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9/24/87

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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.

II. 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 Checklist 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 generate, 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 AHCW, as amended, September 25, 1987.

III. AVAILABILITY OF INFORMATION

State statutes and regulations provide that:

(1) All records shall be available to the public unless they are exempt from the disclosure requirements of Ark. Stat. Ann. §§ 12-2801 to 12-2807, which provides fewer exemptions than the federal FOIA, 5 U.S.C. 552;

(2) 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;

(3) The same types of records would be available to the public from EPA; *the state records will be available from EPA.*

(4) Information is provided the public in substantially the same manner as EPA as indicated in 40 CFR Part 2 and Revision Checklist for Availability of information; and

(5) 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. Stat. Ann. §§ 12-2801 to 12-2807; Ark. Stat. Ann. §§ 34-2509; 70-1001(4), 82-1906, and 82-4211; and Section 6 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. Stat. Ann. §§ 12-280 to 12-2807 (Repl. 1979 and Supp. 1985) contains the basic provisions. Ark. Stat. Ann. §§ 12-2803 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. Stat. Ann. § 12-2803 (Supp. 1985). 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. Stat. Ann. § 12-2804 (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. Stat. Ann. § 12-2804. 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 request by ADPC&E. Any denial of access to records gives the requestor a right to seek immediate judicial review pursuant to Ark. Stat. Ann. § 12-2806 (Repl. 1979). Alternatively, any denial could be appealed pursuant to Ark. Stat. Ann. § 82-1906, Subdivision 3 (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. Stat. Ann. § 82-1906. 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. Stat. § 12-2806 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 the individual record custodians, nor would such custodians be otherwise protected from assessments under sovereign immunity.

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. Stat. Ann. § 12-2804 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. Stat. Ann. § 12-2803 and the listing of exemptions in Ark. Stat. Ann. § 12-2804 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. Stat. Ann. § 12-2804 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. Stat. Ann. § 82-4211(d) (Supp. 1985), which is part of the Arkansas Hazardous Waste Management Act, requires that information submitted to ADPC&E under the Act constituting "trade secrets" be protected if the proper showing is made to the Director. Ark. Stat. Ann. § 70-1001(4) (Supp. 1985), 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. Stat. Ann.

§ 82-4211(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 EPA informed of proposed modifications of its basic statutory or regulatory authority, forms, procedures, or priorities as required by 40 CFR 271.21(a).

IV. 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. Stat. Ann. § 12-2802; Ark. Stat. Ann. § 82-4204.

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. Stat. Ann. § 12-2802 "...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. Stat. Ann. § 82-4204 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:

Steve Clark

September 24, 1987