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PENNSYLVANIA ATTORNEY GENERAL'S
STATEMENT

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COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA. 17120

October 10, 1985

James M. Seif, Regional Administrator
U. S. Environmental Protection Agency
841 Chestnut Street
Philadelphia, PA 19107

Dear Mr. Seif:

Re: Legal Statement to Support
Pennsylvania's Application for
Final Authorization of the
Hazardous Waste Management Program

You have been provided with a Legal Statement prepared by the Office of General Counsel in support of Pennsylvania's application for final authorization under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6987. In the cover letter accompanying the Legal Statement, the General Counsel indicated that a letter concurring in the Legal Statement would be submitted by the Pennsylvania Office of Attorney General.

Under Section 204(c) of the Commonwealth Attorneys Act, Act of October 15, 1980 (P.L. 950, No. 164), 71 P.S. §732.101 et seq., the Office of Attorney General is responsible, in the first instance, for representing Commonwealth agencies in civil litigation. Therefore, this letter of concurrence is submitted to satisfy the requirement of 40 C.F.R. §271.7 respecting legal counsel's "full authority to independently represent the State Agency in court on all matters pertaining to the State program."

The Office of Attorney General has reviewed the Legal Statement dated October 4, 1985, and is in agreement with its contents, consisting of 1) the description of the Pennsylvania Hazardous Waste Management Program and 2) the legal analysis contained therein. The Office of Attorney General concurs in

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the conclusions of the Legal Statement that the Commonwealth has adequate authority to carry out the program set forth in the "Program Description" submitted by the Department of Environmental Resources as part of the application for final authorization.

Sincerely,

Thomas G. Saylor, Jr.
First Deputy Attorney General

TGSjr/mlm

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COMMONWEALTH OF PENNSYLVANIA
OFFICE OF GENERAL COUNSEL
P. O. BOX 11775
HARRISBURG, PENNSYLVANIA 17108
(717) 783-6563

October 4, 1985

Mr. James M. Seif
Regional Administrator
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Re: Legal Statement to Support Pennsylvania's Application For Final Authorization of the Hazardous Waste Management Program

Dear Mr. Seif:

Pennsylvania is applying for final authorization under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901 et seq. The attached Legal Statement is submitted in support of the Commonwealth's application in accordance with 40 C.F.R. §271.7, which requires the Attorney General or independent legal counsel to certify that the state has adequate legal authority to carry out the program described in the application.

EPA's regulations require the "independent legal counsel" signing such a statement "to have full authority to independently represent the state agency in court on all matters pertaining to the state program." 40 C.F.R. §123.23 (emphasis added). Since passage of the Commonwealth Attorneys Act, Act of October 15, 1980 (P.L. 950, No. 164), 71 P.S. §732.101 et seq., authority to represent Pennsylvania on matters pertaining to the hazardous waste management program is divided between the Office of General Counsel and the Office of the Attorney General. In order to assure full compliance with EPA's regulations, I am authorized to sign the Legal Statement for the Office of General Counsel; the Office of the Attorney General will sign a separate letter concurring in the Legal Statement.

Yours truly,

JOHN P. KRILL
Deputy General Counsel

JPK:kab
cc: Hon. Nicholas DeBenedictis
Henry G. Barr, Esq.
John Carroll, Esq.
Maxine Woelfling, Esq.
Cathy Myers, Esq.
David Hess
Leon Kuchinski

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LEGAL STATEMENT FOR FINAL AUTHORIZATION

I hereby certify, pursuant to my authority as Deputy General Counsel for the Commonwealth of Pennsylvania 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 U.S.C. §6901 et seq.), and 40 C.F.R. 271 that, in my opinion, the laws of the Commonwealth of Pennsylvania provide adequate authority to carry out the program set forth in the "Program Description" submitted by the Pennsylvania Department of Environmental Resources. The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this statement is signed and which are fully effective, include those identified below. This certification will remain effective unless modified in writing as a consequence of changes in law or regulations.

I. IDENTIFICATION AND LISTING

A. State statutes and regulations define hazardous waste so as to control all the hazardous waste controlled under 40 C.F.R. 261 as indicated in Checklist I A.

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

Sections 103 and 402 of the Solid Waste Management Act, Act of July 7, 1980 (P.L. 380, No. 97), 35 P.S. §§6018.103 and 6018.402 (hereinafter referred to as "Act 97"); 25 Pa. Code §75.261.

B. State statutes and regulations contain a list of hazardous waste and characteristics for identifying hazardous waste which encompass all wastes controlled under 40 C.F.R. 261 as indicated in Checklist I B and C.

[Federal Authority: RCRA §3001(b) (42 U.S.C. §6921(b)); 40 C.F.R. 261, 271.97]

Sections 103 and 402 of Act 97; 25 Pa. Code §75.261.

Remarks: The regulations of the Pennsylvania Department of Environmental Resources (hereinafter referred to as "the Department") have incorporated the provisions in 40 C.F.R. 261.3 - 261.33 regarding identification and listing of hazardous waste almost verbatim and have incorporated the lists and appendices by reference. Therefore, the Commonwealth of Pennsylvania's program controls all of the hazardous wastes in checklist I A, B, and C.

Definitions: The principal difference in the categorization of wastes is that coal refuse and acid mine drainage treatment plant sludges which are regulated under other Pennsylvania statutes are expressly excluded from the definition of hazardous waste in Act 97, and therefore in the implementing regulations, §75.261(c). Under the Federal scheme, these and other mining wastes are excluded by regulation in 40 C.F.R. 261.4(b)(7). Although the Federal exemption is regulatory and the State exemption is statutory, the effect is the same.

The definition of the term "disposal" in Act 97 is slightly different from the RCRA definition in language but has the same meaning. The definition of disposal in Section 103 of Act 97 is:

> "Disposal." The incineration, deposition, injection, dumping, spilling, leaking or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth. (Emphasis added)

The definition of disposal in §1004(3) of RCRA is

> (3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. (Emphasis added)

EPA has asked whether the difference between the federal "may enter the environment" and the state "enters the environment" affects the equivalency of the state and federal programs. There is no substantive difference because in application "enters the environment" and "may enter the environment" is the same test. Under the state program a solid waste "enters the environment" if it is put on land or in water

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without adequate control to prevent contamination of the environment. The state's definition of disposal does not require a showing of pollution, contamination or damage to the environment. Therefore, entering the environment occurs when the solid waste ceases to be properly managed and under the control of the generator or transporter. The definition of "disposal" in 25 Pa. Code §75.260(a), which states that disposal includes the mere abandonment of solid waste, demonstrates that under state law, waste "enters" the environment when it is no longer actively managed to prevent it from contaminating the environment. Thus, in application a solid waste "enters the environment" at the point at which the waste is uncontrolled and "may enter the environment", making the two definitional tests equivalent.

In a likely enforcement context, the two definitions are also demonstrably equivalent. In a case in which hazardous wastes were placed on land or in water, but had not yet contaminated the environment, an enforcement agency would have to prove the likelihood of success on the merits and the likelihood of immediate and irreparable harm in order to be entitled to a preliminary injunction. Under either the RCRA or the Act 97 definition of "disposal", the agency would be required to demonstrate that a waste or waste constituent would be likely to contaminate the environment if not removed or contained in some way.

However, Pennsylvania law provides two other means of dealing with a case where hazardous wastes threaten to contaminate the environment, but have not yet done so. If the placement of wastes on land or water constitutes storage or treatment, such activity must be carried out under permit. The permit would be subject to modification or revocation

under Section 503(e) of Act 97 if the permitted activity were creating a potential hazard to public health, safety or welfare. The likelihood that unpermitted disposal would occur at a storage or treatment site would also be grounds under Act 97 for revocation or modification of the facility's permit. 35 P.S. §6018.503(e).

Further, the Pennsylvania Supreme Court has determined that where a statute proscribes certain activity, all that need be proven to establish irreparable harm sufficient to support a preliminary injunction is that the illegal activity occurred. PUC v. Israel, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947); DER v. Coward, 489 Pa. 327, 341, 414 A.2d 91, 98 (1980). If the placement of wastes on land or water were carried out in violation of Act 97 or the regulations thereunder, as, for example, placement of drummed waste on land without the labeling or marking required by 25 Pa. Code §75.262(g), such a violation would entitle the Commonwealth to injunctive relief whether or not the wastes had entered the environment.[1]

As noted in checklist I A, the Commonwealth's regulations, unlike 40 C.F.R. 261.2(e), do not contain a definition for a "manufacturing or mining byproduct." The primary function of the Federal definition appears to be the exclusion from classification as solid wastes of primary manufacturing or mining products which may sometimes be discarded. Since both the EPA and Pennsylvania regulations exclude mining wastes from classification as hazardous, only the reference to manufacturing byproducts requires further discussion. Both the Act 97 definition of

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1. Rule 1531 of the Pennsylvania Rules of Civil Procedure provide for an ex parte injunction without notice or hearing, which is the equivalent of the federal "temporary restraining order" (Fed. RCP 65(b)).

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"hazardous waste" and the RCRA definition of "solid waste" refer to "any other discarded material ... resulting from industrial ... operations." The Pennsylvania program, which does not attempt to limit the statutory definition to secondary and incidental manufacturing byproducts, as in Federal regulations, is broader than the Federal definition. As a practical matter, the universe of regulated wastes is more specifically described by the regulations listing and identifying hazardous wastes and their characteristics. In that aspect of the program, 25 Pa. Code Chapter 75.261 is virtually identical to the Federal regulations.

Exemptions

Sections 75.261(e)(1) and (2) of DER's regulations provide exemptions from certain regulatory requirements for characteristic hazardous wastes which are used, reused, recycled, or reclaimed. Such exemptions apply only to characteristic hazardous wastes, not listed wastes. "Characteristic wastes" are wastes that are not specifically listed as hazardous, but which exhibit a hazardous characteristic when tested. The hazardous characteristics in both the state and federal programs are Extraction Procedure toxicity, ignitability, corrosivity and reactivity. For those characteristic hazardous wastes which are used, re-used, recycled, or reclaimed and which are neither sludges nor wastes listed in 25 Pa. Code §75.261(h), Pennsylvania requires compliance with applicable notification, manifest and quarterly report requirements. In this respect, the Commonwealth's program is more stringent than the Federal program.

Authority to List Hazardous Wastes

Pennsylvania has the authority to go beyond the federal program in classifying wastes as hazardous, because the definition of hazardous

waste considers a broader range of public health effects than in RCRA. The definition of "hazardous waste" in Act 97 includes the concept of an "increase in morbidity in either the individual or the total population," while the RCRA definition refers to an "increase in serious irreversible, or incapacitating reversible, illness." The meaning of "morbidity" is construed from accepted technical definitions because it is not defined in Act 97 or the regulations. Price v. Maxwell, 28 Pa. 23 (1857). "Morbidity" is defined in Dorland's Illustrated Medical Dictionary (24th Ed.), as both "the condition of being diseased" and "sick rate; the ratio of sick to well persons in a community." Thus, the Environmental Quality Board, unlike EPA, is authorized to list as hazardous any waste which, because of its quantity, concentration or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in any illness in an individual or the total population.

In those rare instances in which the Department may wish to implement §402 of Act 97 and regulate as hazardous a waste which has not yet been listed by the Environmental Quality Board, 25 Pa. Code §75.261(f)(2) requires the Department to use the more restrictive EPA standard involving "serious irreversible or incapacitating reversible illness".

Listing by Reference

EPA has asked whether Pennsylvania may lawfully adopt regulations that reference EPA (or other) regulations or adopt certain EPA criteria by reference to 40 C.F.R. There are thirteen instances in the Pennsylvania regulations in which "adoption by reference" occurs, in Sections 75.260(c) (4), 75.261(c)(18), 75.261(g)(2)(i), 75.261(g)(4)(i), 75.261 (h)(1)(ii), 75.261(h)(2), 75.261(h)(3), 75.261(h)(4)(v), 75.261(h)(4)(vi),

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courts have upheld the validity of regulations that reference other existing regulations, including federal regulations. See East Suburban Press v. Township of Penn Hills, 40 Pa. Cmwlth 438, A.2d 1263 (1979); Commonwealth v. Tarabilda, 222 Pa. Super. 237, 294 A.2d 830 (1972); Fisher's Petition, 344 Pa. 96, 23 A.2d 878 (1942). Adoption by reference has occurred in water quality, air quality, and safe drinking water regulations approved by this office. (See 25 Pa. Code §§92.31, 131.2) The practice is expressly authorized by Section 1937(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. §1937(a), attached as Appendix 1 hereto, which states that any reference in a statute to a regulation includes all past or subsequent amendments and supplements to that regulation and any new regulation substituted for a former regulation, which were in force at the time of application of the provision of the statute in which such reference was made, unless the context clearly indicates otherwise. The Statutory Construction Act applies to documents codified in the Pennsylvania Code, which includes all regulations. A detailed discussion of the legality of adoption of state regulations which reference federal regulations is attached as Appendix 2 hereto.

II. STANDARDS FOR GENERATORS

State statutes and regulations provide coverage of all the generators covered by 40 C.F.R. 262 as indicated in Checklist II.

[Federal Authority: RCRA 3002 (42 U.S.C. §6922); 40 C.F.R. 262, 271.10]

Sections 105 and 403 of Act 97; 25 Pa. Code §75.262.

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Remarks: Pennsylvania's regulations pertaining to hazardous waste generators, promulgated at 25 Pa. Code §75.262, are equivalent to 40 C.F.R. 262, except for those few elements of the program in which the Pennsylvania regulations are more stringent. First, Pennsylvania generators are not permitted to designate alternate disposal facilities on the manifest. Compare, 40 C.F.R. 262.20(c) and 262.20(d) with 25 Pa. Code §75.262(e)(1)(iv) and §75.262(e)(6). Second, no extensions beyond 90 days are allowed for short-term accumulation of wastes by Pennsylvania generators without a permit. 25 Pa. Code §262(g)(1). Beyond 90 days, such accumulation is considered storage under the Pennsylvania regulations and a permit is required. 25 Pa. Code §264(a)(3)(iv). Third, manifests must be retained for 20 years under the Pennsylvania scheme 25 Pa. Code §262(h), rather than the three years required by 40 C.F.R. 262.40(a). Fourth, Pennsylvania generators must submit quarterly reports to the Department under 25 Pa. Code §262(i), rather than biennial reports, as required by 40 C.F.R. 262.41.

The Commonwealth's regulations pertaining to generators are authorized both by specific and general provisions in Act 97. Examples of specific provisions are Sections 403(b)(2) and (3), which require accurate labeling and packaging in appropriate containers, and Section 403(b)(5) and 403(b)(7), which require that a manifest system be used and that reports listing quantities of wastes generated and the method of their disposal be submitted to the Department. These provisions of Act 97 expressly authorize the regulations concerning the manifest and reporting systems, including the requirements concerning international shipments and exception reporting. The hazardous waste determination provisions, set forth in Sections

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403(b)(1), (4), (5), and (7) of Act 97, require the generator to determine the nature of his waste and the basis for its classification as hazardous. Similarly, Sections 403(b)(1), (5), and (7) of Act 97 authorize a tracking or recordkeeping system, of which an identification number is a natural or reasonably expected element.

Those aspects of the Department's regulatory system which are not authorized by a specific provision of Act 97 are authorized under the general provisions of Act 97. Section 403(a), for example, forbids a generator to transfer hazardous waste unless such generator complies with the Department's rules, regulations, permits, licenses, and orders. Section 104(2) authorizes the Department to cooperate with appropriate Federal, State, interstate, and local units of government in carrying out its duties under the Act. These sections, combined with the general rulemaking authority in Section 105(a) of Act 97, authorize DER to establish such elements of the regulatory system as tracking interstate or international hazardous waste shipments by using manifest and reporting systems compatible with those of EPA and other states.

EPA has questioned whether Sections 403(b)(5) and 403(b)(6) of the Solid Waste Management Act require disposal of solid hazardous waste only at a properly authorized facility in Pennsylvania or at a RCRA authorized facility outside Pennsylvania, while prohibiting disposal at an unauthorized out-of-state facility. The DER regulations address and clarify this issue. Hazardous waste can only be transported to a "designated facility" pursuant to §75.263(d)(8). A designated facility is defined in the DER regulations as:

> A hazardous waste treatment, storage, or disposal facility that has been designated on the manifest by the generator, and which has or is con-

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> sidered to have a solid waste management permit from the Department and has interim status, or has a hazardous waste management permit from the Department, or if located outside the Commonwealth, which has received an EPA permit (or is a facility with interim status) in accordance with requirements of 40 C.F.R. parts 122 and 124 of Subtitle C of RCRA, or has a permit from a state authorized in accordance with Part 123 of Subtitle C of RCRA.
>
> (25 Pa. Code §75.260)
> Emphasis added

Under the definition of "designated facility", only a facility which has a permit from a RCRA-authorized state or from EPA, or interim status may be a designated facility for shipments outside the Commonwealth.

EPA has asked whether the Department has general authority to issue regulations implementing the prohibitions in Section 403. This authority resides with the Environmental Quality Board, not with the Department. Section 105(a) of Act 97 authorizes the Environmental Quality Board to adopt the Department's rules and regulations in order to "carry out the provisions of this Act". Provisions such as Sections 403(b)(1)-(7) serve as a more specific description of principles and policies which may be codified or implemented in the form of regulations. Sections 403(a) and 403(b)(8) and (9) prohibit any person who generates or manages hazardous waste from transferring, transporting, treating, storing, or disposing of such waste unless such person complies with Department regulations. Consequently, the EQB has the authority to promulgate regulations implementing any requirement of Act 97, including the prohibitions set forth in Section 403. The prohibitions are self-executing; they would apply to all persons who undertake hazardous waste management activities even if the EQB had not adopted the provisions as Subchapter D of Chapter 75.

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III. STANDARDS FOR TRANSPORTERS

State statutes and regulations provide coverage of all the transporters covered by 40 C.F.R. 263 as indicated in Checklist III.

[Federal Authority: RCRA §3003 (42 U.S.C. §6923); 40 C.F.R. 263, 271.11]

Sections 105, 401, 403, 404(b), 501(b), 502, 503, and 505(e) of Act 97; 25 Pa. Code §75.263.

Remarks: With respect to those matters governed by 40 C.F.R. Part 263, relating to transporter requirements, Pennsylvania's regulatory program is virtually identical to the Federal scheme. Both Sections 105(a) and 403 of Act 97 provide legal support for these regulations, and the regulatory requirements which are not specifically stated in the statutory language can be necessarily inferred from the statutory scheme. For example, the identification number requirement established in 25 Pa. Code §75.263(b) is an essential element of the manifest tracking and recordkeeping systems required by Subsections 403(b)(5) and (b)(7) of Act 97. In order to use the data collected by these systems for enforcement and administrative purposes, it is necessary to have a number that can provide quick access to information on a particular transporter. The number may be obtained from either EPA or the Department.

Similarly, the requirement in 25 Pa. Code §75.263(g) that transporters notify the National Response Center or the U.S. Department of Transportation in the event of a spill or discharge is authorized by the statutory requirement in Section 403(b)(12) that transporters "take immediate steps to contain and clean up the spill or discharge" and the direction in Section 105(b) of Act 97 that the EQB is to adopt regulations which will protect the safety, health, welfare and property of the public.

EPA has questioned whether the DER transporter regulations apply to transporters of shipments which neither originate nor terminate in

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Pennsylvania, but merely pass through the state. Section 75.263(a)(1) was amended to state that "transporters transporting hazardous waste through Pennsylvania, neither picking up nor delivering hazardous waste within the Commonwealth, need only comply with the U.S. EPA transporter requirements in 40 C.F.R. §263." The intention of this provision is to allow certain interstate transportation to comply with state law by complying with the federal requirements as long as the waste remains in transit. Those transporters which pick up waste from generators or facilities in Pennsylvania or deliver waste to storage, treatment or disposal facilities in Pennsylvania are subjected to additional state requirements that exceed the federal protections. Every transporter who is not required to comply with Chapter 75 must comply with 40 C.F.R. 263 including those who pickup or deliver to another transporter. The additional regulatory protection afforded by the Department's licensing program applies only to transporters of waste which is generated, stored, treated or disposed in Pennsylvania. However, because the term "disposal" is so broadly defined in Section 103 of the Solid Waste Management Act, any leakage, spill, or other incident resulting in a discharge of hazardous waste to the environment in Pennsylvania, subjects all interstate transportation to the full regulatory provisions set forth in §75.263.

IV. STANDARDS FOR FACILITIES

A. State statutes and regulations provide permit standards for hazardous waste management facilities covered by 40 C.F.R. 264 as indicated in Checklist IV A.

[Federal Authority: RCRA §3004 (42 U.S.C. §6924); 40 C.F.R. 264, 271.12]

Sections 104, 105, 401, 403, 501, 502, 503, 505, and 506 of Act 97; 25 Pa. Code §75.264 and §§75.300-336.

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B. State statutes and regulations provide for interim status and include interim status standards for hazardous waste management facilities covered by 40 C.F.R. 265 as indicated in Checklist IV B.

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;

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 C.F.R. 265; and

3. State law and regulations assure that any facility qualifying for State interim status continues to qualify for Federal interim status.

[Federal Authority: RCRA §3005(e) (42 U.S.C. §6925); 40 C.F.R. 265, 271.13(a)] Sections 105(a), 403, 404, and 1001 of Act 97; 25 Pa. Code §75.265.

Remarks: Act 97, like RCRA, requires that owners and operators of treatment, storage, and disposal facilities obtain permits and operate in compliance with them. These permit requirements are set forth in Sections 401, 403(b)(9), and 501 of Act 97. The enforcement and remedies provisions in Article VI of the statute authorize both civil and criminal penalties for violations of the permit requirements.

Sections 401 and 403(b)(9) also require compliance with facility standards contained in 25 Pa. Code §75.264. These regulations are equivalent to 40 C.F.R. Part 264, and in some respects more stringent. The regulations are amply supported by the statutory authorization in Section 105(a), as well as the requirements stated in Article IV and Article V of Act 97. The Department has the express duty to regulate the storage, collection, transportation, processing, treatment, and disposal of hazardous waste under Section 104(6) of Act 97. Aspects of facility operation such as monitoring, inspecting, location, design, construction, ownership, closure and post-closure activities, and continuity

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of operation are necessary in order to implement that duty in accordance with the legislative mandate in Section 102(4) to protect the public health, safety and welfare from the short and long term dangers of hazardous waste management activities. Therefore permits, including post-closure permits, may contain any relevant standards in §75.264 as permit conditions.

Identification numbers for permits for facilities, although not mentioned in the old regulations, were assigned by the Department for filing and administrative purposes. The necessity of coordinating with the Federal numbering system under RCRA made it appropriate to address identification numbers in 25 Pa. Code §75.264(b). Such coordination is a duty of the Department under Section 104(2) of Act 97.

Notice to Subsequent Purchasers

The Commonwealth's program includes three requirements regarding notices to future purchasers of property used to manage hazardous wastes, which together are more comprehensive than the comparable Federal requirements. First, the provisions of 40 C.F.R. 264.120(a)(2) and (3) requiring the recording of notice to future purchasers of use restrictions and survey plats on land used for hazardous waste disposal are codified in 25 Pa. Code §75.264(o)(20). Second, Section 405 of Act 97 requires grantors to acknowledge any known hazardous waste disposal on the deed conveying property. This provision protects purchasers where property may have been used for hazardous waste disposal which was not permitted at all or which occurred long before permits were required. The third requirement imposed by the Pennsylvania regulatory scheme is the landowner consent form required by Section 502(b) of Act 97 as part

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of the application requirements for permits and licenses. This document is required to be recorded in the Office of Recorder of Deeds and must be on a form prepared and furnished by the Department. A copy of this form has been appended to this Statement. (Appendix 6) It should be noted that the final sentence expresses the landowner's intent to bind his "heirs, successors and assigns" and, if recorded as required, is binding on subsequent landowners.

Interim Status. There are two types of hazardous waste management facilities which are affected by the interim status provisions of Act 97 and the regulations adopted thereunder: (1) those disposal and treatment facilities which were permitted under the statute which was the predecessor of Act 97, and (2) those storage and treatment facilities which had no permits and needed none until the enactment of Act 97.

Because most hazardous waste storage and treatment facilities were required to obtain a permit for the first time under Act 97, the legislature in §404(a) of Act 97 provided an "interim status" under which such facilities could lawfully continue operating without a permit until final departmental action on their permit applications. Section 404(a) authorizes the continued operation of storage and treatment facilities under the conditions set forth in that section. Section 404(a) states, however: "In no instance shall such person or municipality continue to store or treat hazardous wastes without obtaining a permit from the department within two years after the date of enactment hereof." Similarly, Section 75.265(z)(6) prohibits the operation of any storage or treatment facility without a permit after September 5, 1982. Section 75.265 of the regulations sets forth operating and other standards for such interim status facilities.

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Permits were required for all disposal facilities and some treatment facilities under the predecessor statute, and continued operation pursuant to these old permits is authorized by Section 1001 of Act 97 unless and until such permits are modified, amended, suspended, or revoked. For these already-permitted facilities, the RCRA permitting process is a re-permitting which will lead to revocation of the old permit at the time the new permit is denied or issued. Section 75.265 of the regulations contains interim status standards for previously permitted treatment and disposal facilities. Owners and operators of previously permitted facilities must comply with these standards until they obtain a permit under Act 97. Section 75.264 establishes design and operational standards for facilities that received hazardous waste management permits under Act 97. Section 75.212 clarifies the requirements applicable to interim status facilities.

Because Section 404(a) of the Act 97 and the Section 75.265(z)(6) of the regulations indicate that hazardous waste treatment and storage facilities cannot operate more than two years after the date of enactment of Act 97 without obtaining a permit, EPA has asked Pennsylvania to discuss the current legal status of existing hazardous waste management facilities.

Previously Permitted Facilities

The continued operation of treatment and disposal facilities which already have permits issued under Act 97's predecessor is clearly authorized, since these old permits continue in effect until modified, amended, or revoked. Because all existing permits will ultimately be re-issued or denied, the Section 75.265 interim status standards apply

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to such facilities until the repermitting process is complete. Section 75.264 standards apply to permittees after permits are issued under Act 97.

Any facility qualifying for interim status under the Commonwealth's program would also qualify for Federal interim status. No disposal facility may qualify for interim status unless it has a current solid waste permit.

It should be emphasized that nothing in Act 97 or the regulations establishes a deadline for the re-permitting of facilities which already hold permits issued under Act 97's predecessor. The two-year deadline in Section 404(a) of Act 97 and §75.265(z)(6) of the regulations applies only to facilities which have not been permitted under Act 97's predecessor. DER v. William Fiore, et al., No. 3162 C.D. 1983 (Slip Op. of Jan. 30, 1984 at 9-10).

Existing Unpermitted Facilities

The legal status of hazardous waste treatment and storage facilities which previously have not been permitted is a more difficult issue. The question is whether these unpermitted facilities can remain in operation after the expiration of the two-year deadline contained in Section 404(a) of Act 97. The only litigation in which this issue has been raised is the case of DER v. William Fiore, et al., No. 3162 C.D. 1983, (slip opinion dated January 30, 1984, attached as Appendix 3 hereto). This case was brought by a hazardous waste disposal facility operator whose permit had been suspended and who alleged that the Department's "failure" to process all treatment and storage applications by the statutory deadline entitled him to a preliminary injunction enjoining the operation of all unpermitted hazardous waste treatment and storage facilities in

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the Commonwealth. The Court found that the plaintiff had no standing to press any of his claims and dismissed the case for that reason. However, the Court noted that Section 404 of Act 97 recognizes that the hazardous waste permit process cannot be put in place to act upon applications overnight. (App. 3, Slip op. at 3) The Court further noted that EPA design standards which were to be promulgated by April 21, 1978, were not promulgated until July 26, 1982, over four years after the statutory deadline. Pennsylvania's design standards, in turn, were not published until September 4, 1982. The Court agreed with Pennsylvania's position that the failure of EPA to meet its RCRA deadlines for promulgating regulations made it impossible for Pennsylvania to adopt equivalent regulations within the deadline prescribed in Act 97.

Because the legislative intent was to allow such facilities to operate for a limited time, and because events beyond the control of the permittee and the Department made it impossible for such facilities to obtain permits within the statutory deadline, it is our opinion that such facilities retain interim status despite the deadline, and that the Courts would, therefore, allow the continued operation of such facilities until final disposition of their permit applications. Continued compliance with the interim status standards in Section 75.265(z) will assure the adequate protection of public health and the environment during this time.

Further, anyone challenging the Department's refusal to close a specific treatment or storage site would be thwarted by a well established body of case law holding that the exercise of prosecutorial discretion by a state agency is not judicially reviewable.

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Termination of Interim Status

Interim status will be terminated under §75.272(d) when the Department makes final administrative disposition of the permit application, when the owner or operator fails to submit any part of the application in a timely fashion, when the owner fails to comply with §75.265 (relating to interim status standards), or when the facility poses a substantial present or potential hazard to human health or the environment. Therefore, the Department may terminate a facility's interim status as part of action on a permit application or as part of an enforcement action. When terminating interim status as part of a permit application action, procedures set forth in §§75.280-282 will be followed. When interim status is terminated as part of an enforcement action, the termination will be incorporated into an appropriate administrative order, which is appealable to the Environmental Hearing Board. Thus, any interim status facility which violates the applicable regulations or causes a substantial hazard is subject to loss of interim status.

For the foregoing reasons, the Commonwealth believes that existing storage and treatment facilities which comply with the interim status regulations and pursue their permit applications in good faith and on schedule may continue to operate under Act 97. As permit decisions are made in the near future and the number of interim status storage and treatment facilities is gradually reduced to zero, this will, no longer be an issue.

Changes in Operations during Interim Status

There is one difference between the Pennsylvania and Federal interim status regulations which should be noted. While Pennsylvania has regulations equivalent to 40 C.F.R. §§270.70 and 270.71, concerning

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interim status criteria, Pennsylvania does not have a regulation equivalent to 40 C.F.R. §270.72, which authorizes changes in the operation of a facility during the interim status. Pennsylvania does not allow a facility with interim status to handle new types of hazardous waste, increase its design capacity, or employ new processes for the treatment, storage, or disposal of hazardous waste during interim status. The absence of such a regulation makes the Pennsylvania program more stringent than the Federal program.

C. Financial Responsibility. State statutes and regulations establish financial responsibility requirements during facility operation and all closure and post-closure activities to assure that money will be available for closure and post-closure monitoring and maintenance which are equivalent to and no less stringent than 40 C.F.R. 264 and 265.

[Federal Authority: RCRA §3004(6) (42 U.S.C. §6924(t)), 40 C.F.R. Part 264 Subpart H]. Sections 502(e), 505 and 506 of Act 97; 25 Pa Code §75.301-336, 75.264(p), 75.265(p).

Financial Responsibility

The financial responsibility regulations (25 Pa. Code §§75.301 et seq.) implement §505 and §506 of Act 97 by establishing bonding requirements and sudden and non-sudden liability insurance requirements. In accordance with Sections 75.311 and 75.331, the financial requirements apply to all hazardous waste facilities which receive a permit or "are being treated as having been issued a permit." This includes all interim status facilities and is coextensive with the applicability of Sections 75.264 and 75.265. Proof of general public liability insurance is required by §502(e).

The Department's regulations in accordance with §505 of Act 97, allow only collateral and surety bonds They apply to all facility owner/operator/permittees and allow no self-bonding, trust funds or self-insurance permitted under Federal regulations. Federal facilities are

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also subjected to the bonding requirement because Act 97 expressly includes federal facilities in its regulatory scheme, and Section 505 of Act 97 does not exempt Federal facilities from the bond requirement. The insurance requirements, in contrast, (Section 506 of Act 97) allowed the Department to determine necessary additional financial assurance. The regulations expressly exempt federal and state facilities from the insurance requirements. (§75.331).

EPA has asked the Commonwealth to demonstrate the equivalency of the state's financial responsibility requirements with reference to EPA's guidance document entitled "Equivalency of State Financial Responsibility Mechanisms." As suggested by EPA, an additional checklist responding to the relevant portions of the guidance document is attached as Appendix 4 hereto.

Commonwealth Authority to Manage Funds

The most noticeable difference between the federal and state programs is the lack of a standby trust in the Commonwealth program. The Commonwealth has the authority to collect, hold and disburse financial assurance funds under Sections 505 (Bonds) and Section 701 (Solid Waste Abatement Fund), and therefore does not need a standby trust fund as used in the federal program. Section 75.328(b) further describes the procedures for bond forfeiture, collection and deposit of funds in the Solid Waste Abatement Fund.

The Commonwealth is authorized under §75.328(a)(2) and (3) and Section 505(d) of Act 97 to forfeit bonds for, inter alia, failure to properly conduct closure and post-closure activities. Under §75.328(b)(3), (4) and (5) the Department can forfeit all bond amounts, collect on the bond, deposit all money from defaulted bonds in the Solid Waste Abatement Fund, and under §701 of Act 97, disburse the amounts needed

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for the Commonwealth to effectuate proper closure and post-closure care.

Bond Liability Period

EPA has asked whether the ten-year period of bond liability after final closure specified in Section 505(a) of Act 97 would expire before the RCRA 30-year post-closure care period. The liability period in Section 505(a) begins after the termination of post-closure care. Section 75.323 of the financial responsibility regulations addresses and clarifies the liability period. Liability under bonds extends "for the duration of the operation and closure of storage, treatment or disposal activities, and for the duration of post closure care activities ..., and for 1 year thereafter, except that water pollution liability shall continue for 10 full years after final closure." (§75.323 Period of liability). Final closure is defined in Section 75.301 as "successful completion of all requirements for closure and post-closure care as required by §75.264(o) (relating to new and existing hazardous waste management facilities applying for a permit)." The RCRA thirty year post-closure care period begins when the facility ceases active operations. Under Section 505(a) of Act 97 and Section 75.323 of the regulations the bond liability period continues throughout the post-closure care period. In addition to this RCRA-mandated coverage, the Commonwealth has provided bond liability extending 1 year, and water pollution liability continuing for 10 years after the completion of post-closure activities.

Financial Responsibility Forms and Instruments

EPA has questioned whether the financial responsibility forms are binding and enforceable by the Department. Section 75.312 authorizes the Department to prescribe and furnish the forms for bond instruments, copies of which are found in Appendix XXV to the program description

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together with all other guidelines, forms and specimens discussed in this part. The bond forms produced are as follows:

1. Form No. ER-SWM-101 Collateral Bond for Hazardous Waste Facility
2. Form No. ER-SWM-102 Collateral Bond Endorsement - Additional Bond
3. Form No. ER-SWM-103 Collateral Bond Endorsement - Transfer of Permit
4. Form No. ER-SWM-104 Collateral Bond Endorsement - Replacement Bond
5. Form No. ER-SWM-105 Collateral Bond Endorsement - Pre-existing Liability
6. Form No. ER-SWM-106 Collateral Bond Endorsement - Partial Replacement Bond
7. Form No. ER-SWM-107 Assignment of Certificate of Deposit
8. Form No. ER-SWM-108 Schedule for Deposit of Collateral
9. Form No. ER-SWM-111 Surety Bond for Hazardous Waste Facility
10. Form No. ER-SWM-112 Surety Bond Endorsement - Additional Bond
11. Form No. ER-SWM-113 Surety Bond Endorsement - Transfer of Permit
12. Form No. ER-SWM-114 Surety Bond Endorsement - Replacement Bond
13. Form No. ER-SWM-115 Surety Bond Endorsement - Pre-Existing Liability

Additionally, the Department has developed certain guideline forms to assist operators in submitting collateral to satisfy collateral bond requirements. These guideline forms are as follows:

1. Form No. ER-SWM-109 Instructions for Submission of Certificates of Deposit
2. Form No. ER-SWM-110 Instructions for Submission of Negotiable Government Securities

The Department has also developed a specimen for use by operators and banks in developing a format for an irrevocable letter of credit acceptable under the financial responsibility regulations.

In accordance with Sections 75.331 - 75.336 of the regulations, dealing with insurance requirements for hazardous waste storage, treatment and disposal facilities, the Department has developed two (2) specimen forms. The forms are as follows:

1. Wording for Hazardous Waste Facility Certificate of Liability Insurance; and

2. Wording for Hazardous Waste Facility Liability Endorsement

The above forms must be used by the applicant and must be completely filled out in order to be approved by the Department. The collateral bond instruments described above will be executed on behalf of the

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permittee. The surety bond instruments described above will be executed on behalf of the permittee and the appropriate surety company, licensed to do business in Pennsylvania. The insurance certificate and endorsement described above will be executed by an authorized representative of the insurer.

Procedures for Review of Instruments

Following execution, the above bond and insurance forms will be reviewed according to established Commonwealth procedures. For surety bond instruments, this includes a certification by the Pennsylvania Department of Insurance that the subject surety company and its agent are duly licensed in the Commonwealth to write fidelity and surety insurance; that the bond does not exceed the ten percent (10%) limitation as to capital and surplus of the surety, set forth in 40 P.S. §832; and that the signatures on behalf of the surety and its agent appear to be in the original. For all surety and collateral bond instruments, this includes a review for legality and form by the Office of General Counsel and the Office of the Attorney General or their designated representatives within the Commonwealth. For the insurance certificate and endorsement, this includes a review by the Department of Environmental Resources to determine if the coverage provided satisfies the insurance coverage required of the permittee or permit applicant under the financial responsibility regulations (§75.334(c)). The bond and insurance instruments must be fully effective and have been approved by the Department prior to construction or operation of the facility.

Interim status facilities must have submitted effective bond and insurance instruments by September 9, 1985 to continue operations.

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The amount of the bond must equal the total estimated cost to the Commonwealth of completing all applicable closure and post-closure requirements in accordance with Section 505 of Act 97 and §75.318 of the regulations, including the factors listed in §75.318(b). The Department is required under §75.311(d) to review the submitted bond within one year and determine whether to approve the bond or require deposit of additional bond amounts under §75.321 (relating to bond amount adjustments). The bond and insurance instruments are binding on the parties executing such instruments and are enforceable pursuant to, and with the same force as, the financial responsibility regulations. No facility covered by §75.264 or §75.265 may operate without fully effective bond and insurance instruments.

Surety Bonds

EPA has asked the Commonwealth to explain how the state's program satisfies the surety bond requirements of 40 C.F.R. §§264.143(c)(4) to (7) and 264.145(c)(4) to (7). These two federal regulations are identical in content; §264.143 provides surety bond requirements for closure bonds and §264.145 provides such requirements for post-closure care bonds. The Commonwealth addresses all surety bonds together without regard to whether they assure closure or post-closure care.

Condition 7 of the bond instrument provides the requirement of 40 C.F.R. §§264.143(c)(4)(i) and 264.145(c)(4)(i), while §75.313(c) of the regulations provides for alternative financial assurance as specified in §§264.143(c)(4)(ii) and 264.145(c)(4)(ii). The bond instrument and §75.313(f) of the regulations bind the surety by making the permittee and surety individually and jointly liable for closure or post-closure activities covered by the bond, which satisfies §§264.143(c)(5) and 264.145(c)(5).

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Sections 264.143(c)(6) and 264.145(c)(6) require the penal sum of the bond to be in an amount at least equal to the current closure cost or post-closure cost estimate. The Commonwealth requires the penal sum to equal the cost to the Commonwealth of performing closure and post-closure activities in place of the permittee and therefore exceeds the cost of closure and post-closure activities if performed by the permittee. (§75.319(a)).

Section 75.318(b) states that the bond amount "shall be based on" certain cost factors. EPA has asked whether this terminology allows the bond amount to be less than the sum of the listed costs of closure and post-closure care. In context, it is apparent that the bond amount being "based on" certain listed costs must at least equal the total costs because it must also satisfy the requirement that the bond amount be sufficient for the Commonwealth to complete final closure (closure and post-closure care). Therefore all operating facilities are required to have bonds in effect by September 9, 1985, in an amount at least equal to the cost estimate for closure and post-closure care. The Department will cause bond amounts to be adjusted within one year, or if additional costs are projected due to any of the factors listed in §75.321. One of the factors in §75.321 (relating to bond amount adjustments) is that the bond requires an additional amount as determined in 75.318(b).

In Section 75.319(c) a permittee must "revise the cost estimate whenever a change in the closure plan or in the measures necessary to prevent adverse effects upon the environment increases the cost." EPA has asked the Commonwealth to clarify that a change in the post-closure plan requires a change in the cost estimate.

Section 75.319(a) clearly states that the permittee must prepare an estimate "of the cost of closing the facility and providing post-closure

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care ... and taking necessary measures before, during and after closure to prevent adverse effects upon the environment." There is no question, therefore, that the estimate includes post closure care, which is required under §§75.264(o)(16) and 75.265(o)(15) to be incorporated in an approved post-closure plan. While §75.319(c) does not expressly state that changes in the post-closure plan must result in changes in the cost-estimate, the post-closure care activities are certainly "measures necessary to prevent adverse impacts upon the environment" and are therefore included. It is the Department's intention to clarify the inclusion of post-closure plan changes as a basis for requiring cost-estimate revisions in the next group of amendments to Subchapter E of the regulations.

Sections 264.143(c)(7) and 264.145(c)(7) require that the owner or operator must adjust the penal sum of the bond within 60 days of an increase in the current closure or post-closure cost estimate or obtain alternate financial assurance to cover the increase. Section 75.322 of the Commonwealth's regulations require the owner or operator to post additional bond within 60 days of a request by the Department. The Department has agreed to include language in its Memorandum of Agreement with EPA that it will make requests for bond increases in accordance with its authority in §75.321(a) and make a decision upon the facility's compliance with the request within 60 days of the change in cost estimate.

Terminology

EPA has asked whether facilities "being treated as having been issued a permit" (§75.311(a), §75.331(a)) include interim status facilities and whether the owners or operators of such facilities are "permittees" for the purposes of the financial responsibility requirements. The answer to both questions is yes. Interim status facilities are precisely those facilities which are "being treated as having been issued a permit"

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until action is taken upon their permit applications, pursuant to Section 404(a) of Act 97 and 25 Pa. Code §75.272.

Under Act 97 and the implementing regulations the "permittee" of a facility is the owner and/or operator. The Commonwealth may require both owner and operator to apply for the facility permit under 25 Pa. Code §75.270 (relating to the hazardous waste permit program). Therefore, "permittee" and "owner or operator" are synonomous in the state program.

Closure Certification

EPA has asked for clarification of the import of §75.326(c) which states that "[c]losure certification shall not take effect until 1 year after receipt of the Department's determination." The major purpose of this provision is to assure insurance coverage for one year after a determination has been made to issue a closure certification. Section 75.333 (relating to period of coverage) requires continuous insurance coverage "until the effective date of closure certification."

The one year waiting period before closure certification becomes effective provides a period during which the public is fully protected to discover defects in the closure or adverse environmental impacts. After the effective date, the Department may, by affirmative action, require an extension of insurance coverage under §75.333(b).

EPA has also asked for a clarification of the purpose of §75.326(d) which states:

> [t]he closure certification shall not constitute a waiver or release of bond liability or other liability existing in law for adverse environmental conditions or conditions of noncompliance existing at the time of the notice or which might occur at a future time, for which the permittee shall remain liable.

The purpose of this provision is to preclude the use of a closure certification as a defense to an action to enforce liability, bonding

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or regulatory requirements. The Department is not estopped from pursuing an action to obtain compliance or to abate environmental harm whether or not the conditions or noncompliance existed at the time of certification or developed later. Closure certification does not automatically release bond liability; a request for release of bond must be made in accordance with §75.325 (relating to bond release).

Liability Coverage

Section 75.329(d) of the state's financial responsibility regulations tracks the language of 40 C.F.R. 264.148(b) and requires the owner or operator to establish other liability coverage within 60 days in the event of the insurer's bankruptcy or suspension or revocation of its authority to act as insurer.

Bond Forfeiture

EPA has asked the Commonwealth to discuss 25 Pa. Code §75.312(c) which provides that bonds "shall be ... conditioned upon the faithful performance" of the requirements of various acts, regulations, permits and orders. The question focuses upon the effect upon the bond of such a violation.

The Department has authority under Act 97, Section 505(d) to forfeit a bond "if the operator abandons the operation of a ... hazardous waste storage, treatment or disposal facility for which a permit is required ... or if the permittee fails or refuses to comply with the requirements of this act in any respect for which liability has been charged on the bond." The Department's regulations interpret this authority to include relevant environmental statutes, and the regulations, permits and orders issued thereunder. Thus, there is broad authority for the Department to declare the bond forfeit for violations related to proper closure or post-closure care of the facility or any other respect "for which liability has been

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charged on the bond." Thus if the Department forfeited a bond it would have to be for a violation relevant to the bonded liability.

In practice the Department will not forfeit a bond if the facility does not have to be closed as a result of the violation. The bonds are site-specific, so a forfeiture could only occur for violation at the bonded facility site. If the facility is ordered to close and the permittee does not proceed to undertake his closure and post-closure care responsibilities, then the bond will be forfeited, the amount collected and put into the Solid Waste Abatement Fund, and the proceeds applied to proper closure and post-closure care. The Commonwealth oversees the activities if the bond is forfeited.

If the facility need not close the Commonwealth will keep the bond intact and proceed with civil penalties or other appropriate enforcement action. In the event that the Commonwealth did forfeit a bond, but allowed continued operation, the Department would demand, and the permittee must supply, additional alternative financial assurance. §§75.311, 75.321(a)(4) and 75.322.

Reissuance of Permits

EPA has asked the Commonwealth to explain "reissuance of permits" as used in §75.317 of the regulations, in light of the fact that permits are not transferable. Permits are not transferable, as stated in §75.270(g). However, in situations where one corporate entity replaces another without changes in the facility, the Department may reissue the permit in the name of the new corporation. The purpose of §75.317 is simply to state that the new permittee must submit a new bond assuming all liability and that any securities used to guarantee the bond must have been expressly assigned to the new corporation by the former corporation.

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Cost Estimate to be Kept at Facility

Sections 75.265(p)(2) and 75.265(p)(5) require that the latest cost estimates for closure and post-closure care must be kept at the facility.

Period of Liability-Interim Status Facilities

EPA has asked the Commonwealth to clarify the period of liability for interim status facilities. The period of liability is the same for interim status facilities as for any other facility. Section 75.323 (relating to period of liability) applies to "bonds posted for a hazardous waste storage, treatment or disposal facility", and therefore includes interim status facilities. As stated in §75.323, the period of liability is defined by the duration of activities specified in §75.264(o) (relating to closure and post-closure).

Surety Bound to Conditions in Regulations

EPA has asked how the Commonwealth assures that the conditions for cancellation of surety bonds found in 25 Pa. Code §75.313(c) are binding on the surety company. The bond forms include a statement that surety companies must abide by the "rules and regulations promulgated under the Act" which includes conditions in §75.313(c).

Permit Modification or Revocation for Failure to Comply with Financial Responsibility Requirements

EPA has asked the Commonwealth to explain the applicability of 25 Pa. Code §73.278(o)(5), which allows permit modification or revocation and reissuance in the event of failure to comply with financial responsibility requirements. The authority in §73.278(a)(5) would be used in factual situations in which the facility failed to obtain insurance or bonds to cover all of the facility described in the existing permit, but had met the financial responsibility requirements for a portion of the facility. The Department has authority to modify the permit to reflect the facility that is under permit with proper financial assurance given, or could

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revoke and reissue the permit to cover only those facilities which continue to be covered by proper financial insurance to assure closure and post-closure care.

V. REQUIREMENTS FOR PERMITS

State statutes and regulations provide requirements for permits as indicated in Checklist V.

[Federal Authority: RCRA §3005 (42 U.S.C. 6925); RCRA §7004 (42 U.S.C. 6974); 40 C.F.R. 271.13 and .14)

Administrative Code of 1929, Act of April 9, 1929 (P.L. 177), as amended, §1921-A, 71 P.S. §510-21.

Administrative Agency Law, Act of November 25, 1970 (P.L. 707), as amended, §§504-506, 2 Pa. C.S. 504-506.

Sections 104, 105, 401, 403, 501, 502, 503, 504 and 610 of Act 97.

25 Pa. Code §§75.264, 75.265(z) and 75.270-280, 25 Pa. Code Chapter 21.

Remarks: Act 97, like RCRA, requires permits for the operation of hazardous waste treatment, storage and disposal facilities. These requirements are set forth in Sections 401 and 501 of Act 97 and underscored in Sections 403 and 610, where operation in violation of a permit is declared to be unlawful. Section 610(2) makes it clear that the permit must be obtained before construction of the facility. According to the provisions of Section 502(a), and 25 Pa. Code §75.273(d), the permit applications must be on forms provided by the Department and must be accompanied by such plans, designs and relevant data as the department may require. These forms, which have been included with the application for authorization as Appendix XV, demonstrate that the department's forms require all the information which is required to be submitted under Federal regulations. Failure to submit the application information represents a failure to comply with §§75.280(b) and (d), and

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75.265(z)(11) of the regulations and will result in return of the application or denial of the permit.

The TSD Application Checklist, expressly required as part of the Part B application, (§75.265(z)(11)(i)) must be included and properly completed, supplying the same information required in the federal program under 40 C.F.R. §§270.15-270.21. Failure to supply any or all of the information required by the TSD application checklist could result in enforcement, permit denial, or termination of interim status; i.e., the same consequences that would occur under the federal program for failure to have a timely, accurate, and complete Part B permit application.

Incorporation of Regulations as Permit Conditions

One aspect of the Pennsylvania permit program which is more stringent than the Federal scheme is the unavailability of the state permit as a shield to prosecution for violations of Act 97 or the regulations. In the preamble to the May 19, 1980, regulations (45 Fed. Reg. 98, p. 33311-33312), EPA presented 40 C.F.R. Part 122.13(a) as a means of assuring permittees that all their obligations would be set forth in one document (the permit) and that compliance with the permit would guarantee immunity from enforcement for anything but an imminent hazard suit under Section 7003 of RCRA.

The Commonwealth cannot adopt this system for several reasons. First, Act 97 does not vest sole enforcement authority in the Department. Section 604 of Act 97 gives municipal solicitors and county district attorneys the authority to sue to enjoin violations of the act and the regulations, as well as permit violations. Moreover, like many states, Pennsylvania has vested criminal enforcement powers in county district attorneys whose rights cannot be abrogated by Department regulation.

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Second, Sections 401(a) and 403(b)(9) of Act 97 make regulated entities responsible for complying with regulations and orders, as well as permits. This approach is repeated in Sections 605 (civil penalties) and 606 (criminal penalties), where violations of the statute, the regulations, permits and orders are all made grounds for enforcement actions. There is no statutory basis for curtailing the rights of municipal prosecutors or for relieving permittees from the responsibility of acquainting themselves with the statute and regulations and complying with them as well as with the permit. In fact, the inability or unwillingness of a permit applicant or permittee to comply with the statute and regulations, as well as the permit provisions, whether from ignorance or by willful violation, is grounds for denial or revocation of the permit under Section 503(c) of the Act. See Swatara Contractors, Inc. v. DER, 1982 EHB 75; Plymouth Equipment Co., Inc. v. DER, 1976 EHB 259.

EPA has expressed concern that certain standards set forth in §75.264 will be unenforceable unless they are converted into site-specific permit conditions. This concern has been addressed, since the Department includes as permit conditions numerous site-specific standards in order to implement the §75.264 regulations. Any of the standards in §75.264 which are not self-implementing and require site-specific application are translated into permit conditions in the permit issued by the Department for operation, closure or post-closure care of a facility. The Department is authorized by Section 104(7) of Act 97 and §75.275(a) of the regulations to insert such permit conditions as appropriate to implement the statute and the regulations. Further, the Department complies with 40 C.F.R. §271.13(c), which states that all permits issued by the state must require compliance with hazardous waste management

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facility standards, by inserting in each permit a condition which requires compliance with the statute and the regulations promulgated thereunder. Thus, every permit issued by the Department requires the permittee to comply with all applicable regulations in Subpart D of Chapter 75. Consequently, Pennsylvania's system is equivalent to the federal scheme in that all state standards equivalent to 40 C.F.R. Part 264 are either incorporated into the permit by virtue of site-specific permit conditions or are incorporated by reference through a permit condition requiring compliance with applicable DER regulations. The standard conditions for permits have been promulgated as regulations in §75.275.

Transfer of Permits

EPA has questioned whether Pennsylvania has a regulation equivalent to 40 C.F.R. §270.40 concerning the transfer of a permit to a new owner or operator. Section 75.270(d) of the Department's regulations expressly prohibit transfer or assignment of permits. Each permit issued by the Department contains an express permit condition stating that the permit is non-transferable. Any person who would like to become the new owner or operator of an existing facility must seek the issuance of a new permit in its name. The public notice and comment procedures affecting the issuance of any new permit or permit modification would likewise apply to a permit issued to a new owner or operator.

Emergency Permits

It should be noted that §75.275(b)(1) of Pennsylvania's regulations which corresponds to 40 C.F.R. §270.30(a), deletes the reference to an "emergency permit" which is contained in the federal regulations. Act 97 does not directly address the issuance of emergency permits which

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circumvent the normal permitting process. Section 75.271(b) of the regulations, however, allows the Department to temporarily waive the permit requirement for activities taken as an immediate response to a discharge or threat of discharge of hazardous waste; as soon as the immediate response is over, the full permit application requirements are applicable. The Department's program is more stringent than the federal program insofar as it does not issue "emergency permits"; but similarly allows for emergency response.

Permit Modification

EPA has questioned whether the Department has regulations concerning permit modification procedures which are equivalent to 40 C.F.R. §270.41. The Department's authority to modify or revoke permits is broader than that required by Federal regulations. Sections 503(c) and (e) of Act 97 establish certain statutory grounds under which a permit may be modified, suspended, or revoked. Section 503(c) of Act 97 authorizes the Department to modify, suspend, or revoke a permit for the failure of the permittee or the applicant to comply with any provision of Act 97 or other federal or state laws relating to environmental or public health, any rule or regulation, order, or permit condition, as indicated by past or continuing violations. Section 503(e) also authorizes the Department to revoke or suspend a permit where the facility (1) is, or has been, conducted in violation of the Act or the rules and regulations adopted thereunder; (2) is creating a public nuisance; (3) is creating a potential hazard to public health, safety and welfare; (4) is adversely affecting the environment; (5) is being operated in violation of any term or condition of the permit; or (6) is operated pursuant to a permit not granted in accordance with law. In addition, §75.265(z)(25) of the regulations authorizes the Department to modify a permit whenever it

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determines there is a need to further protect the public health or the environment.

There is no analogue in the federal regulations to the state's authority under Act 97 to "suspend" a permit as an enforcement measure. Actions on permits are limited to major and minor modifications, revocation and reissuance and termination under 40 C.F.R. 270.41 - 270.43. The Commonwealth implements the Act 97 authority to suspend permits only with regard to non-hazardous municipal and residual waste, which is also covered by Act 97. Consequently no implementing regulations have been promulgated with respect to suspension of hazardous waste permits. The only reference to suspension of permits in the regulations is at §75.322 (relating to failure to maintain adequate bond), which states that appropriate actions may be taken "including suspending or revoking permits." The reference to "suspension" is of no effect.

Because of the Department's broader authority under Act 97, the Department's regulations concerning modification, revocation, and revocation and reissuance of permits differ in several respects from 40 C.F.R. §270.41. The Department has adopted two new sections which clarify the causes for permit modification or revocation and reissuance, §75.278 and §75.279. The Department has not included a regulatory equivalent to §270.41(a)(1), which allows a permit modification if there are substantial and material alterations to the facility after the permit has been issued. Section 75.265(z)(24) of the Department's regulations prohibits any modification to the design or operation of a facility unless the permittee first obtains a permit amendment. The only alterations which the Department may approve without a permit modification are minor design and operation changes described in Section 75.278(c) which have been approved by the Department in writing. (See, also, §75.265(z)(23)).

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EPA regulations, at 40 C.F.R. §270.41(a)(3), provide that a permit may be modified upon promulgation of new regulations only if the permittee requests such modification. New regulations promulgated in Pennsylvania are effective with or without the permittee's consent. The self-executing nature of regulations adopted under Act 97 (see pp. 23-25) makes it unnecessary for the Department to modify permits in order to incorporate new regulatory requirements. The Act clearly intends the regulations to be enforceable independent of inclusion in a permit condition. §§ 401(a); 403(b)(9) and 610(2), (4), (6) and (9). Furthermore the Statutory Construction Act of 1972, 1 Pa. C.S. §1937(a) states that a reference in a statute to a regulation includes all amendments and supplements to that regulation and any new regulation substituted for a former regulation. New regulations are binding on regulated persons on their effective date and would supercede any clearly inconsistent permit conditions. While the Department is not obliged to modify permits in order to implement duly promulgated regulations, the Department will, where appropriate to resolve apparent conflicts between permit conditions and new regulations, or where site-specific applications are appropriate, modify permits to reflect new regulations, in accordance with authority in Section 503 of the Act and §75.278(a)(3) of the regulations.

In sum, DER's authority to modify a permit under Section 503 includes all of the grounds set forth in 40 C.F.R. §270.41, as well as other reasons not expressed in the federal regulations.

Public Information

EPA has asked whether, under Pennsylvania's program, the names and addresses of permit applicants and permittees will be a matter of public

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record. Section 502(c) of Act 97 requires, as a general rule, that all portions of a hazardous waste facility permit application be available to the public. The only exceptions to this rule are items which, if made public, would divulge production or sales figures or methods, processes or production unique to the applicant, or would otherwise harm his competitive position by revealing trade secrets. The applicant's name and address do not fall within the exception. Furthermore, the Department has previously interpreted Pennsylvania's Right-to-Know Law, Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§66.1 et seq. as requiring that permittee's name and addresses be provided to the public upon request. (Appendix 5)

Administrative Appeals

EPA has requested that Pennsylvania discuss the applicable appeal procedures following the modification, revocation and reissuance, or revocation of a permit. Pennsylvania's administrative procedures are somewhat different from the Federal procedures, but the same objectives are achieved by the Commonwealth's procedures as are achieved by the Federal requirements. First, it should be pointed out that in Pennsylvania, the only entity empowered to hold adjudicatory hearings regarding department permit actions and authorized to issue adjudications which can subsequently be subjected to judicial review is the Environmental Hearing Board (hereinafter referred to as "EHB"). This quasi-judicial tribunal of three members was created by the same 1970 statute which created the Department, and its powers and duties are set forth in Section 1921-A of the Administrative Code (71 P.S. 510-21). The EHB is independent of the Department; its members are appointed by the Governor and confirmed by the legislature, and its staff and expenses are funded

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by legislative appropriation as part of DER's budget, with Board members' salaries set by statute and action of the Executive Board of the Commonwealth.

The EHB procedures are determined partly by the mandates of the Administrative Agency Law, which requires notice of, and opportunity for, a hearing on the record (2 Pa. C.S.A. §504), opportunity to introduce evidence and cross-examine witnesses (2 Pa. C.S.A. §505) and opportunity to submit briefs and make oral arguments (2 Pa. C.S.A. §506) before adjudications of agency actions may become final. The EHB also follows the Pennsylvania Rules of Civil Procedure and its own regulations (25 Pa. Code Chapter 21). Hearings before the EHB are adversary proceedings similar to trials, in that pre-hearing discovery is allowed, witnesses testify under oath, a stenographic transcript is made and the hearings are presided over by an EHB member or a hearing examiner appointed by the Board. Parties are usually represented by lawyers, but pro se appeals are also allowed. See, e.g. Deake Porter v. DER, 1975 EHB 230, 73 D. &. C. 2d 185 (1975). Appeal of EHB adjudications is to Commonwealth Court, which is Pennsylvania's intermediate appellate court.

Memorandum of Agreement

EPA has asked whether the Department is authorized to enter into a cooperative agreement with EPA to establish procedures for the efficient administration of the hazardous waste management program. No applicable statute requires that the Department must adopt such procedures as regulations in order to bind itself to them. The Department is empowered by Sections 104(2), 104(7), 104(9) and 104 (13) of Act 97 to cooperate with Federal agencies and may enter into a Memorandum of Agreement in furtherance of that mandate.

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In particular, the Department is authorized to conduct all necessary procedures relating to the permit program which are listed in Checklist V. (Appendix XIII of the application). These procedures include the reporting of noncompliance to EPA and administrative investigation and hearings on permit applications and modifications.

In the appeal of Coolspring Township, et al., EHB Docket No. 81-134-G (adjudication filed August 8, 1983), the appellant municipality claimed that the Department's active gathering of data prior to its grant of a permit for a sewage sludge disposal facility constituted a type of conflict of interest. In rejecting this claim, the EHB stated at page 18 of its adjudication:

> "In reviewing permit applications, it obviously is desirable that DER make its own independent check of the data furnished by the applicant, and DER's power to do so was granted by the Legislature in 35 P.S. §6018.104(13). Therefore the Township's criticisms of DER for having gathered data used to evaluate the application are rejected as unsound. Under 35 P.S. §6018.104(13) it was DER's duty to do whatever it deemed necessary to guarantee that its evaluation of the permit application was based on accurate data." [Emphasis added]

Thus, Section 104(13) has been held to represent authority for those means (hearings, site visits, geological or laboratory tests, solicitations of public comment) which the Department chooses to use in evaluating permit applications.

With respect to the Department's right to hold non-adjudicatory hearings, the case law is quite clear. After the creation of the EHB, the question arose as to whether its assumption of responsibility for adjudicatory hearings also transferred to the EHB both the Department's entire authority to hold any hearings at all, and certain decision-making powers as well. This issue was settled in Pennzoil et al. v. DER, 3 EHB 252 (1974), where the EHB stated:

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"It follows that the department, in performing the duties of the former Oil and Gas Conservation Commission may act with or without hearing, as it chooses - specifically, it is not required to hold a hearing prior to issuing a spacing order. The hearing on appeal before this board would then be the hearing that would satisfy the hearing requirements of the Oil and Gas Conservation Act, supra." [Emphasis added]

3 EHB 254

The Department's practice in the solid waste management permit program has, in fact, been to hold non-adjudicatory hearings upon request before final agency action is taken on a permit application.

Under Section 104 of Act 97, therefore, the Department may implement all of the EPA permit procedures set forth in Checklist V and the Memorandum of Agreement ("MOA"). The Department may hold non-adjudicatory hearings according to EPA hearing procedures. It should be noted, however, that the Department's performance of EPA hearing procedures does not accomplish the same legal result under the state administrative system as under the Federal system. As pointed out above, the Department is not authorized to hold adjudicatory hearings or issue adjudications. Except for the permit itself (which normally incorporates the entire permit application), the Department can build no record or administrative docket which can be judicially reviewed. The record which goes up on appeal to Commonwealth Court is the record established before the EHB, not the Department. Public hearings held by the Department, may accomplish the goals of assisting the Department in a thorough evaluation of a permit application and in keeping citizens informed of the progress of permit applications, but these procedures cannot give citizens an opportunity to be part of a judicially reviewable administrative record. Only an appeal to the EHB can give aggrieved citizens their day in court.

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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 to this requirement).

[Federal Authority: RCRA §3007 (42 U.S.C. 6927), 40 C.F.R. 271.15]

Sections 104(7), 502(b), 608, 609, 610(7) and 614 of Act 97.

Remarks: Regulation of the solid waste industry in Pennsylvania is pervasive, and Act 97 contains a number of references to the broad rights of law enforcement agencies to inspect, monitor, or otherwise investigate to determine compliance with Act 97, the regulations, permit terms and conditions, and other program requirements. Sections 104(7) of the Act specifies that the Department's duties are to "conduct inspections and abate public nuisances to implement the purposes and provisions of this act and the rules, regulations and standards adopted pursuant to this act." In addition, Section 608(3) authorizes warrantless searches by the department, its agents and employees in order to inspect books and papers, documents, and other physical evidence, to require the production of records and reports, and to make any investigation including the taking of samples, or inspection, necessary to ascertain the compliance or noncompliance by any person or municipality with the statute or the regulations promulgated thereunder.

Section 609 of Act 97 authorizes the issuance of a search warrant based upon either traditional or administrative probable cause. The warrant may, according to Section 609, issue for the purpose of inspecting any property, building, place, book, record, or other physical evidence, and for conducting tests or taking samples. Section 610(7) makes it unlawful to "refuse, hinder, obstruct, delay or threaten any agency or

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employee of the department in the course of the performance of any duty under this act, including, but not limited to, entry and inspection under any circumstances."

In addition to the above statutory provisions, each permit applicant is required to sign a landowner consent form which authorizes the Department and its agents to enter upon the facility site during the hazardous waste activity and for twenty years after final closure for inspection, pollution abatement, and pollution prevention. Further, each hazardous waste permit contains a condition providing access to the Department and its agents for the purpose of making such investigations and inspections as may be necessary to determine compliance with Act 97, the regulations promulgated thereunder, and the conditions of the permit §75.275(b)(9). Inspection of any facility equipment is explicitly authorized in the permit condition. Finally, Section 614 requires that any vehicle, equipment, or conveyance used for the transportation or disposal of hazardous waste in the commission of any crime under Act 97 (any violation of the act, or of department regulations, orders or permits) be seized and forfeited as contraband to the Department. Obviously, seizure by law enforcement authorities would be impossible without inspection, and the right to stop and search is an assumption which underlies this provision. In sum, the Department has authority to inspect all vehicles and equipment subject to regulation under the Act. The general police power authority of the Commonwealth combined with the search authority in Sections 608 and 609 of Act 97 provide comprehensive authority that extends to the limits of constitutional protections. The Department has authority to enter a facility in order to examine records, monitor, sample or test hazardous waste; ascertain compliance with regulations and permit

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conditions; and for other purposes set forth in the statute, regulations and permit.

For purposes of this Statement, the constitutional constraints on warrantless search do not affect the basic issue of equivalence to the Federal program. The federal program requirements for authorization clearly cannot exceed limitations placed by current Fourth Amendment law. Therefore, to the extent that Section 608 might be found to be overly broad, it extends to the limits of constitutional restraints that constrain state and federal government alike. In the event that warrantless searches were invalidated, Pennsylvania would still have two mechanisms to fall back on. One is the search warrant mechanism authorized in Section 609 of the Act. The other is the landowner consent form required in Section 502(b) as a prerequisite to issuance of a permit. (See Appendix 6) This form at the very least would be evidence that the landowner, in return for the privilege of profiting from hazardous waste management activities on his land, had waived his right to bar entry to Department inspectors. The document itself is contractual in nature. It is captioned "Contractual Consent of Landowner" and avers on the first page that it does not convey any ownership interest in the land. What it does convey to the Department is the right to enter for the purposes of inspection and for the purpose of conducting such pollution abatement or pollution prevention activities as are required under the Act, the regulations or the permit.

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.

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[Federal Authority: RCRA §3006 (42 U.S.C. 6926); 40 C.F.R. 271.16(a)(1)]

Sections 104(7) and (10), 601, 602, 603, 604 and 610 of Act 97.

Remarks: The order powers of the Department are addressed in Sections 104(7) and 602 of Act 97. Section 602(a) states that such orders may include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring any person to cease "unlawful activities" or operations of a solid waste facility which is in violation of any provision of the act, or the department's regulations, orders or permits. Section 602(b) authorizes department orders designed to "prevent pollution and public nuisances "where the department finds that the storage, collection, transportation, processing, treatment or disposal of solid waste is causing pollution or creating a public nuisance. Finally, Section 604(d) gives the Department the authority to give oral orders, as well as written orders, to suspend or modify hazardous waste treatment or disposal activities when it determines that continued operation will jeopardize public health, safety or welfare.

Section 602(a) authorizes the Department to issue an order restraining violations of regulations, permit conditions, or Act 97 by a generator, transporter, or other person managing hazardous waste, whether or not it is endangering or causing damage to public health or the environment. Section 602(b) adds that storage, transportation, treatment and disposal activities can be addressed by order whenever they constitute a public nuisance even if there is otherwise no apparent violation. Furthermore, because Section 601 declares all violations of statutory, regulatory and permit requirements to be nuisances per se, Section 602(b) authorizes orders enforcing any regulatory requirement applicable to storage, transportation, treatment or disposal activities

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by generators, transporters and other persons and municipalities, regardless of whether they are alleged to endanger or cause damage to public health or the environment.

If there were other unauthorized activities arguably not within the ambit of Section 602, they could be addressed by a suit to restrain the maintenance or threat of a public nuisance under Section 604, discussed infra at B. The major difference between the State order powers and 40 C.F.R. 271.16(a)(1) is that the latter specifies that the violation endanger or cause damage to public health or the environment. Act 97 does not require this showing or allegation; the mere fact that an activity violates the statute, regulations or permit is enough to justify enforcement action by order or by lawsuit.

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.

[Federal Authority: RCRA §3006 (42 U.S.C. 6926); 40 C.F.R. 271.16(a)(2)]

Sections 104(10), 601, 604 and 610 of Act 97.

Remarks: Section 601 of Act 97 contains a statutory declaration of nuisance for any violation of a provision of the Act, state regulations, orders or permit conditions. All violators covered by this provision are explicitly liable for costs of abatement caused by that violation and are also subject to any traditional common-law remedy applicable to public nuisances.

Section 604 authorizes the Commonwealth to institute equity suits for injunctions to restrain violations of the act, or the regulations, standards and orders issued thereunder, and to restrain a nuisance or threat of a public nuisance. The nuisance or threat of nuisance

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addressed in Section 601 would include any violation or threatened violation of any program requirement, whether contained in permit conditions, regulations, orders or statutory provisions. One of the statutory provisions relevant to this issue is Section 610(9), which declares it unlawful to "cause or assist in the violation of" any provision of the act, the regulations, orders or permit conditions.

Act 97 clearly authorizes suits to enjoin such violations without necessitating prior permit revocation. One basis for this conclusion is Section 604(b) wherein municipal solicitors and county district attorneys are authorized to sue to enjoin violations of permit conditions, even though they themselves have no authority to revoke permits and might therefore be forced to sue a facility whose permit was still in effect. Moreover, Section 604(c) of Act 97 describes the penalties and enforcement remedies imposed under the act as "concurrent" and declares that the existence of one remedy (e.g., permit revocation) does not prevent the Department from exercising any other remedy, at law or in equity (e.g., suits for injunctions). The cumulative nature of remedies provided in Act 97 is also emphasized by the phrase "In addition to any other remedies provided in this act," with which Sections 604(a) and (b) begin.

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.

[Federal Authority: RCRA §3006 (42 U.S.C. 6926); 40 C.F.R. 271.16(a)(3)(i)]

Section 605 of Act 97.

Remarks: Act 97 provides for civil penalties of up to $25,000 per day for any violation of the statute, regulations, department orders or permit conditions and is, thus, more stringent than the Federal minimum of $10,000 per day.

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EPA has questioned whether the definition of "person" in the Solid Waste Management Act includes "political subdivisions" and "municipalities" particularly with respect to civil penalties. Both "political subdivisions" and municipalities are included within the ambit of the phrase "any other legal entity whatsoever which is recognized by law as the subject of rights and duties." 35 P.S. §6018.103, 25 Pa. Code §75.260(a). Municipalities and political subdivisions are persons under the act for all purposes including Section 605, civil penalties.

The EPA revised civil penalty policy contained in 40 C.F.R. 271.16(c) requires the penalty to be "appropriate to the violation." The Commonwealth applies four standards in assessing civil penalties under Section 605: (1) willfulness of the violation, (2) damage to air, water, land or other natural resources of the Commonwealth or their uses, (3) cost of restoration or abatement, and (4) savings resulting to the violator because of the violation. The Department is also authorized to consider "other relevant factors." The civil penalty assessment, therefore, should be appropriate to the violation, consistent with 40 C.F.R. §271.16(c), and with the requirement that the Department act in a reasonable manner in assessing a civil penalty. Black Fox Mining and Development Corporation v. Comm., DER, EHB Docket No. 84-114-G (adjudication filed April 29, 1985).

It should be noted that neither the civil penalty limitation provisions of Sections 605(1) and (2) nor the criminal penalties limitation provision of 606(i) relieves generators of program responsibilities imposed upon them. The purpose of these provisions is to relieve the generator from vicarious liability for violations or discharges committed by disposal or treatment facility operators after such facilities have properly received the generator's wastes. With the exception of recordkeeping,

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exception reports, and quarterly reports, the generators will have completed performance of all regulatory responsibilities by the time the wastes have been accepted at the facility and the liability for mishandling the wastes begins to shift. Since these generator responsibilities are imposed by Section 403 of Act 97, and since the exemption cannot apply unless the generator has complied with Section 403, there are no violations of 25 Pa. Code Chapter 75.262 for which generators could be relieved of liability.

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.

[Federal Authority: RCRA §3006 (42 U.S.C. 6926); 40 C.F.R. 271.16(a)(3)(ii)]

Section 606 of Act 97; Section 1104 of Crimes Code, 18 Pa. C.S.A. 1104(c).

Remarks: For criminal offenses listed in Section 606(d) of Act 97, the nature of the offense and the burden of proof are exactly the same as that set by Congress in §3008 of RCRA. The maximum fine is the same in both statutes and the term of imprisonment for a third degree misdemeanor is set by Section 1104 of the Pennsylvania Crimes Code (18 Pa. C.S.A. 1104(3)) at a maximum of one year.

For storage, treatment, transportation or disposal without a permit the penalties are greater under Pennsylvania law than under RCRA, being set by Section 606(f) at $2,500 to $100,000 and/or imprisonment of 2 to 10 years. Moreover, under RCRA, all criminal offenses must be committed "knowingly," whereas Section 606(i) of Act 97 makes it clear that the liability for offenses under Section 606(a), (b), (c) and (f) is absolute and no showing need be made that the crime was committed "knowingly."

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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 action to obtain the remedies specified in Section VII B and C above by any citizen having an interest which is or may be adversely affected; or

1. Assurance that the State agency will investigate and provide written response to all citizen complaints duly submitted;

2. Assurance that the State enforcement authority will not oppose intervention by any citizen where permissive intervention is authoritized by statute, rule, or regulation; and

3. Assurance by the State enforcement authority that it will provide at least 30 days for public comment on all proposed settlements of State civil enforcement actions, except in cases where a settlement requires some immediate action (e.g. cleanup) which if otherwise delayed would result in substantial damage to either public health or the environment.

[Federal Authority: RCRA §7004 (42 U.S.C. 6974); 40 C.F.R. 271.16(d)]

Sections 615, and 616 of Act 97; Section 1921-A of the Administrative Code of 1929, Act of April 9, 1929 (P.L. 177), as amended, 71 P.S. 510-21.

Administrative Agency Law, Act of November 25, 1970 (P.L. 707), as amended, §602 (2 Pa. C.S. §702)

25 Pa. Code Chapter 21 (Rules of Procedure of the Environmental Hearing Board)

Remarks: The three civil and administrative remedies specified in VII B & C above are suits in State courts for equitable relief and civil penalties. Section 615 of Act 97 gives any citizen of the Commonwealth having an interest which is or may be adversely affected the right to intervene in any suit in state courts for equitable relief under Section 604 and in any civil penalty actions pursuant to Section 605.

Intervention before the EHB is granted liberally, with the Board allowing intervention even where the intervenor would not have had standing to file the appeal itself. Campbell et al. v. DER, 1980 EHB 338 (1980). The Board is prohibited by its own rules (25 Pa. Code

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§21.62) from denying intervention on the basis that the proposed intervenor does not have a proprietary interest affected by the action appealed, but the Board does require that the petitioner state why his interest may be inadequately represented in the proceeding.

An additional public participation mechanism is that contained in Section 616 of Act 97. If a settlement is proposed in an action brought pursuant to Section 604 (suits in equity) or Section 605 (civil penalties), the terms of the settlement must be published in a newspaper of general circulation in the area where the violations allegedly took place at least 30 days prior to the effective date of the settlement. The publication must solicit public comments and direct them to the appropriate agency. This provision allows even those citizens who choose not to appeal or intervene to comment nevertheless on the merits of a settlement. Pennsylvania's public comment provision is broader than the corresponding federal provision at 40 C.F.R. §271.16(d)(2)(iii), which allows an exemption from the notice requirement if immediate action is required. Thus the Commonwealth not only grants the kind of intervention rights referred to in Alternative A, but also bestows the right of intervention and comment upon persons who arguably do not have "an interest which is or may be adversely affected."

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.

[Federal Authority: RCRA §3007(b) (42 U.S.C. 6927); 40 C.F.R. 271.17]

Sections 104(2) and 502(c) of Act 97; 25 Pa. Code Chapter 75.265(z)(16)(iv).

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Remarks: The general standard for availability of information submitted to the Department during the permit process is set forth in Section 502(c) of Act 97. Briefly stated, the standard is that all such information is public. The only exception to this rule is certain trade secret information which can be protected as confidential, and even this information must be shared with the "Federal Government or other State agencies as may be necessary for purposes of administration of any Federal or State law." This standard has been codified at 25 Pa. Code §75.265(z)(16). The regulated community is thus on notice that even if a claim of confidentiality is honored, the Department will carry out its duty to cooperate with the Federal government and to enforce Section 502(c) of Act 97 by sharing that information with EPA.

X. CODIFICATION OF REGULATIONS

EPA has asked the Commonwealth to discuss the codification of the regulations and, in particular, limitations upon the authority of the Commonwealth to change the text of the regulations after publication in the Pennsylvania Bulletin. Until codification in the code, the Pennsylvania Bulletin is the official text of the regulation and is "the only legal evidence of the valid and enforceable text" of the regulation. 45 Pa. C.S. §901 (relating to official text of published documents). In preparation for codification in the Pa. Code, the Legislative Reference Bureau may prepare a revised text of a regulation in cooperation with the promulgating agency. The revised text "eliminates all obsolete, unnecessary or unauthorized material ..." and "has been prepared in such a manner as to lend to the published code as a whole uniformity of style and clarity of expression, and which does not effect any change in the substance of the deposited text of such regulations." (emphasis added) 45 Pa. C.S. §723(a). Under Section 723(b) the agency may object

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to the revised text through written objections to the Joint Committee on Documents, which, after consultation with the agency, has the duty to make such alterations as are "necessary in order to retain the the substance of the deposited text of such regulations." 45 Pa. C.S. §723(b).

Thus, there is a statutory prohibition against substantive changes being made in codification of regulations. Further there is an administrative appeal procedure available prior to codification which allows any disputes to be resolved prior to publication, in the event that substantive revisions are made by the persons editing for codification purposes.

XI. AUTHORITY OVER INDIAN LANDS

Not applicable.

John P. Krill Deputy General Counsel

OFFICE OF GENERAL COUNSEL
Commonwealth of Pennsylvania

Date: 4 October 1985

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14. Numerals.

: Roman numerals and the Arabic numerals shall be deemed parts of nglish language.

15. Joint authority; quorum.

Joint authority.—Words in a statute conferring a joint authority three or more public officers or other persons shall be construed to r authority upon a majority of such officers or persons.

Quorum.—A majority of any board or commission shall constitute rum.

16. Bonds.

tatute requiring a bond or undertaking with sureties to be given by erson, shall be construed to permit in lieu thereof a bond of indemnity ety bond for the amount of such bond or undertaking, given by any inity or surety company authorized to do business in this Com-ealth, and approved by the proper authority.

17. Uniform standard time.

ry mention of, or reference to any hour or time in any statute, shall be ued with reference to and in accordance with the mean solar time of 5th meridian of longitude west of Greenwich, commonly called n standard time, unless a different standard is therein expressly ded for, or unless the standard time shall be advanced for any portion year, by any act of Congress.

18. Computation of time.

en any period of time is referred to in any statute, such period in all except as otherwise provided in section 1909 of this title (relating to ation for successive weeks) and section 1910 of this title (relating to utation of months) shall be so computed as to exclude the first and in-the last day of such period. Whenever the last day of any such period all on Saturday or Sunday, or on any day made a legal holiday by the of this Commonwealth or of the United States, such day shall be ed from the computation.

19. Time; publication for successive weeks.

enever in any statute providing for the publishing of notices, the e "successive weeks" is used, weeks shall be construed as calendar . The publication upon any day of such weeks shall be sufficient ation for that week, but at least five days shall elapse between each ation. At least the number of weeks specified in "successive weeks" lapse between the first publication and the day for the happening of ent for which publication shall be made.

Cross References. Section 1909 is referred to in section 1908 of this title.

20. Time; computation of months.

enever in any statute the lapse of a number of months after or before ain day is required, such number of months shall be computed by counting the months from such day, excluding the calendar month which such day occurs, and shall include the day of the month in the month so counted having the same numerical order as the day of the mo from which the computation is made, unless there be not so many day the last month so counted, in which case the period computed shall ex with the last day of such month.

Cross References. Section 1910 is referred to in section 1908 of this title.

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SUBCHAPTER B
CONSTRUCTION OF STATUTES

Sec.

§ 1921. Legislative intent controls.

(a) Object and scope of construction of statutes.—The object of all terpretation and construction of statutes is to ascertain and effectuate t intention of the General Assembly. Every statute shall be construed, possible, to give effect to all its provisions.

(b) Unambiguous words control construction.—When the words o statute are clear and free from all ambiguity, the letter of it is not to be d regarded under the pretext of pursuing its spirit.

(c) Matters considered in ascertaining intent.—When the words o statute are not explicit, the intention of the General Assembly may ascertained by considering, among other matters:

(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.

(5) The former law, if any, including other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

§ 1922. Presumptions in ascertaining legislative intent.

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

§ 1923. Grammar and punctuation of statutes.

(a) **Grammatical errors and transposition of words.**—Grammatical errors shall not vitiate a statute. A transposition of words and clauses may be resorted to where a sentence is without meaning as it stands.

(b) **Use of punctuation in construction.**—In no case shall the punctuation of a statute control or affect the intention of the General Assembly in the enactment thereof but punctuation may be used to aid in the construction thereof if the statute was finally enacted after December 31, 1964.

(c) **Adding words for proper construction.**—Words and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof.

(Dec. 10, 1974, P.L.816, No.271, eff. imd.)

1974 Amendment. Act 271 amended subsec. (b).

§ 1924. Construction of titles, preambles, provisos, exceptions and headings.

The title and preamble of a statute may be considered in the construction thereof. Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a statute shall be construed to exclude all others. The headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof.

§ 1925. Constitutional construction of statutes.

statute or the application thereof to any person or circumstance i valid, the remainder of the statute, and the application of such pr other persons or circumstances, shall not be affected thereby, u court finds that the valid provisions of the statute are so essentia separably connected with, and so depend upon, the void pro application, that it cannot be presumed the General Assembly wo enacted the remaining valid provisions without the void one; or u court finds that the remaining valid provisions, standing alone complete and are incapable of being executed in accordance legislative intent.

§ 1926. Presumption against retroactive effect.

No statute shall be construed to be retroactive unless clea manifestly so intended by the General Assembly.

§ 1927. Construction of uniform laws.

Statutes uniform with those of other states shall be interpreted a strued to effect their general purpose to make uniform the laws states which enact them.

§ 1928. Rule of strict and liberal construction.

(a) **Statutes in derogation of common law.**—The rule that sta derogation of the common law are to be strictly construed, shall application to the statutes of this Commonwealth enacted final September 1, 1937.

(b) **Provisions subject to strict construction.**—All provisio statute of the classes hereafter enumerated shall be strictly consti

(1) Penal provisions.

(2) Retroactive provisions.

(3) Provisions imposing taxes.

(4) Provisions conferring the power of eminent domain.

(5) Provisions exempting persons and property from taxati

(6) Provisions exempting property from the power of emin main.

(7) Provisions decreasing the jurisdiction of a court of reco

(8) Provisions enacted finally prior to September 1, 1937 whic derogation of the common law.

(c) **Provisions subject to liberal construction.**—All other provisi statute shall be liberally construed to effect their objects and to p justice.

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§ 1929. Penalties no bar to civil remedies.

The provision in any statute for a penalty or forfeiture for its vi shall not be construed to deprive an injured person of the right to r from the offender damages sustained by reason of the violation statute.

§ 1930. Penalties for each offense.

atute, such penalty or forfeiture shall be construed to be for each such olation.

1931. Intent to defraud.

Whenever an intent to defraud is required in any statute in order to con- itute an offense, the statute shall be construed to require only an intent to :fraud any person or body politic.

1932. Statutes in pari materia.

(a) Meaning.—Statutes or parts of statutes are in pari materia when ey relate to the same persons or things or to the same class of persons or ings.

(b) Construction.—Statutes in pari materia shall be construed together, possible, as one statute.

1933. Particular controls general.

Whenever a general provision in a statute shall be in conflict with a ecial provision in the same or another statute, the two shall be construed, oossible, so that effect may be given to both. If the conflict between the o provisions is irreconcilable, the special provisions shall prevail and all be construed as an exception to the general provision, unless the neral provision shall be enacted later and it shall be the manifest inten- on of the General Assembly that such general provision shall prevail.

Cross References. Section 1933 is referred to in section 1934 of this title.

1934. Irreconcilable clauses in the same statute.

Except as provided in section 1933 of this title (relating to particular con- ols general), whenever, in the same statute, several clauses are irrecon- able, the clause last in order of date or position shall prevail.

1935. Irreconcilable statutes passed by same General Assembly.

Whenever the provisions of two or more statutes enacted finally during e same General Assembly are irreconcilable, the statute latest in date of ial enactment, and where two or more irreconcilable statutes are enacted ially on the same date, the statute bearing the highest number, in either se irrespective of its effective date, shall prevail from the time it becomes ective except as otherwise provided in section 1952 of this title (relating effect of separate amendments on code provisions enacted by same neral Assembly) and section 1974 of this title (relating to effect of parate repeals on code provisions by same General Assembly).

Cross References. Section 1935 is referred to in section 1955 of this title.

1936. Irreconcilable statutes passed by different General Assemblies.

Whenever the provisions of two or more statutes enacted finally by ferent General Assemblies are irreconcilable, the statute latest in date of al enactment shall prevail.

Cross References. Section 1936 is referred to in section 1955 of this title.

1937. References to statutes and regulations.

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issued by a public body or public officer includes the statute or regu with all amendments and supplements thereto and any new stat regulation substituted for such statute or regulation, as in force at th of application of the provision of the statute in which such refere made, unless the specific language or the context of the reference provision clearly includes only the statute or regulation as in force effective date of the statute in which such reference is made.

(b) Applicability of section.—The provisions of subsection (a) c section shall apply to every statute finally enacted on or after July 1,

§ 1938. References to public bodies and public officers.

A reference in a statute to a governmental agency, department, b commission or other public body or to a public officer includes an ent officer which succeeds to substantially the same functions as those formed by such public body or officer on the effective date of the st unless the specific language or the context of the reference in the st clearly includes only the public body or officer on the effective date statute.

§ 1939. Use of comments and reports.

The comments or report of the commission, committee, associati other entity which drafted a statute may be consulted in the construct application of the original provisions of the statute if such commer report were published or otherwise generally available prior to the sideration of the statute by the General Assembly, but the text of the st shall control in the event of conflict between its text and such commer report.

SUBCHAPTER C
AMENDATORY STATUTES

Sec.

§ 1951. Interpretation of amendatory statutes.

In ascertaining the correct reading, status and interpretation of an ar datory statute, the matter inserted within brackets shall be omitted, an matter in italics or underscored shall be read and interpreted as part o

March 3, 1982

SUBJECT: ORSANCO - Authority to Adopt Regulations That Reference EPA

TO: Louis Bercheni
Director
Bureau of Water Quality Management

FROM: Robert W. Adler RWA
Assistant Counsel
Bureau of Regulatory Counsel

Through: Maxine Woelfling MW
Director
Bureau of Regulatory Counsel

I. INTRODUCTION

ORSANCO's legal counsel (Leonard Weakley) raised the question whether ORSANCO can lawfully adopt regulations that "reference" EPA (or other) regulations (e.g. adoption of EPA effluent limitations by reference to 40 C.F.R.). In the opinion of this Bureau, ORSANCO can adopt regulations which incorporate other standards by reference.

An initial difficulty in responding to Mr. Weakley's question is determining the basis for his opinion that ORSANCO may not be able to adopt EPA regulations by reference. Mr. Weakley's concern can arise out of the due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, the notice and comment rulemaking requirement of the Administrative Procedure Act, 5 U.S.C. §553[1], or the language of the ORSANCO Compact[2].

There are three arguments why it is permissible for ORSANCO to promulgate a regulation that references EPA regulations or other requirements. First, adoption by reference is excepted from the APA publication requirement because publication would be "impracticable, unnecessary or contrary to the public interest," pursuant to 5 U.S.C. §553(b). Second, regulation by reference is accepted practice, as evidenced by Pennsylvania law. Third, an attempt to conform ORSANCO regulations with EPA regulations is consistent with, if not required by, the language and legislative history of the federal Clean Water Act, 33 U.S.C. §1251 et seq.

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1. It is open to question whether ORSANCO is a federal agency subject to the requirements of the APA. Cf. Delaware Water Emergency Group v. Hansler (E.D. Pa. No. 80-4372) (Memorandum and Order filed August 17, 1981), Slip. Op. at 17-18 (left open whether Delaware River Basin Commission is federal agency for purpose of National Environmental Policy Act). However, if ORSANCO adoption of EPA regulations by reference would be excepted from the publication requirement of 5 U.S.C. §553, it would also satisfy the Fifth Amendment (which is clearly applicable to ORSANCO), since an APA provision must also satisfy due process. Therefore, this issue is irrelevant, and the case can be analyzed according to the APA standards.

2. The Compact is codified at 32 P.S. §816.1.

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II. 5 U.S.C. §553

The general requirement of 5 U.S.C. §553(b) is that "General notice of proposed rulemaking shall be published in the Federal Register ... The notice shall include ... (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." It may be argued that incorporation by reference does not adequately describe the "terms or substance" of the proposal. A simple counterargument is that reference to a readily accessible published federal document, such as the C.F.R. or the Federal Register, provides adequate notice to interested parties of the specific terms of the proposed regulation. This does not, however, account for the fact that incorporation by reference automatically includes future amendments and supplements to the referenced regulation. The question then becomes whether the revised referenced EPA regulation will remain a valid ORSANCO regulation absent republication by ORSANCO whenever the referenced regulation changes.

This problem is addressed by the exception clause of 5 U.S.C. §553(b), which states (in part) that "this subsection does not apply ... when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." Repeated republication of referenced EPA regulations is both impracticable and unnecessary[3] because it would essentially duplicate the notice and comment procedure that EPA is required to comply with when promulgating regulations. Persons, industries and government entities subject to ORSANCO regulation are simultaneously subject to regulation by EPA or a state agency with NPDES delegation. Therefore, these regulatees were interested in (i.e. affected by), and had an opportunity to comment on existing EPA regulations when they were originally promulgated by EPA. Similarly, all interested parties will have notice of and opportunity to comment on future EPA regulations referenced in ORSANCO regulations. A second notice and opportunity to comment by ORSANCO would serve no useful purpose in terms of public participation in the rulemaking process. Therefore, lack of publication would not violate either the due process clause or the APA.

This precise interpretation of the "good cause" exception to the APA (i.e. dual publication of regulations is "unnecessary") has never been challenged in the federal courts. The theory is well supported, however, by the general case law describing the "good cause" exception. In Matter of Worksite Inspection of S.C. Warren, Division of Scott Paper, 481 F. Supp. 491, 494 (D. Me. 1978), the Court explained that a rule that merely clarifies, without substantively modifying existing regulation, and without a substantive impact on those regulated, is exempted from APA publication requirements. ORSANCO adoption of EPA regulations by

3. Publication, which would subject the proposed material to potential revision, would also arguably be contrary to the public interest in uniformity of regulation, as discussed in Part III of this memo.

reference clearly fits into this category since regulatees potentially subject to ORSANCO regulation are already subject to existing EPA substantive requirements. Thus, there is no substantive impact on those regulated. See also Texaco, Inc. v. FPC, 412 F.2d 740, 743-4 (3d Cir. 1969) (regulations that are "unimportant to the industry and to the public" are not subject to APA publication requirement, citing National Motor Freight Traffic Association v. United States, 268 F. Supp. 90, 95-96 (D.D.C. 1967)).

It may be argued that the additional notice and comment langauge in the compact provides a requirement independent of the APA, and thus is not subject to the APA's "good cause" exception. Article VI of the compact requires, for example, that industrial wastes shall be treated "to such degree as may be determined to be necessary by the commission after investigation, due notice, and hearing." In the first place, it is not clear that this language applies to rulemaking, as opposed to the issuance of orders. This is evidenced by the separate rulemaking provision of Article VI, which simply states: "The commission is hereby authorized to adopt, prescribe, and promulgate rules, regulations, and standards for administering and enforcing the provisions of this article." (No notice and comment language.) Notably, ORSANCO is empowered to issue orders, but not to grant permits.

Even if this language was intended to apply to rulemaking, however, there is no reason to believe that the requirement was intended to be more stringent than the APA requirement. Viewed in historical perspective, the ORSANCO compact was approved by Congress on July 11, 1940, c. 581, 54 Stat. 752; the compact was executed on April 2, 1945 (Article XI); and the APA was enacted on July 11, 1946, c. 324, 60 Stat. 237. The APA rulemaking provisions superseded prior federal rulemaking standards. Adequate notice and comment for purposes of the APA should satisfy the similar requirement in the compact.

III. REGULATION BY REFERENCE IS ACCEPTED PRACTICE

The validity of adopting regulations that reference other (existing) regulations is accepted practice, at least in Pennsylvania. As you know, Pennsylvania has adopted EPA effluent limitations by reference in 25 Pa. Code §92.31. This incorporation has never been challenged.[4] There is no reason to believe that the practice will be challenged with respect to ORSANCO, particularly since no regulatee will be substantively affected, as noted above.

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4. Nor is the practice unique to the water quality program. See, e.g., 25 Pa. Code §131.2 (National Ambient Air Quality Standards).

The practice of incorporation by reference is recognized by statute in Pennsylvania and has been upheld by the Pennsylvania Courts. Section 1937(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. §1937(a), states:

> Reference to statutes and regulations..
>
> (a) General rule. A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made.

In East Suburban Press v. Township of Penn Hills, 397 A.2d 1263, the Pennsylvania Commonwealth Court considered whether a newspaper's eligibility for legal advertising could be conditioned on a federal determination. The State's Newspaper Advertising Act provided that a newspaper must qualify for "second class mail" privileges in order to qualify for "legal" advertising. Since the "second class mail" qualification was in the domain of federal regulations and outside the State's control, it was argued that the Legislature unlawfully delegated legislative authority. The Court held that the reference to federal regulations in the state law did not constitute unlawful delegation of legislative authority, although regulations of U.S. Postal Service may change "from time to time". In Commonwealth v. Tarabilda, 222 Pa. Super. 237 (1972), the Pennsylvania Superior Court considered whether a conviction for violation of the Drug Device and Cosmetic Act could be sustained, where the definition of a "narcotic drug" in the state law was based on "any drug or other substance found by the United States' Secretary of Treasury or his delegate ... to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine." The Court found that the federal standard, as incorporated in state law, was constitutionally sufficient to sustain a criminal conviction, and was not constitutionally vague or uncertain. See also Fisher's Petition, 344 Pa. 96, 23 A.2d 878 (1942); Commonwealth v. Warner Bros. Theatres, Inc., 345 Pa. 270, 273, 27 A.2d 62, 64 (1972). There is no reason to believe that a different result would be reached in a different forum. In fact, incorporation by reference is utilized in the Federal Register, as long as the incorporated document is accessible to all interested parties. See, e.g., 46 Fed. Reg. 19660 (March 31, 1981).

IV. CLEAN WATER ACT AND LEGISLATIVE HISTORY

A strong argument in favor or ORSANCO adoption of certain EPA regulations arises out of the language and legislative history of the federal Clean Water Act, which is intended to promote uniform national technology-based effluent limitations. Publication of ORSANCO regulations that reference specific EPA standards, with opportunity for public comments and, accordingly, the potential for amendment, would defeat this purpose. Similarly, the absence of automatic incorporation of future amendments, which is attendant to incorporation by reference, would also defeat the goal of uniform regulation.

The 1972 Amendments to the Federal Water Pollution Control Act were enacted largely in response to the failure of the existing system of state water quality standards for both intrastate and interstate waters. See S. REP. No. 414, 92d Cong., 2d Sess. (1971), reprinted at 1972 U.S. Code Cong. & Ad. News 3668, 3668-72, 3675. In enacting the Amendments, Congress intended to supplement the existing system (of which ORSANCO was a part) with a system of uniform, technology-based standards established by the Administrator of EPA. Id. at 3675. See also Rodgers, Environmental Law 455-56 and nn. 36-37, 42 (1977); Clean Water Act §§301, 303, 304, 33 U.S.C. §§1311, 1313, 1314. Thus, the existing system of water pollution control relies first on the application of uniform effluent limitations, with more stringent limitations, if necessary, based on specific water quality standards. Section 303(d)(1)(A), 33 U.S.C. §1313(d)(1)(A). A completely separate set of equivalent ORSANCO effluent limitations confuses rather than strengthens this system. The regulatee is also confused, by being subjected to two sets of different and potentially conflicting standards.

This argument is fully supported by the language of the statute.[5] First, Title I of the statute envisions that states, interstate agencies, and the federal government will engage in cooperative and consistent efforts to control water pollution. Section 102(a) states that "The Administrator shall ... in cooperation with other Federal agencies, state water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating ... pollution." 33 U.S.C. §1252(a) (emphasis added). Section 102(c)(2) adds teeth to this policy by making federal grants for planning agencies, including interstate agencies, contingent upon the development of a comprehensive pollution control plan which is consistent with, among other things, federal

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5. Interstate agency is defined as "any agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more states having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator." Section 502(2), 33 U.S.C. §1362(2). ORSANCO fits within this definition.

effluent limitations. Id. §1252(c)(2). Section 103 further evidences Congress' intent to promote comprehensive and consistent programs for water pollution control by encouraging cooperative activities between states, uniform laws, and interstate compacts. Id. §1253(a). In particular, section 103(b) permits states "to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States ...." Id. §1253(b). Thus, interstate compacts may not be in conflict with the Clean Water Act, or any rules or regulations promulgated thereunder.[6]

Sections 510 and 402 of the Act provide even more force to this argument. Section 510 prohibits any state or interstate agency from adopting or enforcing "any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter..." This provision establishes consistent minimum national standards for water pollution control, 33 U.S.C. §1370 (emphasis added). Thus, ORSANCO standards are required to be at least as stringent as federal standards. Perhaps most persuasive is Section 402(b), which states:

> (b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete discription of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve such submitted program unless he determines that adequate authority does not exist:

---

6. ORSANCO, of course, was established by authority of a statute that preceded the 1972 Federal Water Pollution Control Act Amendments, and therefore did not envision uniform national controls and policies. It is illogical to assume, however, that Congress, in 1972, intended to exclude existing interstate compacts from the goal of comprehensive and consistent programs for water quality management. In fact, section 5 of the Act that approved the ORSANCO compact reserved the right to "alter, amend, or repeal the provisions" of the consent. Act of July 11, 1940, c. 581, §5, 54 Stat. 752.

> (1) To issue permits which--
>
> (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;
>
> * * * *

Id. §1342(b) (emphasis added). This provision is not strictly applicable to ORSANCO, which does not administer an EPA-approved permitting program. However, section 402(b) does evidence that Congress intended state and interstate programs to ensure compliance with federally-promulgated standards. At a minimum, section 402(b) indicates that ORSANCO has the ability and authority to incorporate EPA standards into ORSANCO regulations, because such incorporation would be mandatory if ORSANCO was an NPDES permitting agency.

V. CONCLUSION

There is no persuasive legal barrier to ORSANCO incorporation of EPA standards by reference in ORSANCO regulations. Such incorporation would not violate the requirements of the ORSANCO compact, the Administrative Procedure Act, or the due process clause of the Fifth Amendment to the U.S. Constitution. In fact, there are strong indications that the 1972 Amendments to the Clean Water Act envisioned that interstate agencies would become part of the comprehensive and consistent nationwide program for water pollution control.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Petitioner	:	
v.	:	No. 3162 C.D. 1983
WILLIAM FIORE, d/b/a MUNICIPAL and INDUSTRIAL DISPOSAL COMPANY, INC., Respondents	:	

BEFORE: HONORABLE FRANCIS A. BARRY, Judge

HEARD: December 16, 1983

OPINION NOT REPORTED

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MEMORANDUM OPINION BY JUDGE BARRY FILED: January 30, 1984

Petitioner William Fiore has filed the instant Petition for Review in the nature of an original action in Equity, naming as respondents the Department of Environmental Resources (DER) and the Environmental Quality Board (EQB). Petitioner complains that DER is violating various provisions of the Solid Waste Management Act (Act), Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 (Supp. 1983-84), by allowing various facilities to store, treat and dispose of hazardous wastes without the permits required by the Act. Petitioner also alleges that the EQB has both failed to adopt timely regulations pursuant to the Act and has adopted illegal regulations relating to interim status allowing those facilities to continue operations pending issuance of the permits by DER to store, treat and dispose of hazardous wastes. Finally, petitioner claims that competitors of his are currently polluting the waters of the Commonwealth. Petitioner asks this Court to order DER to (1) stop issuing approvals to facilities allowing the storage and treatment of hazardous wastes pending issuance of permits required by the Act, (2) revoke interim status approval already granted to facilities that store and treat hazardous waste, (3) stop issuing approvals to facilities for disposing of hazardous waste pending the issuance of the required permits and (4) revok

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interim status approval already granted to facilities that dispose of hazardous waste. Petitioner also seeks an order from this Court requiring EQB to adopt the necessary regulations which would allow DER to either grant or deny permits pursuant to the Act for the storage, treatment and disposal of hazardous wastes. Furthermore, petitioner seeks a preliminary injunction which would temporarily grant the relief requested pending a final determination on the Petition for Review.

Respondents have filed numerous preliminary objections to the Petition for Review, alleging (1) lack of subject matter jurisdiction, (2) failure to state a claim in mandamus, (3) that petitioner has no standing, (4) a demurrer and (5) that the EQB is not a proper party. Respondents also oppose the request for preliminary injunctive relief. On December 16, 1983, this Court first heard legal arguments on respondent's preliminary objections. Immediately thereafter, a hearing was held on petitioner's request for a preliminary injunction. Both parties presented testimony and arguments on respondent's preliminary objections and the request for a preliminary injunction.

In order to adequately discuss these issues, a brief narrative of the applicable legislation and regulations is necessary. Prior to the enactment of the present Act, no special permits were required for the handling of hazardous wastes. The only permit then required was a solid waste permit

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issued by DER to all landfill operators generally. Act of July 31, 1968, P.L. 788, as amended, 35 (P.S. § 6007). In 1976, the Congress, having recognized the growing problem of the handling of hazardous wastes, passed the Resource Conservation and Recovery Act, Act of October 21, 1976, Pub. L. 94-580, 42 U.S.C. § 6901, which, inter alia, directed the Environmental Protection Agency (EPA) to promulgate regulations pertaining to the handling of hazardous wastes. The Congress also contemplated that the states would assume primary responsibility for issuing permits and enforcing the regulatory requirements which also would be promulgated by the states, as long as the state issued standards which were no less stringent than those adopted by EPA. 42 U.S.C. § 6979. Although EPA regulations were to be promulgated by April 21, 1978, EPA did not adopt regulations for design standards applicable to the treatment, storage and disposal of hazardous wastes until July 26, 1982. 47 Fed.Reg. 32,274.

When the legislature passed the present Act, it recognized that the permitting process required thereunder could not be put in place to act on applications overnight. Section 404 of the Act provided:

> (a) Any person or municipality who:
> (1) owns or operates a hazardous waste storage or treatment facility required to have a permit under this act, which facility is in existence on the effective date of this Act;

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(2) has complied with the requirements of Section 501(c) [which requires that DER be notified of the description of and location of any activities involving hazardous waste as defined by the Environmental Quality Board];

(3) has made an application for a permit under this act; and

(4) operates and continues to operate in such a manner as will not cause, or create a risk of, a health hazard, a public nuisance, or an adverse effect upon the environment;

shall be treated as having been issued such permit until such time as a final departmental action on such application is made. In no instance shall such person or municipality continue to store or treat hazardous wastes without obtaining a permit from the department within two years after the date of enactment hereof.

35 P.S. §6018.404 (Supp. 1983-84).

Section 402 of the Act requires EQB to promulgate regulations which would (1) list hazardous wastes, (2) set standards on which a decision whether to issue the required permits could be based and (3) delineate the procedures to be utilized therefore. While EQB passed regulations in Novembr, 1980, relating to operational requirements of facilities operating under interim status, it was not until September 4, 1982, the day before the required date for issuing permits as called for in Section 404, that the regulations for design standards and procedures applicable to the permitting process were published in the Pennsylvania Bulletin. As respondents argue, it would have made little sense to adopt regulations less stringent than those adopted by EPA, thereby surrendering the

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authority to issue permits to the Federal Government. Although the Act, in Section 404, called for the termination of interim status for facilities that store and treat hazardous waste after September 5, 1982, a combination of factors has made it impossible to meet that deadline. As of the date of the hearing in this case, no final permits for the treatment, storage and disposal of hazardous wastes have been issued, although DER claims that final decisions on the 500 some applications should be made by the end of 1985. Furthermore, forty-five facilities are presently disposing of hazardous waste under the interim status provisions of 25 Pa. Code § 75.265, which provides:

> (2) any person or municipality who owns or operates an existing hazardous waste storage or treatment facility shall be regarded as having interim status provided that:
>
> (i) the notification requirements of § 75.267 (relating to notification of hazardous waste activities) have been complied with;
>
> (ii) Part A of the permit application has been submitted; and
>
> (iii) this section has been complied with.
>
> (3) A person or municipality who owns or operates an existing hazardous waste disposal facility shall be regarded as having interim status provided that:
>
> (i) the facility has a current solid waste permit issued by the Department; and
>
> (ii) the requirements of paragraph (2) are complied with.

Petitioner is the sole proprietor of Municipal and Industrial Disposal Co. (M & I), a facility in Elizabeth Township of Allegheny County, which was disposing of hazardous

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waste pursuant to the aforementioned interim status provisions. When the DER determined that M & I was disposing of hazardous wastes in a manner detrimental to the environment, DER and M & I signed a Consent Decree wherein M & I agreed to take specific steps to correct the problem. When M & I failed to do so, DER revoked the solid waste permit necessary to have interim status and cited petitioner for contempt. Following a hearing, this Court held that petitioner no longer enjoyed interim status allowing M & I to dispose of hazardous wastes. Department of Environmental Resources v. Fiore, (No. 2083 C.D. 1983, filed October 28, 1983). As a result thereof, M & I is presently not permitted to dispose of hazardous wastes.

Petitioner seeks an order of this Court compelling DER to both stop issuing approvals under interim status for facilities which treat, store and dispose of hazardous waste and revoke interim status approval for all facilities presently handling hazardous wastes. Respondents argue that petitioner has no standing to press any of these claims. This court agrees.

In William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 192, 346 A.2d 269, 280-81 (1975), (plurality opinion)(footnotes omitted), the Court stated:

> The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is

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> not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law.

Accord Lisa H. v. State Board of Education, 67 Pa. Commonwealth Ct. 350, 447 A.2d 669 (1982). Accordingly, petitioner must assert an individual interest apart from the common interest of all citizens of the Commonwealth in having a clean environment. Petitioner attempts to assert such an individualized interest by claiming that DER's actions (or inactions) have given a business advantage to petitioner's competitors in the area, all of whom are operating under interim status. Keeping petitioner's asserted individual interest in mind, it becomes clear that petitioner has no standing to press these claims.

Petitioner argues that he has standing by virtue of a decision of the Environmental Hearing Board in Mill Service, Inc. v. Department of Environmental Resources, (No. 80-078-H, filed July 23, 1980). There, the Board held that a competitor of a facility which had been granted a permit to dispose of hazardous wastes had standing to challenge the issuance of that permit. Even so, petitioner does not have standing because (1) he is not in the business of treating or storing hazardous wastes and therefore does not compete with those facilities and (2) this Court's decision at No. 2083 C.D. 1983, has shut down petitioner's hazardous waste disposal facility so that petitioner is not a competitor of any disposal facilities. As

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such, petitioner has no individualized interest apart from the common interests of society in general and therefore has no standing.

Petitioner finally seeks an order of this Court compelling DER to promptly act on all pending applications for permits to store, treat and dispose of hazardous wastes. The relief sought by petitioner is in mandamus, an extraordinary writ which will compel the performance of a ministerial act or mandatory duty where the plaintiff's right to relief is clear with a concomitant duty in a defendant where the plaintiff has no adequate remedy at law. Shaler Area School District v. Salakas, 494 Pa. 630, 432 A.2d 165 (1981). Respondents argue that petitioner again has no standing to press this claim and we agree in part. Respondent, who was engaged in the business of disposing of hazardous wastes, has never applied for a permit to treat and store hazardous wastes. He therefore lacks the requisite individualized interest to pursue any claim concerning the permitting process for treatment and storage of hazardous wastes. William Penn Parking Garage.

Petitioner has, however, submitted an application to DER for a permit to dispose of hazardous wastes. The essence of petitioner's argument is that interim status approval for disposers is illegal after September 5, 1982, thereby requiring DER to promptly act on those applications. In regard to this

AR190105

claim, respondents argue that petitioner has failed to state a cause of action since allowing facilities to dispose of hazardous wastes under interim status does not violate any provision of the Act. Respondents argue, therefore, that petitioner is unable to establish either his clear right to relief or the duty on respondents' part. This Court agrees.

As previously mentioned, Section 404(a) of the Act, which set up a transition scheme, applies to facilities applying for permits to store and treat hazardous wastes.[1] Petitioner argues that since the disposal of hazardous wastes poses a greater potential threat to the environment than either storing and treating those wastes, the standards for the former must be at least as stringent as those applicable to the latter.

Section 1001 of the Act provides, "The [prior Solid Waste Management Act] is repealed: Provided, however, that all permits and orders issued, municipal solid waste management plans approved, and regulations promulgated under such act shall remain in full force and effect unless and until modified, amended, suspended or revoked." 35 P.S. §6018.1001 (Supp. 1983-84). Under the prior Act, a solid waste permit was required for those facilities disposing of solid wastes, some of which are now classified as hazardous. Because of the existence of these permits and the grandfather clause of Section 1001, it was unnecessary, in the view of the legislature, to set up a

AR190106

transition scheme for disposers of hazardous wastes. Since the legislature has set no date for issuance of permits to dispose of hazardous wastes under the present Act, this Court is loath to intrude into the legislative domain by setting such a date and, therefore, will not do so.

Appellant's premise, i.e., that disposers operating under interim status are violating the provisions of the present Act, on which he bases his request for a Writ of Mandamus, is incorrect. Having failed to establish either his right to, or the respondent's corresponding duty, to prompt action on the permits for disposal facilities, this Court must agree with respondent's preliminary objection that petitioner has failed to state a cause of action in mandamus.

Based on all of the foregoing, petitioner's petition for review must be dismissed. That being the case, the motion for a preliminary injunction must also be denied, as petitioner has failed to establish his clear right to relief for the permanent injunction. New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 392 A.2d 1383 (1978).

Francis A. Barry

FRANCIS A. BARRY, Judge

AR190107

FOOTNOTE

[1]Because of the posture of this case, it is unnecessary to decide whether those facilities presently storing and treating hazardous waste under interim status were operating in violation of the Act.

AR190108

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Petitioner	:	
v.	:	No. 3162 C.D. 1983
WILLIAM FIORE, d/b/a MUNICIPAL and INDUSTRIAL DISPOSAL COMPANY, INC., Respondents	:	

O R D E R

AND NOW, January 30, 1984, the preliminary objections filed by respondents are sustained, the petition for review is dismissed and the motion for a preliminary injunction is denied.

Francis A. Barry

FRANCIS A. BARRY, Judge

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US EPA ARCHIVE DOCUMENT

EQUIVALENCY CRITERIA FOR SURETY BONDS

PENNSYLVANIA RESPONSE

EPA will consider the following factors in determining whether a state-required surety bond is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required surety bond to be considered "equivalent" or "substantially equivalent."

1. Is the surety company required to be listed in Circular 570 or licensed to do business as a surety in the state? Yes - 75.313(b).

2. Does the underwriting limitation in Circular 570 apply? Yes, the company must be listed in Circular 570.

3. Must the surety company be licensed in the state where the surety bond is signed? Yes, must be licensed in PA 75.313(b).

4. Are the terms of a required standby trust fund (if any) at least equivalent to a standby trust fund under the federal RCRA regulations? (see, e.g., 40 CFR 264.143(b)(3) and the equivalency criteria for standby trust funds, below.) Standby trust fund is not used in PA.

5. Must the penal sum of the bond, together with any amount being assured by other mechanisms be at least equal to the current closure and/or post-closure cost estimates? Yes - 75.318.

6. Must any surety bond that is used at an interim status facility be a financial guarantee bond? (performance bonds may not be used under 40 CFR 265 regulations.) Yes. Hazardous waste bonds are penal bonds - Act 97 Section 505(d).

7. For new facilities to be permitted, must the surety bond be submitted to the Regional Administrator or State Director before hazardous waste is first received for treatment, storage or disposal? Yes - 75.311(c).

8. For new permitted facilities, must the surety bond be effective before hazardous waste is first received for treatment, storage or disposal? Yes-75.311(c).

9. When cost estimates increase, must the penal sum of the bond be increased (and evidence of the increase submitted to the Regional Administrator or State Director) or alternate financial assurance obtained within a defined period of time? (federal regulations allow 60 days) Yes-75.321 and 75.322.

10. Can the penal sum be reduced only if cost estimates decrease and following written approval of the Regional Administrator or State Director? Yes-75.321(b) and 75.325.

11. Must the owner or operator obtain alternative financial assurance within a defined time period after bankruptcy of the surety or removal of the surety's name from Circular 570? Yes-75.329(b) and (c).

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12. Must the surety give both the owner or operator and the Regional Administrator or State Director ample notice before cancellation of the surety bond will be allowed? (federal regulations require at least 120 days) Yes-75.313(c).

13. Will the owner or operator have sufficient time after receipt of notice of cancellation to provide alternative financial assurance and obtain written approval of the new assurance from the Regional Administrator or State Director? (federal regulations require at least 90 days) Yes-75.313(c).

14. Is the surety required to pay the penal sum of a financial guarantee bond in at least these circumstances: Financial guarantee is not permitted in PA.

a. The owner or operator has failed to provide funds in the amount of the cost estimate for closure and/or post-closure care before the beginning of final closure of the facility; N/A-no standby trust fund in PA.

b. The Regional Administrator, State Director, or a court has ordered closure to begin and the owner or operator has not provided funds within 15 days; or N/A-no standby trust fund in PA.

c. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within a defined time period? (federal regulations allow 90 days) Yes-75.313(c)(60 days)

15. Must the surety perform closure and/or post-closure care or pay the penal sum of a performance bond in at least the following circumstances:

a. The owner or operator fails to fulfill its closure and/or post-closure obligations, even though closure may occur sooner than expected or the requirements in the plans, regulations, and/or permit have changed; or Yes-75.328(a)(1)-(4).

b. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days? Yes-75.313(c)(60 days)

16. May a surety bond only be terminated with the written consent of the Regional Administrator or State Director? Yes, but authority may be delegated in writing.

17. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before payment will be authorized? Yes. Documentation must be received under §75.325 before payment will be authorized.

18. Where the cost of closure appears to be significantly greater than the amount of available funds, is the Regional Administrator or State Director empowered to withhold reimbursement until satisfactory certification of completion of closure is received? Yes. No reimbursement will be made unless funds are sufficient to cover full cost of closure and post-closure. §75.328(a)(3), §75.326(g) and §75.325(d).

EQUIVALENCY CRITERIA FOR LETTERS OF CREDIT
PENNSYLVANIA RESPONSE

EPA will consider the following factors in determining whether a state-required letter of credit is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required letter of credit to be considered "equivalent" or "substantially equivalent."

1. Is the issuer required to be authorized to issue letters of credit, and must its letter of credit operations be regulated by a state or federal agency? Yes-75.314(d)(1).

2. Are the terms of a required standby trust fund (if any) at least equivalent to the required standby trust fund under the federal RCRA regulations? (see, e.g., 40 CFR 264.143(d)(3) and the equivalency criteria for standby trust funds, below.) Standby trust fund not used in PA.

3. Must the letter of credit be irrevocable for at least a year and provide for automatic extensions? Yes-75.314(d)(2).

4. Does the letter of credit have to be accompanied by a letter or schedule detailing the coverage for each facility? Yes, a breakdown is required if more than one facility.

5. Must the owner or operator submit evidence within a reasonable period that any cost increases are covered by alternate mechanisms or increases in the face amount of the letter of credit? (federal regulations allow up to 60 days.) Yes-75.322.

6. Must owners or operators obtain alternate financial assurance within a specified time if the issuing institution ceases operations, files for bankruptcy, or otherwise ceases to qualify? (federal regulations allow up to 60 days.) Yes-75.329(b) and (c).

7. Must alternate assurance be obtained within a specified time if the issuer gives notice of nonrenewal of the letter? (federal regulations allow up to 90 days.) Yes-75.314(d)(2)(ii).

8. Must the face amount of the letter of credit, together with any amount being assured by other mechanisms be at least equal to the current closure and post-closure cost estimates? Yes-75.318.

9. Must the letter of credit be submitted to the Regional Administrator or State Director by a specified time before hazardous waste is first received for new permitted facilities? (federal regulations require at least 60 days.) Yes. Bond must be submitted and approved prior to waste acceptance-75.311(c).

10. For new facilities to be permitted, must the letter of credit be effective before hazardous waste is first received for treatment, storage or disposal? Yes-75.311(c).

11. Can the amount be reduced only if cost estimates decrease and following written approval of the Regional Administrator or State Director? Yes-75.321(b) and 75.325.

12. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before reimbursement will be authorized? Yes. Documentation must be received under §75.325 before payment will be authorized.

13. Where the cost of closure appears to be significantly greater than the amount of funds available under the letter of credit, is the Regional Administrator or State Director empowered to withhold reimbursement until satisfactory certification of completion of closure is received? Yes. No reimbursement will be made unless funds are sufficient to cover full cost of closure and post-closure. §75.328(a)(3), §75.326(g) and §75.325(d).

14. Is termination of the letter of credit only allowed if (1) alternate assurance is provided, or (2) the owner or operator has been released from closure or post-closure financial requirements? Yes-75.316(b) or 75.325.

EQUIVALENCY CRITERIA FOR CASH DEPOSITS AND CERTIFICATES OF DEPOSIT

PENNSYLVANIA RESPONSE

EPA will consider the following factors in determining whether a state-equired cash deposit or certificate of deposit is "equivalent" or substantially equivalent" to the financial mechanisms prescribed in the ederal regulations. As a general rule, most, if not all of the following uestions must be answered "yes" for the state-required cash deposit or ertificate of deposit to be considered "equivalent" or "substantially quivalent."

1. Must the bank or financial institution holding the cash deposit or ertificate of deposit be regulated and examined by a federal or state agency? Yes-75.314(c)(6).

2. Must the Regional Administrator or State Director be the beneficiary id be empowered to draw upon or direct payment from the funds if the owner or perator fails to perform closure or post-closure care? Yes-75.328(a)(2)-(4) and (b)(3)-(5).

3. For new facilities to be permitted, must the cash deposit or ertificate of deposit be established before hazardous waste is first received or treatment, storage or disposal? Yes-75.311(c).

4. Must payments be made pursuant to a pay-in period and formula at least quivalent to federal RCRA trust fund requirements? Yes. §75.315

5. Must advance notice be provided to the Regional Administrator or State irector in a defined time period prior to termination by the owner or perator? Yes-75.316.

6. Must at least one of the following conditions be met for the cash eposit or certificate of deposit to be terminated: (1) the owner or operator as performed closure/post-closure to the State Director's or Regional dministrator's satisfaction, or (2) alternate assurance has been established a) in accordance with state regulations or (b) that would be acceptable under 0 CFR 264/265.149? Yes-75.315(b) or 75.325.

7. Can funds be released only upon written instruction of the Regional dministrator or State Director? Yes-75.325.

8. Must itemized bills for closure and/or post-closure care be submitted o the Regional Administrator or State Director before payment will be uthorized? Yes. Documentation is required for release of any amount under §75.325.

9. Where the cost of closure appears significantly greater than the mount of available funds, is the Regional Administrator or State Director mpowered to withhold reimbursement until satisfactory certification of losure is received? Yes. No reimbursement will be made unless funds are sufficient to cover full cost of closure and post-closure. §75.328(a)(3), §75.326(g) and §75.325(d).

Commonwealth of Pennsylvania
Environmental Resources
February 1, 1984

Subject: Right to Know Request - List of Water Companies

To: John McSparran, Director
Bureau of Resources Programming

From: Cathy Curran Myers
Assistant Counsel
Bureau of Regulatory Counsel

Through: Maxine Woelfling, Director
Bureau of Regulatory Counsel

You have requested an opinion as to whether you must honor a request from a private citizen for the Department's list of names and addresses of water suppliers. You are advised that under the Pennsylvania "Right to Know Act", Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §66.1 et seq., such lists of names and addresses are public records and must be disclosed.

The information requested is a list of names and addresses of water companies regulated by DER. While DER does not have an actual hard copy list of water suppliers, the information does come into the Department on the annual reports submitted by the water suppliers. In the past, persons requesting a list were invited to copy the addresses off the annual reports in the Department files. At present, the information requested is also stored in our computer and could be printed out as a list if programmed to do so.

Case law has repeatedly interpreted lists of names and addresses as public records requiring disclosure under the Right to Know Law (Merganthaler v. Pennsylvania State Employees Retirement Board, 33 Pa. C. 237, 372 A.2d 944 (1977), list of retired state employees; Young v. Armstrong School District, 21 Pa. C. 203, 344 A.2d 738 (1975), list of kindergarten pupils; Friedman v. Fumo, 9 Pa. C. 609, 309 A.2d 75 (1973), list of candidates for examination as certified public accountants; Hoffman v. Commonwealth, Pennsylvania Game Commission, 71 Pa. C. 99 (1983), subscription list to Pennsylvania Game News.) The lists requested of you cannot be distinguished from those which the courts have declared to be public records.

The courts have left the question of how the information will be provided to the requestor largely in the hands of the agency. Although Section 3 of the Law gives the citizen a clear right to make copies, including photographic copies of records in the custody of the agency, it is left to the agency's discretion whether the applicant must make the copies or whether the agency will provide the copies at the applicant's cost. In a recent case in which a citizen requested mailing labels for the Game Commission's magazine subscription list, the court left the method of providing the information to the Commission's discretion. The court rejected

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the applicant's right to receive mailing labels, but ordered the Commission to afford the applicant with an appropriate, fair and efficient opportunity to take extracts or make copies of the list. Hoffman v. Pa. Game Commission, supra.

If the information is readily accessible by computer in a list form, it is arguably "unfair" or "inefficient" to require the applicant to search addresses from the entire file by hand. However, you are not required to use employee time and effort to make a list more accessible. See, Lewis v. Thornburgh, 462 Pa. C. 310 (1983). Therefore, I suggest you, in consultation with the Bureau of Information Systems, fashion a policy that affords a realistic opportunity for persons to obtain this information, without unduly interfering with the regular work of the Bureau. Any employee time or materials which you decide to use to satisfy such a request are chargeable to the requestor. If you have any further questions regarding this matter, I will be glad to advise you.

cc: Tom Denslinger

AR190116

DEPARTMENT OF ENVIRONMENTAL RESOURCES
BUREAU OF SOLID WASTE MANAGEMENT
DIVISION OF HAZARDOUS WASTE MANAGEMENT

APPLICATION NO. (Department Use Only)

CONTRACTUAL CONSENT OF LANDOWNER

(I)(We), the undersigned, hereinafter sometimes referred to as "landowner", being the owner(s) of _____ acres of land located in _____ (TOWNSHIP, BOROUGH, OR CITY), _____ County, Pennsylvania, as described in the deed(s) recorded in the Recorder of Deeds Office at Deed Book(s) and page(s) _____ and shown by crosshatched lines on the map attached hereto which is signed in the original by the landowner upon which _____ (HAZARDOUS WASTE MANAGEMENT FACILITY OPERATOR) proposes to engage in hazardous waste storage, treatment or disposal activities for which application for permit will be made to the Department of Environmental Resources under the Pennsylvania Solid Waste Management Act, Act of July 7, 1980 (P.L.380,35 P.S.§6018.10 *et seq.*, and of which application this consent will be made a part, DO HEREBY ACKNOWLEDGE THAT THE HAZARDOUS WASTE MANAGEMENT FACILITY OPERATOR AND HIS PERSONNEL HAVE THE RIGHT TO ENTER UPON AND USE THE LAND FOR THE PURPOSES OF CONDUCTING HAZARDOUS WASTE MANAGEMENT ACTIVITIES. Furthermore, (I)(We), the undersigned, do hereby irrevocably grant to the hazardous waste management facility operator and to the Commonwealth of Pennsylvania or any of its authorized agents, or employees, the right to enter upon the aforesaid land before the beginning of the hazardous waste management activities, during the hazardous waste management activities and for a period of 20 years after final closure of the facility, for the purposes of inspection and for the purpose of conducting such pollution abatement or pollution prevention activities required under the Act, the regulations promulgated thereunder and the terms of the permit as the Department deems necessary. (I)(We) do hereby grant in addition to the Commonwealth, for the aforesaid period of time, a right of entry across any adjoining or contiguous lands owned by (us)(me) in order to have access to the land described herein. It is specifically agreed and understood that this contractual consent gives the Commonwealth the right to enter, inspect the premises, and abate or prevent pollution as a matter within the police power but does not obligate the Commonwealth to do so, does not constitute any ownership interest by the Commonwealth in the aforesaid land, and does not affect or limit any rights available to the Commonwealth under applicable law.

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THE LANDOWNER _____ TO ALLOW THE ABOVE-NAMED HAZARDOUS WASTE
(AGREES OR DOES NOT AGREE)
MANAGEMENT FACILITY OPERATOR TO TRANSFER OR ASSIGN, BY WRITTEN AGREEMENT, THIS CONTRACTUAL CONSENT TO ANOTHER HAZARDOUS WASTE MANAGEMENT FACILITY OPERATOR.

This Consent shall terminate and become null and void if the hazardous waste management facility operator does not apply to the Department of Environmental Resources for a permit to conduct hazardous waste management activities on the aforesaid land within _____ year(s) from the date of this Consent. Nothing in this Consent shall preclude or limit the landowner's authority to terminate the right or privilege of the hazardous waste management facility operator to conduct hazardous waste management activities on the aforesaid land.

This Contractual Consent shall be deemed to be a recordable document. Prior to the initiation of hazardous waste management facility operations under the permit, this Consent shall be recorded by _____ and entered into the deed book (d.b.v.) index at
(LANDOWNER OR HAZARDOUS WASTE MANAGEMENT FACILITY OPERATOR)
the office of the recorder of deeds in the county(ies) in which the hazardous waste management facility is to be located.

In witness whereof and intending to legally bind (myself) (ourselves), (my) (our) heirs, successors and assigns, (I) (we) have hereunto set (my) (our) hand(s) and seal this _____ day of _____, 19____.

(SEAL)

_____
LANDOWNER (Print Name)

By: _____
Signature

_____
(Print Name)

By: _____
Signature

_____
(Print Name)

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ACKNOWLEDGEMENT OF INDIVIDUALS OR PARTNERS

STATE OF :

: SS

COUNTY OF :

On _____ (DATE), before me, the undersigned Notary, personally appeared _____ (NAME(S)) known to me (or satisfactorily proven) to be the person whose name is subscribed to this instrument, and who acknowledged that _____ (HE,SHE OR THEY) executed the same and desires it to be recorded.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

(SEAL) _____ My Commission Expires: _____

NOTARY PUBLIC (DATE)

ACKNOWLEDGEMENT OF CORPORATIONS

STATE OF :

: SS

COUNTY OF :

On _____ (DATE), before me, the undersigned Notary, personally appeared _____ (NAME(S)), who acknowledged (herself) (himself) to be the _____ (TITLE OF PERSON) of _____ (NAME OF CORPORATION), a corporation, and that s(he), as such officer, being authorized to do so, executed the foregoing instrument on behalf of the said corporation and desires that this instrument be recorded.

IN WITNESS WHEREOF,I have hereunder set my hand and official seal.

(SEAL) _____ My Commission Expires: _____

NOTARY PUBLIC (DATE)

This instrument has been recorded in _____ County, Pennsylvania, this 19th day of _____, _____, at Book _____, Page(s) _____.

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_____ _____

(SIGNED + PRINT NAME) (SEALED)