

US EPA ARCHIVE DOCUMENT

ATTORNEY GENERAL'S STATEMENT FOR FINAL AUTHORIZATION

I hereby certify, pursuant to my authority as Attorney General and in accordance with Section 3006(b) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, as amended (42 USC 6901, et seq.), and 40 CFR 271 that in my opinion the laws of the State of Delaware provide adequate authority to carry out the program set forth in the "Program Description" submitted by the DNREC. The Specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which shall be fully effective at the time the program is approved, include those identified below.\*

I. IDENTIFICATION AND LISTING

A. State statutes and regulations define hazardous waste so as to control all the hazardous waste controlled under 40 CFR 261 as indicated in Checklist I A. 7 Del. C. §§6302, 6305(a)(1), DNREC Regulations Governing Hazardous Waste, Part 261.

[Federal Authority: RCRA §3001 (42 U.S.C. 6921); 40 CFR 261, 271.9.]

B. State statutes and regulations contain a list of hazardous waste and characteristics for identifying hazardous waste which encompass all wastes controlled under 40 CFR 261 as indicated in Checklist I B and C. 7 Del. C. §§6301, 6305(a)(1), DNREC Regulations Governing Hazardous Waste, Part 261.

[Federal Authority: RCRA §3001(b) 42 USC 6921; 40 CFR 261, 271.9.]

Remarks of the Attorney General: Since DNREC's regulations have adopted 40 CFR Part 261 in its entirety, the State of Delaware's program controls all of the Hazardous Wastes in Checklists I A, B and C. Moreover, the underlying statutory authority for adopting these regulations tracks the pertinent language of §3001 of RCRA.

II. STANDARDS FOR GENERATORS

State statutes and regulations provide coverage of all the generators covered by 40 CFR 262 as indicated in

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\* On July 13, 1983, the Governor signed H.B. 353 (copy attached) which clarified the Secretary's authority regarding certain areas of the hazardous waste program. Each section of that amendment will be discussed below at the appropriate points.

Checklist II. 7 Del. C. §§6301, 6304, 6305, 6306; DNREC Hazardous Waste Regulations, Part 262.

[Federal Authority: RCRA §3002 (42 USC 6922); 40 CFR 271.10(a)]

Remarks of the Attorney General: Because DNREC has adopted 40 CFR Part 262, there is no question that Delaware's regulations in this area are equivalent to EPA's. As to the statutory basis for these regulations, it should be noted that comprehensive generator regulations address 4 main areas: The Manifest; Pre-Transport Requirements; Recordkeeping and Reporting; and Special Conditions. The authority for the manifest system is specifically found in 7 Del. C. §§6305(a)(8), 6305(a)(13) and 6306(c). H.B. 353, signed by the Governor on 7/13/83, expressly provides for use of a manifest during transport and during such other phases of hazardous waste management as the Secretary deems necessary. DNREC regulations requiring use of a manifest for off-site transport of hazardous waste are identical to the Federal regulations and therefore ensure that inter- and intra-state shipments are designated for delivery only to properly permitted facilities. The prohibition, in §6306(c), against transportation of wastes to facilities not permitted under Delaware law or RCRA does not preclude shipment to facilities in other authorized states since all state permitting programs are based on RCRA ultimately; further, Delaware's Regulations at §260.10(11) define a "designated facility" to include facilities with EPA permits, interim status, or permits from authorized states under 40 CFR Part 271. Pre-transport requirements are based in part on §6306(b) which requires compliance with regulations pertaining to labelling practices for containers used to handle hazardous waste. Further authority is also found in §6305(c) which provides for regulations on transportation, containerization and labelling of hazardous wastes, said regulations to be consistent with EPA and DOT regulations on the same subject matter. Also, §6305(a)(13) of H.B. 353 provides for regulations on the use of appropriate containers by generators. Record keeping and reporting requirements are authorized by §6305(a)(10) which essentially allows for any record keeping and reporting as may be necessary to accomplish the purposes of the Act; further, §6305(a)(13) of H.B. 353 gives the Secretary very extensive authority to promulgate regulations on record keeping and reporting requirements for generators specifically. Finally, special conditions, such as international shipments, are supported by the manifest system discussed above, which requires manifesting and appropriate reporting whenever waste is shipped off-site, regardless of the destination; additionally, §6310 provides the basis for advance notification requirements for international shipments since these procedures fall within the scope of reporting and providing such other information "as may be necessary to achieve the purposes of this chapter". Where farmers dispose of waste pesticides

on-site, the provisions of §6301(b)(1) come into play and require protection of health, organisms and the environment. Therefore, triple-rinsing and compliance with label directions for disposal are based on that underlying statutory purpose as well as the broad regulatory authority regarding disposal set forth in §6305(a)(2). In addition, §6304(b) prohibits the generation of hazardous waste "except in compliance with this chapter and regulations hereunder". The requirement for obtaining ID numbers, which is obviously contained in DNREC's regulations is based on 7 Del. C. §§6304(b) and 6305(a)(6). Finally, §6306(c) clearly establishes that Delaware can require delivery of waste only to RCRA permitted facilities.

Beyond the statutory areas already discussed, 7 Del. C. Chapter 63 provides authority for various other significant aspects of the regulatory program. For example, §6306(a) expressly requires reporting of the types, quantities and sources of hazardous waste being generated in accordance with regulations which list or otherwise define such waste. Also, §6305(a)(13) sets forth the Secretary's express power to issue regulations on reporting practices of generators regarding types, quantities and disposition of wastes. Implicit in this requirement is the duty of the generator to determine whether his wastes are in fact hazardous under applicable regulations. Section 6305(a)(6) provides further authority for regulations regarding the reporting of the "generation" of hazardous waste. Finally, §6306(d) explicitly requires generators of solid waste to conduct whatever tests are necessary to determine if their waste is hazardous.

Another important concern - short-term accumulation - is addressed in §6305(a)(2) which authorized regulations "prescribing conditions and time periods upon which generators may accumulate hazardous wastes on-site without a permit". Since DNREC may impose conditions on these activities and since 7 Del. C. §6301(b) requires DNREC, when exercising its authority, to protect human health and the environment, it follows that any regulations under that subsection must be designed to achieve that overriding statutory purpose.

With respect to additional details pertaining to the manifest system such as information required on the form itself, keeping the manifest with the waste at all times and notification of undelivered shipments, 7 Del. C. §§6306(c), 6305(a)(8), 6305(a)(6) and 6305(a)(10) provide comprehensive authority for adoption of all requirements under 40 CFR 262.

### III. STANDARDS FOR TRANSPORTERS

State statutes and regulations provide coverage of all the transporters covered by 40 CFR 263 as indicated in Checklist III. 7 Del. C. §6301(b)(1), §6304(b), §6305(a)(10), §6305(c), §6306.

[Federal Authority: RCRA §3003 (42 U.S.C. 6923); 40 CFR 271.11]

Remarks of the Attorney General: 7 Del. C. Chapter 63 sets forth comprehensive authority regarding DNREC's regulatory power in this area. Thus, §6306(a), 6306(c) and 6306(e) bring all transporters within the scope of the State's program. §6305(a)(10) is the basis for all reporting and recordkeeping requirements, including obtaining I.D. numbers as prescribed in Part 263. Moreover, §6306(c) requires compliance with all aspects of the manifest system including the inter- and intra-state delivery of hazardous waste only to RCRA permitted or authorized facilities; also §6305(a)(8), as amended, reinforces the Secretary's authority to impose manifest requirements on all handlers of hazardous waste, including transporters.

With respect to notification and cleanup of discharges in transit, the statutory basis for these requirements is found in §6305(c) which provides for regulations establishing procedures and requirements for various activities, including transportation of hazardous waste. §6305(c) expressly requires regulations on transportation of hazardous waste which are consistent with EPA and DOT regulations. Additional statutory authority for spill clean-up can be found in the definition of "disposal" which includes discharge, dumping, spilling or leaking onto land, water (including groundwater) or air. Thus, all regulatory authority regarding disposal can technically be the basis for regulations for spill clean-up whether in transit or otherwise. Finally, §6306 has been amended by a new subsection (f) which specifically requires transporters to report and clean up discharges and take other appropriate action. On the basis of the above statutory authority, DNREC has adopted EPA regulations at 40 CFR Part 263 which provide coverage of those items in checklist III. As a result, Delaware's program is equivalent to the Federal program.

#### IV. STANDARDS FOR FACILITIES

A. State statutes and regulations provide permit standards for hazardous waste management facilities covered by 40 CFR 264 as indicated in Checklist IV A. 7 Del. C. §§6301(b), 6305(a)(2) and 6305(a)(4); DNREC Hazardous Waste Regulations, Part 264.

[Federal Authority: RCRA §3004 (42 U.S.C. 6924); 40 CFR 271.12]

B. State statutes and regulations provide for interim status and include interim status standards for hazardous waste management facilities covered by 40 CFR 265 as indicated in Checklist IV B. 7 Del. C. §§6305(a)(2), 6305(a)(4), 6307(g); DNREC Hazardous Waste Regulations, Part 265.



1. State statutes and regulations authorize owners and operators of hazardous waste management facilities which would qualify for interim status under the federal program to remain in operation until a final decision is made on the permit application; 7 Del. C. §6307(g); Department of Natural Resources and Environmental Control Hazardous Waste Regulations §265.1(b).

2. State law and regulations authorize continued operation of hazardous waste management facilities provided that owners and operators of such facilities comply with standards at least as stringent as EPA's interim status standards at 40 CFR 265. Title 7 Del. C. §§6305(a)(2), 6305(a)(4), 6307(g); DNREC Hazardous Waste Regulations, Part 265.

3. State law and regulations include requirements concerning changes in interim status at least as stringent as the requirements set forth at 40 CFR 270.72(c). 7 Del. C. §§6305(a)(3), 6305(a)(4); Department of Natural Resources and Environmental Control Hazardous Waste Regulations §122.72(c).

[Federal Authority: RCRA §3005(e) (42 U.S.C. 6905); 40 CFR 270.10 and 270.70; 40 CFR 265]

Remarks of the Attorney General: In general, it must be emphasized that the primary purpose of 7 Del. C. Chapter 63, as articulated in §6301(b), is protection of human health and the environment. As a result, all regulations promulgated under this chapter must be designed to achieve that goal. By way of further comment, it should be pointed out that Delaware's entire Hazardous Waste system has been patterned after RCRA and has been developed around the central idea of getting and maintaining delegation of the program. For example, regulations setting forth hazardous waste criteria, lists and characteristics under §6305(a)(1) must by statute be consistent with parallel requirements of EPA. The same standard is applied to regulation of the transportation, containerization and labelling of wastes under §6305(c). Again, in §6314 variances can be issued only if consistent with the requirements of RCRA regarding equivalence. In short, the standards both express and implied by which the Secretary shall be guided in issuing regulations are consistency with and equivalence to EPA's regulations at a minimum and protection of public health and the environment in those areas where additional regulation is needed to meet the special circumstances in Delaware which may not be addressed by the Federal standards.

As to some specific concerns raised by EPA during initial reviews of Delaware's statute, the following comments are offered: First, in the area of record keeping requirements under §6305(a)(10), the term "such records" is

rather broad in scope and is to be interpreted to mean whatever records are necessary to achieve the purposes of the statute and overall program. This comment applies with equal force to Transporters and Generators as well.

Second, the statutory basis for regulations on inspection and monitoring of operating facilities by the owners and operators thereof derives from two provisions of 7 Del. C. Chapter 63. §6301(b) (1) makes protection of health and the environment a primary purpose of the statute. Clearly, inspection and monitoring are necessary to achieve that express statutory purpose since the environment and health cannot be protected unless hazardous waste releases, or threats thereof, are detected in a timely fashion. Furthermore, §6305(a) (4) requires regulations establishing procedures for safe operation and maintenance of facilities. Again, safe operation and maintenance necessarily implies inspection and monitoring to prevent or minimize potential problems. When facilities are closed or their operation is interrupted, §6307(j) requires maintenance, monitoring and surveillance in order to protect public health and to prevent pollution.

Third, the regulations requiring compliance with the manifest system are based on the fact that the manifest system is required by various portions of the statute [i.e. §6305(a) (8), §6306(c)]. Moreover, a recent amendment to §6305(a) (8) makes it clear that the regulatory power pertaining to manifests covers all aspects of hazardous waste management, including facilities. Thus, facilities must sign and date the manifest, send copies to the generator, etc. in order that the generators may know whether the waste arrived at the designated facility in accordance with §6306(c). By way of further clarification, it should be noted that 7 Del. C. §6305(a) (2) expressly provides for "[r]egulations for the storage, treatment and disposal of hazardous waste..." Compliance with the manifest system would properly fall, therefore, within the scope of TSD facility requirements as well as within the broad grant of regulatory authority under §6305(a) (8) as amended.

Fourth, the authority to impose location, design and construction requirements is found in 7 Del. C. §6305(a) (15), which now provides for regulations regarding "location, design, construction and remedial action standards for hazardous waste management facilities". As to preparedness and prevention of discharges, contingency plans, etc. §6305(a) (2) provides a statutory basis for such requirements "including regulations regarding contingency plans for effective action to minimize unanticipated damage from the treatment, storage and disposal of such hazardous wastes." As back-up authority, §6305(a) (2) allows for comprehensive facility regulations. As to whether the term "safe" in §6305(a) (4) is as broad as "necessary to protect human health and the environment", one should bear in mind

that the primary, underlying purpose of 7 Del. C. Ch. 63, as articulated in §6301(b)(1) is "to protect the public health and safety, the health of organisms and the environment from the effects of the improper, inadequate or unsound management of hazardous wastes." Therefore, the statute must always be read with this overriding standard in mind.

Fifth, the authority for imposing financial responsibility requirements, including liability insurance, on both permitted and interim status facilities is found in §§6305(a)(2), 6305(a)(11) and 6307(h) as amended. Section 6305(a)(11), as amended, now requires regulations "...setting forth criteria regarding the level of financial responsibility required for hazardous waste management facilities..." (emphasis added). It is clear that these requirements would apply to all facilities, regardless of whether a permit had been issued, and would include liability insurance since this is merely one way of establishing such financial responsibility. Of course, the statutory language is broad enough to embrace operational as well as closure and post-closure requirements. In addition, §6305(a)(2) expressly authorizes regulations for "storage, treatment and disposal of hazardous waste". Again, this is broad authority which would support financial responsibility requirements, including liability insurance, at all stages of operation, closure and post-closure and would include interim status facilities since these requirements are not related to permit issuance.

With respect to permitted facilities, §6307(h)(1), as amended, requires evidence "of financial responsibility, including liability insurance in such form and amount as the Department may determine, pursuant to duly promulgated regulations, to be necessary to insure that during operation or upon abandonment, cessation or interruption of the operation...all appropriate measures are taken to remedy or prevent present and future damage to the public health and safety or the environment." (emphasis added)

Thus, the statutory authority for financial responsibility requirements including liability insurance is well established for both interim status and permitted facilities.

Sixth, the authority to conduct inspections is very comprehensive and explicit under 7 Del. C. §6310(a) and (b) and need not be elaborated here. Of course, owners and operators of facilities may be required to conduct inspections and monitoring themselves under the authority of §6305(a)(10) which provides for virtually any type of sampling, analysis, reporting, record keeping and information-gathering as may be necessary to achieve the purposes of Chapter 63.

Seventh, ownership qualifications are covered in the statute at §§6305(a)(2) and 6305(a)(3) which provide the



basis for comprehensive facility requirements as well as requirements for permit applications. In addition, §6307 expressly requires submission of necessary information as a prerequisite to permit issuance and may include ownership qualifications as prescribed by such regulations. Financial responsibility information is, of course, expressly listed as one of the application requirements. Upon transfer of ownership, the transferee must meet the same standards as the original permittee under §6307(1). Security requirements may be imposed under §6305(a)(2) which provides a broad basis for regulation of all aspects of treatment, storage and disposal of Hazardous Wastes.

Eighth, the question has been raised as to whether the State may impose the various facility requirements on owners as well as operators. The statute prohibits "any person" from constructing, altering or operating a facility without a permit and further prohibits "any person" from storing, treating or disposing without a permit (7 Del. C. §6307(b)) except for interim status facilities which are subject to separate requirements under §6307(g) and §6305(a)(2). Also, §6304 provides that "no person" shall treat, store or dispose of hazardous waste except in compliance with Chapter 63 requirements. In other words, both permitted and interim status facilities are covered by the statutory prohibitions and requirements. These prohibitions and requirements extend to both owners and operators because similar language in 7 Del. C. Chapter 60 has been used for several years to take enforcement action against both or either of these parties. For example, the permit requirements of 7 Del. C. §6003 provide that "no person" shall undertake any activity which may cause or contribute to the discharge of an air contaminant without a permit. This section has been used to proceed against either the owner or the operator. Finally, §6307(a), as amended, now imposes reporting requirements on owners as well as operators. Similarly, §6307(b), as amended, now expressly requires owners as well as operators to have permits for all regulated activities.

#### V. REQUIREMENTS FOR PERMITS

State statutes and regulations provide requirements for permits as indicated in Checklist V. 7 Del. C. §6305(a)(3), §6307(b) - (e); Department of Natural Resources and Environmental Control Hazardous Waste Regulations, Parts 122 and 124.

[Federal Authority: RCRA §3005 (42 USC 6925); 40 CFR 271.14; 40 CFR 271.13]

Remarks of the Attorney General: The above-cited sections clearly provide the basis for regulation regarding all aspects of the permit process and also establish a prohibition against owning, operating, altering or constructing a TSD facility without a permit. Of course, the prohibition applies to both owners and operators under

an amendment to §6307(b). This is reinforced by 7 Del. C. Chapter 60, §6003(a) and §6002(1) which has essentially the same language (construction, operation or use). Those provisions have been used to prosecute owners as well as operators in numerous cases over the past several years.

With respect to compliance schedules, DNREC's authority to provide for compliance schedules as required under §3005(c) of RCRA, is now set forth in 7 Del. C. §6305(a)(3), as amended, which expressly extends the Secretary's regulatory authority regarding permits to include "schedules of compliance". In addition, §6305(a)(4) mandates the adoption of regulations "establishing standards and procedures for the safe operation and maintenance of hazardous waste treatment, storage and disposal facilities or sites..." Also, §6305(a)(2) requires regulations for the storage, treatment and disposal of hazardous waste. Finally, §6307(d) enables the Secretary to issue permits under such terms and conditions as may be prescribed by appropriate regulations. Therefore, on the basis of the Secretary's power to impose regulatory requirements as well as his authority to issue permits reflecting those regulatory standards, especially when considered with his specific powers under the amendment to §6305(a)(3), it follows that, in the exercise of his proper administrative judgment and flexibility, the Secretary may specify a schedule for compliance as part of any permit issued by him so long as that compliance schedule does not violate other applicable provisions of State or Federal law. Additionally, 7 Del. C. §6309(a) sets forth a specific compliance order mechanism which can be used to remedy violations of any law, regulation, permit condition, etc. It should be further noted that the specific requirements of 40 CFR Part 270, §270.33 have been incorporated in the form of regulations at the State level so as to meet RCRA standards in this regard.

In addition, Delaware has an express interim status provision in 7 Del. C. §6307(g) which allows continued operation while permit applications are being processed. As discussed earlier, the statute and regulation also clearly impose self-executing interim status regulations on all facilities in existence, whether they have achieved interim status or not. The term interim status as used in RCRA has the same meaning as 7 Del. C. §6307(g) in that the State statute imposes 3 requirements: (1) The facility must be in existence (as defined in DNREC Regulations which are identical to EPA's) on the effective date of hazardous waste regulations; (2) the facility must have properly notified DNREC of its activity; and (3) the facility must have applied for a permit. These are essentially the same requirements as those for interim status under RCRA.

With respect to "Permits by Rule" under 40 CFR §270.60, the State of Delaware regulations, in §122.60, set forth certain conditions under which a POTW can qualify for this

status. In addition, the "Permit By Rule" status could apply to ocean dumping if the federal government has issued a permit under 40 CFR Part 220. However, there are no "Permits By Rule" for underground injection of hazardous waste because such injections are expressly prohibited by the Delaware UIC regulations, §122.23, adopted in August, 1983.

As to "emergency permits" under 40 CFR §270.61(a), there is a corresponding mechanism in §122.61 of the Delaware regulations, known as "Emergency Administrative Orders", which tracks the federal provisions. Furthermore, the temporary emergency variance provision of 7 Del. C. §6012 applies only to variance from rules or regulations promulgated under the statute, not to the statutory requirement for having a permit. However, under the "imminent hazard" provisions of §6308, the Secretary has broad powers to deal with emergency situations. Of course, these powers must be exercised in a manner consistent with the standards of protecting health and the environment and so as to maintain equivalence with the RCRA program. Specifically, §6314 expressly prohibits any variance (which now includes temporary emergency variances under an amendment to §6314) that would be inconsistent with RCRA requirements regarding equivalence of state programs for final authorization. Therefore, §6314 provides the basis for the commitment in §IV.C.3. of the Memorandum of Agreement.

On the question of pre-operation review under 40 CFR §270.30(1) for new or altered facilities, it should be noted that 7 Del. C. §§6307(a) and (b) now require any person who owns, operates, alters or constructs a facility to provide notification to DNREC. Also, each of those activities is prohibited without a permit. Of course, if a facility already has a permit, any attempt to modify or enlarge the operation would also require a modified permit in order not to be in violation of the original permit. Under Delaware's statute, any such change would require the same type of pre-operation review as regular permit issuance. The specific requirements for such review would be based on regulations promulgated under §6305(a)(2) as well as an amendment to §6305 which added a new subsection (14) to specifically allow for regulations on "pre-operation review and inspection...".

With respect to notice requirements which come into play where an application for a facility permit is received, it should be pointed out that 7 Del. C. §6305(a) has been amended to add a new subsection (16) allowing the Secretary to issue regulations on "such public notice and hearing requirements and other related matters as may be deemed necessary to maintain equivalence of the State's program under the Resource Conservation and Recovery Act of 1976, P.L. 94-580 including requirements for public notice of

draft permits, for public comment periods and requests for hearings and for informal hearings." In addition, §6312 regarding public hearings has also been amended to reflect the Secretary's express regulatory authority in this area. Thus, there is no question that Delaware may impose notice and hearing requirements which are equivalent to EPA's.

## VI. INSPECTIONS

State law provides authority for officers engaged in compliance evaluation activities to enter any conveyance, vehicle, facility or premises subject to regulation or in which records relevant to program operation are kept in order to inspect, monitor, or otherwise investigate compliance with the State program including compliance with permit terms and conditions and other program requirements. (States whose law requires a search warrant prior to entry conform with this requirement). 7 Del. C. §6310(a) and 6310(b).

[Federal Authority: RCRA §3007 (42 USC 6927), 40 CFR 271.15]

Remarks of the Attorney General: Since the above provisions are quite explicit and comprehensive in their coverage, no further comment is necessary. However, on the question of whether this authority applies to sites where hazardous waste has been handled one should note that §6310(a) applies to "developing or enforcing any regulation, permit or other requirement authorized by this chapter" (emphasis added). As noted earlier in this opinion, the overall objective of 7 Del. C. Chapter 63 is protection of health and the environment. In addition, the statute allows for requirements applicable to inactive sites (i.e. closure, long term care, etc. of storage and disposal sites under §6305(a)(4)). Moreover, §6308 gives the Secretary broad powers to deal with "imminent hazards" which could include sites where wastes have been handled. Finally, §6305(a)(4) enables the Secretary to adopt requirements pertaining to "facilities and sites closed prior to July 11, 1980". On the basis of these authorities, it is clear that DNREC personnel may enter, inspect and take samples of all hazardous waste sites whether they are operating at present or have in the past. This power would include monitoring and inspection for compliance since the stated purpose behind §6310 is for "developing or enforcing any regulation, permit or other requirement authorized by this chapter".

## VII. ENFORCEMENT REMEDIES

State statutes and regulations provide the following:

A. Authority to restrain immediately by order or by suit in State court any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment. 7 Del. C. §6308, 6309(c).



[Federal Authority: RCRA §3006 (42 USC 6926); 40 CFR 271.16(a)(1)]

B. Authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit. 7 Del. C. §6309(c).

[Federal Authority: RCRA §3006 (42 USC 6926); 40 CFR 271.16(a)(2)]

C. Authority to assess or sue to recover in court civil penalties in at least the amount of \$10,000 per day for any program violation. 7 Del. C. §6309(b).

[Federal Authority: RCRA §3006 (42 USC 6926); 40 CFR 271.16(a)(3)(i)]

D. Authority to obtain criminal penalties in at least the amount of \$10,000 per day for each violation, and imprisonment for at least six months against any person who knowingly transports any hazardous waste to an unpermitted facility; who treats, stores, or disposes of hazardous waste without a permit; or who makes any false statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for the purposes of program compliance. 7 Del. C. §§6309(f), 6309(g).

[Federal Authority: RCRA §3006 (42 USC 6926); 40 CFR 271.16(a)(3)(ii)]

Remarks of the Attorney General: DNREC does have authority to restrain immediately by administrative order under §6309(a) or by suit under §6309(c) any unauthorized activity which amounts to a violation of any requirement under Chapter 63 or to an imminent and substantial hazard under §6308. Thus, if unauthorized activity were occurring which endangered or damaged public health or the environment, there would be a basis for an administrative order as well as injunctive remedies. Similarly, §6309(c) allows injunctive relief for recurring or continuing violations and also allows the restraining of threatened activities which present an imminent and substantial hazard to public health or the environment. Also, §6304(e) empowers the Secretary to "issue such orders, as may be necessary to carry out his duties under this chapter". As to whether injunctive relief would lie for merely "unauthorized activity" or a mere "violation" which is threatened in the absence of indications of harm to health or the environment, it should be noted that §6309(c) has been amended to include an express provision for "threatened" violations which would apply to any program requirement irrespective of whether actual or potential harm is involved.

As to civil penalties, §6309(b) provides for up to \$25,000 per day of violation and for criminal violations, §6309(f) imposes up to \$25,000 per day and/or 1 year in prison. These penalties apply to all violations of Chapter 63 regulatory requirements including knowingly transporting hazardous wastes to an unpermitted facility or storage, treatment or disposal without a permit. Similarly, any person who falsifies any document, report, etc. required under the chapter is subject to criminal penalties of up to \$25,000 per day of violation and/or one year in prison. The penalties for a first offense under §6309(f) are to be assessed on a per day basis because the next sentence dealing with second violations of the same requirement expressly states that fines are based on each day of violation. Also, §6309(h) clearly provides that each day of violation constitutes a separate violation for all enforcement actions.

#### VIII. PUBLIC PARTICIPATION IN THE STATE ENFORCEMENT PROCESS

State laws and regulations provide for public participation in the State enforcement process by providing either:

A. Authority to allow intervention as of right in any civil or administrative action to obtain the remedies specified in Section VII A, B and C above by any citizen having an interest which is or may be adversely affected; or

B. Assurances that the State agency or enforcement authority will:

(1) Investigate and provide written response to all citizen complaints duly submitted.

(2) Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule, or regulation; and

(3) Publish and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. 7 Del. C. §6309; DNREC Hazardous Waste Regulations, Part 260, Subpart D.

[Federal Authority: RCRA §6004, 40 CFR 271.16(d)]

Remarks of the Attorney General: §7002(b) of RCRA allows citizen intervention as a matter of right in any enforcement action in Federal Court. However, no such right appears in 7 Del. C. Ch. 63. Indeed, the only reference to citizen intervention in State Hazardous Waste Enforcement cases is found in Part 260, Subpart D of DNREC's Regulations Governing Hazardous Waste. That regulation in essence prohibits DNREC from opposing intervention where permissive intervention may be authorized by statute, rule or regulation. Under Delaware law, there is intervention, as a

matter of right under Superior Court Rule 24(a) and Chancery Court Rule 24(a). Both of these rules acknowledge a right of intervention when conferred by statute or when certain factors are present as determined by the court. Therefore, DNREC has no power to affect citizen intervention. However, in furtherance of the Secretary's responsibility to enforce Chapter 63 and as a result of the discretion implicit in that power, the Secretary may comply with the requirements of B above. Indeed, DNREC has adopted those requirements verbatim in Part 260, Subpart D of its regulations.

#### IX. AUTHORITY TO SHARE INFORMATION WITH EPA

State statutes and regulations provide authority for any information obtained or used in the administration of the State program to be available to EPA upon request without restriction. 7 Del. C. §6304(c).

[Federal Authority: RCRA §3007(b) (42 USC 6927); 40 CFR 271.17]

Remarks of the Attorney General: Since the statutory language is explicit on this point, no discussion is necessary here.

#### X. AUTHORITY OVER INDIAN LANDS

[Where a State seeks authority over Indian lands appropriate analysis of the State's authority should be included here.]

[Federal Authority: 40 CFR 271.7(b)]

Remarks of the Attorney General: Not applicable to Delaware.

#### XI. ADDITIONAL REMARKS OF THE ATTORNEY GENERAL

Because some areas of concern from EPA's point of view do not fit comfortably into the model format for the Attorney General's Statement, it will be necessary to discuss these matters below.

Of primary concern is whether DNREC can regulate recycling/reuse activities within the framework of its present statute. In that regard, §6305(a) has been amended by adding a new subsection (12) which specifically empowers the Secretary to promulgate regulations "regarding the reuse, recycling and reduction of hazardous waste;" so as to eliminate any uncertainty in this area.

A comment should be made regarding certain definitions. Although the terms "treatment", "storage", and "disposal" are defined separately in 7 Del. C. Chapter 63 in a manner consistent with RCRA, the only facility specifically defined is a "treatment facility". However, since "storage" and "disposal" are defined and covered in the statute, and the statute as a whole is intended to regulate all these types

of facilities, it is likely that "storage facility" and "disposal facility" would be covered as required by §1004(29) of RCRA.

Another area to be addressed involves the attached checklists which are made part of this Attorney General's statement. Checklists I through IV B make reference to the regulatory requirements in 40 CFR Parts 261 through 265. It is important to note that Delaware's program has adopted all of these regulations on the basis of the statutory authorities which have been discussed thus far. In addition, those matters covered in Checklist V pertaining to permitting requirements under 40 CFR Parts 270, 271 and 124 have likewise been adopted as regulations by DNREC.

Regarding the requirements of 40 CFR §271.16(b) (2) which pertains to the burden of proof and degree of knowledge or intent needed to establish violations in civil or criminal cases at the state level, it should be pointed out that the mental element required for criminal cases under Chapter 63 is "intentionally" or "knowingly". This is the same standard which EPA must meet in criminal actions under RCRA. However, with civil actions no state of mind need be established under 7 Del. C. §6309(b) which is also consistent with the requirements of 40 CFR §271.16(b) (2).

As to the civil penalty policy set forth in 40 CFR §271.16(c), the Attorney General on behalf of the State of Delaware hereby commits to abide by the provisions of that subsection in seeking to assess civil penalties in an enforcement proceeding or where agreeing upon an appropriate penalty in the context of settling administrative or judicial litigation.

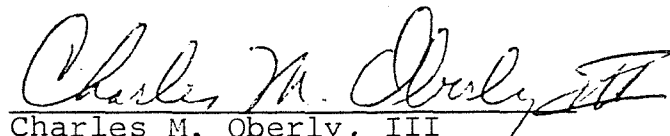
Certain provisions of 7 Del. C. Chapter 60 (copies attached) have been expressly incorporated by reference. It should be emphasized that these sections provide additional authority but in no way do they supersede the provisions of Chapter 63. Thus, the procedure for public hearings under §6312 adopts the requirements of 7 Del. C. §§6004 and 6006, except where the Secretary adopts additional notice and hearing requirements under his expanded authority as set forth in the amendment of §§6305(a) and 6312 discussed earlier. Of course, this has already been done in Part 124 so as to render the procedure of §§6004 and 6006 moot for purposes of this application. Also, appeals under §6313 are governed by 7 Del. C. §§6008 and 6009. Similarly, §6314 dealing with variances and temporary emergency variances refers specifically to 7 Del. C. §§6011 and 6012.

However, other provisions of Chapter 60 may also be applicable to the Hazardous Waste Management Program, though not explicitly incorporated by reference, because the permit mechanism of Chapter 60 would in many cases also embrace hazardous waste operations. As discussed in the enforcement section (VII) herein, the terms "air contaminant", "pollutant" and "solid waste" are very broad and would overlap with many areas of the hazardous waste program in



practice. Similarly, the word "person" is virtually any entity one can imagine. Although the definition of "hazardous waste" has been deleted by a recent amendment, nevertheless many of the provisions of Chapter 60 could be used in specific hazardous waste cases, including the penalty provisions of §§6005, 6013 and 6025(c). The criminal penalties of Chapter 60 and Chapter 63 are basically the same in terms of range of fines and mental element required. The civil penalty section of Chapter 60 is a little less stringent than Chapter 63 but is still equivalent to the standard of 40 CFR 271.16(a)(3)(i). §6025(c) was intended to address minor solid waste violations such as littering or improper disposal of household garbage. Finally, §6024 provides authority for DNREC personnel in regulating this broad universe of activities under Chapter 60, to enter upon public or private property for enforcement purposes. Needless to say, in making such investigations there is the possibility of discovering violations under Chapter 63 as well as Chapter 60.

Finally, on the question of whether there are any facilities in Delaware which would qualify for interim status under §6307(g) but not under RCRA, the records at DNREC indicate that all Delaware TSD's had notified EPA and filed Part A applications with EPA on or before November 19, 1980. Therefore, any potential problem regarding that issue would appear to be moot.

  
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State of Delaware

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