STATEMENT OF LEGAL AUTHORITY FOR FINAL AUTHORIZATION FOR CHANGES TO THE FEDERAL RCRA PROGRAM FROM JULY 1991 THROUGH JUNE 1992

I hereby certify, pursuant to my authority as independent counsel for the Arkansas Department of Pollution Control and Ecology, having full authority to represent the Department in court on all matters relating to the Department's environmental programs, 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 USC 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. 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. These authorities and this certification supplement are in addition to the previously certified authorities described in the certifications of legal authority dated July 9, 1984, September 24, 1987, February 24, 1989, December 11, 1990, May 7, 1992 (Non-HSWA Clusters V and VI), and May 7, 1992 (RCRA Cluster I).

This revision statement addresses the State's implementation of revised Federal requirements under the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984, known collectively as RCRA Cluster II.

References to "Ark. Code Ann." and "A.C.A." refer to the Arkansas Code of 1987 Annotated, as amended and effective in 1993. References to "ADPC&E Reg. No. 23" refer to the Arkansas Department of Pollution Control and Ecology's (ADPC&E) Regulation Number 23, (Hazardous Waste Management) (formerly titled the Arkansas Hazardous Waste Management Code), amended on August 27, 1993, to adopt all final rules promulgated by EPA through June 30, 1992, and which was effective on September 21, 1993. Dates of enactment and adoption for other statutes or regulations are given when cited.

I. IDENTIFICATION AND LISTING

L. State statutes and regulations revise the existing toxicity characteristic by replacing the Extraction Procedure (EP) leach test with the Toxicity Characteristic Leaching Procedure (TCLP) for identifying wastes that are defined as hazardous and subject to regulation under Subtitle C of RCRA as indicated in Revision Checklists 74 and 108. State statutes and regulations also provide for the addition of 25 organic chemicals and their regulatory levels to the list of toxic constituents of concern as indicated in Revision Checklist 74.

Federal Authority: RCRA §§1006, 2002(a), 3001, 3002, 3004, 3005 and 3006; 40 CFR Parts 261, 264, 265 and 268 as amended March 29, 1990 (55 FR 11798), June 29, 1990 (55 FR 26986) and July 10, 1992 (57 FR 30657).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(2) and (6)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

Q. State statutes and regulations exclude from being a solid waste spent wood preserving solutions that have been used and are reclaimed and reused for their original intended purpose as indicated in Revision Checklists 82 and 92.

Federal Authority: RCRA §3001; 40 CFR 261.4(a)(9) as amended December 6, 1990 (55 FR 50450) and July 1, 1991 (56 FR 30192).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(2), (3), (5), (6), and (9)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

R. State statutes and regulations allow deletion of certain hazardous waste codes following equipment cleaning and replacement, provided that the requirements of 261.35 are met, as indicated in Revision Checklists 82 and 92.

Federal Authority: RCRA §3001; 40 CFR 261.35 as amended December 6, 1990 (55 FR 50450) and July 1, 1991 (56 FR 30192).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(2)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

V. State statutes and regulations exclude from being a hazardous waste certain nonwastewater residues resulting from high temperature metals recovery of K061 provided the conditions in 261.3(c)(2)(ii)(C) are met as indicated in Revision Checklist 95.

Federal Authority: RCRA §§3001, 3004(d)-(k) and (m); 40 CFR 261.3(c)(2)(ii)(C) as amended August 19, 1991 (56 FR 41164).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(2) and (8)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

W. State statutes and regulations exclude from being a solid waste, nonwastewater splash condenser dross residue from the treatment of K061 in high temperature metals recovery units provided the requirements of 261.4(a)(11) are met as indicated in Revision Checklist 95.

Federal Authority: RCRA §S3001, 3004(d)-(k) and (m); 40 CFR 261.4(a)(11) as amended August 19, 1991 (56 FR 41164).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(2)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

X. State statutes and regulations exempt from the definition of hazardous waste used oil filters which meet the 40 CFR 261.4(b)(15) criteria as indicated in Revision Checklists 104 and 107.

Federal Authority: RCRA §§1004, 1006, 2002, 3001 and 3014; 40 CFR 261.4(b)(15) as amended May 20, 1992 (57 FR 21524) and July 1, 1992 (57 FR 29220).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(2)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

Z. State statutes and regulations exclude from being a solid waste K087 and those coke by-product residues that are hazardous only because they exhibit the Toxicity Characteristic when, subsequent to generation, these materials are recycled by being returned to coke ovens, to the tar recovery process as a fuel stock to produce coal tar, or mixed with coal tar as indicated in Revision Checklist 105.

Federal Authority: RCRA §3001(e)(2) and (h); 40 CFR 261.4(a)(10) as amended June 22, 1992 (57 FR 27880).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(2)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

II. DEFINITION OF SOLID WASTE

B. State statutes and regulations include as solid waste secondary material fed to a halogen acid furnace that exhibit a characteristic of a hazardous waste or are listed as a hazardous waste in 40 CFR 261, Subparts C and D as indicated in Revision Checklists 85 and 96.

Federal Authority: RCRA §3001; 40 CFR Parts 261.2(d)(2) as amended February 21, 1991 (56 FR 7134) and August 27, 1991 (56 FR 42504).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(2), (6), and (7)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

XI. GROUND-WATER MONITORING

E. State statutes and regulations allow owners and operators to demonstrate that an alternate hydraulically downgradient monitoring well location will meet 40 CFR 265.91(a)(3)(i)-(iii) criteria as specified in Revision Checklist 99.

Federal Authority: RCRA §§1006, 2002(a), 3001, 3004, 3005 and 3015; 40 CFR 264.10, and 264.91(a)(3) as amended December 23, 1991 (56 FR 66365).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(6)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

XV. STANDARDS FOR FACILITIES

L. State statutes and regulations contain design, operating, inspection and closure requirements for drip pads and associated tanks, sumps and other devices used to assist in the collection of treated wood drippage as indicated in Revision Checklists 82 and 92.

Federal Authority: RCRA §§2002(a) and 3001(b)&(e)(1); 40 CFR 262.34(a)(2), 264.190, 264.570, 264.571, 264.572, 264.573, 264.574, 264.575, 265.190, 265.440, 265.441, 265.442, 265.443, 265.444, 265.445 as amended December 6, 1990 (55 FR 50450), and July 1, 1991 (56 FR 30192).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(3), (5), and (6)
Reg 23 §§ 13a(6), (7), (9), and (11)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference. The Department has, however, enacted more rigorous standards for wood preserving facilities at Regulation No. 23, Section 13a by requiring the installation of a protective coating or covering on all existing drip pads, regardless of age, before September 30, 1995 (in advance of the federal requirement for ultimate upgrades of drip pads; and by further prohibiting the use of penetrating sealants in lieu of installing a drip pad coating or covering. State requirements are more stringent than the provisions of the federal program.

N. State statutes and regulations contain an administrative stay, until October 30, 1992, for the requirement that existing drip pads be impermeable as indicated in Revision Checklist 101.

Federal Authority: 40 CFR 264.573(a)(4), and 265.443(a)(4) as amended February 18, 1992 (57 FR 5859).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 13a(7) and (11)

Remarks of the Independent Counsel

Federal revisions have been incorporated as part of a more stringent state rule. State provisions for the administrative stay are equivalent to the Federal program.

XVI. REQUIREMENTS FOR PERMITS

W. State statutes and regulations contain Special Part B information requirements for drip pads as indicated in Revision Checklists 82 and 92.

Federal Authority: RCRA §§2002(a) and 3001(b)&(e)(I); 40 CFR 270.22 as amended December 6, 1990 (55 FR 50450) and July 1, 1991 (56 FR 30192).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(3), (5), (6), and (9)
Reg 23 §§ 13a(6), (7), (9), and (11)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference. The Department has, however, enacted more rigorous standards for wood preserving facilities at Regulation No. 23, Section 13a, and requires the installation of a protective coating or covering on all existing drip pads, regardless of age, before September 30, 1995 (in advance of the federal requirement for ultimate upgrades of drip pads; and further, prohibits the use of penetrating sealants in lieu of installing a drip pad coating or covering. In requiring the submission of data proving compliance with the more stringent state facility requirements, State requirements for special Part B information are thus broader in scope than the provisions of the federal program.

X. State statutes and regulations include permitting requirements for boilers and industrial furnaces burning hazardous waste as indicated in Revision Checklists 85 and 94.

Federal Authority: RCRA §§1006, 2002, 3001 through 3007; 40 CFR 270.22, 270.42(g), 270.42 Appendix I, 270.66, 270.72(a)(6)&(b)(7) and 270.73(f)&(g) as amended February 21, 1991 (56 FR 7134) and July 17, 1991 (56 FR 32688).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(9)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

Y. State statutes and regulations include Specific Part B information requirements for surface impoundments, waste piles and landfills regarding liners; leachate collection, detection, and removal systems; and the construction quality assurance program requirements as indicated in Revision Checklist 100.

Federal Authority: RCRA §§3004, 3005, 3006 and 3015; 40 CFR 270.4(c), 270.17(b)&(c), 270.18(c)&(d), and 270.21(b)&(c) as amended January 29, 1992 (57 FR 3462).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(9)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

XVII. MINIMUM TECHNOLOGICAL REQUIREMENTS

C. State statutes and regulations require owners and operators of new units, expansions, and replacement units at surface impoundments, waste piles, and landfills to meet the monitoring and inspection Construction Quality Assurance (CQA) program, double liner, leachate collection and removal

systems, leak detection systems, action leakage, response action plan and closure/post-closure care requirements as indicated in Revision Checklist 100.

Federal Authority: RCRA §§3004, 3005, 3006 and 3015; 40 CFR 264.19, 264.221-223, 264.226, 264.228, 264.251-264.254, 264.301-264.304, 264.310, 265.19, 265.221-265.223, 265.226-265.228, 265.254, 265.255, 265.259, 265.260, 265.301-265.304 and 265.310 as amended January 29, 1992 (57 FR 3462).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(5) and (6)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

XX. BURNING OF WASTE FUEL AND USED OIL FUEL IN BOILERS AND INDUSTRIAL FURNACES

C. State statutes and regulations include control standards for emissions of toxic organic compounds, toxic metals, hydrogen chloride, chlorine gas and particulate matter from boilers and industrial furnaces burning hazardous waste, and require owners and operators of such facilities to comply with the general facility standards applicable to hazardous waste treatment, storage and disposal facilities, as indicated in Revision Checklists 85, 94 and 96. Hazardous waste storage units at regulated burners are subject to 40 CFR 264 requirements.

Federal Authority: RCRA §§1006, 2002, 3001 through 3007, 3010 and 7004; 40 CFR 260.10, 260.11, 261.3, 261.6, 264.112, 264.340, 265.112, 265.113, 265.340, 265.370, Part 266 Subpart H, and 266 Appendices I-X as amended February 21, 1991 (56 FR 7134), July 17, 1991 (56 FR 32688) and August 27, 1991 (56 FR 42502).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(1), (2), (5), (6), and (7)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

D. State statutes and regulations contain an administrative stay of the permitting standards for boilers and industrial furnaces as they apply to coke ovens burning certain hazardous wastes from the coke by-products recovery process as indicated in Revision Checklist 98.

Federal Authority: 40 CFR 266.100(a) as amended September 5, 1991 (56 FR 43874).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(7)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

XXI. LAND DISPOSAL RESTRICTIONS

F. State statutes and regulations provide specific treatment standards and effective dates for the "Third Third" wastes, "soft hammer" First and Second Third wastes, five newly listed wastes, four wastes that fall into the F002 and F005 (spent solvent) waste codes, F025, mixed radioactive/hazardous wastes, characteristic wastes, and multi-source leachate, as well as establish revised treatment standards for petroleum refining hazardous wastes (K048-K052) as indicated in Revision Checklists 78, 83 and 102.

Federal Authority: RCRA §§3001 and 3004 (d)-(k) and (m); 40 CFR 261, 262, 264, 265, 268, and 270 as amended June 1, 1990 (55 FR 22520), January 31, 1991 (56 FR 3864) and March 6, 1992 (57 FR 8086).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 §§ 3a(2), (3), (5), (6), (8), and (9)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

H. State statutes and regulations contain treatment standards under the land disposal restrictions program for K061 as indicated in Revision Checklist 95.

Federal Authority: RCRA §3004(d)-(k) and (m); 40 CFR 268.41 and 268.42 as amended August 19, 1991 (56 Fr 41164).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(8)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

I. State statutes and regulations provide an extension of the land disposal restriction effective date for hazardous waste debris until May 8, 1993, as indicated in Revision Checklist 103.

Federal Authority: RCRA §3004(h)(3); 40 CFR 268.35(e) as amended May 15, 1992 (57 FR 20766).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(8)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

J. State statutes and regulations provide an extension of the land disposal restriction effective date, until May 8, 1993, for D008 lead-bearing hazardous materials stored before secondary smelting, provided the owner/operator meets the requirements specified at 40 CFR 268.35(k), as indicated in Revision Checklist 106.

Federal Authority: RCRA §3004(h)(3); 40 CFR 268.35(c) and (k) as amended June 26, 1992 (57 FR 28628).

Citation of Laws and Regulations; Date of Enactment and Adoption

Reg 23 § 3a(8)

Remarks of the Independent Counsel

Federal revisions have been incorporated by reference; State provisions are therefore equivalent to the Federal program.

RECENTLY ENACTED STATE LEGISLATION BEARING ON THE AUTHORIZED RCRA PROGRAM:

The 79th Arkansas General Assembly met from January until April of 1993 and enacted a number of new acts which bear upon the State's authorized RCRA program. The provisions and impact of these new state requirements on the RCRA program are discussed below. The full text of each act and its codification in the Arkansas Code, Annotated, is enclosed with this Revision Application.

Acts 163 and 165 of 1993. (HB 1062/SB 22) enacted February 18, 1993; effective August 13, 1993

Citation of Laws and Regulations; Date of Enactment and Adoption

amendments to:
A.C.A. § 8-1-101
A.C.A. § 8-1-102(4)
A.C.A. § 8-1-103(1)
A.C.A. § 8-1-106
A.C.A. § 8-1-201-203
A.C.A. § 8-2-205
A.C.A. § 8-4-102 (3) and (4)
A.C.A. § 8-4-103
A.C.A. § 8-4-201-205, 207, 208(c), 213, 221, 222

Remarks of the Independent Counsel

The 1993 legislative session's most significant impact on the hazardous waste management program results from the enactment of Acts 163 and 165 of 1993 (two companion bills with identical text). These acts amend the Arkansas Water and Air Pollution Control Act and revise the Department's administrative process for the review and issuance of environmental permits, enforcement actions, and its rulemaking procedures. The specific requirements of Acts 163/165 are detailed as follows:

I. Permits

A. Notice

Two public notices are now required for all new permitting actions (excluding permit transfers and minor modifications of existing permits): 1) when the application is determined to be administratively complete and 2) when the draft permit is complete or the application is denied. The term "New permit" applies to the process for obtaining a permit for a proposed facility, a transportation permit, or a permit which will create additional impact to the environment. "Administratively complete" is achieved when the Division determines that enough information has been provided in order to public notice the permit.

1. Notice upon Application

When the Division determines the application is administratively (not technically) complete, the Division shall prepare and send the actual notice for publication to the applicant and shall direct the applicant to cause such notice to be published in the newspaper. Any interested party desiring a public hearing on an application for a permit must make a written request to the Department within ten (10) days of the date of publication of the notice of application. Whether to have a hearing is within the Department's discretion. If a hearing is to be held, all commenters, as well as the applicant, must be notified of the hearing by certified mail. The public hearing is of record but is not adjudicatory in nature. The Department will receive public comments at any time, though it need only respond to comments received during a designated comment period. The only mandatory public comment period is after public notice of the draft permit.

2. Notice of Draft Permit, Permit Transfer, or Modification

When the draft permit is complete or when the Division has determined to deny the application, or when a permit is to be transferred, or a modification of an existing permit is approved, the Division shall cause notice to be published in the newspaper. This notice starts the formal thirty (30)-day public comment period. The Division must receive proof of publication for all required public notices from the applicant and payment of applicable permit fees before the final permit is issued.

3. Justification for Permit Conditions

The Division must justify by a general explanation in its fact or work sheet any permit that contains a "discharge limit, emission limit, environmental standard, analytical method or monitoring requirement". The explanation shall include the scientific or engineering rationale for the permit condition. Citation to the proper regulation will suffice for any standard or requirement that is identical to the regulation. For all other permits, justification must be made with appropriate reference to "scientific and engineering literature or written studies conducted by the Department." This requirement applies to all permits unless the draft permit decision was published for public comment prior to August 13, 1993.

B. Permit Appeals

1. Certificate of Service on Final Permits

Act 163 provides that a thirty (30)-day appeal period begin "after service of notice" for permittees, while it begins "after the date of the Department's final decision" for third parties. Under this provision, third parties would be given less time to appeal a permit decision. In order to resolve this conflict, each final permit decision that is issued by the Department shall contain language that make it the Department's final decision. Service of notice is complete when the permit decision is mailed to the applicant. The following language must be provided as the last paragraph of each permit:

> "The Department decision to issue [Permit No. ___], [to modify Permit No. xx],[to revoke Permit No. xx], or [to deny this permit application] is final for purposes of appeal as of the date indicated in the Certificate of Service below."

In addition, the following Certificate of Service must be placed at the end of each final permit:

> "I, (Person mailing the final permit), hereby certify that a copy of [this permit] or [denial of permit], [permit modification], etc.] has been mailed by first-class mail to (Permittee or applicant], address, on or before this (Day of Month, Year)."

Finally, the notice to commenters must be placed in the mail on the same day as the notice to the applicant.

2. Party Preclusion and Issue Preclusion.

All appeals must be filed within thirty days of service of the permit decision (i.e. thirty days after the decision is mailed as explained in subsection B1 above). However, only interested persons (other than the applicant) who submitted comments on the record during the comment period shall have standing to file an appeal. Written comments submitted prior or subsequent to the public comment period or telephone calls will not suffice to provide standing to appeal. Further, only the particular issues raised in the comments submitted by a party (other than the applicant) can be raised on appeal, unless the party can show good cause why it was not raised. The appeal must include a "complete and detailed statement identifying the legal and factual objections to the permit action". A petition without specific legal and factual objections will no longer be acceptable.

3. Preliminary Hearing

Within thirty (30) days after the appeal is filed with the Commission Secretary, a preliminary hearing shall be held by the hearing officer. At this hearing, the hearing officer shall decide which parties, if any, have standing (party preclusion) and which issues, if any, are properly appealed (issue preclusion). The recommended decision of the hearing officer on these matters will be heard by the Commission at its next regularly scheduled meeting.

The hearing officer will also schedule the hearing and other matters such as discovery deadlines (i.e., for depositions or interrogatories) in order to submit the hearing officer's decision in the matter for final Commission action within 120 days after the preliminary hearing. This 120-day limit may be extended by mutual agreement of the parties or by the hearing officer for just cause.

4. Stays

After a permit appeal is filed and before the Commission makes its final determination, a permit denial shall stand, but permit issuance, modification, revocation, or that part of the permit which is the subject of the appeal shall be stayed. Nevertheless, a stay may be granted or terminated by the Commission upon application by any party to avoid substantial prejudice.

P. Permit Transfers

The language of A.C.A. 8-1-106(e) appears to require automatic transfer of permits within 30 days of application unless the applicant is deemed a "bad actor" after disclosure of the applicant's past compliance history. (As a historical note, this provision was adopted in 1993 primarily because of the concerns raised by a consortium of farming interests about the alienability of state water permits required of animal husbandry operations.) In accordance with this intimate understanding of legislative intent, ADPC&E has construed this language narrowly so as to maintain compliance with its federal mandates. We believe A.C.A. § 8-1-106(e), when considered in the context of Arkansas' specific hazardous waste legislation, allows PC&E the latitude to continue following the RCRA procedures governing permit transfers.

I refer you specifically to the language in A.C.A. § 8-1-106(e)(1) that requires the applicant for the transfer of a permit to notify the director "at least thirty (30) days in advance of the proposed transfer date." This language allows the inference that the Department can require more than 30 days notice if circumstances, including federal mandates, so require. This interpretation is particularly compelling in light of A.C.A. § 8-7-218(b)(2) and (c) which require permitting actions to comply with RCRA. Since the Arkansas Supreme Court, like most state courts, disfavors repeal by implication, we feel safe in interpreting A.C.A. § 8-1-106(e) in light of A.C.A. §8-7-218 and maintaining our previous state law requirements governing transfers of RCRA facility permits.

The amended language is restricted to "applicants for the transfer of a permit." Most, if not all, of the permits issued by the ADPC&E's Water Division are freely transferable. The focus of the FACT group in proposing SB22/HB1062 was, of course, based upon the water permits issued by the Water Division for animal husbandry operations. This language does not compel the conclusion that a permit that is, by its own terms, not transferrable, becomes transferrable because of the provisions of Section 4 of Act 165. The Department can still entertain the presumption that a permit that is not transferrable is not subject to an application for transfer.

A similar analysis applies to RCRA/HSWA hazardous waste permits issued by the Department. The Commission has adopted by reference the EPA regulation stating that the only way to permit a transfer in ownership and control if a RCRA permitted facility is through modification of the original permit or revocation and reissue. (40 CFR 270.40(a)). The permit is not transferred as such. Thus, the Department has interpreted that A.C.A. § 8-1-106(e) would not compel "transfer" of the permit in contravention of regulations mandating modification or revocation and reissuance.

The Department has recently construed A.C.A. § 106(e) as applying only to permits which, by their own terms, are transferrable. If permits are issued pursuant to federal requirements that prevent transfer or the permits by their own terms prevent a transfer, then no one can apply legitimately for such a transfer as contemplated by A.C.A. § 8-1-106(e). Permits with conditions such as these are not subject to the automatic transfer provisions of Act 165. The Department recognizes and follows the mandate of 40 CFR. §270.40(a), which states that RCRA permits can only be "transferred" through modification or revocation and reissue. Thus, since state RCRA permits cannot be outright transferred, the transfer provision at A.C.A. 58-1-106(e) does not apply.

During the 1993 regular session that produced A.C.A. § 8-1-106(e), both the proponents of the Act and the Department recognized that the unqualified language of the transfer provision might raise questions, and that clarifying amendments were in order. In fact, the Senate sponsor of Act 163 was prepared to introduce a noncontroversial "clean-up" bill that would address these ambiguities to PC&E's satisfaction. Other pressing legislative issues prevented this bill being introduced before the

close of the biennial session. Based on our understanding of the drafter's intent, however, we have construed A.C.A. § 8-1-106(e) as allowing PC&E the latitude to insist upon compliance with 40 CFR 270.40 procedures when confronted with the transfer of ownership or control of RCRA facilities. Our experiences with enforcing the RCRA transfer provisions following the effective date of Acts 163/165 met with no opposition or controversy.

Given this analysis, I do not believe state law is less stringent than federal law as it applies to the transfer of ownership and control of facilities governed by Subtitle C of RCRA. In the next session of the Arkansas General Assembly, we intend to introduce legislation that will make this conclusion clear on the face of the statute. In the meantime, however, as independent legal counsel, I opine that A.C.A. §8-1-106(e) does not foreclose PC&E's implementation of RCRA-mandated rules and procedures governing the transfer of ownership and control of Subtitle C facilities, and that state provisions remain equivalent to and no less stringent than the requirements of the Federal program.

E. Moratoria on Permits

The Director can no longer declare a moratorium on the issuance of a particular type of permit. This power is now reserved for the Commission through the rulemaking process in accordance with A.C.A. § 8-4-202(d)(1).

II. Enforcement

A. Notice of Enforcement Actions

1. Notice Required

Public notice must be provided for all enforcement actions (e.g., Notices of Violation, Consent Administrative Orders, and emergency orders) containing civil penalties, including in-kind services, upon the Director's signature on the order. Pursuant to the provisions of Act 163 of 1993, notice is not required for draft documents, Administrative Orders (as these are always preceded by an NOV) or enforcement orders which contain no monetary penalties. As a matter of policy, all enforcement orders will go to public notice. The notices must be sent to the Commissioners and will be published on or about the tenth day of each month.

2. Contents of Notice

The notice must contain the following;: 1) the identity of the person or facility alleged to be in violation 2) the location by city or county of the alleged violation 3) a brief description by environmental media (i.e. water, air, solid waste, hazardous waste) impacted by the alleged violation 4) the type of administrative action proposed (i.e. consent administrative order, notice of violation, or emergency order) and 5) the amount of the penalty to be assessed.

3. Effective Date of Consent Administrative Orders

A Consent Administrative Order containing a civil penalty is effective thirty (30) days after publication of the notice. However, a corrective action may be required to be taken immediately by stating in the enforcement order that such shall be taken immediately notwithstanding public notice requirements. A Consent Administrative Order containing corrective actions only is effective upon the Director's signature.

4. Standing to Appeal

In order to preserve the right to file a request for a hearing on a CAO or to intervene in an action on an NOV, a person must comment on a proposed penalty during the 30~day public comment period which

follows the publication of the notice. Although Act 163 does not contain a requirement for a responsive summary in enforcement actions, each Division shall prepare a response to public comments as soon as practicable. If no hearing is to be held - that is, if a CAO is involved - any person who commented on the proposed CAO may petition the Commission to set aside the order and provide a hearing. This petition must be filed within thirty days after the order is effective, i.e., sixty days after the notice is published, and it is heard by the Commission rather than a hearing officer. As a practical matter, any person who desires a hearing on a CAO must file a petition for such hearing regardless of the Department's response to public comments. In order to obtain a hearing on the CAO, the petitioner must present material evidence that was not considered in the issuance of the order, and the Commission must find that in light of the new evidence the order is not reasonable and appropriate. If the Commission denies the request for a hearing, it must give notice to the petitioner and state its reasons for the denial. That denial is appealable to court. In addition, the Commission may on its own initiative institute review of any enforcement action, but it must do so within thirty days of the effective date of such order. These public notice requirements will assure that our CAOs constitute diligent prosecution by the state agency for purposes of citizen suits under the Clean Water Act and other similar laws. None of these notice provisions apply to (1) criminal actions (2) actions filed directly in court, and (3) actions for recovery of fees where no additional penalty is sought.

III. Rulemaking

Though a substantial amount of language was added to the provisions in the Arkansas Water and Air Pollution Control Act concerning rulemaking (adopting regulations), little has changed in the actual rulemaking process. Procedures to be followed were taken from the State's Administrative Procedure Act. If, in response to comments, the Commission amends a regulation to the extent that it would "have an effect not previously expressed in the notice", another public notice must be given. The Department has been observing this policy at any rate, thus there is no change to current procedure in this matter.

The only major change in rulemaking procedures is the requirement that a rational basis must be found in the rulemaking record to support the regulatory change. This will be required for all changes to regulations, including fee changes. When the Commission adopts a regulation, it must be accompanied by a Statement of Basis and Purpose declaring the necessity of the regulation and demonstrating that a technical regulation or standard is based upon "generally accepted scientific knowledge or engineering practice". Specifically, the Department must produce "a written explanation of the necessity of the regulation and a demonstration that any technical regulation or technical standard is based on generally accepted scientific knowledge and engineering practices." This may be shown by a simple reference to the Code of Federal Regulations for any standard or regulation that is identical to EPA's. For regulations that are more stringent than or different from the federal standards, the Department must show its "own justification with appropriate references to the scientific and engineering; literature or written studies conducted by the Department."

A regulation that is appealed is automatically stayed during the pendency of the appeal, unless the Commission determines that "imminent peril to the public health, safety, or welfare" requires an immediate change in the regulation. Imminent peril can be established by a showing of "the imminent loss of federal funding, certification or authorization for any program administered by the Department." Imminent peril can also be used by the Commission to implement emergency regulation, suspensions or moratoria, but they are effective for no more than ninety days.

The provisions of Acts 163/165 are broader in scope than the requirements of the federal program.

Act 731: In-kind Services In Lieu Of Penalties. (SB 594) enacted March 26, 1993, effective August 13, 1993

Citation of Laws and Regulations; Date of Enactment and Adoption

amendments to:
A.C.A. § 8-7-204(e)
A.C.A. § 8-4-103(e)
A.C.A. § 8-6-204(e)

Remarks of the Independent Counsel

Act 1057 of 1991 provided that violators facing a fine from the Department of Pollution Control and Ecology could provide in-kind services for environmentally significant projects in lieu of cash penalties. A narrow reading of this authority by legislative auditors restricted the Department's ability to use this tool to address such environmentally significant issues as mercury contamination of south Arkansas streams. Act 731 of 1993 thus clarifies the Department's authority to allow mitigation of civil penalties by allowing violators to finance specific environmentally significant projects approved by the Department. This state requirement is equivalent to federal policies regarding the use of in-kind services to offset civil penalties.

Act 1052 of 1993, (HB 2021) enacted April 17, 1993, effective August 13, 1993

Citation of Laws and Regulations; Date of Enactment and Adoption

amendments to:
A.C.A. § 8-1-106

Remarks of the Independent Counsel

Act 1052 amends the requirements of Act 454 of 1991 (codified at A.C.A. § 8-1-106), requiring the submission of a disclosure statement covering the environmental compliance history of a permit applicant. Specifically, Governmental agencies (including subdivisions or agencies of the federal and state government, counties, municipalities, or authorized regional solid waste authorities) are exempted from the disclosure filing requirement. However, this requirement remains more stringent than the corresponding federal requirements.

Act 1263 of 1993, Environmental Equity (HB 1986) Enacted April 20, 1993, effective August 13, 1993

Citation of Laws and Regulations; Date of Enactment and Adoption

A.C.A. §§ 8-6-1501 *et seq.*

Remarks of the Independent Counsel

Enactment of Act 1263 was prompted by a court ruling from Washington County Chancery Court declaring Act 933 of 1991 (currently codified at A.C.A. 8-6-218) to be unconstitutional local and special

legislation. Rather than appeal this ruling, the Department convinced the sponsors of Act 933 that a more appropriate fix would be a law which was clearly of general applicability and continued to address their specific concerns. As a result, Arkansas became the first state in the nation to enact legislation addressing the concept of "environmental equity."

The "environmental equity" concept was prompted by recent national surveys which recognized a trend of locating environmentally "undesirable" facilities in areas populated predominantly by the poor and politically disenfranchised. Act 1263 creates a rebuttable presumption against the permitting of "high impact solid waste facilities" within a 12 mile radius of an existing high-impact solid waste management facility. Such facilities include solid waste landfills and incinerators and hazardous waste treatment, storage and disposal facilities. This presumption may be rebutted if the applicant proves there is no other suitable site for his proposed facility because of geological constraints or existing siting restrictions codified at A.C.A. § 8-6-706(b)(2); or if the local community accepts the facility because of provided incentives such as increased employment opportunities, payment of reasonable host fees, contributions by the facility to the community infrastructure, compensation of any adjacent landowners for any assessed decrease in property values, or subsidization of community services.

The provisions of Act 1263, like those of A.C.A. § 8-7-206(b)(2), are more stringent than federal requirements. The apparent ban on siting hazardous waste treatment. storage, and disposal facilities within 12 miles of an existing facility does not violate the provisions of 40 CFR 271.4 (which prohibits the authorization of any aspect of State law or the State program which has no basis in human health or environmental protection and which acts as a prohibition on on the treatment, storage, or disposal of hazardous wastes in the State) because of the rebuttable presumption. Furthermore, the provisions of Act 1263 are consistent with recent federal initiatives to implement the concepts of environmental justice in the federal RCRA hazardous waste management program.

Act 1264 of 1993, Economic Benefit Analysis (HB 1988) enacted April 20, 1993, effective April 20, 1993.

Citation of Laws and Regulations; Date of Enactment and Adoption

amendments to:
A.C.A. § 8-1-203(b)(1)

Remarks of the Independent Counsel

This Act requires the Pollution Control & Ecology Commission to duly consider the "economic impact," as well as the environmental benefit, of its regulations, with the Commission defining the scope of this analysis through rulemaking . This requirement applies only to those regulations more stringent than required by federal law or regulation. This is a more stringent requirement than provided for in the federal program.

Act 1273 of 1993, The Arkansas Pollution Prevention Act. (SB 791) enacted April 21, 1993, effective August 13, 1993.

Citation of Laws and Regulations; Date of Enactment and Adoption

A.C.A. § 8-10-101 through 105

Remarks of the Independent Counsel

Patterned after the federal Pollution Prevention Act of 1990, codified at 42 U.S.C. 13101 et seq., Act 1273 provides enabling legislation and a policy statement and authorization for various state agencies to promote and disseminate information about pollution prevention, source reduction, waste minimization, and recycling. The policy statement, however, signals a potentially radical departure from past regulatory emphasis by adopting a hierarchy of waste management alternatives. Source reduction and recycling are preferred over treatment and disposal, thus reducing volumes of exhaustive environmental regulations to the status of less favored alternatives.

Act 1273 may be viewed as the template within which a new vision of environmental regulation may evolve in the coming years. Its requirements are equivalent to the Federal requirements of the Pollution Prevention Act of 1990.

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May 10, 1994
(Date)