

MEMORANDUM

Subject: Procedures for Issuing Immediate Final Rules to Authorize State Hazardous Waste Program Revisions

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To: RCRA State Authorization Contacts, Regions 1-10
ORC RCRA Branch Chiefs, Regions 1-10

The purpose of this memorandum is to outline the appropriate procedure for issuing immediate final rules to authorize revisions to State hazardous waste programs under 40 CFR 271.21(b)(3).

An immediate final rule, also known as a direct final rule, is a rule which is published in the Federal Register, and, barring any adverse comment, automatically becomes effective sixty days after publication. Section 271.21(b)(3)(iii) outlines two procedures for dealing with adverse comments on an immediate final rule. If there are adverse comments, the Region must publish a notice withdrawing the immediate final decision prior to the effective date of the rule (i.e., the withdrawal notice must be published in the *Federal Register* before the 60 days elapses). To deal with the possibility of any adverse comment, the Regions should use one of the following procedures:

- A. Regions should publish a proposed rule simultaneously with an immediate final rule. See Model C-1, Proposed Rule. If EPA does not receive adverse comments, the immediate final decision would become effective sixty days after publication. If there are adverse comments, the Region will publish a notice withdrawing the immediate final decision prior to the effective date of the rule and then issue a new final rule responding to comments on the already published proposed rule.
- B. If the Region does not issue a proposed rule simultaneously with the immediate final rule and it receives adverse comments on the immediate final rule, the Region must withdraw the immediate final rule prior to the effective date of the rule. If it still desires to promulgate the rule, the Region must publish a proposed rule, followed by a final rule based on that proposal.

If the Region believes it will need more than thirty days (the time from the end of the standard comment period to the effective date) to determine whether the comments received are adverse and to publish the withdrawal notice, the Region can set an alternate effective date, such as 90 or 120 days from the date of publication of the immediate final rule.

In general, adverse comments are comments that suggest that the rule should not be adopted, that offer contrary facts or that dispute the factual basis of the decision. Similarly, comments recommending changes are adverse if the commenter suggests that the rule without the change would be inappropriate. The Agency should withdraw an immediate final rule due to germane adverse comments, even though EPA deems those comments immaterial because the Agency already considered them and rejected them. On the other hand, comments supporting the rule or irrelevant comments (such as comments addressing aspects of the State program not covered or implicated by the rule) are not considered adverse. In case of doubt, we recommend that you consider a comment to be adverse.

If the Region does not receive adverse comments on an immediate final rule, it can choose (but is not legally required) to publish a notice affirming that the immediate final rule will go into effect as originally indicated. This will eliminate any public confusion about whether and when the rule will become effective. In this notice, the Region may discuss any comments that are not adverse.

For further information, please contact Leslie Bell, in OSW, at (703) 308-8888, or Nina Rivera, in OGC, at (202) 260-1598.

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