

Express Authorization Questions and Answers: What is Generally the Content of a Program Revision Application?

I. ATTORNEY GENERAL'S STATEMENT

A. What's recommended in an Attorney General's Statement?

- The Attorney General's Statement (AGS) the signature page, an attached or referenced Statutory Checklist, and any attached discussion of relevant statutes and judicial decisions.

An AGS should address these specific issues:

- That the State has adequate authority to carry out the revised program addressed by the revision application, and to meet the requirements at 40 CFR part 271, subpart A with respect to the revised program.
- Whether there have been changes in the State's statutes. If a State has amended statutory authorities that were relied on in previous authorizations, then the Attorney General should :
 - describe the changes,
 - identify the impact on the previously authorized program, and
 - certify that the changes do not impact the State's ability to implement the authorized program or meet the requirements at 40 CFR part 271, subpart A.
- Whether there is any (1) legislation (e.g., State audit laws or legislation providing immunity or privilege to the regulated community), or (2) State judicial decisions, that impact the implementation, administration and enforcement of the State's authorized program¹.
- The Model AGS addresses the legal requirements of 40 C.F.R. §271.7, and further explanation by the AG is recommended only when the statements in the Model AGS cannot be made. Absent any information to the contrary, EPA Regional reviewers should accept these affirmative statements.

¹The State need only demonstrate that it has authority to adequately enforce the authorized State program. A State's enforcement authority is not authorized, and State enforcement authorities do not operate in lieu of federal enforcement provisions and authority at the federal level.

B. When are Rule Specific Entries Recommended?

Rule specific entries are recommended in the Attorney General’s Statement under the following circumstances:

- When the program revision involves an innovative interpretation of its regulations. Just as EPA sometimes must defend its interpretation of RCRA and its regulations when attempting to find creative methods for regulating hazardous waste, States may also need to defend the interpretation of their regulations.
- Otherwise, rule specific entries should generally be kept to a minimum on the AGS certification. This information is best documented on the Statutory Checklist or in the rule checklist.

C. Authorization of State Statutory Provisions

- Although EPA does not authorize provisions in State statutes which provide authority for the State’s authorized regulations, or which provide enforcement authority, some States use statutory provisions instead of regulatory provisions as part of the state hazardous waste management program that operates in lieu of the federal program. In this latter situation, the AGS should include a reference to such statutory provisions, e.g., “The *regulatory and statutory* provisions for which the [State/Commonwealth] is seeking authorization are documented in the attached [*Refer to Revision Checklists or other Regulatory Documentation document*].”

II. STATUTORY CHECKLIST

A. What Do We Recommend When there are No Statutory Changes and the State’s Statutes are Well Documented?

- No changes to the current Statutory checklist/documentation should generally be needed. A copy of the current Statutory Checklist can accompany the Attorney General’s Statement or, if the current Statutory checklist/documentation is already on file at the Region, it can be referenced in the Attorney General’s Statement.

B. When is a Revised Statutory Checklist Recommended?

- A State should submit a revised or amended statutory checklist when the statutes identified have been amended or modified by judicial action, but the changes are not significant enough to warrant completely redoing the State's statutory checklist. An addendum to the existing checklist can be used to document these changes, or the current statutory checklist can be directly amended with the revisions clearly identified (e.g., by using bold or italicized print). The State should consult with the EPA Region to establish the appropriate format of the changes.

C. When is a New Statutory Checklist Recommended?

- When a State has not updated its statutory documentation for a number of years and the EPA Region determines that it is appropriate for the documentation to be resubmitted. Examples include but are not limited to: 1) when the only comprehensive statutory documentation was submitted with the base program application package, and 2) when the state program has not been codified in a number of years and the only recent statutory documentation is related to specific program revisions.
- When the State has made a major change to its statutes that would render previous documentation obsolete, such as changing core authorities or extensive reorganization or renumbering of statutes.
- When the program revision involves an expansion in scope of the previously authorized program. Examples include but are not limited to: 1) initial adoption of new portions of the hazardous waste program, e.g., the land disposal restrictions, BIFs, or corrective action, and 2) regulation of new units or treatment types, e.g. miscellaneous units.

Note: We recommend that the complexity of the Statutory Checklist not be determined by the manner in which a State adopts its regulations (i.e., incorporation by reference versus verbatim or re-write), but rather by how broad/specific the State's enabling authorities are. Thus, a State that incorporates the Federal regulations by reference can generally forego regulatory checklists, but may need a very detailed statutory checklist to appropriately document its authorities. Conversely, a State that rewrites the Federal regulations may need very detailed regulatory checklists, but only a simplified statutory crosswalk to represent its authorities because of the broadness of the State's authorities. Also, a statutory checklist does not identify the State statutory provisions that operate in lieu of the federal program, nor does it authorize the State's statutory provisions to operate in lieu of the federal statutory provisions under RCRA.

III. RULE CHECKLISTS

A. When are Rule Checklists Recommended?

- EPA recommends that a State which rewrites the federal regulations submit completed rule checklists to help the Region locate and review the changes made to the regulations and to assist the State in its adoption process. The information in the checklists helps facilitate the review process. Without revision checklists, the authorization process will likely take much longer for a State that rewrites the Federal regulations, as well as for a State that adopts the Federal regulations verbatim. States modifying the rule checklists should consult with their Region before submission to facilitate EPA's review.
- Rule checklists are not usually recommended for States that fully incorporate by reference (IBR).
- There are a handful of self-implementing HSWA provisions for which EPA did not promulgate regulations. Although there are no regulatory checklists for these statutory provisions, States must seek authorization for more stringent provisions.

B. Recommended Content of Rule Checklists

- In addition to providing a detailed crosswalk between State and Federal rule provisions, rule checklists also address the issue of stringency of State regulations. The "comments" column should be used to discuss changes a State has made to a federal provision, either within the column or in a footnote. Such a discussion may answer Regional questions, and preclude comments.

IV. PROGRAM DESCRIPTION

A. When are Revisions or an Addendum to the Program Description (PD) Recommended?

The EPA Region determines when a revised PD or an addendum should be submitted. An update to the PD may be called for under the following situations:

- When the State is seeking authorization for a new program area, e.g., land disposal restrictions, corrective action, universal wastes.

- When a change is made that expands the scope of the program such that more entities must be regulated and more resources are needed to run the program, e.g. a significant new waste listing.
- When the State changes the procedures and policies documented in the current PD.
- When the resources available to run the program significantly change.
- When there is a change in the State agency or agencies responsible to administering the program.

Note: A new section will be added to each revision checklist summary that indicates whether the rule addressed by the checklist may require a change to the program description.

B. What Happens if No Change is Needed in the Program Description?

- The current PD can be resubmitted without change, or the current PD can be referenced in the program revision application transmittal letter as supporting the revision authorization package being submitted.

V. STATE INITIATED REGULATORY CHANGES

How should States keep EPA Informed of Changes to their Regulations that are not Addressed by an EPA Final Rule?

- States should provide EPA with written notification of changes to their regulations that impact the previously authorized program but are not related to a specific Federal rulemaking (see 40 CFR 271.21(a)). These changes are referred to as “State-initiated changes” because they are not made in response to new EPA rules. If the State-initiated changes involve expansion or retraction of the scope of the program or if they are of an innovative nature, the Region may require an AG finding regarding the changes, revised rule checklists, or a revised Program description. Otherwise, the Region may decide to authorize the regulatory changes without further documentation.

