequent reason for why states are not authorized for certain rules is constrained state resources. These resource limitations included a lack of state staff for rule adoption and authorization activities and/or potential implementation of the rules. Another reason why states have not adopted certain rules is federal litigation, particularly on the January 13, 2015, Definition of Solid Waste rule. This rule continues to be challenged in court and EPA has recently amended parts of the rule. Regions also reported that some states cited the absence of a universe of facilities in the state to which the rule would apply as the basis for their decision to not expend resources on adoption. Additional detail on the older significant rules is in a table at the end of this memorandum.

#### **II. Identification of Delays in Authorization**

The Regions provided several reasons for delays in authorization. In addition to resource constraints, litigation, and competing programmatic priorities, several Regions raised the lengthy and complex state adoption process in many states as a reason for delays. In some cases, state staff have experienced delays from extended reviews by other parts of the state government. Both Regional and state staff have noted that they have little influence on the statewide rule adoption process. Additional information regarding these reasons is in a table at the end of this memorandum.

#### **III. Effects of a Lack of Authorization**

The Regions generally believed that a lack of state authorization had little effect on overall program implementation. The Regions noted eight states where EPA implements significant aspects of the hazardous waste program for which the state is not authorized. The most consequential program area is corrective action, with five unauthorized states. The main effect is that EPA must conduct joint



corrective action, with five unauthorized states. The main effect is that EPA must conduct joint permitting with the state or must oversee corrective action at facilities. This compels EPA to expend resources, though these activities enable EPA to maintain program expertise. In one state, EPA was not able to enforce a rule that was promulgated under non-HSWA<sup>1</sup> authority, which was noted in the OIG report.

#### **IV. State Authorization Status**

The OIG report recognized that states vary regarding their authorization status, with some states much further behind than others. However, based on the Regional survey, over 70 percent of states expect to adopt the recent federal rulemakings (through July 1, 2018) within two to three years and at least be actively working on their authorization application or awaiting Regional action. One Region is working with all their states to develop a five-year plan for full rule adoption. For many states, this expected progress signals a marked improvement. Recent national attention to RCRA authorization efforts appears to have encouraged states to focus more on authorization. Regions noted the numerous instances where a state has shifted resources (e.g., staff) towards rule adoption and authorization. The significant federal rulemakings of the past several years and national efforts, such as the March 2018 authorization training and conference, have also highlighted the importance of state authorization.

#### **V. Prioritization of Rules for Authorization**

EPA has placed a high priority on the authorization of recently-promulgated rules, such as the Definition of Solid Waste, Generator Improvements, and e-Manifest rules. This priority is evidenced by the swift development of rule adoption tools, trainings, and frequent discussion of these rules during national conference calls. States have generally responded by including these rules in current or upcoming authorization application packages.

EPA also has placed a priority on reducing the authorization backlog that exists in many states (the backlogs generally range from 5 to 15 years of federal rules). Based on the Regional survey and subsequent interviews with Regional staff, addressing the older rule backlog is also, where appropriate, an important area of focus by the states. While there are notable exceptions, such as several states in Region 1 choosing to not adopt the 1991 Boiler and Industrial Furnace rule due to a lack of existing or expected facilities, the interviews do not support the concern that states are frequently declining to adopt certain rules. Thus, we believe that states and Regions are appropriately prioritizing the adoption of recent rules and clearing out rule adoption backlogs. However, as these backlogs are eliminated, EPA and states should work collaboratively to address the few rules that remain and determine next steps. ORCR may also factor this information into efforts to more accurately measure authorization performance.

#### **VI. Authorization Process Improvements**

Several EPA Regions and states have recently implemented LEAN pilot projects to improve the state rule adoption process by improving EPA's review of state rules. These new practices center on the state and Region working collaboratively on the state's adoption of federal rules, including the resolution of any EPA comments on draft rules prior to finalization by the state. One of the identified practices for improvements was ensuring that the state and Region are aware of each other's process schedule so that

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<sup>1</sup> Rules promulgated under non-HSWA authority do not go into effect under RCRA until states are authorized for them.

unnecessary delays are eliminated. One main purpose of these process improvements is to help clear out the backlog of unauthorized rules that exists in many states.

The discussions between ORCR and the Regions included these practices and the Regions are generally implementing them. Some Regions did note that some states do not make any changes to the federal rules, thus reducing the need for these LEAN process improvements. However, future LEAN efforts regarding other parts of the authorization process or application components may be useful for all states.

### **Conclusion**

The survey and interviews that ORCR conducted with Regional RCRA authorization staff highlighted the impressive progress that Regions and states expect to make in the next few years. ORCR plans to conduct similar interviews with Regional staff periodically to monitor and support this progress. As ORCR and the Regions develop more accurate authorization performance measures, we will subsequently report these expected successes to you and your staff.

### Attachments

cc: RCRA Branch Chiefs

**Authorization Status of Significant More Stringent Rules Promulgated Between 1983 and 2000**

Rule Title	Date of Promulgation	Number of States Not Authorized	Comments
Corrective Action	7/15/85	5	Two states have cleanup programs which cannot be authorized.
Land Disposal Restrictions (Solvents and Dioxins)	11/7/86	3	Two states have a proposed authorization FRN. Third state is very small.
Land Disposal Restrictions for First Third Scheduled Wastes	8/17/88	3	Two states have a proposed authorization FRN. Third state is very small.
Toxicity Characteristic	3/29/90	1	Rule is one of many rules within a significant backlog of unauthorized rules.
Organic Air Emissions Standards for Process Vents and Equipment Leaks	6/21/90	7	Two states have a proposed authorization FRN or is in process. Four states have significant backlogs of unauthorized rules.
Burning of HW in Boilers and Industrial Furnaces (BIF)	2/21/91	13	Rule is largely obsolete because most regulation of combustors is now under the Clean Air Act.
Land Disposal Restrictions Phase II – Universal Treatment Standards	9/19/94	8	Two states have a proposed authorization FRN. Five states have significant backlogs of unauthorized rules. One state has a likely data error.
Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers	11/25/96	8	Two states have a proposed authorization FRN or is in process. Four states have significant backlogs of unauthorized rules.
NESHAPS: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (MACT Rule)	9/30/99	16	Rule transfers regulatory authority for many HW Combustors from RCRA to Clean Air Act Authority. Low priority for many states.



## Summary of Regional Survey Responses to the OIG Report Questions

<b>Question 1: Reasons why states are/were not authorized for rules</b>	
<b>Reason</b>	<b>Number of States</b>
A: State does not have a universe of facilities to which the rule applied.	15
B: State has enforcement impediments (e.g., audit law, enforcement statutes).	2
C: State has resource constraints (e.g., FTE for rule implementation, expertise for implementation).	22
D: Rule is being challenged in court or EPA is making additional changes to the rule (e.g., DSW).	22
E: State is focusing its rulemakings on other program areas.	10
F: Rule is very complex.	8
G: Rule (or major portions of the rule) is less stringent.	7
H: Other reasons the Region identifies.	11

<b>Question 2: Reasons for authorization delays</b>	
<b>Reason</b>	<b>Number of States</b>
A: General state or Regional resource shortage – no person assigned to manage the task.	22
B: Staff not available for specific functions – legal or technical review from either the state or Region.	12
C: Staff pulled away from rule adoption or authorization activities temporarily due to higher priorities.	13
D: Waiting for state legislature/board/commission approval.	19
E: Large number of rules within the rule adoption/authorization package.	12
F: Rules are very complex.	7
G: State made significant changes to the text of the federal rules that require evaluation.	3
H: Adoption or authorization not a priority for the state.	15
I: Other reasons the Region identifies.	5

**Question 3. Implementation effects.** For each state, briefly discuss any implementation effects of a lack of authorization – e.g., joint permits.

Regions reported implementation effects on eight states of varying levels of significance. Five states are not authorized for corrective action. Region 4 reported that they conduct joint permitting with Kentucky due to a lack of authorization that will be remedied soon with a major proposed authorization.

**Question 4. Adoption and authorization status.** For each state, discuss the status of adoption of unauthorized rules and upcoming authorization packages, including timelines for completion. Discuss rules for which there are currently no state plans to adopt.

Regions reported that most states (36 out of 50, or over 70%), expect to adopt and seek authorization of rules up to and including the most recent rules – DSW, Generator Improvements, and even e-Manifest – within 2-3 years. Half of the other states have longer term plans that will reach the same result (Region 1).