
II. BACKGROUND RESEARCH

OVERVIEW

There are a number of important organizational steps that should be taken before beginning the codification process. These steps, which will help ensure timely and effective completion of the process, include:

- A. Establishing a Regional Codification Team;
- B. Determining the State's authorization status;
- C. Obtaining official versions of State statutes and regulations; and
- D. Identifying, obtaining, and organizing other required background documents.

The remainder of this chapter discusses each of these steps in detail. In addition, Section E identifies the codification contacts at EPA Headquarters and the Office of the Federal Register (OFR), as well as contacts in Regions with recent codification experience.

A. ESTABLISHING A REGIONAL CODIFICATION TEAM

KEY CONCEPTS

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| <ul style="list-style-type: none">• Establish a Regional Codification Team to help resolve the problems and issues which will arise during the codification process.• Include on the team a Regional Representative, a State Authorization Specialist from the State being codified, and a representative from the Office of Regional Counsel. |
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POTENTIAL PROBLEMS

Codification can be a time-consuming and complex process, especially if there have been significant time lags between authorization and codification, or between adoption and authorization. Such time lags decrease the ease with which relevant documents can be located, due to factors such as difficulty in finding old files and loss of institutional memory through staff turnover. Additionally, such lags make it more difficult to identify the authorized program.

VALUE OF CODIFICATION

Codification is, however, a valuable and necessary process because it provides an opportunity for EPA to look at a State's program as a whole, rather than on the checklist-by-checklist basis, which is often the case in the revision authorization process. Codification often reveals issues requiring resolutions that were not discovered during program revision reviews. For these reasons, it is important to assemble a Regional codification team to address problems that may arise and help gather background materials that are needed to complete the codification process.

MEMBERSHIP AND DUTIES OF THE REGIONAL CODIFICATION TEAM

The Regional codification team should include, at a minimum, the following members:

REGIONAL
REPRESENTATIVE

The **Regional Representative**, who is responsible for overseeing the entire codification process, including:

- P Determining what the State is authorized for;
- P Gathering and organizing the background material;
- P Developing the statutory and regulatory crosswalks;
- P Resolving issues related to the State's authorization and codification;
- P Coordinating with EPA Headquarters, OFR, and other team members; and
- P Preparing the codification package for submission to the *Federal Register*.

STATE
AUTHORIZATION
SPECIALIST

The **State Authorization Specialist** from the State program to be codified, who provides support in obtaining background documents and the official versions of the State's statutes and regulations.

OFFICE OF
REGIONAL COUNSEL
REPRESENTATIVE

A **representative from the Office of Regional Counsel (ORC)**, who is responsible for reviewing the statutory and regulatory crosswalks to assure accurate classification of all provisions as either (1) authorized, (2) procedural/enforcement, (3) broader in scope, or (4) unauthorized, as explained in Chapters III and IV. The ORC representative also certifies that the State's authorized program has been adequately identified. Additionally, the ORC representative should review the codification Federal Register notice.

ADDITIONAL
PERSONNEL

Additional personnel may be needed to help organize the needed background materials and develop the statutory and regulatory crosswalks discussed in Chapters III and IV. The team should be assembled well before the codification process begins, so that each team member may allocate time in his or her schedule for codification activities.

**POTENTIAL
PROBLEMS AND
ISSUES NEEDING
RESOLUTION**

A number of problems and issues are likely to arise during the codification process. The Regional team will be involved in resolving these issues, some of which include:

- P Conflicts between Regional or State interpretations of a State's authorization status and *Federal Register* notices;
- P Loss of important background materials;
- P Differences between official versions of State statutes or regulations and the authorized program due to recent State amendments;
- P Changes made to State statutes for internal consistency and which have not been authorized;
- P Authorization of less stringent provisions;
- P Inadequate history of amendments to the State statutes or regulations;
- P Extensive lag between what a State has adopted and what it is authorized for; and
- P Reasonable lag between adoption and authorization, but the State has made changes that were not reviewed as part of the most recent authorization.

B. DETERMINING THE AUTHORIZATION STATUS OF THE STATE

KEY CONCEPTS

- The three main data sources for determining authorization status are: the EPA Internet website, *Federal Register* authorization notices, and regional authorization records.
- Use the three data sources to cross-check and supplement one another.

SOURCES OF INFORMATION

Several sources should be utilized when determining the aspects of the program for which the State has authorization. These sources include (1) the EPA Internet website, (2) *Federal Register* authorization notices, and (3) Regional authorization records.

EPA INTERNET WEBSITE

The EPA Internet website at “www.epa.gov/epaoswer/hazwaste/state” provides information by State, on:

- P The Federal rules, identified by rule codes (e.g., 54, 54.1, 28H, 28H.1) that were authorized in each authorization notice;
- P The publication date and *Federal Register* citation for each authorization notice;
- P The authorization date corresponding to each authorization notice;
- P The Rule packages submitted and under review; and
- P Rule packages not yet submitted.

An example of the report is provided in Appendix A.

AUTHORIZATION FEDERAL REGISTER NOTICES

Authorization *Federal Register* notices identify the statutes and regulations for which the State is authorized, their effective dates, and the areas in which the State program is broader in scope. The EPA Internet website report can be used to locate the authorization notices required for the codification. This information is useful in the development of the statutory and regulatory crosswalks addressed in Chapters III and IV.

REGIONAL AUTHORIZATION RECORDS

Regional authorization records provide a cross-check to the information on the EPA Internet website and the *Federal Register*.

COMPARISON OF DATA SOURCES

All three data sources should be compared with one another; in some cases, information from one can be used to supplement the others. The early authorization notices are not always specific on what a State was authorized for, particularly the recent requirements checklists. Additionally, Regional records are not always complete, and information on early authorizations in many Regional databases, as well as on the EPA Internet website, may be based on the Regional staff's collective memory. The authorization database on the EPA Internet website was developed from both authorization notices and input from each of the Regions, particularly the

authorizations conducted in the mid-1980s. There are some authorizations on the EPA Internet website that are based solely on information from the Regions and for which there are no corresponding *Federal Register* notices. The following example illustrates the importance of comparing the various data sources.

EXAMPLE
ILLUSTRATING
IMPORTANCE
OF COMPARING
MULTIPLE
DATA SOURCES

Example

Section 305.122, shown in Exhibit IV 5, was part of the base authorization because the first date in the amendatory history is June 19, 1986; however, the section's history indicates that it was amended to be effective on October 8, 1990 and again to be effective on November 23, 1993. The supporting information already in the preliminary crosswalk indicates that these changes have not been authorized for this section. Thus, the base program version of this section will need to be compared to this section in the official version of the State's regulations and the changes redlined or the October 8, 1990 and the November 23, 1993 amendments excluded. As discussed in Example 1 for Step 6, below, a comparison with the base regulations indicates that 305.122(b)&(c) were the only requirements in the original base regulations. The rest of this section was added later. §305.122(b)&(c) are word-for-word the same as §305.122(a)&(b) in the base regulations. Thus, §305.122(a)&(d) in the official version need to be redlined and indicated on the crosswalk as "unauthorized". §305.122(b)&(c) must be assessed further to see if they are outside the scope of the RCRA Subtitle C regulations, broader in scope, or procedural/enforcement as per Steps 2, 3 and 4 below.

EXAMPLE
ILLUSTRATING
ACTION TAKEN
WHERE
PROVISIONS
WERE IN
BASE
REGULATIONS
BUT AMENDED

Example

In a codification conducted by Region 6, both the EPA Internet website and the Regional records indicated that the State in question was authorized for the Federal rules addressed by Checklists 1-13. The EPA Internet website did not contain a corresponding authorization notice. None of the authorization *Federal Register* notices addressed these Federal rules, but one notice referenced an authorization date. The State's authorization files initially supported the information in the authorization notices, because no checklists, State regulations, or other background information for authorization could be found. There were, however, several letters and Attorney General's Statements that referenced the authorization date. The State Authorization Specialist was asked to provide documentation of this authorization. Several weeks later, the State was able to present a letter from EPA dated August 23, 1985 which granted the State authorization.

C. OBTAINING THE OFFICIAL VERSIONS OF THE STATE STATUTES AND REGULATIONS

KEY CONCEPTS

- The official version of the State statutes and regulations is the one acknowledged by the State as legally enforceable and used in court.
- Electronic copies, computer printouts, or secondary sources (e.g., Environment Reporter) of State statutes and regulations cannot be used for codification.
- Start with the State Secretary of State to obtain the official version of the Statutes and with the State Register for the regulations.

PROBLEMS IN OBTAINING THE OFFICIAL DOCUMENTS

Obtaining the official versions of a State's statutes and regulations can be one of the most frustrating steps in the codification process. However, knowing exactly what is needed and where to begin the search for these documents will eliminate many common problems. It is important to note that the statutes and regulations sent with a State's authorization package are often not the official versions. In addition, an official version submitted with an authorization package may not meet the "ability to be copied" and "clarity" standards set by the Office of the Federal Register.

UNACCEPTABLE FORMATS

An electronic copy of State statutes and regulations is **not** a valid format for incorporation by reference materials submitted to OFR, because it lacks certification that the materials have been officially adopted by the State. The same holds true for secondary sources such as the Bureau of National Affairs publication *Environment Reporter*. Additionally, documents being submitted should not be combined from different sources or from volumes of different dates.

WHERE TO OBTAIN OFFICIAL STATUTES AND REGULATIONS

The best place to start to obtain a copy of the official version of a State's statutes is the State's Secretary of State's Office. For the State's regulations, the State Register is an appropriate contact (Appendix B lists these offices for each State). While these offices may not always be the actual source of the required documents, their staff can refer you to the proper source. Potential places of referral include the State Law Library and the official State publisher. The major publishers of State statutes and regulations include West Publishing, Butterworth Legal Publishers, and the Lexus Law Publishers (formerly Michie Company), although it should be noted that these companies may charge a considerable fee (up to several hundred dollars) for copies of statutes and regulations. Note that the publisher of the statutes may differ from the publisher of the regulations. The addresses and phone numbers for the major publishers are included in Appendix B.

REQUEST LEGALLY ENFORCEABLE COPIES

When requesting the official version of a State's statutes or regulations, bear in mind that it must be the one acknowledged by the State as the official version that is legally recognized and used in court. While some States can provide a current version of their statutes and regulations as a computer print-out, this is not the official version. It is the Region's burden to ensure that the copies of statutes and regulations collected are the official, legally enforceable copies in the State. Official versions of State

regulations typically fall into one of the categories listed below. State Register staff should be consulted to determine the category into which the State fits.

**STATE
REGULATIONS
EFFECTIVE UPON
PUBLICATION IN
STATE REGISTER**

In some States, the regulations are not effective until officially published in the State register. For these States, EPA requires copies of the version published by the State Register. Sometimes these versions will be published as part of a volume of the State Register, while in other cases the State Register may publish a separate codified document containing the entire State hazardous waste regulations. Such compilations may be published by an officially recognized State publisher.

**REGULATIONS
EFFECTIVE UPON
ADOPTION AND
SIGNATURE BY
SECRETARY OF
STATE**

In other States, the regulations are immediately effective upon adoption and signature by the Secretary of State. These States do not have a State Register, and do not publish their regulations in any manner subsequent to adoption and signature by the Secretary of State. (Such States may still have an "Office of the State Register," however. Arkansas is one example.) The appearance of these regulations varies by State and may range from a clean typeset or word-processed version to a legislative mark-up. These regulations have either an official stamp denoting the date of adoption and signature or some other form of certification that the material was adopted by the State. This certification also needs to be submitted with the codification package and must be included in the codification incorporation by reference. Be sure to request both the regulations and the certification.

**PERIODIC
PUBLICATION IN
STATE REGISTER**

Certain State regulations are immediately effective (as above), except that the State periodically publishes a compilation of its regulations. However, this compilation is not considered the official version of the regulations that is effective as a matter of State law. The official version in such States is the originally adopted version signed by the Secretary of State.

**PROVIDE SPECIFIC
LEGAL CITATIONS**

When requesting official versions of State statutes or regulations, it is important to know exactly what the State has been authorized for and be able to provide the specific legal citations of what you need. If a source has a compilation of an entire title, you may be able to ask for a separate publication of the small portion you need. In other cases, there may not be an official separate publication, and you will need to copy the portion you require, including the title page. In either case, you should obtain a letter from the source indicating that the version is the official one. If copies are made, be sure that they meet OFR's standards for copies (see Chapter VII).

**OBTAIN VERSION
CLOSE TO
AUTHORIZED
PROGRAM**

It is helpful to obtain a version of the statutes and regulations that is as close to the State's authorized program as possible. A problem can sometimes arise if a State has adopted many regulations for which it has not been authorized. Typically, a State will have only one recognized official version of the State regulations, and that will be the most recently published version. If the authorized version of the regulations is very different from the present official version, the Region may need to authorize the State for more rules and close the gap between authorization and adoption. If the Region or State has a clean copy of an older version of the regulations which was once considered official, this version may be used for the codification provided the

Region/State has all the necessary information to substantiate that this version was an official version.

D. IDENTIFYING, OBTAINING, AND ORGANIZING REQUIRED BACKGROUND DOCUMENTS

KEY CONCEPTS

- Required background materials include completed and signed Attorney General's Statements, base and revision checklists, the STATE legislation checklist, memoranda of agreement, the HSWA statutory checklist, and program descriptions, as well as copies of the STATE statutes and regulations submitted for the base and each subsequent authorization.
- Use a "checklist" as an initial step in organizing this material to determine what, if any, materials are missing.
- Use a series of three ring binders for each document type with tabs indicating which authorization package the document is from.

REQUIRED DOCUMENTS

There are a number of documents required to develop a codification package, including:

- P Attorney General's Statements;
- P Memoranda of Agreement;
- P Program Description;
- P Legislation Checklists (for base program);
- P Statutory Checklists (for HSWA provisions);
- P Regulatory (Base and Revision) Checklists;
- P Copies of Statutes; and
- P Copies of Regulations.

Most of these documents should have been submitted with the final authorization packages prepared by the State. Therefore, the primary source for these documents is the Regional authorization file. The State's files may be used as a back-up source if there are items missing from the Regional files.

ORGANIZING THE DOCUMENTS

The first step in organizing the background materials is to develop a "checklist" of the materials submitted with each State authorization package submitted to EPA. The "checklist" should include an itemized list of materials submitted with each authorization package, the date of each item in the package, and list any missing items. Exhibit II-1 provides an example of a completed "checklist" for background items needed. A blank "checklist" is included in Appendix C. When organizing the background material, it is probably best to place all like documents together, organized in order of authorization date, starting with base authorization. For example, all Attorney General's Statements should be placed in the same file with each identified by the authorization package with which it was submitted. A useful

filing system is a series of large three-ring binders for each type of document, with tabs indicating which authorization package each document was from. Organizing the materials in this way facilitates preparation of the statutory and regulatory crosswalks as well as the codification *Federal Register* notice.

The following discussion of each document type listed above is written for States being codified for the first time. For codification updates, the same information needs apply, except that the materials would be background documents dating from the last codification to the present, as discussed in Chapter IX.

ATTORNEY
GENERAL'S
STATEMENT

This document provides information on those provisions for which the State is authorized and identifies areas in which the State's requirements are broader in scope. There should be an Attorney General's Statement for each final authorization package submitted by the State, including the base authorization. The early Attorney General's Statements are particularly important because they can provide information on the recent requirement rules for which the State has been authorized. Early in the program, States were often authorized for many of the recent requirement checklists with their base program authorization, but this information was not specifically included in the base authorization *Federal Register* notice. In addition, Attorney General's Statements can help mitigate the frequent loss of early base program and revision checklists. The most important use of the information in the Attorney General's Statement is in developing the statutory and regulatory crosswalks as discussed in Chapters III and IV.

CORRECT
VERSION OF AG
STATEMENT

Within the Regional authorization files, there are often several versions of the Attorney General's Statement associated with a given authorization package. The version needed for codification is the version that is dated and signed by the State's Attorney General or a duly designated representative. Additionally, the date information on each AG statement is needed in Part 272 of the codification notice if a Region chooses to include the optional paragraph addressing "Statement of Legal Authority." While optional, inclusion of this paragraph is a good idea because it provides background information on a State's Attorney General's Statements.

MEMORANDA OF
AGREEMENT

These documents are used to define areas of agreement between the State and EPA and often contain procedural requirements which are not in the State's regulations. They can be helpful in the development of the regulatory and statutory crosswalks. While including a reference to the MOA is optional, it is recommended that for completeness a reference to the MOA be included in all codification notices. There may be several versions of a given MOA within the background files for an authorization package. The version needed is the most recent version signed by the State and the EPA Regional Administrator.

PROGRAM
DESCRIPTION

This document designates the lead agency for the program and other State agencies involved, and identifies where the State program is more stringent and broader in scope. There will typically be a base program description and addenda or supplements to this description addressing revisions to a State's program for

subsequent authorizations. While a reference in the codification notice to the Program Description is optional, it is recommended that for completeness a reference to the Program Description be included in all codification notices.

STATE
LEGISLATION
CHECKLIST (FOR
BASE PROGRAM)

The legislation checklist provides a crosswalk between a State's statutes and RCRA. It is useful in determining what portions of a State's statutes need to be examined in the codification process and helps to develop the initial structure for the statutory crosswalk. The legislation checklist was typically submitted with the base program authorization package. As State statutes usually do not change greatly, this document is still useful even though it may have been submitted many years ago. If the State's statutes have changed significantly, it may be useful to have the State complete one of these checklists again.

STATUTORY
CHECKLIST (FOR
HSWA PROVISIONS)

This checklist is typically submitted by a State when seeking authorization for a HSWA provision for the first time, and is often found with a State's early authorizations. The checklist was part of the SCRAM manual released in the mid-1980s and is helpful when developing the initial statutory crosswalk.

REGULATORY
(BASE AND
REVISION)
CHECKLISTS

The primary use of regulatory checklists (i.e., base program and revision checklists) is to support the information in the authorization notice concerning what portions of a State's program are actually authorized. A copy of each regulatory checklist for which the State is authorized is required, including the base program checklists. The base program checklists are helpful in developing an overall crosswalk between the Federal and State requirements, provided that the State has not renumbered or greatly changed the organization of its regulations. The information from the regulatory checklists is particularly important for the base program authorization because the *Federal Register* notices for these authorizations do not specify what sections of the State's regulations were actually authorized. This is also true for the recent requirement checklists. In addition, the checklists can help check for errors in the authorization *Federal Register* notices.

COPIES OF
STATUTES

You should have a copy of the statutes submitted with the base program as well as a copy of the statutes submitted with each final authorization package. Because a State's statutes tend not to change as frequently as the regulations, statutes will typically be submitted with a package if a change occurred. Thus, it is helpful, although not necessary, to have a copy of each updated version of the statutes.

COPIES OF
REGULATIONS

It is very helpful to have a copy of the State's regulations for each final authorization package submitted as well as a copy of the base program regulations. These documents, used in combination with the amendatory history found in the official version of the State's regulations, provide the information needed to help determine for each section:

- P What version of the section the State is authorized for;
- P What, if any, wording needs to be redlined; and

P What, if any, State amendments or Federal rules need to be excluded from the codification.

This procedure will be discussed further in Chapter IV when the regulatory crosswalk is discussed. Missing versions of the regulations can sometimes be replaced with copies of the rules cited in the regulation's amendment history that became effective between the versions of the regulations that you do have.

E. INTERACTING WITH EPA HEADQUARTERS, OFFICE OF THE FEDERAL REGISTER, AND REGIONS WITH CODIFICATION EXPERIENCE

KEY CONCEPTS

- Help is available from EPA Headquarters for legal and substantive issues that the Codification Team cannot resolve.
- Send copies of the completed codification package to the EPA Liaison, to the Office of the Federal Register, and EPA's State and Regional Programs Branch.
- Contact other Regions with recent codification experience.

EPA HEADQUARTERS

There are three primary codification contacts at EPA Headquarters.

STATE AND REGIONAL PROGRAMS BRANCH

The first is Tony Terrell of the Federal, State and Tribal Programs Branch (FSTPB). He is at EPA Headquarters and is responsible for coordinating codification nationally. His primary role will be to help deal with substantive questions and issues that cannot be resolved by the Regional Codification Team. His telephone number is (703) 308-6496.

OFFICE OF GENERAL COUNSEL

Nina Rivera is an attorney with EPA's Office of General Counsel (OGC). She is that Office's primary liaison with the Federal, State and Tribal Programs Branch with regard to RCRA authorization and codification issues. Her role as a codification contact is to address legal issues that cannot be resolved by the Office of Regional Counsel. The best way to contact Ms. Rivera is through Tony Terrell.

EPA LIAISON TO THE OFFICE OF THE FEDERAL REGISTER

The final EPA contact is Victoria Reed, who is the EPA liaison to the Office of the Federal Register (OFR). She is the person to whom all questions should be directed regarding OFR guidelines (e.g., requirements for copies of statutes and regulations, development of codification EPA binders). In addition, Ms. Reed is the person to whom the codification package should be sent when it is completed. She reviews the completed codification binders and suggests revisions. Once you have made the requested revisions and resubmitted the package to her, she will forward the package to OFR. Ms. Reed's telephone number is (202) 260-7204. Tony Britten, at (202) 260-5251, is an alternate contact if you are unable to reach Ms. Reed.

OFFICE OF THE FEDERAL REGISTER

The primary contact at the Office of Federal Register (OFR) is Sandra Jablonski, who receives the codification package when Vicki Reed forwards it to OFR. Ms. Jablonski reviews the package prior to publication of the *Federal Register* notice; if revisions are needed, the package will be returned to you via Vicki Reed. Once you have made these changes and resubmitted the package to Ms. Reed, and the package is accepted by OFR, the *Federal Register* notice will be published. OFR requests that Ms. Jablonski be contacted through Vicki Reed.

EPA REGIONS

There are several EPA Regions with codification experience, including Regions 3, 4, 5, 6, 7, 9, and 10. Contacting Regional staff members can provide insight on the

process and the potential problems that might arise in developing a codification package.

F. EXERCISES

PURPOSE The following two exercises are designed to reinforce the topics presented in Chapter II and provide hands-on experience in completing specific tasks encountered in gathering background information for the codification.

EXERCISE II-1 Three scenarios reflecting situations you may encounter in ordering the official regulations or statutes.

EXERCISE II-2 Organizing background materials and identifying missing items for the codification.

ANSWERS The answers to these exercises are in Appendix L, pages L-2 through L-4.

EXERCISE II-1

Determining if the version of State statutes or regulations will be acceptable to the Office of Federal Register.

PURPOSE

! Provide situations that may arise when ordering the official regulations or statutes to allow the reader to better understand what is not acceptable to the Office of Federal Register.

**WORKBOOK
REFERENCE**

Chapter II, Section C

**BACKGROUND
MATERIALS
PROVIDED**

P None

ASSUMPTIONS

This exercise assumes that you have read Workbook Chapter II, Section C and that you have already:

- P** Set up the Regional Codification Team.
- P** Determined the authorization status of the State being codified.
- P** Examined the authorization background materials, so that you are able to provide the specific legal citations of the regulations and statutes you need.

INSTRUCTIONS

Three scenarios follow with each describing a situation that may arise when you are ordering or trying to determine whether you have the official version of the State regulations or statutes and whether these versions will be accepted by the Office of Federal Register. Answer the questions that follow each scenario.

ANSWERS

See Appendix L, pages L-2 and L-3.

EXERCISE II-2

Organizing a State's Background Information and Identifying Missing Items.

PURPOSE

- Provide experience in organizing a State's authorization background information and identifying missing items needed for codification.

**WORKBOOK
REFERENCE**

Chapter II.

**BACKGROUND
MATERIALS
PROVIDED**

- P StATS Report for New York.
- P List of items in New York's background materials found in EPA Regional files.

(See Appendix K-1 for background materials.)

ASSUMPTIONS

This exercise assumes that you have read Workbook Chapter II and that you have already:

- P Determined from the State's authorization Federal Register notices you have at your disposal and from EPA Region II that New York's StATS Report accurately reflects the authorization status for the State.
- P Reviewed the EPA Regional records, identified and made copies of background materials regarding New York's previous authorizations that are available from the Region's files.
- P Sorted through the materials, organized them by authorization date and placed them in three-ring binders.

INSTRUCTIONS

On the next page is a blank background "checklist". Complete the "checklist" to show the items that you do have for the codification and list the items missing from each authorization package in the last column.

In Appendix K-1 of this workbook you will find a StATS Report and a list of the background items found in the regional file.

ANSWER

See Appendix L, page L-4.

EXERCISE II-2. State Materials Available to Support Codification

Authorization: <u>FR</u> Publication and Effective Date	Statutory/ Legislation/ Checklist	AG Statement	MOA	Program Description	Statutes	Regulations	Cluster/ Checklists Authorized	Missing Items