

US EPA ARCHIVE DOCUMENT



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

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likely preliminary

Signed
7/21/88

ATTORNEY GENERAL'S STATEMENT
FOR FINAL AUTHORIZATION

I hereby certify, pursuant to my authority as Attorney General of the State of Texas 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 CFR Part 271 that in my opinion the laws of the State of Texas provide adequate authority to carry out the program set forth in the "Program Description" submitted by the Texas Water Commission (also "Commission"). The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which shall be fully effective by the time the program is approved, include those identified below and those provided in the "Checklist" which is incorporated into and made a part of this Statement for all purposes. S. B. 249, passed by the 69th Texas Legislature and effective September 1, 1985, abolishes the Texas Department of Water Resources and transfers responsibility to carry out the provisions of the Texas Solid Waste Disposal Act, Art. 4477-7, V.A.C.S., to the Texas Water Commission. It further amends the Texas Solid Waste Disposal Act to designate the Texas Water Commission as the state agency having authority to regulate municipal hazardous waste, previously under the jurisdiction of the Texas Department of Health. Section 10.004(f) of S. B. 249 provides that the reorganization of the Texas Department of Water Resources into the Texas Water Commission and Texas Water Development Board does not affect or impair any act done, bonds authorized or issued, or obligation, right, permit, license, standard, rule, criterion, order, resolution, or penalty that has accrued or that exists under the authority of the Texas Department of Water Resources, Texas Water Commission, or Texas Water Development Board as they existed before the effective date of this Act, and those bonds, obligations, rights, permits, licenses, standards, rules, and criteria remain in effect until such time as they are paid, recalled, changed, altered, renewed, amended, canceled, revoked, repealed, or abolished under the Water Code, other laws of this state, and outstanding contracts, agreements, and resolutions.

I further certify that I have reviewed the terms and conditions of the Memorandum of Agreement between the State of Texas and the United States Environmental Protection Agency, Region VI, and

that (1) the State has the authority to enter into the agreement, (2) the State has the authority to carry out the agreement, and (3) no applicable State statute requires that the procedure be promulgated as a rule in order to be binding.

I. IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

- A. State statutes and regulations define hazardous waste so as to control all the hazardous waste controlled under 40 CFR as indicated in Checklist I A.

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

- B. State statutes and regulations contain a list of hazardous waste and waste characteristics for identifying hazardous waste which encompass all wastes controlled under 40 CFR Part 261 as indicated in Checklist I B and C and Revision Checklists 4, 7, 8, 9, 13, 14, 17 through 23, 26, and 28.

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

- C. 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 (50 FedReg 614-669), April 11, 1985 (50 FedReg 14216-20), and August 20, 1985 (50 FedReg 33541-43) as indicated in Revision Checklist 13.

[Federal Authority: RCRA Sections 3001, 3004.]

- D. State statutes and regulations provide adequate authority to regulate the hazardous waste component of wastes containing both hazardous waste and source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended (referred to as "radioactive mixed waste"). The state statutory and regulatory authority to regulate the hazardous waste component of radioactive mixed waste is set forth in the Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, Section 3(d) and in 31 Texas Administrative Code (TAC) Section 335.1 (the definitions of "solid waste" and "hazardous waste", which also appear in the Solid Waste Disposal Act). The Texas Department of Health (as the state agency having jurisdiction over radioactive waste activities) and the Texas Water Commission have entered into a Memorandum of Understanding (MOU) providing for concurrent regulatory jurisdiction over the components of radioactive mixed waste subject to each agency's jurisdiction. There is nothing in state law to prohibit the execution of this agreement or the inclusion of the provisions contained therein. The MOU has been adopted by rule, as provided in the Texas Water Code, §5.104.

[Federal Authority: RCRA Sections 1006 and 3001]

Citation of Laws and Regulations

Section 2(31) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, defines solid waste as garbage, refuse, sludge from a waste treatment plant or air pollution control facility, and other discarded material, including soil, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include: (i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulations by permit issued pursuant to Chapter 26, Texas Water Code; (ii) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements; or (iii) waste materials which result from activities associated with the exploration, development or production of oil or gas or geothermal resources, and any other substance or material regulated by the Railroad Commission of Texas pursuant to Section 91.101, Natural Resources Code, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the Administrator of the U. S. Environmental Protection Agency pursuant to RCRA. The term "solid waste" is further defined in 31 TAC Section 335.1 in a manner corresponding to the provisions of 40 CFR Section 261.2, as amended. In addition, Section 2(15) of the Act defines hazardous waste as any solid waste identified or listed as a hazardous waste by the Administrator of the U. S. Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act. This definition of hazardous waste is also contained in 31 TAC Section 335.1. Changes to the universe of federal hazardous wastes and newly listed or identified hazardous wastes are effective in Texas by virtue of the definition of hazardous waste in the state statute and regulations, which incorporates the provisions that identify or list hazardous wastes in 40 CFR Part 261 by reference. In addition, 31 TAC Section 335.29 adopts by reference the appendices to 40 CFR Part 261, which may also function in the identification and listing of hazardous waste.

State regulations relating to recyclable materials are as follows: (1) 31 TAC Section 335.17 relating to special definitions; (2) 31 TAC Section 335.18 relating to variances from classification as a solid waste; (3) 31 TAC Section 335.19 relating to standards and criteria for variances from classification as a solid waste; (4) 31 TAC Section 335.20 relating to variances to be classified as a boiler; (5) 31 TAC Section 335.21 relating to procedures for variances from

classifications as solid waste or to be classified as a boiler; (6) 31 TAC Section 335.22 relating to additional regulation of certain hazardous waste recycling activities on a case-by-case basis; (7) 31 TAC Section 335.23 relating to procedures for case-by-case regulation of hazardous waste recycling activities; (8) 31 TAC Section 335.24 relating to requirements for recyclable materials; and (9) 31 TAC Chapter 335, Subchapter H, relating to standards for the management of specific wastes and specific types of facilities.

Section 3(d) of the Solid Waste Disposal Act affirmatively states that the Texas Water Commission has all powers under the Solid Waste Disposal Act, as amended, necessary or convenient to carry out responsibilities concerning the regulation of the management of hazardous waste components of any radioactive wastes under the Texas Department of Health's jurisdiction. The Texas Water Commission shall consult with the Texas Department of Health with regard to regulation and management under §3(d) of the Act and may not adopt any rules or engage in any management activities that are in conflict with state or federal laws and rules relating to regulation of radioactive wastes.

Date of Enabling Legislation: September 1, 1969; August 29, 1977; September 1, 1985.

Remarks of the Attorney General

Section 2(31)(ii) of the Solid Waste Disposal Act excludes from the definition of solid waste "soil, dirt, rock, sand and other natural or man-made inert solid material used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements." The application of this exclusion does not affect the regulation of hazardous waste in Texas. Any such materials containing hazardous waste would be regulated under the State hazardous waste program because those materials would no longer be "inert solid material" subject to the exclusion.

Section 2(31)(iii) of the Solid Waste Disposal Act, excludes from the definition of solid waste "waste materials which result from activities associated with the exploration, development or production of oil or gas or geothermal resources, and any other substance or material regulated by the Railroad Commission of Texas pursuant to Section 91.101, Natural Resources Code, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the Administrator of U. S. Environmental Protection Agency pursuant to RCRA. Federal law exempts from regulation under Subtitle C of RCRA at 40 CFR Section 261.4(b)(5), "drilling fluids, produced waters,

and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy." (The State provision does not specifically refer to "crude oil and natural gas" [emphasis added] but that is the intent.) However, certain wastes related to petroleum refining operations have been listed by the Administrator as hazardous wastes in 40 CFR Section 261.32. Under State law the exclusion provided for waste materials associated with the production of oil or gas does not include wastes generated from the refining of oil or gas. Therefore, all oil and gas related wastes currently within the federal universe of hazardous wastes are subject to regulation by the Texas Water Commission as hazardous wastes.

Section 2(16) of the Solid Waste Disposal Act defines industrial solid waste designated as Class I by the Executive Director of the Commission as any industrial solid waste or mixture of industrial solid waste which because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means and may pose a substantial present or potential danger to human health or the environment when improperly treated, stored, transported, or otherwise managed, including hazardous waste. Class I waste, by definition, includes all wastes identified or listed as hazardous by the Administrator of the United States Environmental Protection Agency. The Executive Director has no discretion concerning their inclusion in the Class I category.

Section 2(15) of the Solid Waste Disposal Act defines "hazardous waste" as any solid waste identified or listed as a hazardous waste by the Administrator of the U. S. Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by RCRA. The statute thus incorporates by reference those provisions of 40 CFR Part 261 which define what constitutes a hazardous waste. Because the incorporation of the federal regulations is based in the state statute, rule-making procedures, including the prohibition that rules may not incorporate by reference prospectively, do not apply. Moreover, the use of terms "identified" and "listed" in the state provision refer specifically to the language of Section 3001 of RCRA wherein the Administrator is directed to establish criteria for identifying the characteristics of hazardous waste and listing particular hazardous wastes. The use of this terminology in the state definition, therefore, was intended to incorporate the provisions of Subparts C and D of Part 261.

In addition to incorporation of Subparts C and D, the definition of "hazardous waste" also operates to incorporate those provisions of 40 CFR Part 261, most notably Section 261.3 relating to the definition of hazardous waste and Section

261.4 relating to exclusions, which define the universe of hazardous waste. A mixture of hazardous and non-hazardous waste, therefore, would be regulated as a hazardous waste under State law because Section 2(15) of the Act has incorporated the "mixture rule" by extension. The appendices to 40 CFR Part 261 are also incorporated by reference into the Texas universe of hazardous wastes, insofar as the appendices serve to identify or list a hazardous wastes through the operation of the definition of hazardous waste and through their adoption by reference in 31 TAC 335.29.

II. STANDARDS FOR GENERATORS

State statutes and regulations provide coverage of all the generators covered by 40 CFR Parts 262 and 266 as indicated in Checklist II and Revision Checklists 1, 5, 12, 13, 17, 23, and 28.

[Federal Authority: RCRA Section 3002 (42 U.S.C. 6922); 40 CFR Parts 262 and 266, Section 270.10.]

Citations of Laws and Regulations

Under Subsection 3(b) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, the Texas Water Commission is designated as the State agency responsible for the regulation of industrial solid waste and municipal hazardous waste. Subsection 4(c) of the Act authorizes the Texas Water Commission to promulgate rules and regulations consistent with the general intent of the Act and establish minimum standards of operation for all aspects of the management and control of the solid waste over which it has jurisdiction. This provision further provides that the Texas Water Commission shall require persons who generate, transport, process, store or dispose of Class I industrial solid waste or hazardous waste to provide recordkeeping and use a manifest (on forms TWC-0311 and TWC-0311B) or other appropriate system to assure that such wastes are transported to a processing, storage, or disposal facility permitted or otherwise authorized for that purpose.

Date of Enactment of Legislation: August 29, 1977.

Remarks of the Attorney General

Subsection 4(c) of the Solid Waste Disposal Act provides a broad grant of authority to the Texas Water Commission to promulgate rules and regulations regarding all aspects of solid waste management and control. In addition Subsection 3(b) of the Act provides that the Texas Water Commission has authority to control all aspects of solid waste activities within its jurisdiction including collection, handling,

storage, processing, and disposal, and has the powers and duties specifically prescribed in the Act and all other powers necessary or convenient to carry out its responsibilities. This provision provides adequate statutory authority for the hazardous waste management regulations promulgated by the agencies.

The provisions of Subsection 3(b) which provides that the Texas Water Commission should seek to accomplish the purposes of the Act "by all practical and economically feasible methods..." are to be construed within the context of the overriding purpose of the Act "to safeguard the health, welfare, and physical property of the people and to protect the environment." The Texas Water Commission is required under the Act to take whatever action and require whatever methods are necessary to accomplish the Act's fundamental goals.

Subsection 4(c) of the Solid Waste Disposal Act, providing the Texas Water Commission with broad rule-making authority concerning all aspects of solid waste management, and Subsection 3(b) of the Act, granting all powers "necessary and convenient" to the Texas Water Commission, provide adequate bases for a rule requiring that all generators make a hazardous waste determination. Such a requirement is necessary for the successful implementation of the State hazardous waste program.

III. STANDARDS FOR TRANSPORTERS

State statutes and regulations provide coverage of all the transporters covered by 40 CFR Parts 263 and 266 as indicated in Checklist III and Revision Checklists 13 and 23.

[Federal Authority: RCRA Section 3003 (42 U.S.C. 6923); 40 CFR Parts 263 and 266, Section 271.11.]

Citation of Laws and Regulations

Subsection 4(c) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, authorizes the Texas Water Commission to promulgate rules and regulations consistent with the general intent and purposes of the Act and establish minimum standards of operation for all aspects of the management and control of the solid waste over which it has jurisdiction. This subsection further requires the Texas Water Commission to require persons who generate, transport, store, process or dispose of Class I industrial solid waste or hazardous waste to provide recordkeeping and use a manifest or other appropriate system to assure that such wastes are transported to a processing, storage or disposal facility permitted or otherwise authorized for that purpose.

Date of Enactment of Enabling Legislation: August 29, 1977.

IV. STANDARDS FOR FACILITIES

- A. State statutes and regulations provide permit standards for hazardous waste management facilities covered by 40 CFR Parts 264 and 266 as indicated in Checklist IV A and Revision Checklists 1, 3, 6, 10, 13, 14, 15, 16, 17, 19, 23, 24, 25, 27, and 28.

[Federal Authority: RCRA Section 3004 (42 U.S.C. 6924); 40 CFR Parts 264 and 266, Section 271.12.]

- B. State statutes and regulations provide for interim status and include interim status standards for hazardous waste management facilities covered by 40 CFR Part 265 as indicated in Checklist IV B and subsequent checklists noting revisions to 40 CFR Part 265, including checklist 17.

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 the United States Environmental Protection Agency's interim standards at 40 CFR Part 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 Section 3005(e) (42 U.S.C. 6925); 40 CFR Parts 265 and 266, Section 270.73 Section 271.13(a).]

Citation of Laws and Regulations

Subsection 4(c) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, authorizes the Texas Water Commission to promulgate rules and regulations consistent with the general intent and purposes of the Act and establish minimum standards of operation for all aspects of the management and control of the solid waste over which it has jurisdiction. This subsection further requires the Texas Water Commission to require persons who generate, transport, store, process or dispose of hazardous waste to provide record-keeping and use a manifest or other appropriate system to assure that such wastes are transported to a processing,

storage, or disposal facility permitted or otherwise authorized for that purpose.

Subsection 8(a) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides that no person may cause, suffer, allow, or permit the collection, storage, handling, or disposal of solid waste in violation of the Act or of the rules and regulations of the Texas Water Commission. Paragraph 4(f)(2) of the Act provides that owners and operators of existing industrial hazardous waste facilities who have filed an application in accordance with Commission rules may continue to operate until action is taken on the permit, except as provided by Subsection (1). Subsection 4(1) provides that solid waste permits issued by a State agency to a land disposal facility, incinerator facility or other solid waste facility under Subsection 4(f)(2), which have not been reissued in accordance with an approved State program, will terminate on dates specified in the statute, unless the owner or operator of the facility applies for a final determination regarding issuance of a permit before that date and in the case of land disposal facilities certifies that the facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements. The provisions of this Section are implemented by 31 TAC Section 335.43 and Section 305.42. In addition, 31 TAC Section 335.2(c) provides that owners and operators of existing hazardous waste facilities who have filed an application with the Commission may continue the on-site storage, processing, or disposal of hazardous waste until such time as the Texas Water Commission approves or denies the application. This provision is applicable to industrial and municipal hazardous waste. Title 31 TAC Section 335.45 provides that Subchapters B through E (generator, transporter and "interim status" standards) apply to all generators, transporters, and owners and operators of hazardous waste management facilities; all persons holding permits or other authorizations must also meet the requirements of the applicable rules and permit provisions.

Subsection 4(k) of the Solid Waste Disposal Act, Article 4477-7 Revised Civil Statutes, as amended in 1985, requires corrective action for any release of hazardous waste constituents from any solid waste management unit at a solid waste processing, storage, or disposal facility that is required to obtain a permit for the management of hazardous waste and whose permit is issued after November 8, 1984, regardless of the time at which waste is placed in the unit. This subsection further authorizes the commission to issue an order or any other response measure necessary to protect human health and the environment requiring corrective action.

Date of Enactment of Enabling Legislation: September 1, 1985; September 1, 1981; August 29, 1977.

Remarks of the Attorney General

Section 2(23) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, defines "processing" as the extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of hazardous waste so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. This definition is equivalent to the definition of "treatment" contained in Section 1004(34) of the RCRA. The coverage of the term "processing" is broader than that of "treatment."

Title 31 TAC Section 335.2(a) applies to a wide range of solid waste activities, which are not limited to those involving hazardous waste. The rule is therefore drafted generally in order to include those instances where the storage, processing, or disposal of industrial solid waste may be authorized by rule or order of the Commission, or its predecessor agency, or the Texas Department of Health, or by rule, order, or permit of another Texas state agency. In no event does 31 TAC Section 335.2(a) relieve the owner or operator of a hazardous waste management facility from the requirement of a permit under the Solid Waste Disposal Act, unless an exemption is expressly stated in rule, such as in 31 TAC Section 335.69 which exempts from the requirement of a permit the on-site storage of hazardous waste for 90 days or less, as modified by 31 TAC Section 335.78.

The programs for compliance monitoring and corrective action are established in a compliance plan rather than through permit. The compliance plan is, however, virtually a part of the permit. Facilities which require corrective action under Subsection 4(k) of the Act as amended in 1985, must have a compliance plan in order to be granted a permit. In addition, the TWC must consider the two documents together in one proceeding, as required by 31 TAC §305.401(g). The substantive standards to be used in the evaluation and implementation of these programs are identical to the federal standards in 40 CFR Part 264, Subpart F. The procedural requirements applicable to the approval of such plan and contained in 31 TAC Section 305.401, are equivalent to the applicable requirements of 40 CFR Parts 270 and 124.

The requirements for financial assurance, adopted by reference in state law at 31 TAC §335.112(a)(7), include the corporate guarantee as a mechanism for satisfying liability coverage requirements under 40 CFR Part 265. In an opinion dated March 24, 1987, the Attorney General of Texas concludes that a corporate guarantee which is executed to comply with the third party liability requirements for hazardous waste facilities and which tracks the language of the corporate guarantee set forth in 40 CFR §264.151(h)(2) creates a third

party "creditor" beneficiary contract which can be enforced in Texas (see ATTY. GEN. OP. NO. JM-653).

V. REQUIREMENTS FOR PERMITS

State statutes and regulations provide requirements for permitting as indicated in Checklist V and Revision Checklists 1, 2, 6, 11, 13, 14, 16, 17, 23, 24, 27, and 28.

[Federal Authority: RCRA Section 3005 (42 U.S.C. 6925); RCRA Section 7004 (42 U.S.C. 6974); 40 CFR Sections 271.13 and 271.14.]

Citations of Laws and Regulations

Subsection 4(c) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, authorizes the Texas Water Commission to promulgate rules consistent with the general intent and purposes of the Act and establish minimum standards of operation for all aspects of the management and control of the solid waste over which it has jurisdiction. Subsection 4(e) of the Act provides that the Texas Water Commission shall prescribe the form of and reasonable requirements for the permit application and the procedures to be followed in the processing of the application. Paragraph 4(e)(4) provides for opportunity for public hearing to the applicant or persons affected and, requires the Texas Water Commission to establish by rule procedures for public notice and any public hearing authorized under the paragraph. Paragraph 4(f)(2) of the Act provides for public hearing upon Commission motion or the request of a person affected, and requires the Commission to establish by rule procedures for public notice and public hearing authorized by this paragraph (the on-site management of hazardous industrial waste).

Date of Enactment of Enabling Legislation: September 1, 1969; September 1, 1977.

Remarks of the Attorney General

The Commission's statutory authority to require permits for the storage, processing or disposal of solid waste is found in Subsection 4(e) of the Solid Waste Disposal Act. That subsection provides that the agency may require permits authorizing the construction, operation and maintenance of facilities used for the storage, processing or disposal of solid waste and outlines the basic framework for permit issuance including establishing certain permit characteristics and procedures for the processing of applications and the transfer, amendment or revocation of permits. A limitation on this general authority to require permits for the management of solid waste is Subsection 4(f) of the Act. Paragraph 4(f)(1) provides that the Texas Water Commission may not require a permit for the on-site management of

industrial solid waste that is not hazardous waste. Originally enacted simply as Subsection 4(f) and applicable to all industrial solid waste management, including hazardous waste, this provision was amended in 1977 to require that upon the identification and listing of hazardous waste by the Administrator of the U. S. Environmental Protection Agency, no person may store, process, or dispose of hazardous waste under the subsection without first having obtained a permit. This provision, which was enacted as Paragraph 4(f)(2), is applicable to existing facilities only and also sets out a procedure whereby operation of solid waste management facilities could continue pending action on the application. With the 1977 statutory amendment, Subsection 4(f), a basic limitation on the Commission's permitting authority, was thus divided into two Paragraphs, 4(f)(1) containing the original permit exemption and Paragraph 4(f)(2) which brought the on-site management of hazardous industrial solid waste within the scope of Subsection 4(e) and also served to supplement the requirements of that Subsection. The language introducing Subsection 4(e) "except as provided in Subsection 4(f) of this section with respect to certain industrial solid wastes" therefore necessarily refers to Paragraph 4(f)(1) only because the effect of Paragraph 4(f)(2) is to include a class of formerly excepted facilities within the permitting authority of Subsection 4(e). The provisions of Subsection 4(e), Paragraphs (1)-(10) and the rules promulgated pursuant to these provisions therefore are fully applicable to facilities described in Paragraph 4(f)(2) of the Act. In addition, Subsection 4(c) of the Act provides a broad grant of rule-making authority to the state agency to control all aspects of solid waste management and control. Requirements relating to the issuance, amendment and revocation of permits are necessary to control effectively the management of solid waste; Subsection 4(c) therefore is further support for procedural requirements relating to applications filed pursuant to Paragraph 4(f)(2) of the Act.

Title 31 TAC Section 305.50(9)(A) provides that in the case of a corporation, the application shall be signed by a responsible corporate officer. In this section, a responsible corporate officer includes a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or the manager of an operating facility meeting certain criteria. The rule ensures that the application will be signed by an individual with the capacity to act on behalf of the corporation and that there is an adequate level of corporate liability and a high level of concern and responsibility for the corporation's compliance with the Solid Waste Disposal Act and regulations thereunder. The requirement, therefore, achieves the objective of corporate responsibility in the permitting process, while providing for flexibility regarding

signatory requirements in those instances where it may be necessary or desirable.

Also in Section 305.50(9), paragraph (C) specifies that permit applications submitted by a municipality or other public agency shall be signed by either a principal executive officer or a ranking elected official.

In Section 305.50(10), a person signing a hazardous waste permit application shall make the certification stated in the rule, which certifies that the application was prepared in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted.

Pursuant to 31 TAC Section 281.21(c), the Commission will provide a copy of the draft permit and technical summary to any person, including those agencies listed in 40 CFR Sections 124.10(c)(1)(ii) and (iii), if requested to do so. By making these documents available to any person upon request, 31 TAC Section 281.21(c) is equivalent to 40 CFR Section 124.10. In addition, pursuant to 31 TAC Section 305.103(b), those agencies listed in 40 CFR Sections 124.10(c)(1) (ii) and (iii) receive the notice of application, which states whether a draft permit has been prepared, and are thereby informed of the existence of any draft permit, to enable them to request a copy under 31 TAC Section 281.21(c).

The rules of the Texas Water Commission contain comprehensive notice requirements which provide opportunity for public notice and public participation equivalent to and more stringent than the notice requirements contained in Section 7004(b)(2) of RCRA. Title 31 TAC Section 305.103 requires that, in addition to the applicant and local, state and federal health or environmental authorities, landowners named on the application map or supplemental map be mailed notices of application and of hearing. Title 31 TAC Sections 31 TAC 305.93 and 305.102 require that notices of application and of hearing be published in a newspaper of general circulation regularly circulated within each county where the facility is to be located and in each county that may be affected by the facility. In addition, 31 TAC Section 305.104 provides that the applicant shall cause the public notice prepared by the Commission to be broadcast over and on more local radio stations in the affected area of a pending application to store, process and dispose of hazardous waste. These notice requirements achieve the same result intended by Section 7004(b) of RCRA.

Section 13 of the Administrative Procedure and Texas Register Act, Article 6252-13a, Revised Civil Statutes, provides that in a contested case, all parties must be afforded an

opportunity for hearing after reasonable notice of not less than 10 days.

Paragraphs 4(e)(4) and 4(f)(2) of the Solid Waste Disposal Act and the rules of the Texas Water Commission provide that a hearing be held whenever requested by a person affected. The term "person affected" is defined in Section 2(22) of the Solid Waste Disposal Act as any person who is a resident of a county or any county adjacent or contiguous to the county in which a solid waste facility is to be located including any person who is doing business or owns land in the county or adjacent or contiguous county and any local government; such person affected shall also demonstrate that he has suffered or will suffer actual injury or economic damage. The term is expanded in 31 TAC Section 305.105(c) as one who is determined by the Commission to have an interest that may be adversely affected by an action taken on the application. Subsection (b) of that rule provides that the written request describe the interest of the requester and explain how the application, if granted, would adversely affect such interest. Section 265.9 of the procedural rules of the Texas Water Commission, which establishes written protest requirements, also requires that the protestant state the basis of his interest and allege any relevant facts or conclusions, and describe the location of the protestant's property relative to the application.

The Memorandum of Agreement between the State and the U. S. Environmental Protection Agency provides that the State will provide an informal public hearing session upon receipt of a notice of opposition and a request for such hearing, accompanied by a statement that an aesthetic, conservational, recreational, or economic interest is or may be harmed by the proposed action; in accordance with the agreement the State will presume that residents, property owners, or individuals doing business in the local area meet this test. The terms of the agreement relating to request for public hearing are consistent with the requirements of the Solid Waste Disposal Act and the rules of the Texas Water Commission discussed above. Title 31 TAC Section 305.105(c) requires that a person affected have an interest which may be adversely affected by the action taken on an application. This rule therefore requires a showing of actual or possible harm or effect, consistent with the terms of the Memorandum of Agreement, and in addition may be construed to include the protection of aesthetic, conservational, recreational or economic interests. Residents, property owners, or individuals doing business in the local area may be presumed under the terms of 31 TAC Section 305.105 to be adversely affected by virtue of their proximity to the facility. The provisions of Section 2(22) of the Solid Waste Disposal Act, which uses a geographic standard in defining "person affected" as a resident of a county or any county adjacent to the county

where the facility is proposed to be located, supports this interpretation of the Commission's rules. The statutory definition also specifically references persons doing business or owning land in the county or adjacent counties as persons within the scope of the term "person affected."

The State requirements relating to requests for hearing are also consistent with the legislative history of Section 7004(b)(2) of RCRA. In the words of the House sponsor:

It is my belief that people who live in the vicinity of a proposed site have a right to know what kinds of hazardous and toxic substances may be buried in their neighborhood. My amendment will assure them of this right to help protect future safety and health. 126 Cong. Rec. 1099 (daily ed. Feb. 20, 1980).

Because the State provisions are consistent with Congressional intent and the terms of the Memorandum of Agreement, the State program should be deemed in compliance with the requirements in Section 7004(b)(2).

The Texas Water Commission has several mechanisms facilitating public participation in the hearing process. The implementation of these procedures results in requirements for public participation which are equivalent to those in 40 CFR Section 124.12.

First, the rules contain liberal notice requirements, discussed above, which inform persons potentially affected by a facility, of the permit application and any hearing on that application. In addition, although the procedural rules of the Texas Water Commission require that a person demonstrate a justiciable interest in order to be designated as a formal party to the hearing, it is the customary practice to allow any person wishing to present an oral or written statement at the hearing to do so, the requirement of a justiciable interest notwithstanding. Moreover, as provided in the Memorandum of Agreement between the State and U. S. Environmental Protection Agency, oral or written comment submitted to the Executive Director of the Texas Water Commission will be considered and responded to in conjunction with the Executive Director's recommendation on the permit application, thereby ensuring consideration and accommodation of such comment before a final decision is made. In addition, 31 TAC 305.106 provides a regulation equivalent to 40 CFR Section 124.17 by establishing a procedure for describing and responding to significant public comments received on a draft hazardous waste permit.

Finally, Section 5.271 of the Texas Water Code creates an office of public interest, the statutory purpose of which is to ensure that the Commission promotes the public interest and is responsive to citizens. The office is headed by a public interest advocate who is required to represent the public interest and, under the provisions of the statute, is a mandatory party to all proceedings before the Commission. Those persons unable to make a showing of a justiciable interest under 31 TAC Section 267.1 have a mechanism, in the office of public interest, whereby their viewpoints, if determined to be in the public interest, can be presented to the hearing body and receive full evidentiary consideration.

When reviewed in the context of the procedures discussed above, it is recognized that the requirement of a justiciable interest does not operate to restrict public participation but to focus issues and strengthen evidence, both desirable goals of the adjudicative process.

Title 31 TAC Section 269.3 of the procedural rules of the Texas Water Commission provides that the Commission shall by written order make its final decision which, if adverse to any party, shall include findings of fact, and conclusions of law separately stated. If any party filed proposed findings of fact, the rule provides that the Commission will include in its final decision a ruling on the proposed findings of fact, unless waived by the party.

In addition, Subsections 16(a) and (b) of the Administrative Procedure and Texas Register Act, Article 6252-13a, Revised Civil Statutes, provide that if a party submits proposed findings of fact, the agency's final decision must include a ruling on the proposed findings.

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.

[Federal Authority: RCRA Section 3007(42 U.S.C. 6927), 40 CFR 271.15.]

Citation of Laws and Regulations

Subsection 7(a) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides that authorized

agents or employees of the Commission have the right to enter at all reasonable times in or upon any property for the purpose of inspecting and investigating conditions relating to solid waste management and control.

Subsection 7(b) of the Act provides that authorized agents or employees of the Commission may have access to, examine, and copy during regular business hours any records pertaining to hazardous waste management and control.

Date of Enactment of Enabling Legislation: August 29, 1977.

Remarks of the Attorney General

The inspection authority granted in Section 7 of the Act extends to the inspection of any conveyance or vehicle associated with the transportation or management of hazardous waste. The Commission has the authority to enter in or upon any property, including all oil and gas facilities, for the purpose of inspecting and investigating conditions relating to solid waste management and control. Transportation activities are within the scope of the broad term "solid waste management and control." In addition the use of the term "property" is sufficiently broad to include both real property and personalty so that the Commission's authority would not only include transportation-related yards or facilities but also individual vehicles or conveyances. An interagency agreement between the Texas Department of Water Resources (the predecessor agency of the Texas Water Commission) and the Texas Department of Public Safety also assists in the enforcement of requirements applicable to transporters. Pursuant to Section 10.004(f) of S. B. 249, this agreement is binding on the Texas Water Commission. *Agreement*

Also available to facilitate inspections is Article 18.05 of the Code of Criminal Procedure which provides that a search warrant may be issued to the fire marshall or health officer of the State of any county, city or other political subdivision for the purpose of allowing the inspection of any specified premises to determine the presence of a fire or health hazard or violation of any fire or health regulation, statute or ordinance. By statute, search warrants are available but not required for the conduct of civil investigations. *Agreement*

The inspection authority under Subsection 7(a) which provides that state and local inspectors "shall observe the rules and regulations of the establishment being inspected concerning safety, internal security, and fire protection" is to be construed within the context of the overriding purpose of the Act "to safeguard the health, welfare, and physical property of the people and to protect the environment;" thus while inspectors should observe safety, security and fire rules

wherever reasonable, the overriding purpose of the Act requires that under no circumstances may these rules in any way impede or obstruct thorough and complete investigations as deemed necessary by the individuals conducting inspections.

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.

[Federal Authority: RCRA Section 3006 (42 U.S.C. 6926); 40 CFR Section 261.16.]

Citation of Laws and Regulations

Paragraph 8(a)(3) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides that the Commission may cause a civil suit to be instituted in a district court for injunctive relief whenever it appears that a person has violated or is violating, or threatening to violate any provisions of the Act, or of any rule, regulation, permit, or other order of the Commission.

Paragraph 8(a)(6) of the Act provides that in a suit brought to enjoin a violation, the court may grant the Commission bringing the suit, without bond or other undertaking, any prohibitory or mandatory injunction the facts may warrant, including temporary restraining orders after notice and hearing, temporary injunctions, and permanent injunctions.

Paragraph 4(e)(10) of the Solid Waste Disposal Act provides that the Commission may issue an emergency order, either mandatory or prohibitory in nature, regarding any activity of solid waste management within its jurisdiction, whether such activity is covered by a permit or not, if the Commission determines that the activity is creating or will cause extensive or severe property damage or economic loss to others or is posing an immediate and serious threat to human life or health and that other procedures available to the Commission to prevent or remedy the occurrence will result in unreasonable delay.

Date of Enactment of Enabling Legislation: September 1, 1969; September 1, 1981.

- 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 a permit.

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

Citation of Laws and Regulations

Paragraph 8(a)(3) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides that the Commission may cause a civil suit to be instituted in a district court for injunctive relief whenever it appears that a person has violated or is violating, or threatening to violate any provision of the Act, or of any rule, regulation, permit, or other order of the Commission.

Date of Enactment of Enabling Legislation: September 1, 1969.

- 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 Section 3006 (42 U.S.C. 6926); 40 CFR Section 271.16(a)(3)(i).]

Citation of Laws and Regulations

Paragraph 8(a)(2) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides that any person who violates any provision of the Act or of any rule, regulation, permit, license, or other order of the Commission is subject to a civil penalty of not less than \$100.00 nor more than \$25,000.00 for each act of violation and for each day, as the court may deem proper.

Paragraph 8(a)(3) of the Act provides that the Commission may cause a civil suit to be instituted in a district court for the assessment and recovery of a civil penalty not less than \$100.00 nor more than \$25,000.00 for each act of violation and for each day of violation.

Date of Enactment of Enabling Legislation: September 1, 1969.

- D. Authority to obtain criminal penalties in at least the amount of \$10,000.00 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 Section 3006 (42 U.S.C. 6926); 40 CFR Section 271.16(a)(3)(ii).]

Citations of Laws and Regulations

Subsection 8(b) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides authority to obtain criminal penalties of not less than \$100.00 nor more than \$50,000.00 for each act of violation and each day of violation, or to imprisonment not to exceed two years, or both, against any person who knowingly transports, or causes to be transported for storage, processing, or disposal, any hazardous waste to any location which does not have a permit; stores, processes, or disposes, or causes to be stored, processed, or disposed, any hazardous waste without having obtained a permit or in knowing violation of any material condition or requirement of a permit or in knowing violation of any material condition or requirement of an applicable interim status rule or standard; omits or causes to be omitted material information, or makes, or causes to be made, any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with any requirement applicable to hazardous waste; generates, transports, stores, processes, or disposes of, or otherwise handles, or causes to be generated, transported, stored, processed, disposed of, or otherwise handled, any hazardous waste and who knowingly destroys, alters, conceals, or fails to file, or causes to be destroyed, altered, concealed, or failed to file any record required to be maintained; and transports without a manifest or causes to be transported without a manifest any hazardous waste required to be accompanied by a manifest. A maximum imprisonment not to exceed five years is available in the case of knowing transportation of hazardous waste to an unpermitted location, and knowing storage, processing, or disposal of hazardous waste without a permit, knowing violation of any material condition or requirement of a permit, or knowing violation of any material condition or requirement of an applicable interim status rule or standard. Penalties may be doubled if the conviction is for a violation committed after a first conviction.

Date of Enactment of Enabling Legislation: September 1, 1981

- E. Authority to assess administrative penalties against persons who violate the provisions of the Texas Solid Waste Disposal Act or rules, orders, permits or registrations issued under the Act.

Citation of Laws and Regulations

Section 8b of the Solid Waste Disposal Act authorizes the Commission to assess administrative civil penalties against a person who violates the provisions of the Act, or rules, orders, permits or registrations issued under the Act. The penalty may be in an amount not to exceed \$10,000 a day. Each day a violation continues may be considered a separate violation for purposes of penalty assessment. Payment of an administrative penalty shall be full and complete satisfaction of the violation for which the penalty is assessed and should preclude any other civil or criminal penalty for the same violation.

Date of Enactment of Enabling Legislation: September 1, 1985

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 which allows intervention as of right in any civil or administrative action to obtain the remedies specified in VII above and any citizen having an interest which is or may be adversely affected; or
- B. Assurances that the State agency or enforcement authority will:
 - (1) Investigate and provide written response to all citizen complaints duly submitted;
 - (2) Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule, or regulations; and
 - (3) Publish and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

[Federal Authority: RCRA Section 7004, 40 CFR Section 271.16(d).

Citation of Laws and Regulations

The Attorney General of Texas and the Texas Water Commission have executed a Memorandum of Understanding providing for public participation in the State enforcement process in accordance with 40 CFR Section 271.16(d). There is nothing in State law to prohibit the execution of this agreement or the inclusion of the provisions contained therein. The MOU has been adopted by rules, as required by the Texas Water Code, Section 5.104, and appears at 31 TAC Section 335.28.

IX. AUTHORITY TO SHARE INFORMATION WITH ENVIRONMENTAL PROTECTION AGENCY

State statutes and regulations provide authority for any information obtained or used in the administration of the State program to be available to Environmental Protection Agency upon request without restriction.

[Federal Authority: RCRA Section 3007(b) (42 U.S.C. 6927); 40 CFR Section 271.17.]

Citation of Laws and Regulations

Under Article 6252-17a, Revised Civil Statutes, all information collected, assembled or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, subject to exceptions provided therein. Subsection 7(c) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, provides that records copied pursuant to Subsection 7(b) of the Act shall be public records, except that, if a satisfactory showing is made by the owner of such records that the records would divulge trade secrets if made public, then the Commission would consider such copied records as confidential.

Subsection 7(b) of the Act provides that authorized agents or employees of the Commission may have access to, examine, and copy during regular business hours any records pertaining to hazardous waste management and control.

A State agency may forward confidential information to the federal government, provided that a federal law so requires. Section 271.132 of Title 40 of the Code of Federal Regulation, promulgated pursuant to Section 3006 of RCRA, provides that any information obtained or used in the administration of a State hazardous waste program shall be made available to the Environmental Protection Agency upon request.

Subsection 4(c) of the Solid Waste Disposal Act, Article 4477-7, Revised Civil Statutes, authorizes the Commission to promulgate rules consistent with the general intents and purposes of the Act and establish minimum standards of operation for all aspects of the management and control of the solid waste over which it has jurisdiction, including but not limited to collection, handling, storage, processing, and disposal. 31 TAC Section 335.46 provides that information obtained or used by the Commission in the administration of a hazardous waste program authorized under Section 3006 of RCRA and 40 CFR Part 271 shall be available to the U. S. Environmental Protection Agency upon request without restriction.

Date of Enactment of Enabling Legislation: August 29, 1977
[Article 4477-7, Sections 4(c) and 7(b) and (c)]; June 14,
1973 [Article 6252-17a].

X. AUTHORITY OVER INDIAN LANDS

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

[Federal Authority: 40 CFR Section 271.7(b).]

Remarks of the Attorney General

The State does not presently seek authority over Indian lands.

SEAL OF OFFICE



Jim Mattox,
Attorney General of Texas

July 21, 1988
Date