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Title 40 —Protection of Environment
Chapter I —Environmental Protection Agency
Subchapter I —Solid Wastes

Part 239 Requirements for State Permit Program Determination of Adequacy

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**PART 239—REQUIREMENTS FOR STATE PERMIT PROGRAM
DETERMINATION OF ADEQUACY**

Authority: 42 U.S.C. 6912, 6945.

Source: 63 FR 57040, Oct. 23, 1998, unless otherwise noted.

Subpart A—General

§ 239.1 Purpose.

This part specifies the requirements that state permit programs must meet to be determined adequate by the EPA under section 4005(c)(1)(C) of the Resource Conservation and Recovery Act (RCRA or the Act) and the procedures EPA will follow in determining the adequacy of state Subtitle D permit programs or other systems of prior approval and conditions required to be adopted and implemented by states under RCRA section 4005(c)(1)(B).

§ 239.2 Scope and definitions.

(a) Scope.

- (1) Nothing in this part precludes a state from adopting or enforcing requirements that are more stringent or more extensive than those required under this part or from operating a permit program or other system of prior approval and conditions with more stringent requirements or a broader scope of coverage than that required under this part.
- (2) All states which develop and implement a Subtitle D permit program must submit an application for an adequacy determination for purposes of this part. Except as provided in § 239.12, state Subtitle D permit programs which received full approval prior to November 23, 1998 need not submit new applications for approval under this part. Similarly, except as provided in § 239.12, states that received partial approval of their Subtitle D permit programs prior to November 23, 1998 need not reapply under this part for approval for those program elements EPA has already determined to be adequate.
- (3) If EPA determines that a state Subtitle D permit program is inadequate, EPA will have the authority to enforce the Subtitle D federal revised criteria on the RCRA section 4010(c) regulated facilities under the state's jurisdiction.

(b) Definitions.

- (1) For purposes of this part:

Administrator means the Administrator of the U.S. Environmental Protection Agency or any authorized representative.

Approved permit program or approved program means a state Subtitle D permit program or other system of prior approval and conditions required under section 4005(c)(1)(B) of RCRA that has been determined to be adequate by EPA under this part.

Approved state means a state whose Subtitle D permit program or other system of prior approval and conditions required under section 4005(c)(1)(B) of RCRA has been determined to be adequate by EPA under this part.

Guidance means policy memorandum, an application for approval under this Part, or other technical or policy documents that supplement state laws and regulations. These documents provide direction with regard to how state agencies should interpret their permit program requirements and must be consistent with state laws and regulations.

Implementing agency means the state and/or local agency(ies) responsible for carrying out an approved state permit program.

Lead state agency means the state agency which has the legal authority and oversight responsibilities to implement the permit program or other system of prior approval and conditions to ensure that facilities regulated under section 4010(c) of Subtitle D of RCRA comply with the requirements of the approved state permit program and/or has been designated as lead agency.

Permit or prior approval and conditions means any authorization, license, or equivalent control document issued under the authority of the state regulating the location, design, operation, ground-water monitoring, closure, post-closure care, corrective action, and financial assurance of Subtitle D regulated facilities.

Permit documents means permit applications, draft and final permits, or other documents that include applicable design and management conditions in accordance with the Subtitle D federal revised criteria, found at 40 CFR part 257, subpart B and 40 CFR part 258, and the technical and administrative information used to explain the basis of permit conditions.

Regional Administrator means any one of the ten Regional Administrators of the U.S. Environmental Protection Agency or any authorized representative.

State Director means the chief administrative officer of the lead state agency responsible for implementing the state permit program for Subtitle D regulated facilities.

State program or permit program means all the authorities, activities, and procedures that comprise the state's system of prior approval and conditions for regulating the location, design, operation, ground-water monitoring, closure, post-closure care, corrective action, and financial assurance of Subtitle D regulated facilities.

Subtitle D regulated facilities means all solid waste disposal facilities subject to the revised criteria promulgated by EPA under the authority of RCRA Section 4010(c).

(c) The definitions in 40 CFR part 257, subpart B and 40 CFR part 258 apply to all subparts of this part.

Subpart B—State Program Application

§ 239.3 Components of program application.

Any state that seeks a determination of adequacy under this part must submit an application to the Regional Administrator in the appropriate EPA Region. The application must identify the scope of the program for which the state is seeking approval (*i.e.*, which class of Subtitle D regulated facilities are covered by the application). The application also must demonstrate that the state's authorities and procedures are adequate to ensure compliance with the relevant Subtitle D federal revised criteria and that its permit program is uniformly applicable to all the relevant Subtitle D regulated facilities within the state's jurisdiction. The application must contain the following parts:

- (a) A transmittal letter, signed by the State Director, requesting program approval. If more than one state agency has implementation responsibilities, the transmittal letter must designate a lead agency and be jointly signed by all state agencies with implementation responsibilities or by the State Governor;
- (b) A narrative description of the state permit program in accordance with § 239.4;
- (c) A legal certification in accordance with § 239.5;
- (d) Copies of all applicable state statutes, regulations, and guidance.

§ 239.4 Narrative description of state permit program.

The description of a state's program must include:

- (a) An explanation of the jurisdiction and responsibilities of all state agencies and local agencies implementing the permit program and description of the coordination and communication responsibilities of the lead state agency to facilitate communications between EPA and the state if more than one state agency has implementation responsibilities;

- (b) An explanation of how the state will ensure that existing and new facilities are permitted or otherwise approved and in compliance with the relevant Subtitle D federal revised criteria;
- (c) A demonstration that the state meets the requirements in §§ 239.6, 239.7, 239.8, and 239.9;
- (d) The number of facilities within the state's jurisdiction that received waste on or after the following dates:
 - (1) For municipal solid waste landfill units, October 9, 1991.
 - (2) For non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste, January 1, 1998.
- (e) A discussion of staff resources available to carry out and enforce the relevant state permit program.
- (f) A description of the state's public participation procedures as specified in § 239.6(a) through (c).

§ 239.5 State legal certification.

- (a) A state must submit a written certification from the state Attorney General that the laws, regulations, and any applicable guidance cited in the application are enacted at the time the certification is signed and are fully effective when the state permit program is approved. This certification may be signed by the independent legal counsel for the state rather than the Attorney General, provided that such counsel has full authority to independently represent the lead state agency in court on all matters pertaining to the state program.
- (b) If guidance is to be used to supplement statutes and regulations, the state legal certification must discuss that the state has the authority to use guidance to develop enforceable permits which will ensure compliance with relevant standards issued pursuant to RCRA section 4010(c) and that the guidance was duly issued in accordance with state law.
- (c) If any laws, regulations, or guidance are not enacted or fully effective when the legal certification is signed, the certification should specify what portion(s) of laws, regulations, or guidance are not yet enacted or fully effective and when they are expected to be enacted or fully effective.

The Agency may make a tentative determination of adequacy using this legal certification. The state must submit a revised legal certification meeting the requirements of paragraph (a) of this section and, if appropriate, paragraph (b) of this section along with all the applicable fully enacted and effective statutes, regulations, or guidance, prior to the Agency making a final determination of adequacy. If the statutes, regulations or guidance originally submitted under § 239.3(d) and certified to under this section are modified in a significant way, the Regional Administrator will publish a new tentative determination to ensure adequate public participation.

Subpart C—Requirements for Adequate Permit Programs

§ 239.6 Permitting requirements.

- (a) State law must require that:
 - (1) Documents for permit determinations are made available for public review and comment; and
 - (2) Final determinations on permit applications are made known to the public.
- (b) The state shall have procedures that ensure that public comments on permit determinations are considered.

- (c) The state must fully describe its public participation procedures for permit issuance and post-permit actions in the narrative description required under § 239.4 and include a copy of these procedures in its permit program application.
- (d) The state shall have the authority to collect all information necessary to issue permits that are adequate to ensure compliance with the relevant 40 CFR part 257, subpart B or 40 CFR part 258 federal revised criteria.
- (e) For municipal solid waste landfill units, state law must require that:
 - (1) Prior to construction and operation, all new municipal solid waste landfill units shall have a permit incorporating the conditions identified in paragraph (e)(3) of this section;
 - (2) All existing municipal solid waste landfill units shall have a permit incorporating the conditions identified in paragraph (e)(3) of this section by the deadlines identified in 40 CFR 258.1;
 - (3) The state shall have the authority to impose requirements for municipal solid waste landfill units adequate to ensure compliance with 40 CFR part 258. These requirements shall include:
 - (i) General standards which achieve compliance with 40 CFR part 258, subpart A;
 - (ii) Location restrictions for municipal solid waste landfill units which achieve compliance with 40 CFR part 258, subpart B;
 - (iii) Operating criteria for municipal solid waste landfill units which achieve compliance with 40 CFR part 258, subpart C;
 - (iv) Design criteria for municipal solid waste landfill units which achieve compliance with 40 CFR part 258, subpart D;
 - (v) Ground-water monitoring and corrective action standards for municipal solid waste landfill units which achieve compliance with 40 CFR part 258, subpart E;
 - (vi) Closure and post-closure care standards for municipal solid waste landfill units which achieve compliance with 40 CFR part 258, subpart F; and
 - (vii) Financial assurance standards for municipal solid waste landfill units which achieve compliance with 40 CFR part 258, subpart G.
- (f) For non-municipal, non-hazardous waste disposal units that receive CESQG waste, state law must require that:
 - (1) Prior to construction and operation, all new non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste shall have a permit incorporating the conditions identified in paragraph (f)(3) of this section;
 - (2) All existing non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste shall have a permit incorporating the conditions identified in paragraph (f)(3) of this section by the deadlines identified in 40 CFR 257.5;
 - (3) The state shall have the authority to impose requirements for non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste adequate to ensure compliance with 40 CFR part 257, subpart B. These requirements shall include:
 - (i) General standards which achieve compliance with 40 CFR part 257, subpart B (§ 257.5);

- (ii) Location restrictions for non-municipal, non-hazardous waste disposal units which achieve compliance with 40 CFR 257.7 through 257.13;
- (iii) Ground-water monitoring and corrective action standards for non-municipal, non-hazardous waste disposal units which achieve compliance with 40 CFR 257.21 through 257.28; and,
- (iv) Recordkeeping for non-municipal, non-hazardous waste disposal units which achieves compliance with 40 CFR 257.30.

§ 239.7 Requirements for compliance monitoring authority.

- (a) The state must have the authority to:
 - (1) Obtain any and all information necessary, including records and reports, from an owner or operator of a Subtitle D regulated facility, to determine whether the owner or operator is in compliance with the state requirements;
 - (2) Conduct monitoring or testing to ensure that owners and operators are in compliance with the state requirements; and
 - (3) Enter any site or premise subject to the permit program or in which records relevant to the operation of Subtitle D regulated facilities or activities are kept.
- (b) A state must demonstrate that its compliance monitoring program provides for inspections adequate to determine compliance with the approved state permit program.
- (c) A state must demonstrate that its compliance monitoring program provides mechanisms or processes to:
 - (1) Verify the accuracy of information submitted by owners or operators of Subtitle D regulated facilities;
 - (2) Verify the adequacy of methods (including sampling) used by owners or operators in developing that information;
 - (3) Produce evidence admissible in an enforcement proceeding; and
 - (4) Receive and ensure proper consideration of information submitted by the public.

§ 239.8 Requirements for enforcement authority.

Any state seeking approval must have the authority to impose the following remedies for violation of state program requirements:

- (a) To restrain immediately and effectively any person by administrative or court order or by suit in a court of competent jurisdiction from engaging in any activity which may endanger or cause damage to human health or the environment.
- (b) To sue in a court of competent jurisdiction to enjoin any threatened or continuing activity which violates any statute, regulation, order, or permit which is part of or issued pursuant to the state program.
- (c) To sue in a court of competent jurisdiction to recover civil penalties for violations of a statute or regulation which is part of the state program or of an order or permit which is issued pursuant to the state program.

§ 239.9 Intervention in civil enforcement proceedings.

Any state seeking approval must provide for intervention in the state civil enforcement process by providing either:

- (a) Authority that allows intervention, as a right, in any civil action to obtain remedies specified in § 239.8 by any citizen having an interest that is or may be adversely affected; or,
- (b) Assurance by the appropriate state agency that:
 - (1) It will provide notice and opportunity for public involvement in all proposed settlements of civil enforcement actions (except where immediate action is necessary to adequately protect human health and the environment); and,
 - (2) It will investigate and provide responses to citizen complaints about violations; and,
 - (3) It will not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

Subpart D—Adequacy Determination Procedures

§ 239.10 Criteria and procedures for making adequacy determinations.

- (a) The State Director seeking an adequacy determination must submit to the appropriate Regional Administrator an application in accordance with § 239.3.
- (b) Within 30 days of receipt of a state program application, the Regional Administrator will review the application and notify the state whether its application is administratively complete in accordance with the application components required in § 239.3. The 180-day review period for final determination of adequacy, described in paragraph (d) of this section, begins when the Regional Administrator deems a state application to be administratively complete.
- (c) After receipt and review of a complete application, the Regional Administrator will make a tentative determination on the adequacy of the state program. The Regional Administrator shall publish the tentative determination on the adequacy of the state program in the FEDERAL REGISTER. Notice of the tentative determination must:
 - (1) Specify the Regional Administrator's tentative determination;
 - (2) Afford the public at least 30 days after the notice to comment on the state application and the Regional Administrator's tentative determination;
 - (3) Include a specific statement of the areas of concern, if the Regional Administrator indicates the state program may not be adequate;
 - (4) Note the availability for inspection by the public of the state permit program application; and
 - (5) Indicate that a public hearing will be held by EPA if sufficient public interest is expressed during the comment period. The Regional Administrator may determine when such a hearing is necessary to clarify issues involved in the tentative adequacy determination. If held, the public hearing will be scheduled at least 45 days from public notice of such hearing. The public comment period may be continued after the hearing at the discretion of the Regional Administrator.
- (d) Within 180 days of determining that a state program application is administratively complete, the Regional Administrator will make a final determination of adequacy after review and consideration of all public comments, unless the Regional Administrator, after consultation with the State Director, agrees to extend the review period. The Regional Administrator will give notice of the final determination in the FEDERAL REGISTER. The document must include a statement of the reasons for the determination and a response to significant comments received.

- (e) For all states that do not submit an application, the Administrator or Regional Administrator may issue a final determination of inadequacy in the FEDERAL REGISTER declaring those state permit programs inadequate to ensure compliance with the relevant Subtitle D federal revised criteria. Such states may apply later for a determination of adequacy.

§ 239.11 Approval procedures for partial approval.

- (a) EPA may partially approve state permit programs that do not meet all of the requirements in § 239.6(e)(3) (i.e., do not incorporate all of the relevant Subtitle D federal revised criteria). Such permit programs may be partially approved if:
 - (1) The appropriate Regional Administrator determines that the state's permit program largely meets the technical requirements of § 239.6 and meets all other requirements of this part;
 - (2) Changes to a specific part(s) of the state permit program are required in order for the state program to fully meet the requirements of § 239.6; and
 - (3) Provisions not included in the partially approved portions of the state permit program are clearly identifiable and separable subsets of the relevant Subtitle D federal revised criteria.
- (b) A state applying for partial approval must include in its application a schedule to revise the necessary laws, regulations, and/or guidance to obtain full approval within two years of final approval of the partial permit program. The Regional Administrator and the State Director must agree to the schedule.
- (c) The application for partial approval must fully meet the requirements of subparts B and C of this part.
- (d) States with partially approved permit programs are only approved for those relevant provisions of the Subtitle D criteria included in the partial approval.
- (e) Any partial approval adequacy determination made by the Regional Administrator pursuant to this section and § 239.10 shall expire two years from the effective date of the final partial program adequacy determination unless the Regional Administrator grants an extension. States seeking an extension must submit a request to the appropriate Regional Administrator, must provide good cause for missing the deadline, and must supply a new schedule to revise necessary laws, regulations, and/or guidance to obtain full approval. The appropriate Regional Administrator will decide if there is good cause and if the new schedule is realistic. If the Regional Administrator extends the expiration date, the Region will publish a document in the FEDERAL REGISTER along with the new expiration date. A state with partial approval shall submit an amended application meeting all of the requirements of this part and have that application approved by the two-year deadline or the amended date set by the Regional Administrator.
- (f) The Regional Administrator will follow the adequacy determination procedures in § 239.10 for all initial applications for partial program approval and follow the adequacy determination procedures in § 239.12(f) for any amendments for approval for unapproved sections of the relevant Subtitle D federal revised criteria.

§ 239.12 Modifications of state programs.

- (a) Approved state permit programs may be modified for various reasons, such as changes in federal or state statutory or regulatory authority.

- (b) If the federal statutory or regulatory authorities that have significant implications for state permit programs change, approved states may be required to revise their permit programs. These changes may necessitate submission of a revised application. Such a change at the federal level and resultant state requirements would be made known to the states either in a FEDERAL REGISTER document containing the change or through the appropriate EPA Regional Office.
- (c) States that modify their programs must notify the Regional Administrator of the modifications. Program modifications include changes in state statutory or regulatory authority or relevant guidance or shifting of responsibility for the state program within the lead agency or to a new or different state agency or agencies. Changes to the state's permit program, as described in its application which may result in the program becoming inadequate, must be reported to the Regional Administrator. In addition, changes to a state's basic statutory or regulatory authority or guidance which were not part of the state's initial application, but may have a significant impact on the adequacy of the state's permit program, also must be reported to the Regional Administrator.
- (d) States must notify the appropriate Regional Administrator of all permit program modifications required in paragraphs (b) and (c) of this section within a time-frame agreed to by the State Director and the Regional Administrator.
- (e) The Regional Administrator will review the modifications and determine whether the State Director must submit a revised application. If a revised application is necessary, the Regional Administrator will inform the State Director in writing that a revised application is necessary, specifying the required revisions and establishing a schedule for submission of the revised application.
- (f) For all revised municipal solid waste landfill permit program applications, and for all amended applications in the case of partially approved programs, the state must submit to the appropriate Regional Administrator an amended application that addresses those portions of its program that have changed or are being amended. For such revised programs, as well as for those from states seeking EPA approval of permit programs for state regulation of non-municipal, non-hazardous waste disposal units which receive conditionally exempt small quantity generator hazardous waste, the Regional Administrator will make an adequacy determination using the criteria found in § 239.10.
- (g) For revised applications that do not incorporate permit programs for additional classifications of Subtitle D regulated facilities and for all amended applications in the case of partially approved programs, the appropriate Regional Administrator shall provide for public participation using the procedures outlined in § 239.10 or, at the Regional Administrator's discretion, using the following procedures.
 - (1) The Regional Administrator will publish an adequacy determination in the FEDERAL REGISTER summarizing the Agency's decision and the portion(s) of the state permit program affected and providing an opportunity to comment for a period of at least 60 days.
 - (2) The adequacy determination will become effective 60 days following publication, if no adverse comments are received. If EPA receives comments opposing its adequacy determination, the Regional Administrator will review these comments and publish another FEDERAL REGISTER document responding to public comments and either affirming or revising the initial decision.

§ 239.13 Criteria and procedures for withdrawal of determination of adequacy.

- (a) The Regional Administrator may initiate withdrawal of a determination of adequacy when the Regional Administrator has reason to believe that:
 - (1) A state no longer has an adequate permit program; or

- (2) The state no longer has adequate authority to administer and enforce an approved program in accordance with this part.
- (b) Upon receipt of substantive information sufficient to indicate that a state program may no longer be adequate, the Regional Administrator shall inform the state in writing of the information.
- (c) If, within 45 days of the state's receipt of the information in paragraph (b) of this section, the state demonstrates to the satisfaction of the Regional Administrator that the state program is adequate (i.e., in compliance with this part), the Regional Administrator shall take no further action toward withdrawal of the determination of adequacy and shall so notify the state and any person(s) who submitted information regarding the adequacy of the state's program and authorities.
- (d) If the State Director does not demonstrate the state's compliance with this part to the satisfaction of the Regional Administrator, the Regional Administrator shall list the deficiencies in the program and negotiate with the state a reasonable time for the state to complete such action to correct deficiencies as the Regional Administrator determines necessary. If these negotiations reach an impasse, the Regional Administrator shall establish a time period within which the state must correct any program deficiencies and inform the State Director of the time period in writing.
- (e) Within the schedule negotiated by the Regional Administrator and the State Director, or set by the Regional Administrator, the state shall take appropriate action to correct deficiencies and shall file with the Regional Administrator a statement certified by the State Director describing the steps taken to correct the deficiencies.
- (f) If the state takes appropriate action to correct deficiencies, the Regional Administrator shall take no further action toward withdrawal of determination of adequacy and shall so notify the state and any person(s) who submitted information regarding the adequacy of the state's permit program. If the state has not demonstrated its compliance with this part to the satisfaction of the Regional Administrator, the Regional Administrator shall inform the State Director and may initiate withdrawal of all or part of the determination of state program adequacy.
- (g) The Regional Administrator shall initiate withdrawal of determination of adequacy by publishing the tentative withdrawal of determination of adequacy of the state program in the FEDERAL REGISTER. Notice of the tentative determination must:
 - (1) Afford the public at least 60 days after the notice to comment on the Regional Administrator's tentative determination;
 - (2) Include a specific statement of the Regional Administrator's areas of concern and reason to believe the state program may no longer be adequate; and
 - (3) Indicate that a public hearing will be held by EPA if sufficient public interest is expressed during the comment period or when the Regional Administrator determines that such a hearing might clarify issues involved in the tentative withdrawal determination.
- (h) If the Regional Administrator finds, after the public hearing (if any) and review and consideration of all public comments, that the state is in compliance with this part, the withdrawal proceedings shall be terminated and the decision shall be published in the FEDERAL REGISTER. The document must include a statement of the reasons for this determination and a response to significant comments received. If the Regional Administrator finds that the state program is not in compliance with this Part by the date prescribed by the Regional Administrator or any extension approved by the Regional Administrator, a final

notice of inadequacy shall be published in the FEDERAL REGISTER declaring the state permit program inadequate to ensure compliance with the relevant Subtitle D federal revised criteria. The document will include a statement of the reasons for this determination and response to significant comments received.

- (i) States may seek a determination of adequacy at any time after a determination of inadequacy.

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