

US EPA ARCHIVE DOCUMENT

2. REVISED ATTORNEY GENERAL'S STATEMENT OF FINAL AUTHORIZATION



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STATEMENT OF LEGAL AUTHORITY

I hereby certify, pursuant to my authority as Attorney General of the State of Arkansas and in accordance with Section 3006(b) of the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984 (42 U.S.C. 6901 et seq.), and 40 CFR 271, that in my opinion, the laws of the State of Arkansas provide adequate authority to carry out the revised program set forth in the revised "Program Description" submitted by the Arkansas Department of Pollution Control and Ecology (ADPC&E). The specific authorities provided are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which are in effect now, as specified below.

I. IDENTIFICATION AND LISTING

A. State statutes and regulations contain lists of hazardous waste which encompass all wastes controlled under the following federal regulations as indicated in the designated Revision Checklists:

1. Listing of spent pickle liquor from steel finishing operations, 40 CFR 261.32, as

amended, May 28, 1986, and September 22, 1986,
Revision Checklist 26.

2. Listing of commercial chemical products and Appendix VIII constituents 40 CFR 261.33 and Appendix VIII, as amended, August 6, 1986, Revision Checklist 29.

STATE AUTHORITY: Section 3(a)(2) of the Arkansas Hazardous Waste Management Code, as amended, September 25, 1987.

The Arkansas Hazardous Waste Management Code (AHWMC) incorporates 40 CFR Part 261 by reference. The AHWMC was amended on September 26, 1986, to adopt all final rules promulgated by EPA through July 17, 1986. The AHWMC was amended on September 25, 1987, to adopt all final rules promulgated by EPA through July 31, 1987.

B. State statutes and regulations define solid wastes to include the hazardous components of radioactive mixed wastes, 51 F.R. 24504, July 3, 1986.

C. State statutes and regulations incorporate the most recent edition and updates to "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846) as indicated in Revision Checklists 11 and 35.

STATE AUTHORITY: Section 3(a) of the AHWMC, as amended, September 25, 1987.

II. MANAGEMENT STANDARDS

State statutes and regulations define hazardous waste and impose management standards so as to control all the hazardous waste controlled under 40 CFR Parts 261, 264, 265 and 266, as amended, January 4, 1985, April 15, 1985, August 20, 1985, and June 5, 1987, as indicated in Revision Checklists 13 and 37

STATE AUTHORITY: Section 3(a) of the AHWMC, as amended, September 25, 1987.

III. STANDARDS FOR FACILITIES

A. State statutes and regulations require that closure and post-closure requirements and special requirements for containers apply to interim status landfills as indicated in Revision Checklist 15

STATE AUTHORITY: Section 3(a)(6), AHWMC, as amended, September 26, 1986.

B. State statutes and regulations require compliance with closure/post-closure and financial responsibility requirements applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities as indicated in Revision Checklists 24 and 36.

STATE AUTHORITY: Section 3(a)(1), (5), (6) and (9), AHWMC, as amended, September 27, 1987.

C. State statutes and regulations allow companies that treat, store, or dispose of hazardous waste to demonstrate alternate coverage for liability insurance in the form of a corporate guarantee as indicated in Revision Checklist 27.

STATE AUTHORITY: Section 3(a)(5) and (6), AHWMC, as amended, September 27, 1987.

D. State statutes and regulations require companies that generates, treat, or store hazardous waste in containers to comply with tank standards equivalent to those indicated in Revision Checklist 28.

STATE AUTHORITY: Section 3(a)(1), (2), (3), (5), (6), and (9) of the AHWMC, as amended, September 25, 1987.

IV. AVAILABILITY OF INFORMATION

State statutes and regulations provide that:

A. All records shall be available to the public unless they are exempt from the disclosure requirements of Ark. Code Ann. §§25-19-101 to 25-19-107, which provides fewer exemptions than the federal FOIA, 5 U.S.C. 552. The state FOIA does not exempt matters established by Executive order to be kept secret in the interest of national defense or foreign policy as provided at 5 U.S.C. 552(b)(1)(A) and (B). Nor does the state FOIA exempt all inter-agency or intra-agency memoranda or letters as provided at 5 U.S.C. 552(b)(5). Ark. Code Ann. §25-19-105(7) does exempt

unpublished memoranda, working papers and correspondence of the Governor, legislators, Supreme Court Justices, and the Attorney General. Ark. Code Ann. §25-19-105(7) relates to governmental privilege, as does 5 U.S.C. 552(b)(5). However, the Arkansas exemption is narrower and more restrictive in scope than the broad federal exemption. Thus, the state FOIA, Ark. Code Ann. §§25-19-101 to 25-19-107, provides fewer exemptions than the federal FOIA, 5 U.S.C. 552, as described above.

B. All nonexempt records will be available to the public upon request regardless of whether any justification or need for such records has been shown by the requestor.

C. The same types of records would be available to the public from the state as would be available from EPA.

D. Information is provided to the public in substantially the same manner as EPA as indicated in 40 CFR Part 2 and Revision Checklist for Availability of information.

E. The state statutes and regulations do not protect Confidential Business Information (CBI) more broadly than it is in 40 CFR Part 2 as indicated in Revision Checklist for Availability of Information.

STATE AUTHORITY: The Arkansas Freedom of Information Act, Act 93 of 1967, as amended;
Ark. Code Ann. §§25-19-101 to 25-19-107;

Ark. Code Ann. §§16-111-111; 4-75-601(4);
8-4-222 to 8-4-229; 8-7-225; and Section 6
of the Arkansas Hazardous Waste Management
Code, as amended, September 27, 1987.

The state authorities which provide for public availability of information regarding facilities and sites for the treatment, storage, and disposal of hazardous waste in substantially the same manner and to the same degree as EPA are scattered over several titles of the Arkansas statutes and regulations. The Arkansas Freedom of Information Act codified at Ark. Code Ann. §§25-19-101 to 25-19-107 (Repl. 1979 and Supp. 1987) contains the basic provisions. Ark. Code Ann. §25-19-103 describes a scope of records subject to request at least as broad as that defined by 40 CFR, Part 2. 100(b).

Under the Arkansas FOIA "All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records." Ark. Code Ann. §25-19-103 (Supp. 1987). The burden is on the agency to demonstrate that any record meets one of the exceptions specified in the Act. Except for records the law allows or requires to be closed, "all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records." Ark. Code Ann. §25-19-105 (Repl. 1979). No written request is required in order to have access to public records. The records are open upon request

at any time during business hours. Only if the record is in use or in storage can the agency not allow access upon request, unless the record is subject to protection. Ark. Code Ann. §25-19-105. 40 CFR 2.104(b) is thus satisfied.

As specified in Section 6 of the Code, the Director makes the decisions for the agency on information required. There is no administrative appeal or review of a denial of a request by ADPC&E. Any denial of access to records gives the requestor a right to seek immediate judicial review pursuant to Ark. Code Ann. §25-19-107 (Repl. 1979). Alternatively, any denial could be appealed pursuant to Ark. Code Ann. §§8-4-222 to 8-4-229 (Repl. 1976). Under the Arkansas FOIA a request must be honored by allowing access to the documents within three (3) days. In addition, Section 6(1) of the Arkansas Hazardous Waste Management Code as amended September 27, 1987, provides that a Notice of Denial shall be mailed to each requestor within twenty (20) days of the request. Section 6(m) of the Code provides that if the material requested is not produced and there is a failure to send the Notice of Denial within the twenty (20) days, that such failure constitutes final agency action entitling the requestor to a judicial appeal under Ark. Code Ann. §§8-4-222 to 8-4-229. Section 6(b) of the Code provides the requirement that Notice of Denial and judicial appeal procedures be sent to a requestor. Therefore, 40 CFR 2.112, 2.113(f), 2.114(a), 2.116, 2.117, and 5 U.S.C. 552(a)(6)(C) are each satisfied.

Federal requirements 1.6, 1.7, and 1.8 as designated on the Checklist for Availability of Information are not applicable because there are no provisions for an administrative appeal of a Director's decision denying a request and, as specified in Section 6(k)-(m) of the Code, a requestor may seek judicial review directly from the Director's decision.

Section 3 of Act 49 of 1987 of the General Assembly of the State of Arkansas modified the Arkansas Freedom of Information Act to add to Ark. Code Ann. §25-19-107 explicit authority for a court in actions to enforce rights under the Act, to "assess against the defendant reasonable attorney fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed." The amendatory provision does prohibit assessment of such expenses against the State or its agencies. However, this exemption would not prevent the assessment of such attorney fees and expenses against individual record custodians if they acted maliciously in denying a person's rights under the Act. Additionally, Ark. Code Ann. § 25-19-104 specifically provides criminal penalties, including fines and jail terms, for any person who negligently violates any of the provisions of the Act.

The consideration of fee waivers as specified in 40 CFR 2.120(d) and the commitment to use reasonable efforts to assist requestors as per 40 CFR 2.104 (b) are both addressed in the MOA. Ark. Code Ann. §25-19-105 specifically commands

state agencies to grant "reasonable access," and it is clearly within an agency's authority to agree to assist requestors and to waive fees when in the public interest.

The definition of "public records" in Ark. Code Ann. §25-19-103 and the listing of exemptions in Ark. Code Ann. §25-19-105 complies with 5 U.S.C. 552. That is, all records are available at least to the same extent as provided by 5 U.S.C. 552. This statement specifically takes into account the types of records subject to release by EPA.

The Arkansas FOIA in Ark. Code Ann. §25-19-105 exempts "files which, if disclosed, would give advantage to competitors or bidders; and other similar records which by law are required to be closed to the public." Ark. Code Ann. §8-7-225 (Supp. 1987), which is part of the Arkansas Hazardous Waste Management Act, requires that information submitted to ADPC&E under the Act constituting "trade secrets" to be protected if the proper showing is made to the Director. Ark. Code Ann. §4-75-601(4) (Supp. 1987), part of the Arkansas Trade Secrets Act, defines "trade secrets." Section 6 of the Arkansas Hazardous Waste Management Code sets forth the procedures for making the showing and obtaining the determination by the Director required by Ark. Code Ann. §8-7-225(d) to protect trade secrets. These cited provisions do not define "trade secrets" more broadly than "confidential business information" is defined in 40 CFR, Part 2. Section 6(d) of the Code specifies that no information shall be protected

unless claimed confidential as provided in the Code, thereby satisfying 40 CFR 270.12 and Federal Requirement 3.2 of the Checklist for Availability of Information.

The MOA contains provisions whereby the State agrees to notify the requestor within twenty (20) days of the request of a claim of confidentiality of business information and that the request is denied in order to resolve the business confidentiality claim. The MOA also provides for ADPC&E to compile a list of denials of requests and for the State to keep EFA informed of proposed modifications of its basic statutory or regulatory authority, forms, procedures, or priorities as required by 40 CFR 271.21(a).

V. MEMORANDUM OF AGREEMENT (MOA)

State statutes and regulations provide authority for the State to enter into the MOA as set forth in the Program Description, including the authority to carry out the agreement. No applicable state statute requires the procedures agreed to in the MOA to be promulgated as a rule in order to be binding.

STATE AUTHORITY: Ark. Code Ann. §25-19-102;
Ark. Code Ann. §8-7-209.

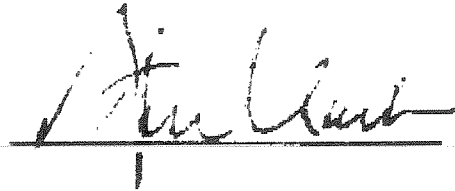
The provisions of the MOA relating to components of the Availability of Information Checklist were discussed above. The declaration of public policy as established in Ark. Code Ann. §25-19-102 ". . .that public business be performed in

an open and public manner. . ." in addition to the fact that there is no state statute or regulation prohibiting such agreements and their implementation establishes that the components of the Availability of Information checklist are substantially met through the Ark. Statutes, AHWMC, and the MOA. Ark. Code Ann. §8-7-209 specifically authorized the agency to adopt regulations but also to establish "policies and standards" for effective hazardous waste management.

Yours truly,

STEVE CLARK
ATTORNEY GENERAL

STATE OF ARKANSAS



DATE: 2/24/89