12-1980

0254 Committee on Hazardous Waste

Colorado Legislative Council

0254 Committee on Hazardous Waste

Report to the Colorado General Assembly:

RECOMMENDATIONS FOR 1981 COMMITTEE ON:

HAZARDOUS WASTE

COLORADO LEGISLATIVE COUNCIL

RESEARCH PUBLICATION NO. 254
December, 1980

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OF THE

COLORADO GENERAL ASSEMBLY

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The Legislative Council, which is composed of six Senators, six Representatives, plus the Speaker of the House and the Majority Leader of the Senate, serves as a continuing research agency for the legislature through the maintenance of a trained staff. Between sessions, research activities are concentrated on the study of relatively broad problems formally proposed by legislators, and the publication and distribution of factual reports to aid in their solution.

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COLORADO LEGISLATIVE COUNCIL

RECOMMENDATIONS FOR 1981

(Colorado. Legislative Council. COMMITTEE ON HAZARDOUS WASTE).

Legislative Council

Report to the

Colorado General Assembly

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COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

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DENVER, COLORADO 80203
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AREA CODE 303

To Members of the Fifty-third Colorado General Assembly:

Submitted herewith is the final report and recommendations of the 1980 interim Committee on Hazardous Waste which was appointed pursuant to Senate Joint Resolution No. 26 of the 1980 Session of the Colorado General Assembly.

Respectfully submitted,

/s/ Senator Fred Anderson
Chairman
Colorado Legislative Council

FA/pm

FOREWORD

In accordance with Senate Joint Resolution No. 26, 1980 session, the Legislative Council directed the 1980 interim Committee on Hazardous Waste to conduct a study on hazardous waste as outlined in Senate Bill 56, 1980 session, as it passed the House State Affairs Committee. The committee held six meetings during the interim and recommends three items for legislative consideration. One bill would provide for the determination of the location of waste sites; a concurrent resolution is recommended as a proposed constitutional amendment; and a joint resolution would provide for the continuation of a committee on this subject.

This volume contains the report and recommendations of the Committee on Hazardous Waste. The Legislative Council reviewed these recommendations at its meeting on November 24, 1980, and voted to accept the report and the recommended legislation for transmittal to the 1981 session of the General Assembly.

The Committee on Hazardous Waste and the staff of the Legislative Council were assisted by Bill Hobbs of the Legislative Drafting Office in the preparation of the committee's proposed legislation.

December, 1980

Lyle C. Kyle
Director

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COMMITTEE ON HAZARDOUS WASTE

Members of the Committee

Legislative Members

Rep. Anne McGill Gorsuch,
Chairman
Sen. Ted Strickland,
Vice-Chairman
Sen. Sam Barnhill
Sen. Dennis Gallagher
Rep. Carol Edmonds
Rep. Bob Stephenson

Nonlegislative Members

Mr. Pat Conley
(County Commissioner)
Mr. Joseph Tunner
(Business & Industry)
Mr. Jim Martin
(County Commissioner)
Mr. Whit Field
(Business & Industry)

Dr. Frank H. Traylor, Jr., or Dr. Bob Arnott
(Department of Health)

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Senate Joint Resolution 26 directed the Legislative Council to provide for a study on hazardous waste. The study was to be conducted as outlined in Senate Bill 56, 1980 Session, as it passed the House State Affairs Committee. Senate Bill 56 specified that the committee membership include six legislators and five non-legislators, the latter representing the following particular areas of expertise: two county commissioners familiar with local control of land use; two industrial representatives involved with problems related to generating and disposing of hazardous waste materials; and the Executive Director of the Department of Health (or his designee) who has responsibilities for health protection.

Senate Bill 56 directed that the committee "consider the advisability of and proposals for a program of hazardous waste management to be administered by the state under the requirements of the federal 'Resource Conservation and Recovery Act of 1976', as amended". A description of the federal act preceeds a discussion of committee findings and recommendations.

The Federal Resource Conservation and Recovery Act of 1976 (RCRA)

General provisions. The United States Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976, which amended the existing Solid Waste Disposal Act. Subtitle C of the act, entitled "Hazardous Waste Management", mandated the establishment of a national program to regulate hazardous wastes from "cradle to grave", that is, from generation through final disposal.

The hazardous waste program mandated under Subtitle C became effective November 19, 1980. "Hazardous waste" was defined primarily to include industrial chemical wastes which are considered potentially hazardous. Radioactive wastes regulated under the Atomic Energy Act of 1954, as amended, are not included under the Resource Conservation and Recovery Act.

The act requires the United States Environmental Protection Agency (EPA) to promulgate regulations for the implementation of a national hazardous waste management program. States are given the option of administering a program equivalent to the federal program, "equivalence" to be determined by the EPA. The agency is mandated to administer the federal program within those states which choose not to establish their own equivalent program.

Regulations for the implementation of Subtitle C of the Resource Conservation and Recovery Act include the following:

-- identification and listing of hazardous wastes;

-- standards applicable to generators of hazardous wastes;

-- standards applicable to transporters of hazardous wastes;

-- standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities;

-- provisions for issuing permits for treatment, storage, or disposal of hazardous wastes; and

-- provisions for authorizing state hazardous waste programs.

An outline of the federal law and the regulations promulgated thereunder is contained in Appendix A.

Regulated wastes. Beginning November 19, 1980, a total of 361 itemized substances became subject to regulation under Subtitle C of the act. Of that total, 239 are classified as "hazardous wastes". Any person who generates more than 1,000 kilograms per month of those wastes must comply with the program regulations. The remaining 122 substances listed are "acutely hazardous wastes", and generators who produce more than one kilogram per month of those wastes are subject to regulation.

In addition to the listed wastes, other wastes which meet published criteria as being "hazardous" are subject to regulation. The Environmental Protection Agency established criteria for identifying hazardous waste on the basis of measurable characteristics for which standard tests are available. The regulations provide detailed technical specifications for the following characteristics: ignitability, corrosivity, reactivity (explosiveness), and toxicity. Waste generators are responsible for determining if their wastes come under the regulations, whether the wastes are specifically listed, or whether they meet the published criteria. Those persons generating, transporting, treating, storing, or disposing of hazardous wastes are required to notify their regional EPA office.

Program exclusions. Persons who generate hazardous waste in amounts less than the quantity specified for regulation are exempted from regulation as generators, but nevertheless must treat or dispose of the waste at a facility permitted for hazardous waste under Subtitle C, or at a facility certified by a state for management of municipal or industrial solid waste. These provisions are known as the "small quantity exclusion". Also excluded from regulation at the present time are: domestic sewage; industrial wastewater discharges; nuclear wastes regulated under the Atomic Energy Act of 1954; irrigation return flows; household waste; wastes that are recycled (except for storage and transportation); agricultural wastes returned to the soil as fertilizers or soil conditioners; mining overburden returned to the mine site; utility wastes; and oil and gas drilling muds and brines.

Status of regulations. The main body of regulations governing the federal hazardous waste management program was published in the May 19, 1980, Federal Register and became effective November 19, 1980.

Completed regulations to date include program requirements applicable to: hazardous waste identification; hazardous waste generators and transporters; management of hazardous waste facilities under "Phase I" (explained below); issuance of permits; and authorization of state hazardous waste programs.

Regulations applicable to facility owners and operators commencing November 19 are referred to as "Phase I -- Interim Status Standards" and include primarily managerial requirements and future closure and postclosure activities for disposal facilities.

The Phase I interim status standards, which will "grandfather in" existing facilities, give temporary authority to facility owners and operators who meet the standards to continue operations until final administrative action is taken on their permit applications.

Not included in the portion of the regulations which became effective on November 19 are those which will specify technical requirements for obtaining permits by owners and operators of treatment, storage, and disposal facilities. Those technical regulations, referred to by the Environmental Protection Agency as "Phase II -- Permanent Status Standards", are expected to be published in late December, 1980, and will become effective six months thereafter.

Additions to the regulations will be made periodically by the EPA. For example:

-- new wastes will be added to the listing of substances to be regulated;

-- regulations governing use, re-use, recycling, and reclamation of wastes are to be proposed;

-- standards applicable to specific types of industries are to be promulgated;

-- the small quantity exemption ceiling, which currently exempts generators producing less than 1,000 kilograms of hazardous waste per month from regulation under Subtitle C, reportedly will be lowered to 100 kilograms; and

-- the "Phase II -- Permanent Status Standards" for facilities are to be published in late December 1980.

State administered programs. The Resource Conservation and Recovery Act provides that states may be authorized by the Environmental Protection Agency to carry out a hazardous waste program in lieu of the federal program. In order for a state to receive such authorization, the federal law stipulates that EPA must determine that the state program meets the following requirements:

-- it must be equivalent to the federal program;

-- it must be consistent with the federal program or state programs applicable in other states; and

-- it must provide adequate enforcement of compliance with program requirements.

If a state chooses not to carry out an authorized program, the EPA is mandated to administer the federal program in that state.

Interim authorization. The federal law also provides that states which had their own hazardous waste program on August 18, 1980, may be eligible to receive temporary authorization to carry out the program. Such "interim authorization" may be granted for up to two years if the program is determined by the EPA to be "substantially equivalent" to the federal program. Once "full equivalence", a term interpreted by the EPA to mean "equal in effect", is achieved by a state program, the state would qualify for "final" or "full" authorization.

Cooperative arrangement. In a state which sought interim authorization but failed to qualify, the Environmental Protection Agency retains regulatory responsibility for the program. However, " ... the cooperation and participation of the State ... " is encouraged in order to implement the federal program until the state's program receives authorization. 1/ Through a "cooperative arrangement", a state would perform designated administrative tasks and would receive federal financial support for those activities.

Colorado. Colorado does not have a statutory hazardous waste program and is not eligible to receive interim authorization to administer its own program. Region VIII Environmental Protection Agency officials have been responsible for the administration of the federal program in Colorado since November 19, 1980. The Colorado Department of Health, however, may enter into a cooperative arrangement with the EPA without further statutory authority, and the department currently is negotiating a cooperative arrangement with federal officials. It is understood that $202,000 in federal funds will be provided in fiscal year 1981 for the department's participation in the program. If legislative authority is not received by the Department of Health for a state administered hazardous waste program by October 1, 1982, the cooperative arrangement funding and program effort will cease.

Funding. Twenty-five million dollars was allocated under the Resource Conservation and Recovery Act for each of the fiscal years 1978 and 1979 to assist states in the development and implementation of authorized state hazardous waste programs. Colorado has received the following federal funds for hazardous waste program development: fiscal year 1978 -- $75,000; fiscal year 1979 -- $152,000; and fiscal year 1980 -- $188,000.

1/ Federal Register, May 20, 1980, page 33784.

In states where the Environmental Protection Agency administers the program, program costs will be funded entirely by the federal government. In states administering authorized programs, federal funding may not exceed seventy-five percent of allowable work program costs. 2/

Site selection for hazardous waste facilities. The federal program includes standards and provisions for permitting and operating hazardous waste treatment, storage, and disposal facilities, but it does not contain provisions for selecting particular locations for those facilities. Authority for locating sites remains with state or local governments in accordance with existing laws or practices.

Committee Study Directive and Committee Priorities

Study directive. The primary assignment of the committee was to consider the advisability of establishing a state administered hazardous waste program under the requirements of Subtitle C of the federal Resource Conservation and Recovery Act of 1976. Senate Bill 56 also included the following items for consideration:

(a) Permitting the transition of existing hazardous waste disposal sites to a complying status with existing and proposed state and federal laws and regulations;

(b) Identification of activities required to be terminated in the event of noncompliance with existing and proposed state and federal laws and regulations;

(c) Standards for achieving compliance for existing hazardous waste disposal sites located in areas determined by the department of health to have marginal probability of developing safe storage facilities for geological and hydrological reasons;

(d) Proposals for minimizing the volumes of hazardous wastes requiring disposal, such as waste exchange programs;

(e) Factual rationales as may be required by public health and safety considerations for limiting access to hazardous waste disposal sites for extremely hazardous wastes or hazardous wastes requiring long-term care or surveillance;

(f) The role of local land use controls upon the siting of hazardous waste disposal facilities; and

2/ Federal Register, September 25, 1978, page 43426.

(g) The advisability of the use of state lands as disposal sites in light of other options.

Study priorities. The question of whether or not to recommend the establishment of a state administered hazardous waste program was the highest priority question before the committee.

The study directives in Senate Bill 56 were adopted prior to publication on May 19 of the regulations under the federal act. Publication of the regulations in May meant that the committee could consider each directive in light of the impending federal program. Several items in Senate Bill 56 were found no longer relevant to state policy-making because they are addressed by the federal regulations.

Specifically, paragraphs (a), (b), (c), and (e) were identified as regulated under federal law and no longer considered as study priorities. Since the federal program does not contain site selection provisions for hazardous waste facilities, paragraphs (f) and (g) were identified as important considerations.

Committee Procedures

Six all-day sessions were held during which the committee extensively reviewed federal hazardous waste legislation and regulations; reviewed state laws and county regulations related to its deliberations; heard testimony from interested parties relating to the administration of a hazardous waste program in the state; compiled a list of arguments for and against a state administered program as opposed to a federally administered program in the state; considered four bill drafts of proposed legislation; and submits several recommendations including three proposals for legislation.

A synopsis of committee activities by subject area is contained below.

Overview of federal law and regulations. A detailed review was conducted of Subtitle C under the federal Resource Conservation and Recovery Act of 1976 (RCRA) and the regulations promulgated thereunder. Program details and legal questions were reviewed with representatives of the Environmental Protection Agency. 3/

3/ EPA Region VIII representatives who responded to committee inquiries were: Mr. Jon Yeagley, Chief, State Assistance Section; Dr. Henry Schroeder, Regional Hazardous Waste Specialist and the Program Manager for Oversight; and Mr. Wilkes McClave, Assistant Regional Counsel.

Regional EPA representatives responded to questions at the committee meetings and, in cases where more definitive answers or further clarifications were sought, requests for further clarification were addressed to the regional office by the chairman on behalf of the committee for subsequent consideration. A compilation by subject area of the questions and responses between the chairman and representatives of the regional office is contained in Appendix B.

Colorado Department of Health. Representatives of the state Department of Health 4/ made several presentations to the committee and responded to verbal and written committee questions. Copies of correspondence between the chairman on behalf of the committee and department officials is contained in Appendix C.

Departmental representatives spoke in support of a state administered hazardous waste program and proposed that the twenty-five percent state share of program costs be financed through a fee system.

Other interested parties. Representatives of the Colorado Association of Commerce and Industry, 5/ the Governor's Solid Waste Advisory Committee, 6/ Chemical Waste Management, Inc., 7/ and the State Board of Land Commissioners 8/, addressed the committee. Written statements from the Colorado Association of Commerce and Industry and the advisory committee are contained in Appendix E. A memorandum prepared by Jim Spaanstra 5/ entitled "EPA Oversight of the RCRA Permitting Process in States With Authorized Hazardous Waste Programs" is attached as Appendix H. The memorandum was distributed to committee members for review.

4/ Department of Health representatives who were available to respond to committee questions were: Dr. Frank A. Traylor, Executive Director (and a committee member); Dr. Robert Arnott, Assistant Director of Health, Office of Health Protection; and Dr. James Martin, Chief, Hazardous and Solid Waste Section. Although the Attorney General was specifically invited to submit any proposals for legislation for consideration by the committee, his office chose to act in a legal advisory capacity to the Department of Health. Janice Burnett, Assistant Attorney General, served as a resource for the department in that capacity. A memorandum requested by the committee from the Attorney General, J.D. MacFarlane, is attached as Appendix D.

5/ O.L. Webb, Colorado Association of Commerce and Industry, Director of Environmental Affairs; and Jim Spaanstra, an attorney with Holland & Hart, Denver.

6/ Joe Madonna, Chairman.

7/ Leonard Tinnan, Western Area Manager.

8/ Bill Claire, Commissioner, and Rowena Rogers, Board President.

In addition, three citizens concerned with present conditions at the Lowry Landfill and the lack of citizen knowledge and participation in plans for the construction of a hazardous waste facility at that site spoke with the committee. 9/

Overview of Colorado statutes. A comprehensive search was made of Colorado statutes to identify current legal vehicles available for regulating site selection for disposal of wastes. The following were found to be of greater or lesser relevance, and are included here for further reference:

-- Article IX, Sections 9 and 10 of the Constitution of Colorado, which establish the State Board of Land Commissioners and provide for the selection and control of public lands subject to board control;

-- Title 36, Article 1, C.R.S. 1973, which prescribes the duties of the State Board of Land Commissioners;

-- Title 30, Article 20, Part I, C.R.S. 1973, "Solid Wastes Disposal Sites and Facilities", which provides for certification and regulation of solid waste sites and facilities;

-- Title 24, Article 65.1, C.R.S. 1973, "Areas and Activities of State Interest", which allows local governments, subject to specified procedures, to designate certain activities of state interest, including site selection and development of solid waste disposal sites (with some specified exceptions);

-- Title 24, Article 67, C.R.S. 1973, "Planned Unit Development Act of 1972", which permits counties and municipalities to authorize "planned unit developments", or areas of land to be developed under unified control for specified uses, the plans for which are not subject to certain existing land use regulations;

-- Title 30, Article 28, C.R.S. 1973, "County Planning and Building Codes", which authorizes the boards of county commissioners to provide for zoning and the physical development of unincorporated territory within their respective counties; and

9/ Mary Ann Rains, Bonnie Exner, and Rebecca Smith, citizens of Arapahoe County.

-- Title 29, Article 20, C.R.S. 1973, "Local Government Land Use Control Enabling Act of 1974", which is intended to provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions.

Arguments for and against a state administered hazardous waste program. Arguments for and against a state administered program were solicited from interested persons, including committee members, and from representatives of the Environmental Protection Agency, the Colorado Department of Health, the Colorado Association of Commerce and Industry, and Colorado Counties, Inc. Proposed arguments were consolidated into a list of popular arguments for and against a state administered program. The committee chose to include the list of arguments in Exhibit I (pages 10-14) in the report for future reference, but did not endorse the list as being necessarily factual.

Proposed legislation. All committee members and any other interested persons were invited to submit proposals for legislation to the committee. Senator Barnhill, the state Department of Health, and a drafting group consisting of the two attorney members on the committee -- Chairman Gorsuch and Mr. Field -- submitted bill drafts to the committee. Also assisting the drafting group was Mr. William Robb, an attorney with Welborn, Dufford, Cook, and Brown of Denver.

All the proposals considered by the committee were intended to provide a mechanism for siting hazardous waste facilities. In addition to siting provisions, one proposal submitted by the Department of Health would have given authority to the department to regulate the operations of hazardous waste disposal sites.

The committee recommends Bill 1 concerning waste disposal and siting authority for hazardous waste sites. An annotated draft of the bill starts on page 21.

In addition to Bill 1, the committee recommends two other legislative proposals, as described in the section beginning on page 15 (following Exhibit I).

EXHIBIT I

POPULAR ARGUMENTS FOR AND AGAINST A STATE ADMINISTERED PROGRAM

Definitions

RCRA -- the Federal Resource Conservation and Recovery Act of 1976, as amended. Subtitle C of RCRA establishes a hazardous waste management program and requires the Environmental Protection Agency to promulgate regulations defining hazardous waste and providing for the control of the waste from generation, through transportation, and final treatment, storage, or disposal.

EPA -- the Environmental Protection Agency. The EPA is mandated to administer the RCRA program in states which do not have their own EPA authorized hazardous waste management program.

Federally administered program -- the RCRA program as administered by the regional EPA office in states which do not have an EPA authorized state administered hazardous waste program.

State administered program -- an EPA authorized hazardous waste management program administered by a state in compliance with requirements of RCRA and EPA-promulgated regulations. In order to receive EPA authorization, a state administered program must: a) be substantially equivalent to the federal program; b) be consistent with other state programs; and c) be adequately enforced.

Popular Arguments For a State Program

1. It was the Congressional intent of RCRA that the states administer the program as developed by Congress and the EPA.

2. Colorado administrators are in a better posture than the federal bureaucracy to realize and manage the state's particular needs within the framework of RCRA.

Popular Arguments Against a State Program

1. No reference to such a Congressional intent is contained in RCRA. It is a federally developed program and the burden of the administration should not be placed on the states; nor should states be put in the position of serving as a buffer for criticisms aimed at the federal program.

2. Colorado, either legislatively or administratively, would have very little flexibility in setting its own priorities. State legislation and regulations would have to be:

   a) substantially equivalent to or more stringent than the program requirements specified in RCRA;

Popular Arguments For a State Program

3. Colorado administrators of a state program would be more responsive and accountable to constituent industries and local citizens than EPA administrators of a federal program. Although there would be little flexibility in writing regulations, there would be considerable room for applying good judgment in the day-to-day implementation of the regulations under a state administered program. States would have some leeway in writing permits for treatment, storage, and disposal facilities, and may be able to issue permits by rule in certain circumstances. The use of the "best engineering judgment" concept could be incorporated into the state program.

4. Federal funding alone may not provide adequate resources for the protection of the public health and environment. In Region VIII, EPA personnel would be divided among the six states within their jurisdiction. The state could administer a better program, and it is preferable that the state regulate activities within its own boundaries rather than let the federal government have control.

Popular Arguments Against a State Program

b) consistent with other state programs (e.g., may not interfere with interstate commerce); and

c) adequately enforced, "adequacy" to be determined by the EPA.

3. RCRA requires that state administered programs be at least as stringent as the federal program, thus establishing a minimum "floor" of regulation. Unlike other federal programs, RCRA also establishes a "ceiling" above which state administered programs may not establish regulations, as illustrated by the requirement that a state's program must be consistent with other states' programs. Such a provision curtails flexibility even further. EPA cannot assure that states will be authorized to issue permits by rule, and even if authorized, EPA cannot assure that such permits could allow something which is different from provisions of programs adopted in other states. Nothing in the current regulations recognizes "best engineering judgment" (BEJ) as a standard or criterion for decision making. BEJ, as a standard, has not yet been adopted, and if adopted, would apply solely to disposal facilities, providing no flexibility for generators or transporters.

4. A federally administered program provides that the agency (EPA) which has written the regulations will implement them. Consistent interpretation and application of the regulations by EPA will provide for a uniform program. To develop the same expertise in Colorado would require an enormous up-front educational effort, would be duplicative of the federal effort and even under the best circumstances would not provide the same uniformity.

Popular Arguments For a State Program

5. A state administered program would provide some latitude for variation from a federal program, as dictated by state or local conditions.

6. A state administered program would reduce duplication of efforts. Industry could coordinate other state administered regulatory programs, such as water and air quality programs, with RCRA, and would thereby need to deal with only one agency for permits. Efficiencies which are possible by combining several regulatory programs include permit writing, inspections, monitoring, analytical laboratory support, district engineering support, assistance with problems concerning overlapping areas, enforcement measures, and technical advice.

7. A state administered program would be subject to state legislative review and oversight, thereby providing more ready and convenient access to constituents as new problems arise or changes become necessary.

8. Under a federally administered program counties have no incentive to site a hazardous waste facility, particularly since such a facility may cause a drain on county services for which a county would have no mechanism for reimbursement. A state administered program, through a fee system, could provide for a transfer of funds to counties for services expended in providing services for a facility and for any part

Popular Arguments Against a State Program

5. To the extent industry and the federal government desire a uniform program, a federally administered program could best accomplish that goal.

6. A state administered program would create duplicate regulatory control for hazardous waste. Some portion of the state decisions would be subject to EPA review and override, such as permitting and monitoring of permitted activities, so that the regulated community would have to satisfy two agencies on many major decisions.

7. State legislative authority would be limited by federal regulations which mandate "substantial equivalence," consistency with other state programs, and adequate enforcement. Problems and complaints concerning the program would be brought to the General Assembly, but because of constraints imposed by the federal requirements of "substantial equivalence" and consistency with other state programs, the legislature would not be able to respond effectively. Furthermore, state law and regulations would be required to change in concert with federal changes, which may prove cumbersome.

8. The state could provide a mechanism for incentives to counties to site hazardous waste facilities with or without a state administered program. Control of the disposal of non-regulated hazardous waste assumes a liability exists, which is unclear at this time. EPA has been unable to establish that any greater or lesser liability would exist for approved solid waste sites with the implementation of RCRA. Even if such a liability

Popular Arguments For a State Program

the county may play in implementing a program. In addition, RCRA requires that "small generators" of hazardous waste must dispose of the waste at permitted facilities or state approved disposal sites. The requirement will place an additional financial burden on counties which may have to increase their monitoring of disposal sites in order to control the types of waste deposited. A state administered program could help address the financial burden thus placed on local governments.

9. In a state administered program the state has the option to address issues which EPA cannot, including optimum siting, clean-up of existing sites, fees for local governments, resource recovery, technical assistance to industry, issues related to the mining industry and oil shale development, and regulation of small quantity generators not regulated under RCRA.

10. A state administered program would give the state authority to enforce RCRA regulations on federal facilities in Colorado.

11. The total cost to the taxpayer would be less in a state administered program due to higher salaries for federal employees.

Popular Arguments Against a State Program

existed, the state, in assuming an equivalent program would surely not have the funding to provide regulatory staff at the more than 200 solid waste sites in the state. Furthermore, the state could provide for funding to counties for site monitoring with or without a state administered program.

9. Colorado may address issues not covered by RCRA with or without a state administered program. The other issues are extraneous to the decision of whether or not Colorado should have a "state administered program".

10. The RCRA legislative history reads "state hazardous waste plans do not apply to federal facilities, nor should such state plans take into account hazardous waste generated on such facilities ... " (U.S. Code Congressional and Administrative News, 1976, p. 6262). State authority to enforce federal regulations on federal facilities would merely burden the state with what should be federal responsibilities.

11. The total cost to the taxpayer under a state administered program would be at least 25 percent greater. Federal funds, which would be 100 percent for a federally administered program, become 75 percent of a state administered program. Federal regulations require at least a 25 percent state match.

Popular Arguments For a State Program	Popular Arguments Against a State Program
12. The federal government will pay up to 75 percent of a state administered program's costs.	12. Since funds allocated to EPA for the administration of the hazardous waste program are appropriated on a yearly basis and not by continuing resolution, continued funding and the amount of funding by the federal government to the states is uncertain. Further, under a federally administered program, the 75 percent becomes the total expenditure.
13. A fee system could be implemented to cover the additional cost of a state administered program. Such a fee system would directly impose the cost of the program on the generators of hazardous waste and indirectly on the consumers who buy products, the production of which generates hazardous wastes. Industry representatives have testified they would be willing to bear a fair burden of the costs.	13. A fee system imposed under a state administered program would burden the consumer with greater costs of production. Industry, while "willing to bear a fair burden," in fact merely passes the added costs of production on to consumers, and is in a poor posture to volunteer the consumer.

Note: A memorandum which addresses several issues raised in the above arguments for and against a state program is attached as Appendix H. The memorandum, entitled "EPA Oversight of the RCRA Permitting Process in States With Authorized Hazardous Waste Programs", was written by Jim Spaanstra, an attorney with Holland and Hart, a Denver law firm.

Committee Findings and Recommendations

Several findings were made by the committee in four major areas: program administration responsibility; site selection procedures; hazardous waste generation in Colorado; and authority of the State Board of Land Commissioners. Each area is listed below with major findings and recommendations, if any.

Findings -- State or Federal Program Administration

Federal regulations establish three requirements for state program authorization:

1) equivalence to the federal program;

2) consistency with programs in other states; and

3) adequate enforcement.

The first criterion sets a minimum standard, or "floor"; the second establishes a maximum standard, or "ceiling"; and the third criterion determines the level of required resources (personnel and funding).

The committee found that:

-- Contradictions exist concerning the amount of flexibility Colorado would be allowed in designing its own program. Several unresolved issues concerning the state's prerogatives include the following: the state's authority to issue permits; the state's latitude, if any, in determining "best engineering judgment" criteria; the state's ability to limit citizen suits; and the state's authority to issue permits by rule. (See Appendix B for discussion of the issues.)

-- It is not now possible to determine the cost of a state administered program in Colorado. Estimates of the Environmental Protection Agency and the state Department of Health concerning the number of personnel for a program vary greatly. However, the level of enforcement in a state will be determined largely by the EPA. Determination of the level of enforcement means that the EPA, not the state, will determine the cost of a state administered program, at least twenty-five percent of which will be state monies.

Colorado is the largest generator of hazardous waste in Region VIII. Federal funds for program administration are allocated within the region based on a formula which takes into consideration population, land size, number of generators, and volume of hazardous waste generated. The federal dollars will determine the level of expenditure by the state regardless of

any other conclusion reached by the state itself.

-- Uncertainty exists concerning the amount of duplication inherent in the case of a state administered program. The state would "operate a program in lieu of the federal program", but EPA would retain oversight functions. These functions include enforcement monitoring and the authority to review and comment on some permit applications.

-- Federal regulations governing the implementation of the hazardous waste program are incomplete. Technical requirements for permit eligibility by treatment, storage, and disposal facilities have not yet been published.

Recommendations.

-- That the state not establish a program to administer the hazardous waste program as specified in Subtitle C of the federal Resource Conservation and Recovery Act at this time.

-- That the committee be continued in order to study new developments surrounding the issue of the state's assumption of administrative responsibility for a hazardous waste program. To the extent possible membership should be comprised of the same appointees. A proposed Joint Resolution, Bill 2, to continue the study committee, is contained on page 67.

-- Implicit in these recommendations is that the state Department of Health continue its negotiations with the Environmental Protection Agency on contracting for a cooperative arrangement. A contract of this type would permit administration at the state level of some responsibilities for the RCRA program. The division of responsibilities between the state and federal agencies is subject to the negotiated agreement, but decisions concerning the granting of permits would be an exclusive power of the EPA.

Findings -- Site Selection for Hazardous Waste Facilities

Federal regulations provide standards for the operation of hazardous waste facilities but do not include procedures for selecting site location. Designation of hazardous waste sites continues as a matter of state or local government jurisdiction. Certification of solid waste disposal sites in Colorado is under the jurisdiction of boards of county commissioners, subject to disapproval by the state Department of Health (Part 1 of Title 30, Article 20, C.R.S. 1973). The Department of Health promulgates regulations for the engineering design and operation of solid waste sites and facilities. Counties receive technical assistance from the department concerning the development of solid waste sites.

Current Colorado law is ambiguous as to whether solid waste disposal sites are also certified to accept hazardous wastes. The RCRA definition of hazardous wastes includes materials in all physical forms, whether solid, semi-solid, liquid, or gaseous. The Colorado definition of "solid waste" refers to materials in solid form. It is the opinion of the Attorney General that discarded liquid materials are not included in the definition. The Attorney General nevertheless asserts that the Department of Health and the boards of county commissioners have the authority to "...control, limit and preclude the disposal of liquid hazardous waste at a solid waste disposal site...". (See Appendix D, page 129) The definitional exclusion of wastes in semi-solid, liquid, or gaseous forms leaves significant questions concerning the adequacy of the current law for site selection of disposal sites for hazardous waste.

Recommendation. Boards of county commissioners should be given siting authority for hazardous waste disposal sites, the decision based in part on technical advice received from the Department of Health. Such statutory authority should be patterned on the procedures now used for establishing solid waste sites. Disposal of one's own waste on one's own property should, as the current law states, not be subject to state or local regulation " ... as long as it does not constitute a public nuisance ... and as long as such dumping is in accordance with the rules and regulations of the department." (Section 30-20-106, C.R.S. 1973) Implicit in the recommendation is that the department will be given no regulatory authority which supersedes or duplicates the federal program administered by the Environmental Protection Agency.

The committee recommends Bill 1, "Concerning Waste Disposal Which is not Regulated Under the Federal 'Resource Conservation and Recovery Act of 1976'." The bill, which begins on page 21, amends the current "Solid Wastes Disposal Sites and Facilities" act (Title 30, Article 20, Part 1, Colorado Revised Statutes, 1973). The version printed is shown as an amendment to current law, with explanatory comments, in order to facilitate comparisons between existing law and the proposal. The bill as introduced in the 1981 legislative session will be a shorter version, to repeal and reenact the present article. The shorter version of the bill is also contained in this report beginning on page 51.

Findings -- Hazardous Waste Generation in Colorado

The following major categories of hazardous waste disposition exist in Colorado:

a) "on-site" treatment or disposal at the location where the waste is generated;

b) "off-site" treatment or disposal at a hazardous waste facility in the state;

c) out-of-state shipment for treatment or disposal; and

d) reuse or recycling.

Regardless of the location of disposition, all the above categories are regulated under Subtitle C of the Resource Conservation and Recovery Act (RCRA). However, given the committee's focus on supplementing rather than duplicating the federal program, it is the "off-site" treatment or disposal category which has primary relevance to the committee's deliberations.

Estimates from three sources were received by the committee for the volume of hazardous waste generated in Colorado:

1) The Department of Health conducted a survey of hazardous waste generated in Colorado in accordance with provisions of Senate Bill 336, 1979 session (see Appendix F). Survey results indicated that approximately 850,000 tons of hazardous wastes are generated per year in the state. Since the survey was completed before the publication of RCRA regulations identifying those hazardous wastes and quantities to be regulated under the federal program, survey results were subsequently revised by the department based on the promulgated regulations.

   The revised estimate presented to the committee was that at least 648,000 tons of hazardous waste are generated each year in Colorado. Of that amount, the department approximated that before Subtitle C of the federal act became effective on November 19, the wastes were disposed of as follows: 225,000 tons washed down the sewer; 200,000 tons treated or disposed of "on-site"; and at least 159,000 tons disposed of "off-site" at various disposal sites, including at least 59,000 tons at the Lowry Landfill. The department was unable to provide information about the disposition of the remaining 64,000 tons due to limitations of the survey.

2) Chemical Waste Management, Inc. conducted a marketing survey prior to developing a hazardous waste treatment site in Colorado to determine quantities of hazardous waste generated in the "off-site" disposition category. The company's estimate for generation of waste subject to off-site treatment or disposal in Colorado is 50,000 tons per year.

3) The Region VIII Environmental Protection Agency office does not yet have an accurate estimate of the amount of hazardous waste generated in Colorado. The notification requirements under the federal act for persons generating, transporting, treating, storing, or disposing of hazardous wastes did not include amounts of waste generated or handled. (Resource Conservation and Recovery Act of 1976, as amended, Subtitle C, Section 3010; 42 USC 6930) As of October 27, 1980, a total of 710 notices had been filed with the EPA office from Colorado. Of those, 586 were for generation, 169 were for transportation, and 368

were for treatment, storage, or disposal. Some notifiers specified more than one activity, which accounts for fewer notifiers than numbers of activities. There were four notifications received for "off-site" treatment or disposal facilities in the state, one of which was the proposed facility near Pueblo which was subsequently rejected by area residents. The EPA expects to know the volume of hazardous waste being generated in Colorado by March 1, 1981 when reports are received from those persons who are subject to the hazardous waste regulations.

Findings -- State Board of Land Commissioners

It is the duty of the State Board of Land Commissioners to assure that the state receive maximum revenues from the public lands held in trust by the board. (Article IX, Section 10, Constitution of Colorado). Approximately eighty-five percent of the revenue is credited to the public school trust fund. The requirement could be interpreted to mean that the board would be required to authorize use of state lands for hazardous waste disposal facilities if that use would be the most financially beneficial use for the fund.

In response to inquiry, the board commissioners indicated they could approve a hazardous waste facility on state lands without the approval of county commissioners in that county or of another state agency. The policy of the current board is, however, that it comply with local ordinances and respect and observe any county regulations imposed relative to the siting of a hazardous waste facility. Lessees are required by the board to comply with all local ordinances and state statutes.

The board reported on the number of acres and locations of state lands suitable for hazardous waste deposit. This information was based on office data of the Colorado Geological Survey relating to erosion, hydrology, and seismicity of the state land areas. Four categories of lands were identified and the acreage calculated for each was as follows: "most suitable formations, low erosion", 116,243 acres; "most suitable formations, moderate erosion", 41,777 acres; "marginally suitable formations, low erosion", 295,021 acres; and "marginally suitable formations, moderate erosion", 93,420 acres. The total acreage (all categories) was 546,461 acres, located in 33 counties. Appendix G contains a list of acreage by category for each county.

Recommendation. The General Assembly should consider a constitutional amendment to the powers of the State Board of Land Commissioners to provide that the health and safety of the public be considered in board actions. The criterion of the board's responsibilities -- securing the maximum possible amount for the school fund -- may not provide sufficient protection for the public if hazardous waste dis-

posal facilities were to be established on these lands.

A proposed Concurrent Resolution, Bill 3, to accomplish the committee's recommendations is contained on page 69.

BILL 1-A
(Showing All Amendments to the Existing Solid Waste Act)

A BILL FOR AN ACT

CONCERNING WASTE DISPOSAL WHICH IS NOT REGULATED UNDER THE FEDERAL "RESOURCE CONSERVATION AND RECOVERY ACT OF 1976".

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Rewrites the state's solid waste disposal law. Makes numerous amendments to take into account that the disposal of hazardous wastes will be comprehensively regulated by the environmental protection agency under the federal "Resource Conservation and Recovery Act of 1976" (RCRA). Amends definitions to be consistent with RCRA where appropriate and clarifies that liquid wastes are included within scope of law, thereby implicitly including hazardous waste disposal sites within the siting authority of the county commissioners. Provides that the EPA's regulatory authority will not be duplicated by the department of health.

Provides a more complete description of the factors to be considered by the county commissioners in granting a certificate of designation. Prohibits the sale or assignment of the certificate.

Transfers the department of health's rule-making authority

COMMENTARY

This bill rewrites Colorado's solid waste law; to facilitate comparisons with current law, this version of the bill is shown as an amendment in the form of "strike type" (deletions) and "all caps" (additions). A version of the bill in proper bill form (repealing and reenacting the solid waste law) follows this version.

to the board of health. Requires the county commissioners to consider the department's recommendation with respect to an application for a certificate of designation, but removes the department's power to "veto" the application. Provides for judicial review if the county commissioners deny an application for a certificate of designation.

Exempts certain inert materials used for construction fill or topsoil placement from the definition of waste. Removes provisions relating to municipalities' designation of exclusive waste disposal sites.

Eliminates provisions for criminal penalties and substitutes provisions for civil penalties.

Makes numerous minor amendments relating to style, logical order, and clarification.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 1 of article 20 of title 30, Colorado Revised Statutes 1973, 1977 Repl. Vol., as amended, is amended to read:

PART 1

WASTE DISPOSAL SITES

30-20-100.2. Legislative declaration - limitation. (1) THE GENERAL ASSEMBLY FINDS THAT IMPROPER AND INEFFICIENT METHODS OF DISPOSAL OF WASTE MATERIALS MAY: RESULT IN SCENIC BLIGHTS; CREATE SERIOUS HAZARDS TO THE PUBLIC HEALTH, INCLUDING ACCIDENT HAZARDS, POLLUTION OF AIR AND WATER RESOURCES, AND

Legislative declaration added.

Subsection (1) modeled after a provision in the federal "Solid Waste Disposal Act" prior to amendment by RCRA.

INCREASED RODENT AND INSECT VECTORS OF DISEASE; ADVERSELY AFFECT LAND VALUES; CREATE PUBLIC NUISANCES; AND 'OTHERWISE INTERFERE WITH COMMUNITY LIFE AND DEVELOPMENT. IT IS THEREFORE THE PURPOSE OF THE GENERAL ASSEMBLY IN ENACTING THIS PART 1 TO PROMOTE THE PUBLIC HEALTH AND WELFARE BY PROVIDING FOR PROPER AND EFFICIENT METHODS OF WASTE DISPOSAL.

(2) IT IS THE INTENT OF THE GENERAL ASSEMBLY IN ENACTING THIS PART 1 TO PROVIDE COUNTY GOVERNMENTS WITH SITING AUTHORITY OVER WASTE DISPOSAL SITES, INCLUDING HAZARDOUS WASTE DISPOSAL SITES, AND TO IMPOSE ON THE DEPARTMENT OF HEALTH REASONABLE DUTIES AND REGULATORY AUTHORITY WITH RESPECT TO WASTE DISPOSAL SITES NECESSARY TO PROTECT THE PUBLIC HEALTH AND WELFARE. HOWEVER, THE GENERAL ASSEMBLY RECOGNIZES THAT HAZARDOUS WASTES ARE SUBJECT TO COMPREHENSIVE REGULATION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY UNDER THE FEDERAL "RESOURCE CONSERVATION AND RECOVERY ACT OF 1976", PUBLIC LAW 94-580. THEREFORE, NOTHING CONTAINED IN THIS PART 1 SHALL BE CONSTRUED TO PROVIDE ANY REGULATORY AUTHORITY WHICH SUPERSEDES OR DUPLICATES THE REGULATORY AUTHORITY OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY UNDER SAID ACT.

The bill generally continues the duties and powers of the counties and the department of health with respect to solid waste disposal sites. It makes it clear that a certificate of designation must be obtained from the county commissioners for a hazardous waste disposal site in the same manner as other waste disposal sites.

Assuming, however, that hazardous waste disposal is regulated by the EPA under RCRA, there is no need to have the department of health duplicate that regulation. A similar provision is added to 30-20-109 as subsection (3).

30-20-101. Definitions. As used in this part 1, unless the context otherwise requires:

(1) "Approved site" ~~or--facility~~ means a WASTE DISPOSAL site ~~or facility~~ for which a certificate of designation has been obtained, as provided in ~~this--part-1~~ SECTION 30-20-103, OR A WASTE DISPOSAL SITE WHICH IS APPROVED UNDER SECTION 30-20-102 (1.3) WITHOUT COMPLYING WITH SECTION 30-20-104.

"Site or facility" is changed simply to "site" throughout the bill.

Definition is expanded to include certain on-site private disposal not needing a certificate, as provided in section 30-20-102 (3).

(1.5) "BOARD" MEANS THE STATE BOARD OF HEALTH.

Definition added.

(2) "Department" means the department of health.

(2.1) "DOMESTIC SEWAGE" MEANS UNTREATED SANITARY WASTES THAT PASS THROUGH A SEWER SYSTEM.

Definition added; same as EPA definition, 40 CFR 261.4 (a)(1)(ii); term used in 30-20-101 (11) as an exclusion from the definition of "waste".

(2.3) "GOVERNMENTAL UNIT" MEANS THE STATE OF COLORADO, EVERY COUNTY, CITY AND COUNTY, MUNICIPALITY, SCHOOL DISTRICT, SPECIAL DISTRICT, AND AUTHORITY LOCATED IN THIS STATE, EVERY PUBLIC BODY CORPORATE CREATED OR ESTABLISHED UNDER THE CONSTITUTION OR ANY LAW OF THIS STATE, AND EVERY BOARD, COMMISSION, DEPARTMENT, INSTITUTION, OR AGENCY OF ANY OF THE FOREGOING OR OF THE UNITED STATES.

Definition added to clarify 30-20-102 (1.3); term also used in 30-20-101 (3), definition of "person", and 30-20-108, which authorizes contracts with governmental units.

Modeled after definition contained in the "Public Deposit Protection Act of 1975", section 11-10.5-103 (8), C.R.S. 1973.

(2.5) "HAZARDOUS WASTE DISPOSAL SITE" MEANS ANY WASTE DISPOSAL SITE WHICH IS SUBJECT TO THE PERMIT REQUIREMENTS OF

New definition; term used in 30-20-100.2 (2) and 30-20-109 (3).

SECTION 3005 OF THE FEDERAL "SOLID WASTE DISPOSAL ACT", AS AMENDED BY THE FEDERAL "RESOURCE CONSERVATION AND RECOVERY ACT OF 1976", AS FROM TIME TO TIME AMENDED, 42 U.S.C. SEC. 6925.

Section 3005 requires the EPA to "promulgate regulations requiring each person owning or operating a facility for the treatment, storage, or disposal or hazardous waste identified or listed under this subtitle to have a permit issued pursuant to this section".

(2.8) "INERT MATERIAL" MEANS NON-WATER-SOLUBLE AND NONDECOMPOSABLE INERT SOLIDS TOGETHER WITH SUCH MINOR AMOUNTS AND TYPES OF OTHER MATERIALS AS WILL NOT SIGNIFICANTLY AFFECT THE INERT NATURE OF SUCH SOLIDS ACCORDING TO RULES AND REGULATIONS OF THE BOARD. THE TERM INCLUDES BUT IS NOT LIMITED TO EARTH, SAND, GRAVEL, ROCK, CONCRETE WHICH HAS BEEN IN A HARDENED STATE FOR AT LEAST SIXTY DAYS, MASONRY, ASPHALT PAVING FRAGMENTS, AND SUCH OTHER NON-WATER-SOLUBLE AND NONDECOMPOSABLE INERT SOLIDS AS THE BOARD MAY BY REGULATION IDENTIFY.

New definition; term used in 30-20-101 (11)(f) as an exclusion from the definition of "waste".

(3) "Person" means ~~an individual, partnership, private or municipal corporation, firm, or other association of persons~~ ANY INDIVIDUAL, PUBLIC OR PRIVATE CORPORATION, PARTNERSHIP, ASSOCIATION, FIRM, TRUST, ESTATE, OR GOVERNMENTAL UNIT, OR ANY OTHER LEGAL ENTITY WHATSOEVER WHICH IS RECOGNIZED BY LAW AS THE SUBJECT OF RIGHTS AND DUTIES, OR ANY ASSOCIATION OF PERSONS.

Definition of "person" amplified; modeled after definition in air quality control statutes, section 25-7-103.

Definition intended to be extremely broad.

~~(4) "Recyclable materials" means a type of material that is subject to reuse or recycling.~~

Definition deleted: term used only in the following subsection, which is also deleted.

~~(5) "Recycling operation" means that part of a solid wastes disposal facility or a part of a general disposal facility at which recyclable materials may be separated from other materials for further processing.~~

~~(6) "Solid wastes" means garbage, refuse, sludge of sewage disposal plants, and other discarded solid materials, including solid waste materials resulting from industrial, commercial, and community activities but does not include agricultural wastes.~~

Definition deleted: term used only in 30-20-109 (1) (a), where it is deleted.

"Solid wastes" changed to "waste" throughout bill in order to make it clear that liquid and contained gaseous wastes are included. Definition moved to subsection (11) to retain alphabetic order.

~~(7) "Solid wastes disposal" means the collection, storage, treatment, utilization, processing, or final disposal of solid wastes.~~

Changed to "waste disposal" and moved to subsection (12) with some modification.

~~(8) "Solid wastes disposal site and facility" means the location and facility at which the deposit and final treatment of solid wastes occur.~~

Changed to "waste disposal site" and moved to subsection (13), where it is rewritten.

~~(9) "Transfer station" means a facility at which refuse, awaiting transportation to a disposal site, is transferred from one type of collection vehicle and placed into another.~~

Definition deleted; term not used, even in current law.

(10) "TREATMENT" MEANS ANY ACTIVITY, METHOD, TECHNIQUE, OR PROCESS DESIGNED TO CHANGE THE PHYSICAL, CHEMICAL, OR BIOLOGICAL CHARACTER OR COMPOSITION OF ANY WASTE SO AS TO:

Definition added; term used in definition of "waste disposal" in subsection (12). Definition based on definitions in RCRA and EPA regulations.

(a) NEUTRALIZE SUCH WASTE;

(b) RECOVER ENERGY OR MATERIAL RESOURCES FROM SUCH WASTE;

OR

(c) RENDER SUCH WASTE:

(I) LESS HAZARDOUS;

(II) SAFER FOR TRANSPORTATION, STORAGE, OR DISPOSAL;

(III) AMENABLE TO RECOVERY OR STORAGE; OR

(IV) REDUCED IN VOLUME.

(11) "WASTE" MEANS ANY GARBAGE, REFUSE, SLUDGE FROM A WASTE TREATMENT PLANT, WATER SUPPLY TREATMENT PLANT, OR AIR POLLUTION CONTROL FACILITY, AND OTHER DISCARDED MATERIAL, BUT DOES NOT INCLUDE:

Definition, formerly "solid wastes", rewritten to follow generally the RCRA definition. As thus amended, "waste" includes "hazardous waste", and therefore a "waste disposal site" (which requires a certificate of designation) includes a hazardous waste disposal site. RCRA definition reads: "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include . . . "

(a) DISCHARGES WHICH ARE POINT SOURCES SUBJECT TO PERMITS UNDER SECTION 402 OF THE "FEDERAL WATER POLLUTION CONTROL ACT", AS AMENDED;

Corresponding RCRA exclusion reads: "Solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended . . . "

(b) SOURCE, SPECIAL NUCLEAR, OR BYPRODUCT MATERIAL AS DEFINED BY THE FEDERAL "ATOMIC ENERGY ACT OF 1954", AS AMENDED;

Same as corresponding RCRA exclusion.

(c) AGRICULTURAL WASTE;

No directly corresponding exclusion in RCRA, but current law excludes agricultural wastes; therefore exclusion retained.

(d) DOMESTIC SEWAGE;

RCRA excludes "solid or dissolved materials in domestic sewage". "Domestic sewage" is defined in 30-20-101 (2.1).

(e) IRRIGATION RETURN FLOWS;

Corresponding RCRA exclusion reads: "Solid or dissolved materials in irrigation return flows . . . "

(f) INERT MATERIALS DEPOSITED FOR CONSTRUCTION FILL OR TOPSOIL PLACEMENT IN CONNECTION WITH ACTUAL OR CONTEMPLATED CONSTRUCTION AT SUCH LOCATION OR FOR CHANGES IN LAND CONTOUR FOR AGRICULTURAL PURPOSES.

No such exclusion exists in RCRA or current state law. "Inert material" is defined in 30-20-101 (2.8). Since such material does not pose a hazard, its deposit for fill purposes should not require a certificate of designation.

(12) "WASTE DISPOSAL" MEANS THE FINAL DEPOSIT OF WASTE. THE TERM DOES NOT INCLUDE RECYCLING, RECLAIMING, OR TREATMENT OF WASTE. THE TERM ALSO DOES NOT INCLUDE THE BENEFICIAL USE, INCLUDING USE FOR FERTILIZER, SOIL CONDITIONER, FUEL, OR LIVESTOCK FEED, OF SLUDGE FROM WASTEWATER TREATMENT PLANTS IF SUCH SLUDGE MEETS ALL APPLICABLE STANDARDS OF THE DEPARTMENT.

Definition based on prior definition of "solid waste disposal".

Recycling exclusion drawn from 30-20-102 (1.5), which is deleted.

Exclusion of beneficial use, etc., drawn from 30-20-102 (3), which is deleted.

(13) "WASTE DISPOSAL SITE" MEANS ALL CONTIGUOUS LAND USED FOR WASTE DISPOSAL UNDER COMMON OWNERSHIP.

Former definition of "solid wastes disposal site and facility" rewritten for greater precision; clarifies that only the portion of land used for waste disposal is within scope of definition.

30-20-102. Certificate required - disposal prohibited - exception. (1) ~~Except--as--provided--in-subsection-(3)-of-this section;-it-is-unlawful-for-any-person-to-operate-a-solid--wastes disposal--site--and-facility-in-the-unincorporated-portion-of-any county-without-first-having-obtained-therefor--a--certificate--of designation--from-the-board-of-county-commissioners-of-the-county in-which-such--site--and--facility--is--located~~ ANY PERSON WHO OPERATES A WASTE DISPOSAL SITE IN THE UNINCORPORATED PORTION OF ANY COUNTY SHALL FIRST OBTAIN A CERTIFICATE OF DESIGNATION FROM THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY IN WHICH SUCH SITE IS LOCATED.

(1.2) WASTE DISPOSAL BY ANY PERSON WITHIN THE UNINCORPORATED PORTION OF ANY COUNTY IS PROHIBITED EXCEPT ON OR AT A WASTE DISPOSAL SITE FOR WHICH A CERTIFICATE OF DESIGNATION HAS BEEN OBTAINED AS PROVIDED IN SECTION 30-20-103.

(1.3) NOTWITHSTANDING THE PROVISIONS OF SUBSECTIONS (1) AND (1.2) OF THIS SECTION, ANY PERSON OTHER THAN A GOVERNMENTAL UNIT MAY DISPOSE OF HIS OWN WASTE ON HIS OWN PROPERTY, AS LONG AS SUCH WASTE DISPOSAL SITE COMPLIES WITH THE RULES AND REGULATIONS OF THE BOARD AND DOES NOT CONSTITUTE A PUBLIC NUISANCE. FOR THE

Subsection (1) reworded to read positively, i.e., to state a requirement rather than a prohibition.

Violators are subject to a public nuisance action under 30-20-113 and civil penalties under 30-20-114.

Subsection (1.2) replaces a provision of 30-20-106, now deleted, which states: "No private dumping of solid wastes shall be made on any property within the unincorporated portion of any county except on or at an approved site".

Subsection (1.3) states an exception to subsections (1) and (1.2). It is based on an unclear provision of 30-20-106, now deleted, which exempts "private dumping of one's own solid wastes on one's own property" from the provisions of the solid waste law.

PURPOSES OF THIS PART 1, SUCH WASTE DISPOSAL SITE SHALL BE AN APPROVED SITE FOR WHICH OBTAINING A CERTIFICATE OF DESIGNATION UNDER THE PROVISIONS OF SECTION 30-20-103 SHALL BE UNNECESSARY.

~~(1.5)--Any--site--and--facility--operated-for-the-purpose-of processing,-reclaiming,-or-recycling-metallic,--glass,--or--cloth solid-wastes-shall-not-be-considered-a-solid-wastes-disposal-site and--facility--and-shall-not-require-a-certificate-of-designation as-a-solid-wastes-disposal-site-and-facility-as-long-as-it-is-not operated-on-the-site-of-a-landfill-or-incineration-operation.~~

(2) Repealed, L. 77, p. 286, 57, effective June 29, 1977.

~~(3)--The---final--use--for--beneficial--purposes,--including fertilizer,-soil-conditioner,-fuel,-and-livestock-feed,-of-sludge which-has-been-processed-and-certified-or-designated--as--meeting all--applicable--regulations-of-the-department-and-the-department of-agriculture-shall-not-require-a-certificate-of-designation-for such-final-use.~~

30-20-103. Application for certificate - review by department - hearing. (1) Any person desiring to operate a ~~solid--wastes~~ WASTE disposal site ~~and--facility~~ within the unincorporated portion of any county shall make application to

Language is added to satisfy the requirements of EPA regulations applicable to small quantity generators of hazardous wastes. The definition of "approved site" in 30-20-101 is amended to be consistent with the exemption stated in this subsection.

Subsection (1.5) is deleted as its purpose is accomplished by excluding "recycling, reclaiming, or treatment of waste" from the definition of "waste disposal".

Subsection (3) is revised and moved to 30-20-101 (12) as an exception in the definition of "waste disposal".

Section caption rewritten to reflect added provisions.

the board of county commissioners of the county in which such site ~~and--facility~~ is or is proposed to be located for a certificate of designation. Such application shall be accompanied by a fee of ~~twenty-five~~ _____ dollars which shall not be refundable, and it shall set forth the location of the site; ~~and--facility;--the-type-of-site-and-facility~~ THE TYPES OF WASTE TO BE ACCEPTED OR REJECTED; the ~~type~~ TYPES of ~~processing-to be-used;-such-as-sanitary-landfill;-composting;--or--incineration~~ WASTE DISPOSAL; the hours of operation; the method of supervision; AND the rates to be charged, if any. ~~and-such--other information---as---may--be---required--by--the--board--of--county commissioners~~. The application shall also contain such engineering, geological, hydrological, and operational data as may REASONABLY be required by ~~the-department-by-regulation~~ RULES OF THE BOARD DEVELOPED PURSUANT TO SECTION 30-20-109 TO ENABLE THE DEPARTMENT TO PERFORM ITS DUTIES UNDER SUBSECTION (2) OF THIS SECTION.

(2) The application shall be referred to the department for review and for recommendation as to approval or disapproval, which shall be based SOLELY upon criteria established by the

Fee amount has not changed since law was originally enacted in 1967 and therefore an increase may be appropriate.

"Type of site and facility" removed as too ambiguous. "Types of waste" added to determine if hazardous wastes are involved.

Wording simplified.

Enumerated items required in application appear reasonably complete; therefore, it is unnecessary to give county commissioners open-ended power to require additional information.

The department needs limited technical information to fulfill its review function. The board must specify in advance through rules and regulations what information is needed. Rule-making authority is changed from the department to the board (see 30-20-109).

"Solely" inserted for emphasis.

state board, ~~of health~~, the water quality control commission, and the air quality control commission. SUCH RECOMMENDATION SHALL BE ISSUED TO THE BOARD OF COUNTY COMMISSIONERS, AND A COPY PROVIDED THE APPLICANT, WITHIN NINETY DAYS OF RECEIPT OF THE APPLICATION BY THE DEPARTMENT AND SHALL CONTAIN A STATEMENT OF THE REASONS FOR SUCH RECOMMENDATION, WITH REFERENCE TO SPECIFIC CRITERIA OF THE BOARD, THE WATER QUALITY CONTROL COMMISSION, AND THE AIR QUALITY CONTROL COMMISSION.

Time requirement added to encourage prompt staff review.

Added language intended to insure that staff review is based solely upon pre-existing published criteria and to insure that the applicant will be informed of specific reasons for any disapproval so that he can take appropriate corrective measures and submit an amended application.

(3) THE APPLICATION SHALL BE CONSIDERED BY THE BOARD OF COUNTY COMMISSIONERS AT A PUBLIC HEARING TO BE HELD AFTER NOTICE. SUCH NOTICE SHALL CONTAIN THE TIME AND PLACE OF THE HEARING AND SHALL STATE THAT THE MATTER TO BE CONSIDERED IS THE APPLICANT'S PROPOSAL FOR A WASTE DISPOSAL SITE. THE NOTICE SHALL BE PUBLISHED IN A NEWSPAPER HAVING GENERAL CIRCULATION IN THE COUNTY IN WHICH THE PROPOSED WASTE DISPOSAL SITE IS LOCATED AT LEAST TEN BUT NO MORE THAN THIRTY DAYS PRIOR TO THE DATE OF THE HEARING.

Subsection (3) moved without change from latter portion of 30-20-104 (3).

30-20-104. Factors to be considered. (1) In considering an application for a certificate of designation, the board of county commissioners shall take into account:

With amendments and additions, this subsection (1) contains a more complete description of the factors to be considered by the board of county commissioners.

(a) THE INFORMATION CONTAINED IN THE APPLICATION;

New provision.

(b) THE RECOMMENDATION OF THE DEPARTMENT;

Adds specific requirement that recommendation be considered, but department's "veto power"is removed in 30-20-105.

(c) ~~(d)~~ WRITTEN recommendations by local health departments BASED UPON ESTABLISHED CRITERIA OF SUCH LOCAL HEALTH DEPARTMENTS;

Input from local health departments should be formally submitted and based upon criteria known to the applicant in advance.

(d) WHETHER THE WASTE DISPOSAL SITE CONFORMS TO THE COMPREHENSIVE COUNTY LAND USE PLAN, IF ANY;

Paragraph (d) was moved without substantive change from subsection (3) of this section.

(e) ~~(a)~~ The effect that the ~~solid--wastes~~ WASTE disposal site ~~and--facility~~ will have on the surrounding property, taking into consideration the types of ~~processing~~ DISPOSAL to be used, surrounding property uses and values, and wind and climatic conditions;

(f) ~~(b)~~ The convenience and accessibility of the ~~solid wastes~~ WASTE disposal site ~~and-facility~~ to potential users;

~~(c) The--ability-of-the-applicant-to-comply-with-the-health~~

~~standards-and-operating-procedures-provided-for-in--this--part--1 and--such--rules--and--regulations--as--may--be-prescribed-by-the department;~~

Deleted as unnecessary and vague, and therefore subject to abuse. "The ability . . . to comply" implies the authority to speculate as to the applicant's financial future.

(g) THE PROTECTION AFFORDED THE PUBLIC HEALTH, SAFETY, AND WELFARE AND THE ENVIRONMENT, TAKING INTO CONSIDERATION:

(I) THE DENSITY OF POPULATION IN AREAS NEIGHBORING THE WASTE DISPOSAL SITE;

(II) THE DENSITY OF POPULATION IN AREAS ADJACENT TO DELIVERY ROUTES TO THE WASTE DISPOSAL SITE;

(III) THE RISK OF ACCIDENT DURING THE TRANSPORTATION OF WASTES TO THE WASTE DISPOSAL SITE; AND

(IV) THE IMPACT ON THE ENVIRONMENT, INCLUDING ADVERSE EFFECTS ON SURFACE AND GROUND WATER QUALITY, AIR QUALITY, WILDLIFE, AND SCENIC, HISTORIC, AND RECREATIONAL RESOURCES.

Paragraph (g) added to insure that county commissioners broadly consider matters relevant to protecting the public health, safety, and welfare.

~~(2) Except-as-provided--in--this--part--1;--designation--of approved--solid--wastes--disposal--sites--and-facilities-shall-be discretionary-with-the-board-of-county-commissioners;-subject--to judicial---review---by---the---district---court---of--appropriate jurisdiction.~~

Language relating to county commissioners' discretion is unnecessary and is therefore deleted.

Language relating to judicial review is replaced with the more complete provisions of new section 30-20-104.5.

(3) Prior to the issuance of a certificate of designation, the board of county commissioners shall require that the report which shall be submitted by the applicant under section 30-20-103 be reviewed and a recommendation as to approval or disapproval made by the department and shall be satisfied that the proposed solid wastes disposal site and facility conforms to the comprehensive county land use plan, if any. The application, report of the department, comprehensive land use plan, and other pertinent information shall be presented to the board of county commissioners at a public hearing to be held after notice. Such notice shall contain the time and place of the hearing and shall state that the matter to be considered is the applicant's proposal for a solid wastes disposal site and facility. The notice shall be published in a newspaper having general circulation in the county in which the proposed solid wastes disposal site and facility is located at least ten but no more than thirty days prior to the date of the hearing.

30-20-104.5 Judicial review. THE DENIAL OF A CERTIFICATE OF DESIGNATION BY THE BOARD OF COUNTY COMMISSIONERS SHALL BE SUBJECT TO JUDICIAL REVIEW IN THE DISTRICT COURT FOR THE JUDICIAL

Language relating to department review is unnecessary and is therefore deleted: 30-20-103 (2) provides for the review and 30-20-104 (1) (b) requires its consideration.

Language relating to the county land use plan moved to 30-20-104 (1) (d) under "factors to be considered".

Provisions for notice and hearing moved to 30-20-103 (3).

New section added to provide details of judicial review, such as jurisdiction and grounds. Replaces inadequate reference to judicial review in 30-20-104 (2).

DISTRICT IN WHICH THE WASTE DISPOSAL SITE IS PROPOSED. IF THE COURT FINDS NO ERROR, IT SHALL AFFIRM THE DENIAL. IF THE COURT FINDS THAT THE DENIAL IS ARBITRARY AND CAPRICIOUS, NOT IN ACCORD WITH THE PROCEDURES OR PROCEDURAL LIMITATIONS OF THIS PART 1, UNSUPPORTED BY SUBSTANTIAL EVIDENCE WHEN THE RECORD IS CONSIDERED AS A WHOLE, OR OTHERWISE CONTRARY TO LAW, THEN THE COURT SHALL HOLD UNLAWFUL AND SET ASIDE THE DENIAL AND REMAND THE CASE TO THE BOARD OF COUNTY COMMISSIONERS FOR FURTHER PROCEEDINGS AS MAY BE APPROPRIATE.

Provisions are consistent with the provisions for judicial review contained in the state administrative procedures act, section 24-4-106, C.R.S. 1973.

30-20-105. Certificate. (1) ~~If---the--board--of--county commissioners-deems-that-a-certificate-of-designation--should--be granted--to--the--applicant;--it-shall-issue-the-certificate;-and such-certificate-shall-be-displayed-in-a-prominent-place--at--the site--and--facility.---The-board-of-county-commissioners-shall-not issue--a--certificate--of--designation--if--the--department---has recommended--disapproval--pursuant--to-section-30-20-103~~ IF THE BOARD OF COUNTY COMMISSIONERS ISSUES A CERTIFICATE OF DESIGNATION, SUCH CERTIFICATE SHALL IDENTIFY THE GENERAL TYPES OF WASTE WHICH MAY BE ACCEPTED OR WHICH SHALL BE REJECTED.

Unnecessary language removed.

Department's "veto power" is removed and replaced with a requirement in 30-20-104 (1)(b) that the county commissioners consider the department's recommendation. As a practical matter, it is assumed that the county commissioners will defer to the department's technical expertise, especially if there is public opposition to the application. Some counties, however, may have local expertise which may be weighed against the department's recommendation.

County commissioners may specify, for example, that hazardous wastes may not be disposed of at the site.

(2) THE CERTIFICATE OF DESIGNATION SHALL BE DISPLAYED IN A

Language moved from subsection (1).

PROMINENT PLACE AT THE WASTE DISPOSAL SITE.

(3) THE CERTIFICATE OF DESIGNATION SHALL NOT BE SOLD, ASSIGNED, OR OTHERWISE TRANSFERRED WITHOUT PRIOR APPROVAL OF THE BOARD OF COUNTY COMMISSIONERS.

Current law is silent on the transferability of the certificate; therefore, some limitation may be needed for county commissioners to retain some oversight.

30-20-106. Private disposal prohibited - when. ~~No--private dumping--of-solid-wastes-shall-be-made-on-any-property-within-the unincorporated-portion-of-any-county-except-on-or-at-an--approved site--and-facility;-but-private-dumping-of-one's-own-solid-wastes on-one's-own-property-shall-not-be-subject-to-the--provisions--of this--part--i-as-long-as-it-does-not-constitute-a-public-nuisance endangering-the-health;-safety;-and-welfare-of-others-and-as-long as-such-dumping-is-in-accordance-with-the-rules--and--regulations of-the-department.~~

Private dumping prohibition is reworded and moved to 30-20-102 (1.2).

Exemption for certain on-site disposal reworded for clarity and moved to 30-20-102 (1.3).

30-20-107. Designation of exclusive sites and facilities. ~~The-governing-body-of-any-city;-city-and-county;-or--incorporated town--may--by--ordinance--designate-and-approve-one-or-more-solid wastes-disposal-sites-and-facilities;-either--within--or--without its--corporate-limits;-if-designated-and-approved-by-the-board-of county-commissioners;-as-its-exclusive-solid-wastes-disposal-site and-facility-or-sites-and-facilities;-and--thereafter--each--such~~

This section is ambiguous and confusing. Since its purpose is unclear, it is removed.

~~site-and-facility-shall-be-used-by-such-city,-city-and-county,-or town-for-the-disposal-of-its-solid-wastes;-but,-prior-to-any-such designation-and-approval,-such-governing-body-shall-hold-a-public hearing--to-review-the-disposal-method-to-be-used-and-the-fees-to be-charged,-if-any.~~

30-20-107.5. Operation of landfill gas facilities within waste disposal sites. The governing body of any municipality or county shall have the authority to make such provisions as may be necessary for the operation of landfill gas facilities within any ~~solid--wastes~~ WASTE disposal site ~~or---facility~~ under its jurisdiction to enable the municipality or county to exercise its powers relating to landfill gas operations under sections 30-11-307 and 31-15-716, C.R.S. 1973.

No substantive change. (This section was added in 1980 by House Bill 1214.)

30-20-108. Contracts with governmental units authorized. (1) ~~An--approved--solid-wastes-disposal-site-and-facility-may-be operated--by--any--person--pursuant---to---contract---with~~ Any governmental unit MAY CONTRACT FOR THE OPERATION OF AN APPROVED SITE.

No substantive change.

Subsection (1) reworded to read positively.

(2) Any city, city and county, county, or incorporated town acting by itself or in association with any other such

governmental unit may establish and operate an approved site ~~and facility~~ under such terms and conditions as may be approved by the governing bodies of the governmental units involved. In the event such site ~~and-facility~~ is not operated by the governmental unit involved, any contract to operate such a site ~~and-facility~~ shall be awarded on a competitive bid basis if there is more than one applicant for a contract to operate such site. ~~and--facility.~~

(3) Any city, city and county, county, or incorporated town acting by itself or in association with any other such governmental unit may acquire by condemnation such sites as are needed for ~~trash~~ WASTE disposal purposes.

30-20-109. Board to promulgate rules and regulations - minimum standards - limitation. (1) The ~~department shall~~ BOARD MAY promulgate rules and regulations ESTABLISHING CRITERIA for the engineering design and operation of ~~solid--wastes~~ WASTE disposal sites, ~~and-facilities,-which-may-include:~~

~~(a)--The---establishment---of--engineering--design--criteria~~ ~~applicable~~ INCLUDING, but not limited to: Protection of surface and subsurface waters, suitable soil characteristics, distance from ~~solid--wastes~~ WASTE generation centers, access routes,

Rule-making authority shifted from the department to the board. In actual practice, it is apparently the board which has adopted these criteria in the past. Also, it was felt that the final authority for rules more appropriately belongs to a public body than to a single individual (executive director). In either case, it is assumed that technical staff will draft the rules and present them for final adoption.

Criteria established by the board may cover these general topics, as well as other matters relating to the engineering design and operation of waste disposal sites. Specific minimum standards are provided for in subsection (2).

distance from water wells, ~~disposal--facility~~ on-site traffic control patterns, insect and rodent control, methods of ~~solid wastes~~ WASTE compaction in the disposal fill, confinement of windblown debris, ~~recycling--operations;~~ fire prevention, and final closure of the compacted fill.

"Recycling operations" removed for consistency: This law is concerned with disposal operations, not transportation, storage, or recycling; recycling is excluded from the definition of waste disposal.

~~(b) The establishment of criteria for solid wastes disposal sites and facilities which will place into operation the engineering design for such disposal sites and facilities;~~

Deleted as unnecessary and vague.

(2) SUCH RULES AND REGULATIONS SHALL CONTAIN THE FOLLOWING MINIMUM STANDARDS:

Subsection (2) replaces the provisions of 30-20-110 (1).

(a) WASTE DISPOSAL SITES SHALL COMPLY WITH THE HEALTH LAWS, RULES AND REGULATIONS OF THE BOARD, THE AIR QUALITY CONTROL COMMISSION, AND THE WATER QUALITY CONTROL COMMISSION, AND ALL APPLICABLE ZONING LAWS AND ORDINANCES.

Paragraph (a) is moved from 30-20-110 (1) (b); reference to air quality control commission is added.

(b) EXCEPT AS PROVIDED IN SECTION 30-20-110, WASTE DEPOSITED AT ANY WASTE DISPOSAL SITE SHALL NOT BE BURNED, OTHER THAN BY INCINERATION IN ACCORDANCE WITH A CERTIFICATE OF DESIGNATION ISSUED PURSUANT TO SECTION 30-20-103; EXCEPT THAT, IN EXTREME EMERGENCIES RESULTING IN THE GENERATION OF LARGE

Paragraph (b) is moved from 30-20-110 (1) (f); cross-reference to remaining provisions of 30-20-110 is added.

QUANTITIES OF COMBUSTIBLE MATERIALS, AUTHORIZATION FOR BURNING UNDER CONTROLLED CONDITIONS MAY BE GIVEN BY THE DEPARTMENT.

(c) NO RADIOACTIVE MATERIALS OR MATERIALS CONTAMINATED BY RADIOACTIVE SUBSTANCES SHALL BE DISPOSED OF IN WASTE DISPOSAL SITES NOT SPECIFICALLY DESIGNATED FOR THAT PURPOSE.

Paragraph (c) is moved without change from 30-20-110 (1) (c).

(d) WASTE DISPOSAL SITES LOCATED WITHIN FLOODPLAINS SHALL NOT RESTRICT THE FLOW OF FLOODS, REDUCE THE TEMPORARY WATER STORAGE CAPACITY OF FLOODPLAINS, OR RESULT IN WASHOUTS OF WASTES.

(e) WASTE DISPOSAL SITES SHALL NOT ADVERSELY AFFECT ENDANGERED OR THREATENED SPECIES OF PLANTS, FISH, OR WILDLIFE.

(f) WASTE DISPOSAL SITES SHALL PROTECT THE FOOD CHAIN FROM THE INTRODUCTION OF TOXIC SUBSTANCES.

Paragraphs (d) through (h) are based upon guidelines published by the EPA for determining which solid waste disposal facilities pose a reasonable probability of adverse effects on health or the environment ("open dumps") for purposes of reviewing state solid waste management plans under Subtitle D of RCRA. (Federal Register for September 13, 1979, pages 53438 - 53468)

(g) WASTE DISPOSAL SITES SHALL MINIMIZE OBNOXIOUS ODORS, WINDBLOWN DEBRIS, AND THE BREEDING AND INFESTATION OF RODENTS, FLIES, AND MOSQUITOES CAPABLE OF TRANSMITTING DISEASE TO HUMANS.

EPA guidelines refer to rodent and insect vectors of disease but make no mention of nuisance conditions of odors and debris; reference to odors and debris is retained from current law, 30-20-110 (1) (a), (d), and (e).

(h) WASTE DISPOSAL SITES SHALL BE LOCATED, DESIGNED, AND OPERATED SO AS TO PROTECT THE PUBLIC HEALTH AND SAFETY AND SHALL MINIMIZE ACCIDENT HAZARDS SUCH AS EXPLOSIVE GASES, FIRES, BIRD HAZARDS TO AIRCRAFT, AND UNCONTROLLED PUBLIC ACCESS TO THE SITES.

"Bird hazards" refers to the fact that some disposal sites dealing with putrescible wastes attract birds and present a risk of accidents due to collisions between birds and planes.

(i) IN THE OPERATION OF WASTE DISPOSAL SITES, WASTES SHALL

Paragraph (i) is based upon provisions in 30-20-110 (1) (d).

BE DISTRIBUTED IN THE SMALLEST AREA CONSISTENT WITH HANDLING TRAFFIC TO BE UNLOADED AND SHALL BE PLACED IN THE MOST DENSE VOLUME PRACTICABLE.

(j) UPON CLOSURE, WASTE DISPOSAL SITES SHALL BE LEFT IN A CONDITION OF ORDERLINESS AND GOOD ESTHETIC APPEARANCE.

Paragraph (j) is based upon a provision in 30-20-110 (1) (d).

(3) THE BOARD SHALL HAVE NO AUTHORITY TO PROMULGATE RULES AND REGULATIONS APPLICABLE TO HAZARDOUS WASTE DISPOSAL SITES TO THE EXTENT THAT SUCH SITES ARE SUBJECT TO REGULATIONS PROMULGATED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO SUBTITLE C OF TITLE II OF THE FEDERAL "SOLID WASTE DISPOSAL ACT", AS AMENDED BY THE FEDERAL "RESOURCE CONSERVATION AND RECOVERY ACT OF 1976", AS FROM TIME TO TIME AMENDED.

New subsection added to insure that there is no duplication of regulatory authority under RCRA, since RCRA comprehensively regulates hazardous waste disposal sites. State laws and regulations would cover all waste disposal sites except to the extent that RCRA regulations apply. Similar provision appears in the legislative declaration, 30-20-100.2 (2).

30-20-110. Noncommercial burning of waste. ~~(1) The rules and regulations promulgated by the department shall, subject to the provisions of section 30-20-106, contain the following minimum standards:~~

Section caption changed to reflect that subsection (1) is deleted; subsection (1) is replaced by 30-20-109 (2).

~~(a) Such sites and facilities shall be located, operated, and maintained in a manner so as to control obnoxious odors and prevent rodent and insect breeding and infestation; and they shall be kept adequately covered during their use;~~

Similar to new provisions of 30-20-109 (2) (g).

(b)--Such--sites-and-facilities-shall-comply-with-the-health laws;-standards;-rules;-and-regulations-of--the--department;--the water--quality-control-commission;-and-all-applicable-zoning-laws and-ordinances:

Similar to new provisions of 30-20-109 (2) (a).

(c)--No-radioactive-materials-or-materials--contaminated--by radioactive---substances---shall--be--disposed--of--in--sites--or facilities-not-specifically-designated-for-that-purpose:

Same as new 30-20-109 (2) (c).

(d)--A-site-and-facility-operated--as--a--sanitary--landfill shall--provide-means-of-finally-disposing-of-solid-wastes-on-land in-a-manner--to--minimize--nuisance--conditions--such--as--odors; windblown--debris;-insects;-rodents;-and-smoke;-and-shall-provide compacted--fill--material;--shall--provide--adequate--cover--with suitable--material--and--surface--drainage--designed--to--prevent ponding-and-water-and-wind-erosion--and--prevent--water--and--air pollution;--and;--upon-being-filled;-shall-be-left-in-a-condition of-orderliness--and--good--esthetic--appearance--and--capable--of blending--with--the-surrounding-area:--In-the-operation-of-such-a site-and-facility;-the-solid-wastes-shall-be-distributed--in--the smallest--area--consistent--with-handling-traffic-to-be-unloaded; shall-be-placed--in--the--most--dense--volume--practicable--using

Compare new provisions of 30-20-109 (2) (g), (i), and (j).

moisture---and---compaction--or--other--method--approved--by--the department;-shall-be-fire;-insect;-and-rodent--resistant--through the-application-of-an-adequate-layer-of-inert-material-at-regular intervals;--and--shall--have--a-minimum-of-windblown-debris-which shall-be-collected-regularly-and-placed-into-the-fill:

(e)--Sites-and-facilities-shall-be-adequately-fenced--so--as to-prevent-waste-material-and-debris-from-escaping-therefrom;-and material--and-debris-shall-not-be-allowed-to-accumulate-along-the fence-line:

(f)--Solid-wastes-deposited-at-any-site-and--facility--shall not--be--burned;--other-than-by-incineration-in-accordance-with-a certificate-of-designation-issued-pursuant-to-section--30-20-105; except--that;--in-extreme-emergencies-resulting-in-the-generation of-large-quantities-of-combustible-materials;--authorization--for burning---under---controlled--conditions--may--be--given--by--the department:

(2) Any provision of section 25-7-108, C.R.S. 1973, to the contrary notwithstanding, the board of county commissioners in any county with less than twenty-five thousand population, according to the latest federal census, is authorized to develop

Compare new provisions of 30-20-109 (2) (g).

Moved to 30-20-109 (2) (b).

regulations, by resolution, permitting the noncommercial burning of ~~trash~~ WASTE in the unincorporated area of said county; except that no permit shall be issued which shall allow the county to exceed primary and secondary ambient air quality standards as prescribed by federal OR STATE laws and regulations adopted pursuant thereto.

(3) As used in subsection (2) of this section, "noncommercial burning of ~~trash~~ WASTE" includes the burning of wood waste in wigwam wood waste burners.

30-20-111. Departments to render assistance. The department and local health departments shall render technical advice and services to owners and operators of ~~solid-wastes~~ WASTE disposal sites ~~and-facilities-and--to-municipalities-and-counties~~ UPON THE REQUEST OF SUCH OWNERS AND OPERATORS in order to assure that appropriate measures are being taken to protect the public health, safety, and welfare. In addition, the department has the duty to coordinate the ~~solid-wastes~~ WASTE program under this part 1 with all other programs within the department and with the other agencies of FEDERAL, state, and local government which are concerned with ~~solid-wastes~~ WASTE disposal.

"Trash", an undefined term, is changed to "waste", which is a defined term.

Reference to state air quality laws and regulations added.

Language modified to insure that "technical advice" is not forced upon owners and operators.

Reference to federal agencies added.

30-20-112. Revocation of certificate. ~~The board of county commissioners, after reasonable notice and public hearing, shall temporarily suspend or revoke a certificate of designation that has been granted by it for failure of a site and facility to comply with all applicable laws, resolutions, and ordinances or to comply with the provisions of this part 1 or any rule or regulation adopted pursuant thereto.~~

Provisions for revocation of the certificate deleted and replaced with a new section, 30-20-112.5. Revocation by the county commissioners is unnecessary and inappropriate since the proper remedy for violations of regulatory requirements is contained in the regulatory provisions themselves. Furthermore, the county commissioners have available the remedy of bringing a nuisance action under 30-20-113 or an action for civil penalties under 30-20-114.

30-20-112.5. Complaint filed with county commissioners - procedure. UPON THE SWORN COMPLAINT OF ANY PERSON FILED WITH THE BOARD OF COUNTY COMMISSIONERS ALLEGING THAT A WASTE DISPOSAL SITE LOCATED WITHIN THE COUNTY IS A PUBLIC NUISANCE UNDER THE PROVISIONS OF SECTION 30-20-113 AND ALLEGING SUFFICIENT FACTS IN SUPPORT THEREOF, THE BOARD MAY HOLD A PUBLIC HEARING ON THE COMPLAINT AFTER REASONABLE NOTICE TO THE PUBLIC AND TO THE OPERATOR OF THE WASTE DISPOSAL SITE. ALL RELEVANT TESTIMONY SHALL BE RECEIVED AT SUCH HEARING, AND AT THE CONCLUSION THEREOF THE BOARD MAY BY RESOLUTION AUTHORIZE THE COUNTY ATTORNEY TO COMMENCE AN ACTION ON BEHALF OF THE BOARD UNDER SECTION 30-20-113 OR 30-20-114.

Although the county commissioners' revocation power in 30-20-112 is deleted, this section makes it clear that citizens have a forum in the board of county commissioners to complain of nuisance conditions. This section also provides county commissioners with some needed procedural guidelines when considering whether to bring a nuisance action under 30-20-113 or an action for civil penalties under 30-20-114.

30-20-113. Sites deemed public nuisance - when. Any solid

wastes WASTE disposal site and--facility THAT IS found to be abandoned or that is operated or maintained in a manner so as to violate any of the provisions of this part 1 or any rule or regulation adopted pursuant thereto shall be deemed a public nuisance, and such violation may be enjoined by a THE district court of-competent-jurisdiction FOR THE JUDICIAL DISTRICT WHEREIN THE VIOLATION OCCURRED in an action brought by the department, the board of county commissioners of the county wherein the violation occurred, or the governing body of the municipality wherein the violation occurred.

Jurisdiction clarified.

30-20-114. Violation - civil penalty. ~~Any--person--who violates--any-provision-of-this-part-1-is-guilty-of-a-misdemeanor and;-upon-conviction-thereof;-shall-be-punished-by-a-fine-of--one hundred--dollars;--or--by-imprisonment-in-the-county-jail-for-not more-than-thirty-days;-or-by-both-such-fine-and-imprisonment~~ ANY PERSON WHO VIOLATES ANY PROVISION OF THIS PART 1 SHALL BE SUBJECT TO A CIVIL PENALTY OF NOT MORE THAN FIVE HUNDRED DOLLARS PER DAY OF VIOLATION. SUCH PENALTY SHALL BE DETERMINED AND COLLECTED BY THE DISTRICT COURT FOR THE JUDICIAL DISTRICT IN WHICH SUCH VIOLATION OCCURS UPON ACTION INSTITUTED BY THE DEPARTMENT, THE

Criminal provisions removed and replaced with civil penalties.

Language modeled after civil penalty provisions of existing environmental statutes, in particular section 25-7-122, C.R.S. 1973, relating to air quality control.

Maximum penalty specified; applies to each day of violation.

Jurisdiction specified.

Standing to bring suit specified.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY IN WHICH THE VIOLATION OCCURS, OR THE GOVERNING BODY OF THE MUNICIPALITY IN WHICH THE VIOLATION OCCURS. IN DETERMINING THE AMOUNT OF ANY SUCH PENALTY, THE COURT SHALL TAKE INTO ACCOUNT THE SERIOUSNESS OF THE VIOLATION, WHETHER THE VIOLATION WAS WILLFUL OR DUE TO MISTAKE, THE ECONOMIC IMPACT OF THE PENALTY ON THE VIOLATOR, AND ANY OTHER RELEVANT FACTORS. ALL PENALTIES COLLECTED PURSUANT TO THIS SECTION SHALL BE TRANSMITTED TO THE STATE TREASURER AND CREDITED TO THE GENERAL FUND. Nothing in this part 1 shall preclude or preempt a city, a city and county, or an incorporated town from enforcement of its local ordinances. ~~Each--day--of violation--shall-be-deemed-a-separate-offense-under-this-section.~~

Court given broad authority to consider relevant factors in determining the amount of the penalty, but several examples of relevant factors are specified.

Disposition of penalties specified.

Language now redundant and therefore deleted.

30-20-115. County waste disposal site fund - tax - fees. Any county THAT OPERATES A COUNTY WASTE DISPOSAL SITE OR SITES is authorized to establish a county ~~solid-wastes~~ WASTE disposal site ~~and--facility~~ fund. The board of county commissioners of such county may levy a ~~solid-wastes~~ WASTE disposal site ~~and--facility~~ tax, in addition to any other tax authorized by law, on any of the taxable property within said county, the proceeds of which shall be deposited to the credit of said fund and appropriated to

No substantive change.

pay the cost of land, labor, equipment, and services needed in the operation of ~~solid-wastes~~ COUNTY WASTE disposal sites. ~~and facilities.~~ Any SUCH county is also authorized, after a public hearing, to fix, modify, and collect service charges from users of ~~solid--wastes~~ COUNTY WASTE disposal sites ~~and facilities~~ for the purpose of financing the operations at those sites. ~~and facilities.~~

SECTION 2. Effective date. This act shall take effect July 1, 1981.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Effective date intended to provide adequate time after passage of bill for affected persons to become familiar with changes in the law.

BILL 1-B
(Final Form as Prepared for Introduction to the General Assembly)

A BILL FOR AN ACT

CONCERNING WASTE DISPOSAL WHICH IS NOT REGULATED UNDER THE FEDERAL "RESOURCE CONSERVATION AND RECOVERY ACT OF 1976".

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Rewrites the state's solid waste disposal law. Makes numerous amendments to take into account that the disposal of hazardous wastes will be comprehensively regulated by the environmental protection agency under the federal "Resource Conservation and Recovery Act of 1976" (RCRA). Amends definitions to be consistent with RCRA where appropriate and clarifies that liquid wastes are included within scope of law, thereby implicitly including hazardous waste disposal sites within the siting authority of the county commissioners. Provides that the EPA's regulatory authority will not be duplicated by the department of health.

Provides a more complete description of the factors to be considered by the county commissioners in granting a certificate of designation. Prohibits the sale or assignment of the certificate.

Transfers the department of health's rule-making authority to the board of health. Requires the county commissioners to consider the department's recommendation with respect to an application for a certificate of designation, but removes the department's power to "veto" the application. Provides for judicial review if the county commissioners deny an application for a certificate of designation.

Exempts certain inert materials used for construction fill or topsoil placement from the definition of waste. Removes provisions relating to municipalities' designation of exclusive waste disposal sites.

Eliminates provisions for criminal penalties and substitutes provisions for civil penalties.

Makes numerous minor amendments relating to style, logical order, and clarification.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 1 of article 20 of title 30, Colorado Revised Statutes 1973, 1977 Repl. Vol., as amended, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

PART 1

WASTE DISPOSAL SITES

30-20-101. Legislative declaration - limitation. (1) The general assembly finds that improper and inefficient methods of disposal of waste materials may: result in scenic blights; create serious hazards to the public health, including accident hazards, pollution of air and water resources, and increased rodent and insect vectors of disease; adversely affect land values; create public nuisances; and otherwise interfere with community life and development. It is therefore the purpose of the general assembly in enacting this part 1 to promote the public health and welfare by providing for proper and efficient methods of waste disposal.

(2) It is the intent of the general assembly in enacting this part 1 to provide county governments with siting authority over waste disposal sites, including hazardous waste disposal sites, and to impose on the department of health reasonable duties and regulatory authority with respect to waste disposal

sites necessary to protect the public health and welfare. However, the general assembly recognizes that hazardous wastes are subject to comprehensive regulation by the United States environmental protection agency under the federal "Resource Conservation and Recovery Act of 1976", Public Law 94-580. Therefore, nothing contained in this part 1 shall be construed to provide any regulatory authority which supersedes or duplicates the regulatory authority of the United States environmental protection agency under said act.

30-20-102. Definitions. As used in this part 1, unless the context otherwise requires:

(1) "Approved site" means a waste disposal site for which a certificate of designation has been obtained, as provided in section 30-20-104, or a waste disposal site which is approved under section 30-20-103 (3) without complying with section 30-20-104.

(2) "Board" means the state board of health.

(3) "Department" means the department of health.

(4) "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

(5) "Governmental unit" means the state of Colorado, every county, city and county, municipality, school district, special district, and authority located in this state, every public body corporate created or established under the constitution or any law of this state, and every board, commission, department, institution, or agency of any of the foregoing or of the United

States.

(6) "Hazardous waste disposal site" means any waste disposal site which is subject to the permit requirements of section 3005 of the federal "Solid Waste Disposal Act", as amended by the federal "Resource Conservation and Recovery Act of 1976", as from time to time amended, 42 U.S.C. sec. 6925.

(7) "Inert material" means non-water-soluble and nondecomposable inert solids together with such minor amounts and types of other materials as will not significantly affect the inert nature of such solids according to rules and regulations of the board. The term includes but is not limited to earth, sand, gravel, rock, concrete which has been in a hardened state for at least sixty days, masonry, asphalt paving fragments, and such other non-water-soluble and nondecomposable inert solids as the board may by regulation identify.

(8) "Person" means any individual, public or private corporation, partnership, association, firm, trust, estate, or governmental unit, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties, or any association of persons.

(9) "Treatment" means any activity, method, technique, or process designed to change the physical, chemical, or biological character or composition of any waste so as to:

(a) Neutralize such waste;

(b) Recover energy or material resources from such waste; or

(c) Render such waste:

(I) Less hazardous;

(II) Safer for transportation, storage, or disposal;

(III) Amenable to recovery or storage; or

(IV) Reduced in volume.

(10) "Waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, but does not include:

(a) Discharges which are point sources subject to permits under section 402 of the "Federal Water Pollution Control Act", as amended;

(b) Source, special nuclear, or byproduct material as defined by the federal "Atomic Energy Act of 1954", as amended;

(c) Agricultural waste;

(d) Domestic sewage;

(e) Irrigation return flows;

(f) Inert materials deposited for construction fill or topsoil placement in connection with actual or contemplated construction at such location or for changes in land contour for agricultural purposes.

(11) "Waste disposal" means the final deposit of waste. The term does not include recycling, reclaiming, or treatment of waste. The term also does not include the beneficial use, including use for fertilizer, soil conditioner, fuel, or livestock feed, of sludge from wastewater treatment plants if such sludge meets all applicable standards of the department.

(12) "Waste disposal site" means all contiguous land used for waste disposal under common ownership.

30-20-103. Certificate required - disposal prohibited - exception. (1) Any person who operates a waste disposal site in the unincorporated portion of any county shall first obtain a certificate of designation from the board of county commissioners of the county in which such site is located.

(2) Waste disposal by any person within the unincorporated portion of any county is prohibited except on or at a waste disposal site for which a certificate of designation has been obtained as provided in section 30-20-104.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, any person other than a governmental unit may dispose of his own waste on his own property, as long as such waste disposal site complies with the rules and regulations of the board and does not constitute a public nuisance. For the purposes of this part 1, such waste disposal site shall be an approved site for which obtaining a certificate of designation under the provisions of section 30-20-104 shall be unnecessary.

30-20-104. Application for certificate - review by department - hearing. (1) Any person desiring to operate a waste disposal site within the unincorporated portion of any county shall make application to the board of county commissioners of the county in which such site is or is proposed to be located for a certificate of designation. Such application shall be accompanied by a fee of _____ dollars which shall not

be refundable, and it shall set forth the location of the site; the types of waste to be accepted or rejected; the types of waste disposal; the hours of operation; the method of supervision; and the rates to be charged, if any. The application shall also contain such engineering, geological, hydrological, and operational data as may reasonably be required by rules of the board developed pursuant to section 30-20-110 to enable the department to perform its duties under subsection (2) of this section.

(2) The application shall be referred to the department for review and for recommendation as to approval or disapproval, which shall be based solely upon criteria established by the board, the water quality control commission, and the air quality control commission. Such recommendation shall be issued to the board of county commissioners, and a copy provided the applicant, within ninety days of receipt of the application by the department and shall contain a statement of the reasons for such recommendation, with reference to specific criteria of the board, the water quality control commission, and the air quality control commission.

(3) The application shall be considered by the board of county commissioners at a public hearing to be held after notice. Such notice shall contain the time and place of the hearing and shall state that the matter to be considered is the applicant's proposal for a waste disposal site. The notice shall be published in a newspaper having general circulation in the county

in which the proposed waste disposal site is located at least ten but no more than thirty days prior to the date of the hearing.

30-20-105. Factors to be considered. (1) In considering an application for a certificate of designation, the board of county commissioners shall take into account:

(a) The information contained in the application;

(b) The recommendation of the department;

(c) Written recommendations by local health departments based upon established criteria of such local health departments;

(d) Whether the waste disposal site conforms to the comprehensive county land use plan, if any;

(e) The effect that the waste disposal site will have on the surrounding property, taking into consideration the types of disposal to be used, surrounding property uses and values, and wind and climatic conditions;

(f) The convenience and accessibility of the waste disposal site to potential users;

(g) The protection afforded the public health, safety, and welfare and the environment, taking into consideration:

(I) The density of population in areas neighboring the waste disposal site;

(II) The density of population in areas adjacent to delivery routes to the waste disposal site;

(III) The risk of accident during the transportation of wastes to the waste disposal site; and

(IV) The impact on the environment, including adverse

effects on surface and ground water quality, air quality, wildlife, and scenic, historic, and recreational resources.

30-20-106. Judicial review. The denial of a certificate of designation by the board of county commissioners shall be subject to judicial review in the district court for the judicial district in which the waste disposal site is proposed. If the court finds no error, it shall affirm the denial. If the court finds that the denial is arbitrary and capricious, not in accord with the procedures or procedural limitations of this part 1, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the denial and remand the case to the board of county commissioners for further proceedings as may be appropriate.

30-20-107. Certificate. (1) If the board of county commissioners issues a certificate of designation, such certificate shall identify the general types of waste which may be accepted or which shall be rejected.

(2) The certificate of designation shall be displayed in a prominent place at the waste disposal site.

(3) The certificate of designation shall not be sold, assigned, or otherwise transferred without prior approval of the board of county commissioners.

30-20-108. Operation of landfill gas facilities within waste disposal sites. The governing body of any municipality or county shall have the authority to make such provisions as may be

necessary for the operation of landfill gas facilities within any waste disposal site under its jurisdiction to enable the municipality or county to exercise its powers relating to landfill gas operations under sections 30-11-307 and 31-15-716, C.R.S. 1973.

30-20-109. Contracts with governmental units authorized. (1) Any governmental unit may contract for the operation of an approved site.

(2) Any city, city and county, county, or incorporated town acting by itself or in association with any other such governmental unit may establish and operate an approved site under such terms and conditions as may be approved by the governing bodies of the governmental units involved. In the event such site is not operated by the governmental unit involved, any contract to operate such a site shall be awarded on a competitive bid basis if there is more than one applicant for a contract to operate such site.

(3) Any city, city and county, county, or incorporated town acting by itself or in association with any other such governmental unit may acquire by condemnation such sites as are needed for waste disposal purposes.

30-20-110. Board to promulgate rules and regulations - minimum standards - limitation. (1) The board may promulgate rules and regulations establishing criteria for the engineering design and operation of waste disposal sites, including, but not limited to: Protection of surface and subsurface waters,

suitable soil characteristics, distance from waste generation centers, access routes, distance from water wells, on-site traffic control patterns, insect and rodent control, methods of waste compaction in the disposal fill, confinement of windblown debris, fire prevention, and final closure of the compacted fill.

(2) Such rules and regulations shall contain the following minimum standards:

(a) Waste disposal sites shall comply with the health laws, rules and regulations of the board, the air quality control commission, and the water quality control commission, and all applicable zoning laws and ordinances.

(b) Except as provided in section 30-20-111, waste deposited at any waste disposal site shall not be burned, other than by incineration in accordance with a certificate of designation issued pursuant to section 30-20-104; except that, in extreme emergencies resulting in the generation of large quantities of combustible materials, authorization for burning under controlled conditions may be given by the department.

(c) No radioactive materials or materials contaminated by radioactive substances shall be disposed of in waste disposal sites not specifically designated for that purpose.

(d) Waste disposal sites located within floodplains shall not restrict the flow of floods, reduce the temporary water storage capacity of floodplains, or result in washouts of wastes.

(e) Waste disposal sites shall not adversely affect endangered or threatened species of plants, fish, or wildlife.

(f) Waste disposal sites shall protect the food chain from the introduction of toxic substances.

(g) Waste disposal sites shall minimize obnoxious odors, windblown debris, and the breeding and infestation of rodents, flies, and mosquitoes capable of transmitting disease to humans.

(h) Waste disposal sites shall be located, designed, and operated so as to protect the public health and safety and shall minimize accident hazards such as explosive gases, fires, bird hazards to aircraft, and uncontrolled public access to the sites.

(i) In the operation of waste disposal sites, wastes shall be distributed in the smallest area consistent with handling traffic to be unloaded and shall be placed in the most dense volume practicable.

(j) Upon closure, waste disposal sites shall be left in a condition of orderliness and good esthetic appearance.

(3) The board shall have no authority to promulgate rules and regulations applicable to hazardous waste disposal sites to the extent that such sites are subject to regulations promulgated by the United States environmental protection agency pursuant to Subtitle C of Title II of the federal "Solid Waste Disposal Act", as amended by the federal "Resource Conservation and Recovery Act of 1976", as from time to time amended.

30-20-111. Noncommercial burning of waste. (1) Any provision of section 25-7-108, C.R.S. 1973, to the contrary notwithstanding, the board of county commissioners in any county with less than twenty-five thousand population, according to the

latest federal census, is authorized to develop regulations, by resolution, permitting the noncommercial burning of waste in the unincorporated area of said county; except that no permit shall be issued which shall allow the county to exceed primary and secondary ambient air quality standards as prescribed by federal or state laws and regulations adopted pursuant thereto.

(2) As used in subsection (1) of this section, "noncommercial burning of waste" includes the burning of wood waste in wigwam wood waste burners.

30-20-112. Departments to render assistance. The department and local health departments shall render technical advice and services to owners and operators of waste disposal sites upon the request of such owners and operators in order to assure that appropriate measures are being taken to protect the public health, safety, and welfare. In addition, the department has the duty to coordinate the waste program under this part 1 with all other programs within the department and with the other agencies of federal, state, and local government which are concerned with waste disposal.

30-20-113. Complaint filed with board of county commissioners - procedure. Upon the sworn complaint of any person filed with the board of county commissioners alleging that a waste disposal site located within the county is a public nuisance under the provisions of section 30-20-114 and alleging sufficient facts in support thereof, the board of county commissioners may hold a public hearing on the complaint after

reasonable notice to the public and to the operator of the waste disposal site. All relevant testimony shall be received at such hearing, and at the conclusion thereof the board of county commissioners may by resolution authorize the county attorney to commence an action on its behalf under section 30-20-114 or 30-20-115.

30-20-114. Sites deemed public nuisance - when. Any waste disposal site that is found to be abandoned or that is operated or maintained in a manner so as to violate any of the provisions of this part 1 or any rule or regulation adopted pursuant thereto shall be deemed a public nuisance, and such violation may be enjoined by the district court for the judicial district wherein the violation occurred in an action brought by the department, the board of county commissioners of the county wherein the violation occurred, or the governing body of the municipality wherein the violation occurred.

30-20-115. Violation - civil penalty. Any person who violates any provision of this part 1 shall be subject to a civil penalty of not more than five hundred dollars per day of violation. Such penalty shall be determined and collected by the district court for the judicial district in which such violation occurs upon action instituted by the department, the board of county commissioners of the county in which the violation occurs, or the governing body of the municipality in which the violation occurs. In determining the amount of any such penalty, the court shall take into account the seriousness

of the violation, whether the violation was willful or due to mistake, the economic impact of the penalty on the violator, and any other relevant factors. All penalties collected pursuant to this section shall be transmitted to the state treasurer and credited to the general fund. Nothing in this part 1 shall preclude or preempt a city, a city and county, or an incorporated town from enforcement of its local ordinances.

30-20-116. County waste disposal site fund - tax - fees. Any county that operates a county waste disposal site or sites is authorized to establish a county waste disposal site fund. The board of county commissioners of such county may levy a waste disposal site tax in addition to any other tax authorized by law, on any of the taxable property within said county, the proceeds of which shall be deposited to the credit of said fund and appropriated to pay the cost of land, labor, equipment, and services needed in the operation of county waste disposal sites. Any such county is also authorized, after a public hearing, to fix, modify, and collect service charges from users of county waste disposal sites for the purpose of financing the operations at those sites.

SECTION 2. Effective date. This act shall take effect July 1, 1981.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

BILL 2

SENATE JOINT RESOLUTION NO.

DIRECTING THE LEGISLATIVE COUNCIL TO APPOINT A COMMITTEE TO CONTINUE THE WORK OF THE 1980 INTERIM COMMITTEE ON HAZARDOUS WASTE.

WHEREAS, The General Assembly established an interim committee in its 1980 session to undertake a study of the management of hazardous waste; and

WHEREAS, During the 1980 legislative interim such committee extensively studied the advisability of the state adopting a hazardous waste management program under the federal "Resource Conservation and Recovery Act of 1976", as amended (RCRA), to be administered by the state in lieu of administration by the United States Environmental Protection Agency; and

WHEREAS, The committee's deliberations were handicapped by a lack of adequate information, in part because of the newness of the federal regulations implementing RCRA and in part because such regulations are incomplete at this time; and

WHEREAS, Based on the information the committee had before it, the committee elected to recommend that the General Assembly not establish a state-administered hazardous waste program under RCRA at this time; and

WHEREAS, The state will continue to have the opportunity to assume administration of the RCRA program through the passage of appropriate enabling legislation; and

WHEREAS, Ongoing developments in the area of hazardous waste, including federal rule-making, administrative implementation, litigation, and legislation in other states, may reflect on the advisability of the state assuming administration of the RCRA program, and, therefore, there is a need for a continuing study of such developments; and

WHEREAS, The members of the 1980 interim committee on

hazardous waste acquired considerable expertise in the field of hazardous waste management, which expertise should be utilized to the extent possible by any further study; now, therefore,

Be It Resolved by the Senate of the Fifty-third General Assembly of the State of Colorado, the House of Representatives concurring herein:

(1) That the Legislative Council is directed to appoint a committee to continue the work of the 1980 interim committee on hazardous waste, with particular emphasis on studying the advisability of the state establishing a program to administer the hazardous waste program under the federal "Resource Conservation and Recovery Act of 1976", as amended.

(2) (a) That such committee shall be composed of eleven members, as follows: Three members shall be from the Senate, two of whom shall be of the majority party and one of whom shall be of the minority party; three members shall be from the House of Representatives, two of whom shall be of the majority party and one of whom shall be of the minority party; one member shall be the executive director of the Department of Health or his designee; two members shall be individuals representing businesses or industries directly engaged in or affected by hazardous waste management; and two members shall be county commissioners.

(b) To the extent possible, the membership of such committee shall be comprised of the individuals who served on the 1980 interim committee on hazardous waste.

(3) That the findings and conclusions of such committee shall be submitted to the second regular session of the Fifty-third General Assembly.

(4) That the nonlegislative members of such committee shall be entitled to actual and necessary travel expenses incurred in carrying out their duties at official meetings of the committee.

(5) That all expenditures incurred in the conduct of the study directed by this resolution shall be approved by the chairman of the Legislative Council and shall be paid by vouchers and warrants drawn as provided by law from funds allocated for legislative studies from appropriations made by the General Assembly.

BILL 3

SENATE CONCURRENT RESOLUTION NO.

SUBMITTING TO THE QUALIFIED ELECTORS OF THE STATE OF COLORADO AN AMENDMENT TO SECTION 10 OF ARTICLE IX OF THE CONSTITUTION OF THE STATE OF COLORADO, DIRECTING THE STATE BOARD OF LAND COMMISSIONERS TO TAKE INTO CONSIDERATION THE PUBLIC HEALTH AND SAFETY WHEN PROVIDING FOR THE SALE OR OTHER DISPOSITION OF STATE LANDS.

Resolution Summary

(Note: This summary applies to this resolution as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Directs the state board of land commissioners, when providing for the sale, lease, or other disposition of state lands, to take into consideration the public health and safety. Present law requires only that the board secure the maximum possible revenue from such dispositions.

Be It Resolved by the Senate of the Fifty-third General Assembly of the State of Colorado, the House of Representatives concurring herein:

SECTION 1. At the next general election for members of the general assembly, there shall be submitted to the qualified

electors of the state of Colorado, for their approval or rejection, the following amendment to the constitution of the state of Colorado, to wit:

Section 10 of article IX of the constitution of the state of Colorado is amended to read:

Section 10. Selection and control of public lands. It shall be the duty of the state board of land commissioners to provide for the location, protection, sale, or other disposition of all the lands heretofore, or which may hereafter be, granted to the state by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor, TAKING INTO CONSIDERATION THE PUBLIC HEALTH AND SAFETY. No law shall ever be passed by the general assembly granting any privileges to persons who may have settled upon any such public lands subsequent to the survey thereof by the general government by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made, and the general assembly shall provide for the sale of said lands from time to time, and for the faithful application of the proceeds thereof in accordance with the terms of said grants.

SECTION 2. Each elector voting at said election and desirous of voting for or against said amendment shall cast his vote as provided by law either "Yes" or "No" on the proposition: "An amendment to section 10 of article IX of the constitution of the state of Colorado, directing the state board of land commissioners to take into consideration the public health and safety when providing for the sale or other disposition of state lands."

SECTION 3. The votes cast for the adoption or rejection of said amendment shall be canvassed and the result determined in the manner provided by law for the canvassing of votes for representatives in Congress, and if a majority of the electors voting on the question shall have voted "Yes", the said amendment shall become a part of the state constitution.

APPENDIX A

OUTLINE OF FEDERAL HAZARDOUS WASTE REGULATIONS

MEMORANDUM

June 4, 1980

TO: Committee on Hazardous Wastes

FROM: Legislative Council Staff

SUBJECT: Outline of Federal Resource Conservation and Recovery Act (RCRA -- P.L. 94-580) and Regulations Promulgated Thereunder

Subtitle C -- Hazardous Waste Management

RCRA Section	Subject of Regulation	Code of Federal Regulations Citation
3001	Identification and Listing	40 CFR 261
3002	Generator Standards	40 CFR 262
3003	Transporter Standards	40 CFR 263
3004	Owner/Operator Standards for Treatment, Storage, Disposal Facilities (264 -- Permitting Standards) (265 -- Interim Status Standards)	40 CFR 264, 265
3005	Permit Requirements	
	--EPA Administered Permit Programs	40 CFR 122
	--Procedures for Decisionmaking	40 CFR 124
3006	Authorized State Hazardous Waste Programs	40 CFR 123
3007	Inspections	None
3008	Federal Enforcement	None
3009	Retention of State Authority	None
3010	Effective Date -- Notification	(45 FR 12746, Feb. 26, 1980)
3011	Assistance to States	None

Identification and Listing
(40 CFR 261)

1. List of hazardous wastes

   a. 85 process wastes (p. 33122*)
   b. 361 discarded substances
      --239 hazardous wastes (p. 33126)
      --122 acutely hazardous wastes (p. 33124)

   (June 1980 -- 25 additional process wastes to be listed)
   (Fall 1980 -- infectious and radioactive wastes to be listed)

2. Characteristics of hazardous wastes (p. 33121)

   a. ignitability
   b. corrosivity
   c. reactivity
   d. EP toxicity (extract procedure)

3. Exclusions include: (p. 33120)

   - domestic sewage
   - nuclear wastes
   - household wastes
   - mining overburden
   - agricultural wastes
   - industrial waste water discharges
   - fly ash waste

* page numbers refer to the May 19, 1980 Federal Register

Notification
(RCRA Section 3010)

Who Must Notify:

1. Generators
2. Transporters
3. Owners/Operators of storage, treatment, disposal facilities

When:

By August 18, 1980

Information Required:

1. Name/address of installation
2. Owner's Name
3. Description of activities
4. Description of hazardous wastes

Generators
(40 CFR 262)

Must: (p. 33142)

-- Determine if waste is hazardous
-- Notify EPA
-- Obtain an identification number
-- Originate/follow-up manifest for off-site shipments
-- Obtain a permit for on-site handling
-- Properly package, label, mark, placard
-- Keep records, submit reports
-- Meet special conditions

Small generators are exempted (p. 33120)
Farmers are exempted (p. 33144)

Transporters

Must: (p. 33151)

-- Notify EPA
-- Obtain an identification number
-- Deliver waste to designated facility
-- Carry manifest with shipment
-- Report and clean up spills

Owners/Operators of Treatment, Storage, and Disposal Facilities (40 CFR 264, 265)

Must:

-- Notify EPA
-- Obtain an identification number
-- Apply for permit from EPA
-- Meet Interim Status Standards
   (until permit approved or denied)
-- Meet General Standards
   (after permit issued)

A. Interim Status Standards (Temporary Authority)

1. Qualifications for interim status (p. 33434)
   a. be an existing facility
   b. file notification
   c. submit Part A of the two-part permit application

2. Minimum technical requirements
   a. general standards
   b. facility specific standards

3. Administrative requirements

B. General Standards (for Permit)

1. Administrative requirements (p. 33221)

2. Major technical requirements (Fall 1980)

Permits for Treatment, Storage, or Disposal
(40 CFR 122)

1. Consolidated permit regulations for several environmental laws are provided in order to facilitate and streamline the regulatory process (p. 33418)

2. RCRA permit application (p. 33432)

   a. Part A -- Interim Status (p. 33434)
      -- general data
      -- photographs
      -- description of processes used
      -- specification of hazardous wastes handled

   b. Part B -- Permit (date to be set)
      -- specific data (p. 33434)

State Program
(40 CFR 123)

1. Must: (p. 33465)

   a. be consistent with other state programs
   b. be equivalent to the federal program
   c. be adequately enforced

2. Must include: (p. 33466)

   a. identification and listing
   b. notification procedures
   c. generator standards
   d. transporter standards
   e. facility standards
   f. permit standards

APPENDIX B

A Compilation of Committee Correspondence with the Environmental Protection Agency

During the course of the interim study, several questions were raised at each committee meeting which were addressed to Environmental Protection Agency representatives in writing for response at subsequent meetings.

This appendix contains the full text of questions and answers exchanged between the committee chairman, on behalf of the committee, and EPA representatives. The following letters were exchanged:

1) Questions raised at the June 5, 1980 committee meeting: committee letter -- June 18; EPA response -- June 26.

2) Questions raised at the June 26, 1980 committee meeting: committee letter -- July 3; EPA response -- August 25.

3) Questions raised at the August 26, 1980 committee meeting: committee letter -- September 8; EPA response -- September 15.

4) Questions raised at the September 16, 1980 committee meeting: committee letter -- September 24; EPA response -- October 23.

5) Questions raised at the October 27, 1980 committee meeting: committee letter -- November 6; EPA response -- December 10.

Questions and responses are grouped by topic in this appendix and dates beside each question indicate the meeting at which the question was raised. The letters referenced above are on file in the Legislative Council Office.

Topic areas with related questions are grouped as follows:

I. Flexibility Allowed by EPA Under a State Administered Program

6-5* (1) Q. What differences could exist if the state or the EPA were to administer a hazardous waste program?

A. The State has the option to address things which EPA cannot. Siting can be addressed as can technical assistance to Industry. EPA does not have authority to become involved in these except from a regulatory standpoint. Our technical assistance is usually done through consultants in the form of technology transfer seminars to Industry as a whole not on an individual basis.

Chapters 10 through 13 of the RCRA State Interim Authorization Guidance Manual specify the differences allowed between an EPA program and a state program under Interim Authorization. Very little difference is allowed between EPA and the State on Part 261 Identification and Listing of Hazardous Waste and the universe of Generators, Transporters, Storers, Treaters, and Disposers covered. However, there is considerable leeway allowed in the manner in which a state accomplishes the major objectives as long as the end point is equivalent or more stringent. For example:

* Meeting date indicating when question was raised (see introduction to appendix)

40 CFR 265.16 Personnel Training

Federal Requirement

This section provides personnel training requirements for operating treatment, storage and disposal facilities. In particular, this section states that operating personnel must complete a training program within six (6) months, and that owners and operators must retain records of training for three years after an employee leaves during the life of the facility.

Substantial Equivalence

The State must require personnel training. However, the State may exercise flexibility in determining the training required and the length of time for training, recordkeeping and reporting requirements.

40 CFR 262.40, .41, .42, .43 Recordkeeping and Reporting

Federal Requirement

These sections summarize the content and procedures for recordkeeping, annual reporting, exception reporting, and additional reporting.

The generator is required to retain a copy of the manifest signed by all transporters and the treatment, storage and disposal facility owner/operator for a minimum of three years from the date of acceptance by the initial transporter.

The generator must prepare annual and exception reports and must retain copies of these reports for three years. EPA Form 8700-13 must be used for annual reports; these are due 60 days after the end of the calendar year. Procedures for filing exception reports are described.

Substantial Equivalence

The State must specify that the generator is required to maintain records for a minimum of three years for the purpose of compiling an Annual Report except in cases with litigation or enforcement actions pending. The State must require an annual report or reports that supply the State with the needed information to make the annual report. The information contained therein must contain the generator's name, quantity, type of waste and disposition of the waste.

The State must have a means of tracking exceptions which accomplishes the purpose of exception reports. For interim authorization, the generator need not have primary

responsibility for reporting exceptions provided the State has a means of tracking wastes which are unaccounted for within a specified time period. Reporting by the State to the Regional Administrator should be done at least quarterly.

6-26 (2) Q. Are there any circumstances under which a state program would be approved if such state program had requirements less stringent than those specified in the regulations, particularly as related to site selection (e.g., climate, geology, topography, or hydrology)?

A. The regulations were written to take into account all types of site conditions, therefore it is doubtful that regulations less stringent than EPA's would be approved.

6-26 (3) Q. One source of testimony at the committee's June 26 meeting asserted that an advantage of a state-administered program is that a state could impose a time limit for action to be taken in the permitting process. Contrary testimony was offered by EPA representatives to the effect that the regulations now require EPA to respond to a permit within 90 days of receipt of a complete application. When requested to reference the time limit in the law or regulations, EPA representatives were not able to supply a citation. Is there such a time constraint? If so, would you cite the provisions?

A. The 90 day period referred to by Jon Yeagley in the June 26, 1980 committee meeting was misrepresented as the maximum time allowed for EPA to issue a permit. It is actually the minimum amount of time needed to issue a permit. There is no maximum time limit. We expect it to take from 3-6 months to issue a permit depending on the complexity of the permit.

i. Q. If the time limit exists, what would be the consequence, under the current regulations, if the EPA does not act within the specified time period?

A. There is no time limit for permit issuance.

ii. Q. If, under a state program, the state required permit approval in less time than required under RCRA, could the state program be approved as "substantially equivalent"?

A. The State could set a time limit for permit issuance depending on the consequences of such a time limit. Permit by rule until permit issuance might be acceptable.

iii. Q. If, under a state-administered program, the state provided that permit approval became automatic in cases where a permit application was not acted on within the specified

period, could the state program be approved as "substantially equivalent"?

A. A State program that allowed automatic permit approval would not be approved as "substantially equivalent" as it would not meet the mandate of RCRA to protect the public health and environment.

iv. Q. If the time limit is not specified in RCRA or in the regulations, address (ii) and (iii) above.

A. Addressed immediately above.

8-26 (4) Q. In written response to a question regarding authorization by EPA of a state program which imposed time limits for permit approval, the EPA responded: "The State could set a time limit for permit issuance depending on the consequences of such a time limit ...".

a) Q. If the state provided for automatic approval within a specified period of time could the program be authorized?

A. An automatic permit approval process that does not allow for required public participation in the approval process or allows for institution of less than minimum Federal Standards would not be allowed or authorized.

b) Q. Which, if any, other consequences would be acceptable?

A. Automatic permit denial (prior to automatic approval) for permits which do not meet minimum Federal Standards, which have not had substantive review, or had required public participation (notice and hearing) would be acceptable.

8-26 (5) Q. Assuming fees would be imposed for the purpose of administering a state program, could a state program be authorized with fee schedules based on the following conditions:

a) A fee which increases with the distance from point of generation to point of treatment or disposal.

b) A lower fee charged for waste originating in-state than out-of-state.

c) A uniform fee which is substantially greater than fees charged at facilities in any neighboring states.

A. (a-c) We do not have guidelines or regulations covering allowance of certain kinds of fees and whether they would impede Interstate Commerce and thus be ruled out. An investigation into court cases involving such fees by your

staff could probably ascertain this probability. We would probably ask the ICC for a ruling on a fee imposed by a State prior to authorization.

6-26 (6) Q. During testimony at the committee's meeting, an argument was made that a state-administered program would not have to require an environmental impact statement (EIS) for disposal sites because, as a state program, withstanding the use of federal money, it would not have "federal impact". Is there, in your legal opinion, any justification for that argument?

A. See memo excerpt below:

"As a starting point, since the functional equivalence test applies only to regulatory actions, some actions taken under RCRA are not exempt from NEPA (the National Environmental Policy Act). The funding of demonstration projects and solid waste disposal facilities are not regulatory; therefore, they are not exempt. However, this does not necessarily mean that environmental impact statements are required. NEPA requires impact statements only for 'major federal action significantly affecting the quality of the human environment.' Existing regulations provide procedures for reviewing research and development projects and financial assistance for solid waste disposal facilities which can be used to decide whether impact statements are needed for specific projects.

"RCRA also requires a number of studies and reports. Although these activities are not exempt as regulatory activities, it is unlikely that they would significantly affect the environment. For all practical purposes, they can be considered to be exempt from NEPA."

II. Retention of Authority by the Environmental Protection Agency in the Case of a State Administered Program

A. General

6-5 (1) Q. (a) What authority would be retained by the EPA under federal control and under state control?

(b) What preemptive powers would the EPA retain even though the state were to adopt its own program?

(c) What powers, if any, would the EPA relinquish to Colorado if the state were to run the program?

A. (a-c) When the state is authorized to run the hazardous waste management system they are operating the system in lieu of the Federal government. As long

as the state is operating and enforcing the system under the terms of the authorization and specifically the EPA/State Memorandum of Agreement (MOA), EPA cannot preempt the state. However, if the state is derelict in carrying out its duties such that human health or the environment may be threatened, EPA is mandated within the scope of the MOA to step in and enforce the state regulations. EPA must maintain an oversite role in an authorized state, the details of which would be outlined in the MOA.

B. Siting

6-5 (1) Q. Could the EPA preempt the siting authority of a local unit of government if that unit had designated a solid waste or hazardous waste disposal site?

A. Any facility approved by a local siting authority would also require an EPA permit. Local laws would take precedent where they were more stringent than EPA. State or local laws cannot be so stringent as to disrupt the National Hazardous Waste Management System, Department of Transportation regulations, or interfere with interstate commerce as evidenced by a recent Supreme Court decision over-turning a New Jersey law banning the importation of waste from outside that State.

C. Permits

8-26 (1) Q. It is the chairman's best recollection of EPA testimony that permits for treatment, storage, and disposal facilities would be issued for a 10 year period. Please confirm the time period and cite the provision in the regulations. If such a time period is not specified in the regulations, how will the duration of a permit be determined?

A. A RCRA permit may be issued for a fixed term up to 10 years. 40 CFR Part 122, Subpart A, Section 122.9.

6-26 (2) Q. Assuming an approved state-administered program, once a state permit has been issued to a facility, does the EPA retain any ability to modify the terms and conditions of the permit? If so, under what circumstances?

A. During the permit application and review EPA retains the right to supplement the terms and conditions of a State issued permit where the State was less stringent than EPA's minimum standards. 123.38 (a-e) under 3008 (a)(3) of the Act, EPA retains the authority

to suspend or revoke the permit of a violator, after due notice to the State 123.38 (a-e).

6-26 (3) Q. Assuming an approved state-administered program and a state permit, does 40 CFR 123.38 (2) (3) allow EPA to expand or add to the conditions of the permit? If so, are the expanded or additional conditions limited to " ... approved state program requirements ... " or can they include conditions not part of the state program regulations?

A. Conditions added to a State permit by EPA through comments (123.38 (a)) would not include conditions that were not part of the State program's regulations. These comments would normally be limited to major permits.

9-16 (4) Q. Regarding a permittee's rights and duties under a permit issued by EPA, it was our understanding from Mr. McClave's response that modifications in a permit's conditions are initiated only at the request of the permittee (unless there is a determination that the permitted activity endangers human health or the environment). Please verify the information.

A. Mr. McClave's response was given in reply to a question concerning a permittee's responsibilities and duties under an EPA issued permit when new regulations are passed. He was correct in stating that a permit condition modification is initiated at the permittee's request, in the absence of a determination that the permitted activity endangers human health or the environment. See 40 CFR 122.15 (a)(3) page 33429 of the May 19, 1980, Federal Register.

6-26 (5) Q. In reference to EPA's authority under RCRA, Section 7003, and the regulations, 40 CFR 123.38 (4), in your legal opinion, are the permittee's rights under the permit suspended by the " ... receipt of evidence ... " or by the district court's determination?

A. The permittee's rights under the permit would not be automatically suspended by the "receipt of evidence". However, the receipt of such evidence could trigger proceedings under section 3008 (a)(1-3) of the Act (40 CFR 124 Subpart E) that could result in suspension or revocation of the permit. Also, under 7003 EPA could seek interim relief from the Court that would suspend a permittee's rights under the permit prior to the Court's final determination.

10-27 (6) Q. There were several opinions expressed during the October 27 meeting which were postulated in response to

a memorandum prepared by Holland & Hart, dated September 4, 1980. The memo, entitled "EPA Oversight of the RCRA Permitting Process in States with Authorized Hazardous Waste Programs", is enclosed. Please respond to the memo in full, outlining points of agreement and disagreement.

A. While we might take exception with the characterizations in the Introduction (p.p. 1 & 2) of the Holland and Hart memorandum, we are in general agreement with the substance of the document (p.p. 3-24). (Note: The memorandum is contained in this report as Appendix H, beginning on page 157.)

D. Best Engineering Judgment

6-26 (1) Under federally mandated air quality programs, the standards which must be met are both performance standards AND "best available technology". Testimony offered at the committee hearing indicated that the sole standard for hazardous waste disposal/treatment/storage (TSD) site permitting would be "best engineering judgment". Can you verify this testimony?

a) Q. If not, can you clarify what the standards are?

A. Standards applicable to TSD facility permits under Part 264 are anticipated to be performance and design standards applied to a given facility through the "Best Engineering Judgment" (BEJ) of the administering agency's permit writers. These standards and the BEJ concept are scheduled to be published in final form in the Federal Register in the Fall of 1980.

b) Q. If so, assuming an approved state program, who makes the final determination of "best engineering judgment"?

A. The administering agency (EPA or the State) will make the final BEJ decision. These decisions are usually based on periodically updated guidance manuals published by EPA outlining the latest technology available to achieve the desired end point. As pointed out in question number (2) under "Permits", EPA retains the right to supplement the terms and conditions of a permit (123.38 (a-e).)

c) Q. Assuming "best engineering judgment" will change as the state of technology changes, at what point in time does that determination become final?

A. The permit conditions become final when the permit is issued (for up to 10 years) and remains in effect until renewal.

8-26 (2) Q. Could a permitted facility be required to meet amended BEJ standards promulgated during the life of a permit issued before those standards?

A. BEJ is only a proposal at the present time and has no documented place in the RCRA regulations. However, Section 122.15 covers modification or revocation and reissuance of permits including application of new regulations. Minor modifications are covered under 122.17.

8-26 (3) Q. When a permit for a facility is subject to renewal, would the renewal process require compliance with either new or amended standards?

A. A permit is subject to new or amended standards upon renewal and may be subject to them prior to renewal under 122.15.

8-26 (4) Q. If a treatment, storage, or disposal permit is issued by EPA, which is based on the then "best engineering judgment", could the validity of that permit be challenged by citizen suits? If so, under what conditions?

A. Yes if the BEJ deviates significantly from accepted engineering practices or EPA guidelines and the citizen feels it will endanger human health or the environment. Also, any time a BEJ fails to do the job it was intended to do and the administering agency fails to take timely action a citizen suit could be filed.

E. Permits by Rule

8-26 (1) Q. Assuming a state-administered EPA approved hazardous waste program, would the state be allowed to:

a) Q. issue state regulatory interpretive memoranda (RIM)?

A. RCRA does not contain any restrictions to the issuance of regulatory interpretive memoranda by an authorized state as long as the state program maintains equivalence to the federal programs. The final interpretation for EPA or state interpretive memoranda will ultimately lie with the courts.

b) Q. issue "permits by rule"?

A. As of November 19, 1980, all state-authorized hazardous waste programs will be implementing "permits by rule" which will remain in effect until a final permit is issued or denied.

9-16 (2) Q. Given an EPA approved state program, regarding the authority of a state to issue permits by rule, there is confusion about whether or not a state would be allowed to issue such permits, and if so, the amount of flexibility which would be allowed. On one hand, it was stated by EPA representatives that the state may be able to issue permits by rule under certain circumstances, but on the other hand, it was also asserted that such permits would be subject to EPA oversight on a case by case basis in order to ensure equivalence with the federal program and consistency with other state programs. Would you please clarify the issue.

A. Permits by rule may and, most probably, will have to be issued by an authorized State. Bringing all waste management facilities into permit status after November 19, 1980, will require permit by rule. The Environmental Protection Agency (EPA) has the responsibility of assuring protection of public health and the environment from improper management of hazardous waste within the nation. Under Section 3008 (a)(2) and 40 CFR 123.6 and 123.38, permits written by an authorized state, either site by site or by rule, are subject to: (1) supplemental permit conditions (comments) by EPA; and (2) compliance inspections and supplemental permit enforcement by EPA based on state regulations (since the state authorization is "in lieu of" the EPA regulations). While specific facilities to be permitted will be designated in the Memorandum of Agreement for specific oversight (permit application review, draft permit review, compliance inspections, and enforcement review all with followup comment), EPA's compliance inspection and supplemental enforcement authorities are not limited by facility. The evaluation of state program equivalence and consistency will be done at the time of authorization. The oversight activity evaluates the state's ability to implement its regulations in comparison to EPA guidance and to upgrade its authorities as the Resource Conservation and Recovery Act (RCRA) is updated.

F. Citizen Suit Provisions

8-26 (1) Q. Would a state administered program not allowing citizen suits against permitted facilities be approved by EPA?

A. Citizens have the right to file citizen suits under RCRA regardless of whether the states allow them or not.

9-16 (2) Please clarify whether or not a state program would be approved by EPA under the following circumstances:

a) Q. A state program not providing for citizen suits to be brought in Colorado;

A. 40 CFR 123.9(d), page 33463, delineates the requirements for public participation in the State enforcement process. Generally citizens with an interest that may be affected must be allowed intervention, or an alternative procedure must be met.

b) Q. A program prohibiting citizen suits in Colorado.

A. See 2(a).

8-26 (3) Q. Assuming provision for citizen suits in an authorized state-administered program, would the state be able to assume jurisdiction in the case of a citizen suit?

A. Citizen suits are filed in Federal Court.

8-26 (4) Q. Assuming a permit is good for 10 years and will not be challenged by EPA, notwithstanding a change in BEJ, would not a citizen still have a right to sue under RCRA?

A. Yes if the BEJ did not provide the intended protection and the administering agency failed to take timely enforcement action. EPA could also be sued for improper oversight.

10-27 (5) Q. It is the committee's understanding from Mr. Yeagley's response that a state-administered program prohibiting citizen suits in a state forum would not be acceptable to the EPA. However, Mr. Yeagley said provisions in RCRA do allow the EPA to consider alternative methods for citizen participation other than the citizen suit provision. Please delineate possible alternatives which would be acceptable alternatives.

A. "Alternatives" referred to the citizen participation of CFR-40-123.128(f)(2) which reads as follows:

Any State agency administering a program under this Subpart shall provide for public participation in the State enforcement process by providing either: (1) authority which allows intervention as of right in any

civil or administrative action to obtain remedies specified in paragraph (f)(1) of this section by any citizen having an interest which is or may be adversely affected; or (2) assurance that the State agency or enforcement authority will:

A. Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in paragraph (g)(2)(IV) of this section;

B. Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule or regulation; and

C. Publish and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

III. Required Resources

6-26 (1) Q. Section 3006(b) of RCRA speaks to EPA authorization of a state program, and lists three conditions for disapproval, the third of which is "(3) such program does not provide adequate enforcement of compliance with the requirements of this subtitle." What is EPA's required funding for an approved program in Colorado for FY 1980-81? Can you state that requirement in lump sum dollars and then specify numbers of full-time employees (FTE), travel expenditures, and capital required?

A. EPA does not have a required funding level for program approval but we do have a suggested number of 15 FTE's in the Interim Authorization Guidance Manual for Colorado in FY-81. The Colorado Health Department (CHD) informed us that it would cost about $20,250 per FTE including travel and benefits. The EPA grant funds available to Colorado in FY-81 are $304,200. EPA will implement a hazardous waste program in Colorado, possibly with assistance from the CHD through a Cooperative Arrangement that includes approximately 10 FTE's and $202,000 in Federal grant funds.

8-26 (2) Contradictory data have been presented concerning acceptable levels of FTE for an authorized state program in Colorado.

(a)Q. What are the acceptable FTE positions for "phase I" and "phase II" programs, and elaborate on the differences between the phases, if any.

A. Phase I is mainly for existing facilities and includes "permit by rule". The resources required for Phase I are delineated in the Interim Authorization Guidance Manual.

Phase II includes issuing permits for existing and new facilities and will require more resources. Phase II resource requirements are also listed in the manual, however, since these figures are based on estimated data, they will probably change as data is received from the notification and Part A permit applications.

(b) Q. Please describe the formula which will be used to determine the number of FTE required for an authorized program in Colorado. When will final determination be made?

A. The formula for deriving these numbers is presented in the guidance manual which has been provided to your committee.

IV. Status of Legislation in Other States

6-5 (1) Q. What is the status of hazardous waste legislation in other states? What other states intend to seek interim status in November, 1980?

A. There are currently (based on EPA preliminary assessments) twenty-five states with sufficient legislative authority that will be seeking Interim Authorization by November 19, 1980. Twenty-seven more (with varying amounts of authority) are expected to enter into Cooperative Arrangements; and in four states there will only be a Federal program (West Virginia, New Mexico, Ohio and Nebraska). Region VIII states expected to apply for Interim Authorization include Utah, Montana, South Dakota and North Dakota. We anticipate that Colorado and Wyoming will enter into Cooperative Arrangements to help administer the Federal Hazardous Waste Program until they gain sufficient authority to be authorized.

6-5 (2) Q. Have any other states entered into a memorandum of agreement with the EPA for administration of a hazardous waste program? If so, we would like to have a copy of this agreement. If not, please describe what you would anticipate as the content of such an agreement.

A. No state can receive Interim Authorization until November 19, 1980. All those that will be seeking Interim Authorization are currently completing applications which include a Memorandum of Agreement as part of the package. Drafts of MOA's are due by August 2, 1980. Copies of these drafts could be made available to the Committee after August 2, 1980. A model MOA is included in the guidance manual for Interim Authorization provided to your Committee on June 5, 1980.

11-19 3) (Note: An update was received from the EPA on December 10):

Of the six states in my Region, North Dakota, South Dakota, Utah, and Montana have hazardous waste legislation. Utah and North Dakota have assumed the hazardous waste program and the applications of Montana and South Dakota for the program are currently being processed. EPA is not directly involved in the programs of states with full authorization. Wyoming and Colorado have cooperative arrangements where we are working in partnership with the state to ensure effective implementation of a reasonable hazardous waste management program. This partnership approach is and will continue to work well. I'm very pleased with the results to date.

Clearly, state and local concerns can best be handled by state and local governments. It is my desire, consistent with the intent of RCRA, to have states with appropriate legislation fully assume the program, but it is not my policy to pressure any state towards enactment of legislation to assume the program. More than thirty states across the country have applied for interim authorization.

V. Current Colorado Law

6-5 (1) Q. If the EPA were to administer a program in Colorado, would present state laws and procedures of counties and municipalities governing siting need to be amended?

A. Present laws and procedures of counties appear to be compatible and would most likely not have to undergo any changes if EPA were operating the Hazardous Waste Program. However, there are currently two levels of government involved in siting now (state and local); and EPA would add a third level. Approval would be needed from all three levels prior to operation of a facility.

6-5 (2) Q. Could the EPA preempt the siting authority of a local unit of government if that unit had designated a solid waste or hazardous waste disposal site?

A. Any facility approved by a local siting authority would also require an EPA permit. Local laws would take precedent where they were more stringent than EPA. State or local laws cannot be so stringent as to disrupt the National Hazardous Waste Management System, Department of Transportation regulations, or interfere with interstate commerce as evidenced by a recent Supreme Court decision over-turning a New Jersey law banning the importation of waste from outside that State.

8-26 (3) In written response to a question regarding whether amendments to Colorado statutes and procedures of local governments governing siting would be necessary if EPA were to administer a hazardous waste program in Colorado, the EPA response was: "Present laws and procedures of counties appear to be compatible and would most likely not have to undergo any changes if EPA were operating the Hazardous Waste Program ...".

a) Q. Would you cite the Colorado statutes and local government procedures reviewed in above.

A. The Colorado statutes and local government procedures reviewed were only those pertaining to Solid Waste, the Solid Waste Disposal Sites and Facilities Act (Title 30, Article 20, Part 1 CRS, 1973 as amended).

b) Q. Do you continue to be satisfied with the response?

A. Yes, as it pertains to (a) above.

9-16 (4) Q. In response to a question regarding the status of current Colorado statutes and whether amendments would be necessary if EPA were to administer the RCRA program in the state, there were significant differences in answers provided by EPA representatives. Mr. Yeagley said he thought no amendments to current statutes would be necessary, while Mr. McClave, responding to an interpretive memorandum he had just received, thought that any state laws with provisions less stringent than those in RCRA would be preempted by RCRA. Please elaborate on the implications for current Colorado statutes governing solid wastes in the case of EPA administering the RCRA program in the state. Please provide a citation for any statutes reviewed in making your response.

A. It is the opinion of the U.S. EPA Office of General Counsel that Section 3009 of RCRA will preempt less stringent state laws regarding the same matter. Therefore, the state would be precluded from enforcing those laws. The state is not required to amend such laws.

10-27 (5) Q. Regarding the preemptive authority of federal law under RCRA:

(a) Are there any provisions in the current Colorado "Solid Wastes Disposal Sites and Facilities" act (enclosed), which overlap with existing RCRA regulations and would therefore be preempted?

(b) If the act, as a siting law, were amended to include authority for siting hazardous waste facilities, would there be an overlap with RCRA regulations such that portions of the Colorado law would be subject to preemption?

A. Based on our present review:

a. The Colorado "Solid Waste Disposal Sites and Facilities Act" does not appear to overlap present RCRA law or regulation and, therefore, would not be preempted.

b. To the effect that any new law or revision of this existing law was found to impose less restrictive requirements than those under RCRA and associated regulations, it would be preempted.

9-16 (6) a) Q. In addition to any other Colorado statutes you may have reviewed, I would like to call to your particular attention the "Radioactive Waste Disposal" law, enacted in 1979, a copy of which is enclosed. Would you please provide an analysis of the definitions from a scientific point of view, as they are contained in the law, and delineate for the committee what the two definitions include in practical terms.

A. RCRA DEFINITIONS:

"The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)."

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

COLORADO RADIOACTIVE WASTE DISPOSAL DEFINITION:

"Disposal" means burial in soil, release through a

sanitary sewerage system, incineration, or long-term storage with no intention of, or provision for, subsequent removal.

Due to EPA imposed limitations on RCRA relative to radioactive materials this State statute has, at present, little bearing on State equivalence to EPA RCRA regulations. However, the definition for disposal found in the 1979 "Radioactive Waste Disposal" law differs from the Resource Conservation and Recovery Act definition of disposal in two areas:

i. Waste discharged to a sanitary sewer system is included by the State Act while it is excluded by RCRA. RCRA addresses sewage treatment sludges as the final waste to be regulated as a result of the sanitary treatment system. The pretreatment program, developed under the Clean Water Act provides authority to regulate waste discharged to the sanitary system. Coverage of discharge to the sanitary system may be repetitive under the State "Radioactive Waste Disposal" law and State pretreatment type authority.

ii. Waste spilled and/or leaked is defined by RCRA as being disposed of. The State Act does not include this coverage. In the absence of such coverage by other definitions or authorities, such a definition of disposal would not be considered equivalent to RCRA for application to hazardous waste disposal.

b) Q. Would you also provide an opinion regarding whether the act may be in violation of any interstate commerce laws, particularly in light of recent court decisions (e.g., Philadelphia v. New Jersey).

A. We decline to provide an opinion on the constitutionality of this statute because that determination is the province of the State's legal counsel.

VI. Liabilities

8-26 (1) Delineate, for each of the parties involved, the responsibilities, possible legal actions, possible liability, and penalties under the following circumstances:

a) Q. A transporter illegally dumps a manifested hazardous waste load subject to RCRA at an unmanned county dump not authorized to receive hazardous waste, and fails to return a copy of the manifest to the generator.

A. A transporter illegally dumping a manifested hazardous waste load subject to RCRA at an unmanned county dump, county dump not authorized to receive hazardous waste, and

failing to return a copy of the manifest to the generator would be subject to criminal penalties under RCRA Subtitle C, Section 3008(d)(1) on several violations each of which could be counted as a separate violation. The transporter would also be responsible for cleaning up and removing the hazardous waste to an approved site.

b) Q. A properly packaged and manifested hazardous waste load is properly delivered and received at an authorized hazardous waste facility, at which point spillage occurs, causing injury and environmental damage.

A. A properly packaged and manifested hazardous waste load is properly delivered and received at a permitted hazardous waste facility, at which point spillage occurs, causing injury and environmental damage. The actual circumstances involved in the spill would dictate the responsibilities of the parties involved and whether RCRA violations have occured. The spill and environmental damage must be mitigated in any case.

10-27 (2) Q. Please provide a legal opinion specifying the liability of an industry whose activities are in compliance with a RCRA permit, which industry, in carrying out the permitted activity, causes damage to human health or the environment. Specifically, is the liability of an industry limited to the terms and conditions of a permit, however adequate or inadequate those conditions may be? Please also address this issue as it relates to changes in "best engineering judgment" over the duration of the permit.

A. EPA, as stated previously, believes that liability questions can only be answered by the courts. EPA will only hold a permittee to the terms and conditions of his permit, subject to the broad oversight requirement of Section 7003 of RCRA and 40 CFR 122.16, which states in pertinent part, that a permit will be terminated after

"a determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination."

Generally permit conditions will not be changed to reflect changes in Best Engineering Judgment (BEJ) unless a permittee requests a change, subject to 122.16 supra (see 40 CFR 122.15 for modification of permits. A copy of 40 CFR 122.15 and 122.16 is enclosed).

6-26 (3) Q. In the case of an owner/operator of a treatment, storage, or disposal (TSD) facility which routinely accepts shipments of hazardous wastes, no single shipment of which is subject to regulation under RCRA because of minimal

quantity, what are the duties/liabilities of the owner/operator to monitor wastes received from a single generator whose non-regulated waste shipments in aggregate (during a one month period) may exceed the minimum quantity subject to regulation?

A. The TSD facility owner/operator has no RCRA imposed requirements or liabilities to monitor waste received from a single generator to ascertain if that generator is exceeding the entry level during a single month 261.5 (c). The state could require the TSD facility operator to keep records on incoming shipments for future reference and he would be encouraged to contact the administering agency if he suspects a generator is in violation.

6-26 (4) Q. In the case of a county owned/operated disposal site not authorized to accept hazardous wastes:

i. What are the county's duties/liabilities to identify matter as hazardous?

ii. What sanctions could be imposed against the county for accepting hazardous wastes which will be subject to RCRA?

A. i. County owned/operated sites would have the same duties/liabilities under RCRA as the privately owned TSD facility in the previous question.

ii. County owned/operated facilities are subject to the same standards and penalties as a privately owned facility.

VII. Miscellaneous

6-26 (1) Committee members had several questions regarding the application of RCRA regulations to specific situations, as follows:

(a) Under what conditions would a transporter be subject to or exempt from regulation under RCRA, given the following situations:

i. Q. A transporter with a vehicle containing an aggregate cargo of 40 self-contained barrels of hazardous materials collected from several generators, each of whom is exempt from regulation due to minimal quantities generated.

A. A transporter with a vehicle containing an aggregate cargo of 40 self-contained barrels of hazardous waste collected from several generators, each of whom is exempt from regulation due to monthly quantities generated below the entry level would:

(1) be exempt from manifest provisions of RCRA

(2) still be subject to Department of Transportation (DOT) hazardous material (and waste) transportation regulations (49 CFR 171-177) (F.R. Vol. 45, No. 101)

(3) still be required by RCRA to deliver the waste to a State permitted landfill or a permitted chemical waste landfill under RCRA. It is very likely that a RCRA permitted site would require a manifest even for small quantities, 261.5 (d)

ii. Q. A transporter with a single-tank vehicle who accumulates liquid hazardous wastes totaling an amount subject to regulation under RCRA, but received from separate generators, each of whom is exempt from regulation due to minimal quantities generated.

A. A transporter with a single-tank vehicle who accumulates liquid hazardous waste totaling an amount subject to regulation under RCRA, but received from separate generators, each of whom is exempt from regulation due to generation below the entry level would:

(1) become a generator and transporter subject to RCRA regulations upon accumulating an amount subject to regulation 263.10(c)(2)

(2) be subject to DOT transportation regulations

8-26 (2) During committee discussion with EPA representatives, there was considerable confusion about what constitutes "disposal", "storage", and "accumulation", particularly as related to the point at which a county dump could be considered a "generator" of hazardous waste.

a) Q. Clarify and elaborate on those definitions.

A. Definitions

i. Disposal -- 40 CFR Part 260, Subpart B, Section 260.10(14)

ii. Storage -- 40 CFR Part 260, Subpart B, Section 260.10(66)

iii. Generator -- 40 CFR Part 260, Subpart B, Section 260.10(26)

iv. Accumulation -- There is no definition for "accumulation" in the regulations, however, the intent is well documented in the preamble of 40 CFR Part 261, IV Subpart A, E Section 261.5, 1-7 particularly the

last four paragraphs of 5 on page 33104.

b) Q. Can sealed drums of liquid hazardous waste be "disposed" of by burial? If so, under what conditions (e.g., size of container, retrievability)? And if so, is there a proposed ban on such disposal after a date certain?

A. 40 CFR Part 265, Section 264.314 addresses special requirements for liquid wastes. This section bans the disposal of sealed drums of liquid hazardous waste 12 months after the effective date of this Part. There is a further elaboration of this requirement in the preamble on pages 333214 and 333215.

8-26 (3) Q. Is there litigation pending which challenges the authority of the federal executive branch to issue regulatory interpretive memoranda, or the legal effect of those memoranda? (Reference was made in committee to a case, Grove City College v. HEW)

A. We are unaware of any pending litigation which challenges the authority of the Federal Executive Branch to issue Regulatory Interpretation Memoranda (RIMs). No reference to the Grove City College vs HEW case has been found.

VIII. Summary Statement from the EPA

(Note: Contained below is a summary excerpt from the EPA's December 10 response to questions raised at the October 27 committee meeting.)

I'm pleased to provide you and your committee with additional information concerning implementation of the Resource Conservation and Recovery Act (RCRA) in Colorado. This information is designed to supplement, not duplicate, information provided you in your meetings and earlier correspondence.

From the State's viewpoint there are pros and cons concerning full state administration but an EPA program has some distinct limitations which can be improved upon by a state program.

1. EPA cannot deal with siting issues. We only permit (or don't permit) sites on the merits of technical standards for environmental protection. The State can have a full siting act that examines such aspects as social, economic, transportation or any other impacts it may wish to consider. The recent events concerning the Lowry Site are a case in point.

2. EPA cannot address issues relating to mining waste management. Based on recent amendments to RCRA, we are limited to chemical waste generated by mining facilities.

3. EPA does not regulate small generators of hazardous wastes. Only the State of Colorado can provide the regulatory framework to protect citizens from the impact of improper management of these wastes. There is considerable public concern over County Landfills continuing to receive these wastes in an unmonitored fashion.

4. An authorized State is given great flexibility by EPA regulations in writing permits. In developing Best Engineering Judgment in permits, EPA is more constrained by actions taken by the Agency in other states to provide for consistency across the Nation.

I am hopeful that these broader issues will not be clouded by the details of our many presentations.

We have been pleased to work with your committee during the last several months. If we can be of any further assistance in the future, please feel free to contact us.

APPENDIX C

A Compilation of Committee Correspondence with the Colorado Department of Health

Several questions were raised at each committee meeting which were addressed in writing to Dr. Frank Traylor, Executive Director of the Department of Health by the committee chairman on behalf of the committee. Written responses were received from the department and were reviewed at the meeting following each inquiry.

This appendix contains the text of questions and answers exchanged between Chairman Gorsuch and Dr. Traylor with two minor exceptions. 10/ The following letters were exchanged:

1) Questions raised at the June 5, 1980 committee meeting: committee letter -- June 16; Department of Health response -- June 25.

2) Questions raised at the June 26, 1980 committee meeting: committee letter -- July 18; Department of Health response -- August 18.

3) Questions raised at the August 26, 1980 committee meeting: committee letter -- September 10; Department of Health response -- September 15.

4) Questions raised at the September 15, 1980 committee meeting: committee letter -- October 2; Department of Health response -- October 24 (by Dr. Robert Arnott).

5) Questions raised at the October 27, 1980 committee meeting: committee letter -- November 6; Department of Health response -- November 19.

Questions and responses are grouped by topic in this appendix and dates noted indicate the meeting at which the question was raised. The letters referenced above are on file in the Legislative Council office.

10/ a) Minor editing by Legislative Council staff for clarification purposes only; and b) the exclusion of the first two versions of a fiscal note (requested at the June 5 and June 26 committee meetings) from the department showing projected costs for a state hazardous waste program. The fiscal note included is the final version submitted to the committee by the department and includes some clarifications of earlier projections, as requested by committee members.

Topic areas are as follows:

I. Hazardous Waste Generated in Colorado

(Note: In 1979 the Colorado General Assembly enacted Senate Bill 336 which directed the Department of Health to conduct a statewide study of the disposal of hazardous wastes. The department surveyed industries in the state and estimated that over 850,000 tons of potentially hazardous wastes are generated annually statewide. A description of the Senate Bill 336 study is contained in Appendix F.)

Volume

9-26* 1) Q. It has come to my attention that the 850,000 ton figure for hazardous waste generation in Colorado was an initial reporting of "potentially hazardous waste" in the state in response to a survey conducted before the Environmental

* Date shown before each question indicates meeting at which question was raised.

Protection Agency (EPA) issued its final regulations identifying such wastes. It is also my understanding that, although a higher percentage of surveys was returned from larger industries, 61 percent of the total were completed. Does the 850,000 ton figure represent an aggregate amount reported from the compiled surveys, or was some extrapolation done? Please verify the procedure used.

A. When we developed the Senate Bill 336 study report (which we had less than six months to do), we reported the quantity of wastes companies said they disposed of if they were wastes listed in available classifications of hazardous materials, including the earlier EPA regulations. A lot of high-bulk low-hazard material was left out; however, we included material that today we would leave out of the report, since we are assured it is not hazardous per new EPA listings. This may reduce the total by about 25 percent, and treatment of other wastes would perhaps lower it another 25 percent, but we believe the total amount for Colorado will be well above Chemical Waste Management, Inc.'s (CWMI) estimated 50,000 tons/year, which is their estimate of what they will accept for treatment, not the amount generated in Colorado. Since only 61 percent of companies responded, our number may increase; how much we don't know yet but we'll have a better handle in a few months after we review EPA's notification information.

Major Generators

8-26 2) Q. In addition, it is my understanding that a large proportion of the 850,000 ton estimate is generated by a few major industries located along the front range. Please indicate if this is true, and if so, would you provide a list of those industries and the proportions involved.

A. With regard to your question about the largest generators of waste, it is true that some 25 or so generate the largest proportion of hazardous waste in the State. You will recall that because of our promise of confidentiality to industry to protect proprietary information, we have released the names of generators, but not waste quantity nor type. For this reason, we would be pleased to discuss the matter with you in an effort to provide you or the Committee with the essential information you need.

Revised Volume Figures

9-16 3) Q. The Department of Health indicated that its estimate of hazardous waste generated yearly in Colorado (850,000 tons), which was derived from the Senate Bill 336 study (1979 session), could be overestimated by a figure of about 50 percent. The margin of error is due to several circumstances, including: a) final identification regulations

under the federal Resource Conservation and Recovery Act (RCRA) have now been promulgated; b) the small quantities exclusion under RCRA was raised from 100 kilograms to 1,000 kilograms per month; c) the proposed toxicity level was raised by a factor of 10; and d) many companies are exploring re-use, treatment, or exchange efforts in order to reduce the amount of waste to be disposed. Please reevaluate the survey results and derive a revised estimate of the quantity of hazardous waste generated in Colorado which would be subject to regulation under RCRA, as the regulations are now drafted. In addition, please delineate possible avenues which companies may use to divert materials which would ordinarily enter the hazardous waste stream, and provide a more accurate estimate of the impact those methods may have on your quantity estimate.

A. Our reevaluation of the State's hazardous waste survey, based on the new EPA regulations, shows that there are 648,000 tons per year of hazardous wastes generated in Colorado. This is based on a 61 percent response to the survey form sent out. We are not able to determine which wastes will be treated by the generators, but the Hazardous Materials Subcommittee of the Governor's Solid Waste Advisory Committee studied the situation and concluded that about 35 percent could be treated or recycled.

Largest Generators

9-16 4) Q. In testimony presented to the committee, Dr. Jim Martin estimated that about 25 of the largest generators in Colorado produce 60 to 80 percent of the hazardous waste. Would you please narrow that estimate to a more precise figure and provide an indication of the quantity of waste produced by each of the top five generators.

A. Our best estimate is that the 25 largest generators produce 77 percent of the total. The five largest produce 415,000 tons per year or about 65 percent of the total.

Hazardous Waste Disposition

10-27 5) Q. At the October 27 meeting, Dr. Bob Arnott presented the committee with a revised estimate of hazardous waste generated annually in Colorado which would be subject to regulation under RCRA. The DOH estimate of 648,000 tons contrasts sharply with the 50,000 ton estimate given the committee by Chemical Waste Management, Inc. (CWM). Although it is the committee's understanding that the CWM estimate includes only those wastes to be disposed of or treated off-site, and the DOH estimate includes all hazardous wastes produced, the discrepancy is so large that I would appreciate it if you would either reconcile the DOH figures with the CWM estimate, or show where the differences exist.

According to testimony by DOH representatives, four possible alternatives may account for differences in figures, including: on-site disposal; recycling or reclamation; out-of-state shipment; and waste treatment. Please consult with CWM officials to compare estimates and determine where, if at all, their figures concur with yours, and where discrepancies exist.

Your previous response indicated that as few as five Colorado industries may generate about 65 percent of the hazardous waste in the state. If two or three of those companies dispose of waste on-site or reduce the volume through reuse or treatment, it may account for a significant difference in the estimates. Please clarify categories and quantities of end-results you expect for the wastes you have estimated.

A. In response to your letter of November 6, 1980, we have again looked at our survey results of hazardous waste generation in Colorado to try to answer your questions. I hope you will appreciate that we can only do this in general terms since it would take considerable effort to do a detailed break down of the data in about 1,100 survey forms; however, we believe this general examination provides the essential data required.

Our survey, as adjusted and based on a 61 percent response, provides hard data that at least 648,000 tons of hazardous waste are generated each year in Colorado. We have no real problems with Chemical Waste Management's (CWMI) estimate that they will receive 50,000 tons per year from Colorado and an additional 25,000 tons per year from four surrounding states. We don't believe their estimates and ours are in conflict, because they represent two different data bases. For example, CWMI's estimate appears to be based primarily on the quantity they received the first six weeks they operated the site. Their out-of-state estimate appears to be mostly a guess which could be higher since this is the only site serving New Mexico, Utah, Wyoming, and South Dakota. Two of our generators say they send 59,000 tons per year to Lowry, and a number of other generators also send wastes to the Lowry site.

The most informative data on this situation is, as you suggest, the manner in which Colorado wastes are handled. Reexamination of the survey forms for some of the top generators shows that some 225,000 tons per year now go down the sewer that will require treatment or other disposal after November 19, 1980 (whether EPA will view this as part of the generation process or will require a permit we don't know). Some 200,000 tons are treated and/or disposed on site. Some of the wastes are high-solids septage of low hazard disposed off-site; these are not being received at

Lowry, but will have to be controlled as hazardous waste after November 19, 1980. We estimate that such septage wastes may well total 100,000 tons per year. In summary, we believe that the disparity you site is explainable partially by the ways Colorado wastes have been managed and partially by what is probably a conservative estimate by CWMI. We believe this will sort itself out once we obtain data from the EPA data system and the situation stabilizes under the new regulations.

Small Generators

9-16 6) Q. It was our understanding that there are only about 200 to 250 generators in Colorado producing more than 1,000 kilograms of hazardous waste per month and would therefore be subject to regulation under RCRA, as the regulations are now written. Would you verify that figure please, and provide an estimate of the number of generators which would be subject to RCRA if the small quantities limit were set at 100 kilograms per month. What effect would the lower limit have on the quantity of hazardous waste to be regulated in Colorado?

A. We are unable to estimate exactly how many additional generators would exist in the State if the small generator cutoff were to be lowered to 100 kilograms per month; however, we believe it would increase by about 25 percent since Colorado has a rather high percentage of small industries.

10-27 7) Q. During committee discussion, there was some confusion about the DOH estimate for the number of additional generators which would be regulated under RCRA if the small generator exclusion were lowered to 100 kilograms per month. Please clarify your estimate and also include an estimate of the additional quantity of waste which would be expected if the small quantity exclusion were lowered.

A. We still are uncertain about the number of small generators that would come into the system by lowering the cutoff to 100 Kg/month but believe it would add about 50-75 generators. If each of these generate 1,000 Kg/month (one ton/month) this could theoretically increase the quantity by about 500 to 750 tons per year. We believe the increase is almost certain to be considerably less, but it will be at least 50 to 75 tons per year if 50-75 additional generators are brought into the system.

II. Projected Resources Needed for Implementing a State Hazardous Waste Management Program

A. Costs

6-25 1) Q. Please provide the following information:

a) The estimated annual cost to the state if the Department of Health were to administer a hazardous waste management program, as specified in RCRA, with a breakdown of costs for personal services (including numbers and types of employees), operating expenses, travel, capital outlay, and any other anticipated expenditures;

b) An estimate of revenues from various sources which may be generated through user fees; and

c) Which of the expenditures listed in your response to question (a) would be necessary if Colorado were to choose not to adopt a state hazardous waste management program?

A. See assumptions and fiscal note projections on the following two pages.

ASSUMPTIONS

1. That the Health Department will negotiate a cooperative agreement with EPA to obtain grant funds to define or expand program development activities within current authority for the period, October 1, 1980 - September 30, 1981, and will negotiate another agreement for the period, October 1, 1981 - September 30, 1982, to accomplish tasks that may remain prior to obtaining full authorization. Cooperative agreement funds are available for only two years. The amount awarded depends on negotiations but we anticipate receiving two-thirds of the $304,200 available in 1980-81, or $202,800 shown in column II.

2. If the legislature passes authorization for a State program effective July 1, 1981, we assume that the total grant funding available will be received effective October 1, 1981 (estimated to be $304,200 plus escalation for inflation or $355,810. This is shown in column IV. Assuming the July 1, 1981 effective date of State legislation, the Federal grant is the best estimate and not expected to increase for the period of July 1, 1981 - September 30, 1981. This period would be used for the preparation and approval of a State application. If not, the Department is assumed to continue operating under a cooperative agreement until October 1, 1982; this is shown in column III with escalation over 80-81. In 1982-83, fees will pay State funded efforts, and EPA grant levels will be increased to about $384,275 in 82-83. This is shown in column VI. State funding is required for specific State programs such as waste exchange, technical assistance to local government and industry, and State emergency response capability. EPA regulations under RCRA (40 CFR 35.714 (b)) requires states to provide 25% match to receive Federal funding of operational programs. An increase in State effort in 81-82 from $36,000 to $88,000 and $93,839 in 82-83 will adequately fund State program interests; these funds plus $30,000 for hazardous material incidents (S.B. 55) and $26,000 of District Engineer efforts can be used for matching funds. This assumes continued funding of S.B. 55 at the current level.

3. If legislative authorization is not received by July, 1982, the cooperative agreement funding and program effort will cease and the State hazardous waste effort will be replaced by a Federal program, except for activities required to be conducted under the Solid Waste Act (30-20-Part I CRS 1973). These solid waste activities related to hazardous waste will require 2 FTE, funded by the State.

4. If new legislation becomes effective July 1, 1981 authorizing a fee system, it will not generate significant revenues in 81-82 to offset general funding needs; therefore, up-front funding of $52,000 is needed for 81-82 only. Total State budget for hazardous wastes in 82-83 ($93,839) will be cash funded as well as for future years. In 81-82, it is expected that fees will generate sufficient revenue in 82-83 to provide State funding of program. (A fee of $0.12 per ton could produce up to $102,000 annually based on the 85,000 tons reported in the S.B. 336 study if all the wastes were disposed or treated in Colorado.) If legislation provides for transfer of funds to local government, a corresponding increase in fees would be required. If tonnage varies, the fee per ton would be adjusted annually to generate revenues up to State program costs only.

12/2/80

ESTIMATED FISCAL IMPACT - STATE HAZARDOUS WASTE CONTROL

	I	II	III	IV	V	VI
	1979-80	1980-81	1981-82		1982-83	
Estimated Effect on Revenue and/or Expenditures	Est. Current Law	Coop. Agreement	Coop. Agreement	Estimate Prop. Law	Est. Current Law	Estimate Prop. Law
A. Revenue: Permit Fees	0	0	0	0	0	+93,839
TOTAL REVENUE IMPACT	0	0	0	0	0	93,839
B. Expenditures						
Personal Services	158,891	208,148	197,124	345,639	47,425	370,983
FTE	6.75 FTE	***10.75 FTE	*** 10.75 FTE	15.0 FTE	**** 2.0 FTE	15.0 FTE
Operating, Travel, Outlay	12,000	**20,520	**22.160	40,110	6,065	44,415
Indirect. 19.5% of Federal Grant Funds	28,555	38,184	35,740	58,061	-	62,706
TOTAL EXPENDITURE IMPACT	199,446	266,852	255,024	443,810***	53,480	478,104***
General Fund	10,842	32,852	36,000	88,000**	53,480	0
Cash Fund	0	0	0	0	0	+93,829
Federal Fund	188,604	*234,000	219,024	355,810	0	384,275

*$304,200 available from EPA, but only $202,000 awarded plus $32,000 of carry over; no carry over in 81-82.

**Indicates a $52,000 increase above current law funding of $36,000 for 1.25 FTE to provide State match; this is expected to be one-time up-front cost since program which could be funded by fees from 82-83 on. $88,000 represents current funding of 1.25 FTE plus 2.0 new.

***FY 81-82 and 82-83 funding due to escalation of $304,200 (amount available in 80-81); unavailable unless State authorized.

****FTE's required to carry out hazardous waste control aspects of solid waste act only; all Federal funding of program efforts would cease without new authorization. Represents a decrease of 4.75 FTE from the FY 1979-80 level of 6.75 FTE of which 6.5 is Federally funded; new State funding of 1.75 FTE would be required by 82-83.

*****Negotiated work scope with EPA: Funding depends upon carry over or other funds.
+ Fee per ton will be imposed to offset State costs (somewhere between $0.11 and $0.12 per ton if 850,000 tons disposed).

B. Fee Schedule

8-26 1) Q. Pursuant to your memorandum outlining the estimated fiscal impact of a state hazardous waste program, you estimated revenues for the state's share totaling $102,000 in FY 1982-1983, to be collected through a fee system. Your figures were based on the assumption that 850,000 tons of waste would be disposed of or treated in Colorado during that year, and $102,000 would be collected by levying a 12 cent fee per ton on the entire amount.

In other testimony before the committee, Mr. Leonard Tinnan, Western Area Manager for Chemical Waste Management, Inc. (CWM), indicated that CWM based its facility construction at the Lowry site on a projection of about 50,000 tons of hazardous waste to be treated or disposed of off-site per year in Colorado, with an additional 25,000 tons to be shipped in from other states, totaling 75,000 tons per year.

Using the CWM projections, and assuming an amount of waste equal to the amount disposed of off-site would be handled by industries on-site in Colorado, a total of 125,000 tons would be subject to a fee levy to support a state program. A table of fees for each quantity of waste delineated above yields the following figures:

Tons	Revenue Collected at 12¢/Ton	Fee Required per Ton to Yield $120,000
50,000	$ 6,000	$2.40
75,000	9,000	1.60
125,000	15,000	.96

I am requesting that you elaborate on your proposal for fee rates, clarifying your assumptions about the amount of waste which will annually be subject to a fee.

A. Your letter calculates several fee scenarios correctly based on the assumptions you used. I believe the main point of all of this estimating is that a fee system is one very appropriate way to generate the State's program costs which we believe will be about $93,800 in FY 82-83, and that it is not an unreasonable burden on industry to do so, whether the cost is $0.12 per ton or $0.96 per ton. Obviously, the total quantity of wastes to be treated or disposed in permitted facilities will change now that the RCRA system is taking effect. Two factors that serve to decrease the total amounts of waste are: 1) an increased use of treatment to avoid more costly disposal, and 2) new exceptions for small generators (raised from 100 Kg/mo

to 1,000 Kg/mo) and toxicity (raised from 10 times drinking water standards to 100 times).

(Note: See also answer to question (1) under "Hazardous Waste Generated in Colorado".)

Even though CWMI may expect to treat 75,000 tons annually, there will be shipment to other treatment facilities and on site disposal. A State program would need to permit these activities too; thus, they should be assessed their fair share for program costs. It may also be fair to have a sliding-scale fee for various hazardous classes. In any case, we expect the system to stabilize over the next several months prior to any State action to develop fees. At that point, we will know waste quantities and types well enough to set good fee schedules for recovery of program costs, and we believe they will be reasonable ones for industry to pay.

C. Personnel Requirements

8-26 1) Q. Your fiscal projections are also based on the assumption that 15 FTE would be adequate to administer a state program. Current federal EPA criteria call for 45 FTE to administer a full-scale Colorado program (which would have the effect of tripling your budget projections) and the minimum projection by the regional EPA office is 25 to 30 FTE (which would at least double your budget projections). Please address the cost and fee projection in light of the estimated higher FTE projections.

A. We continue to believe that 15 FTE will be sufficient to administer a State program, and strongly disagree with EPA on their estimate of 45 which was done in Washington by some unknown formula. We believe we know the program needs for our State much better, not only in this but other areas as well, and will continue to argue for that level of direct effort in the department. By soft-matching all the activities that are conducted in the State relative to hazardous materials and wastes, (AG office support, Colorado Geological Survey coordination and review, laboratory work, local government activities, broad District Engineer services, emergency response under S.B. 55, and executive support), we could perhaps show over 20 FTE direct and indirect. Unless we have greatly underestimated the amount of waste to be managed under a control program, we can handle it with that level of effort, but if substantially more waste needs to be controlled, fees would generate more revenues for staff.

III. Current Statutory Authority of the Department of Health with Respect to Hazardous Waste Management

(Note: see also Appendix D)

6-26 1) Q. What statutory authority does the Department of Health currently have with respect to disposal of hazardous wastes?

A. The Department of Health has the authority to regulate the disposal of hazardous wastes at solid waste disposal sites and facilities pursuant to Title 30, Article 20, Part 1, CRS 1973, as amended.

6-26 2) Q. What additional statutory authority does the Department believe is necessary for proper regulation of hazardous wastes?

A. In order to properly regulate hazardous wastes, the Department of Health requires the authority to regulate hazardous wastes in all circumstances, not just at solid waste disposal sites and facilities. The Department will need direct control over processors, storers, and disposers of hazardous wastes, including permitting authority. Penalties for wilful violation of such regulatory requirements should be included in the statute.

6-26 3) Q. The Department of Health is authorized to approve the siting of solid waste facilities. What does the Department do in its regulation of the following types of wastes that are received by solid waste disposal facilities: (a) hazardous wastes; (b) low-level radioactive wastes; and (c) solid wastes?

A. (a) & (c). With regard to solid wastes (c) and hazardous wastes (a) when plans are submitted to the board of county commissioners and in turn provided to the department, the submissions are reviewed for their technical ability to meet the criteria established by the State Board of Health, the Air Quality Control Commission and the Water Quality Control Commission. Participating in the reviews are the Radiation and Hazardous Wastes Control, Air Pollution Control, Water Quality Control and Laboratory (primarily chemistry) divisions of the State Health Department; the State Geological Survey, the State Engineers Office (as appropriate) and Wildlife Division of the State Department of Natural Resources; and the local Health Department. We give technical assistance to the individuals involved as early as possible to preclude the need for change late in the review process. We provide to the county commissioners a recommendation of approval or disapproval and supporting documents. If there are circumstances that need further clarification (conditional recommendation of approval)

those specific items are identified. In the case of other matters which are outside of the Department's jurisdiction but which come to our attention and may be of interest to the commissioners, that information is also included in the recommendation letter. After approval of the site, an inspection schedule is established for the district engineer. Technical assistance to the site operators is available from both the district engineers and the program staff. Both also provide assistance on the investigation of citizen complaints.

(b) In addition to the above actions, the following is done concerning the disposal of low-level radioactive wastes at solid waste disposal sites:

(i) There are a limited number of licensees who are authorized to dispose of low-level radioactive wastes by specific license conditions at solid waste disposal sites which have been authorized to receive small quantities of such wastes. (An example of a licensee is the University of Colorado Medical Center.) At the time of license inspection, waste disposal records of the licensee and the site are inspected by a health physicist for compliance with the license conditions and proper practices.

(ii) Certificates of designations are also issued by county commissioners where uranium mill tailings disposal is to occur. The Department coordinates its efforts on the licensing of such facilities with the county commissioners. The review of such facilities is quite extensive because of the extreme long-term commitment of the land use. Inspections are done at least annually for compliance status determination. Investigations are also made as a result of citizen complaints. The Department coordinates its efforts with those of the local government.

9-15 4) Q. During the course of other committee business, a question arose concerning the Department of Health's authorities under section 30-20-109 (1) of the solid waste law (C.R.S. 1973, as amended). In your opinion, are there any rules and regulations pertaining to engineering design and operation of solid wastes disposal sites and facilities not covered in paragraphs (a) or (b) which the department may need the authority to promulgate in order to ensure public health?

A. At the September 16 meeting you asked Dr. Martin if the Department needed to establish any rules and regulations that were not covered in paragraphs (a) and (b) of 30-20-109, C.R.S. 1973, as amended. If the Interim committee addresses its charge to consider hazardous waste by

recommending an amendment of the Solid Waste Act to specifically provide coverage for hazardous waste and wishes to narrow the rule making authority provided in Section 109, then we would suggest the language contained below:

30-20-109. DEPARTMENT TO PROMULGATE RULES AND REGULATIONS. The department shall promulgate rules and regulations for the engineering design and operation of solid wastes disposal sites and facilities including: engineering design requirements for the protection of surface and subsurface waters and the prevention of air pollution from any site operations; operational requirements to implement engineering design requirements for such disposal sites and facilities; classification of facilities; hydrological, soil, and other site characteristics to assure long-term isolation of disposed wastes from the environment; site location distances from generation centers, transportation routes, and water wells; wastes that can be received and disposed at different classes of facilities; records and reports of wastes received and where disposed on the site; on-site safety including traffic control patterns, operator training, protective equipment, security, and fire prevention; insect and rodent control; methods of solid wastes placement, compaction, and covering in the disposal area; confinement of windblown debris or other pollutants; environmental protection requirements for recycling or other waste treatment operations; and closure and post closure requirements for long-term management of the site.

IV. Department of Health Role in Administering Portions of the Federal Hazardous Waste Program

6-26 1) a) Q. Is the Department of Health currently negotiating with the Environmental Protection Agency to administer portions of the hazardous waste management program in Colorado under RCRA?

A. Yes.

b) Q. If so, please answer the following:

What are the parts of the program for which the Department of Health would take responsibility? Under what conditions would this responsibility be assumed?

A. These matters are currently under negotiation.

c) Q. When would the Department of Health commence its duties?

A. October 1, 1980.

d) Q. For what time duration would the state assume a role in

the negotiated portion of the program?

A. October 1, 1980 through September 30, 1981 and maybe renegotiated for an additional year.

e) Q. How many FTE's and what resources would be required at the state level and at the county level?

What is the estimated cost for the state's/counties' role during the first year of operation?

What is the projected reimbursement from the federal government for the first year of operation?

A. These matters are currently under negotiation.

f) Q. Under what statutory authority is the Department negotiating with the EPA to administer portions of the federal program?

A. Enclosed is a memorandum from the Colorado Department of Law dated July 23, 1980, which addresses this matter. (Note: see attached under item VIII at the back of this appendix.)

g) Q. If a cooperative arrangement were to be concluded, would it be based on a presumption that Colorado will seek final authorization for a state-administered hazardous waste program?

A. Yes.

V. County Authority and Liability Regarding Hazardous Waste Disposal

6-26 1) a) Q. In your opinion, what authority does a county have either to reject or to allow the receipt and disposal of hazardous wastes, whether in a liquid or solid state, at a solid waste disposal facility?

A. The county commissioners have the authority to preclude the receipt of any materials at a solid waste disposal site.

b) Q. Have you advised counties regarding their authority to accept or reject hazardous wastes? If so, what is the authority or rationale for the advice?

A. Yes. The authority for giving the advice is C.R.S. 1973, 30-20-103, 104 and 111. The rationale for the advice given is the Solid Waste Disposal Sites and Facilities Act and the rules and regulations promulgated thereunder. The

counties arguably may also have local planning and zoning authority pertaining to the disposal of hazardous waste at a solid waste disposal site or facility, but the advice given by the Department is based on the language of the Solid Waste Act and regulation since this appears to provide sufficient authority to the counties to accept or reject such wastes.

6-26 2) Q. Have you advised cities and counties, as owners/operators of solid waste disposal sites, with particular reference to: (a) any potential liability they might incur if they were to accept hazardous wastes at a solid waste disposal site; and b) the authority of owners/operators to accept hazardous waste? What is the basis or rationale for any such advice?

A. No, the Department, to the best of our recollection, has not advised cities and counties as owners/operators of solid waste disposal sites with reference to potential legal liability that they might incur. However, the Department does advise cities and counties as to their requirements and responsibilities if they receive hazardous wastes at solid waste disposal sites. For the basis for that advice, see answer to 1(b), above.

VI. Legislative Proposals by the Department of Health

10-27 1) Q. Please formalize any comments you have concerning proposed legislation before the committee and recommend any amendments for committee consideration at this time.

9-15 A. As you know, on October 14, 1980, we invited the Interim Committee Members and other interested individuals and organizations to discuss issues that the Health Department should address if it offered a bill for hazardous waste disposal siting. This group reached a general consensus on three points: 1) any bill should cover the same universe of wastes contained in Federal regulations issued pursuant to Subtitle C of RCRA, 2) that the current Solid Waste Act procedure of approving sites through county designation and health department approval appears to be adequate for hazardous waste siting for the time being, and 3) that disposal of one's own hazardous waste on one's own property should not require a certificate of designation, but that such disposal should meet the public health and environmental protection requirements of the Department.

We believe the recommendations we received on October 14, 1980, issues addressed by last year's Interim Committee, and issues that arose during the 1980 Session of the Legislature would be best addressed in a separate bill specifically for hazardous waste siting. We believe the current

Solid Waste Act provides a workable mechanism for addressing local land use and health and environmental protection for solid wastes which is an important local problem. We are concerned that any but minor changes in that Act to address important hazardous waste issues would either disrupt a workable approach for solid waste or result in inadequate procedures to provide hazardous waste sites.

We believe that hazardous waste siting legislation should provide a fair and balanced process that will not only yield the required sites but will also assure that such sites are safe and that the public is assured that they are safe. We have, therefore, built upon the effort of last year's Interim Committee to develop a proposed bill for the Interim Committee's consideration. The department has also asked for time on the agenda to explain our proposed siting bill and to respond to any issues the Committee may raise.

I hope this responds to your questions and provides material that will help the State to deal effectively with the important matter of hazardous waste siting.

10-27 With respect to proposed legislation, we have revised the proposed bill we presented at the meeting of the Interim Committee on October 27, 1980, to incorporate comments received at the meeting. I am enclosing this revised bill for review and discussion with the Interim Committee.

We continue to believe that a separate siting bill specifically designed for hazardous waste is preferable to revising the Solid Waste Act. Adding various restrictions primarily to accommodate specific committee concerns for hazardous wastes (principally no revocation of certificates for EPA-permitted sites) weakens the current solid waste program which we don't believe the Committee intends to do. Although the redrafted solid waste bill contains a number of improvements and clarifications, the Committee has not studied solid waste needs and has not discussed proposed approaches to address these needs. A separate bill allows the specific concerns for hazardous waste siting to be dealt with without raising solid waste issues that have not been studied.

If the Interim Committee determines that a rewritten Solid Waste Act is the course it wishes to take, we will offer amendments at the meeting on November 19, 1980. If this is the course chosen, we strongly urge the Interim Committee to spend the time necessary to discuss the impact on local government, which is primarily responsible for solid waste management, and the State's program of: a) the role of Departmental approval as a preventative control for solid waste as well as hazardous waste siting, b) specific features of on-site disposal of both types of wastes, c)

requirements for private disposal of solid wastes, d) what constitutes commercial burning of solid wastes, e) an appropriate penalty system for both types of wastes, and f) most importantly, retention of the mechanism for County Commissioners to revoke Certificates of Designation for solid waste sites as a necessary administrative control mechanism (this is not critical for a designated hazardous waste site since these will have a RCRA permit which is revocable for significant noncompliance with environmental and public health requirements).

VII. Department of Health Responses to Study Resolution Topics

The Interim Committee requested the department to examine the SB 336 study data to gauge how many industries would need to shut down due to RCRA regulations. The study data are inadequate for this purpose since it didn't establish conditions of waste management, only how much. All of the 237 hazardous waste generators reported in the study can meet the requirements of RCRA if they choose to remain in business after November 19, 1980. We expect about 100 will apply for on-site storage permits and such compliance need not be costly; some 20-30 separate storage facilities can be expected to provide additional capacity and can readily meet the regulations. Treatment facilities will probably number less than 10 and 3 or 4 of these may be marginal facilities that will require regulatory effort to upgrade or close.

We only expect one existing off-site disposal facility to declare itself an existing hazardous waste disposal site before November, 1980 (one other may apply for a new facility permit later). Considerable regulatory effort will be required for this site to assure proper operation. I hope you will appreciate that these are estimates at this point, but we believe they are reasonable ones.

With regard to subsection 5(c) of SB 56 (see study directive topics, page 5), the Colorado Geological Survey and this Department developed criteria for waste disposal sites and locations and reported them in the SB 336 study. None of the sites likely to declare existing facility status satisfy the optimal criteria provided the Legislature in the study report. The Lowry site is the largest site. As you know, the Governor has appointed a Task Force to review the site, to examine its current and planned operation, and to recommend courses of action that will address all of Colorado's needs including environmental and public health protection criteria. With respect to the Lowry site, I am enclosing a copy of my letter to Mayor McNichols on May 14, 1980, his response, and the report of the technical subcommittee of the Governor's Lowry Landfill Task Force. The full Task Force report will be available in September, and I will provide it to the Interim Commit-

tee as soon as it is available.

The role of local government (subsection 5(f)) in siting of hazardous waste facilities is one of the more compelling reasons for state legislation. Siting is the toughest question facing us and I believe local government has a significant role to play. Legislation is the only means I know of to spell out the desired role and see that it is carried out. Otherwise, EPA will be making the decisions on permits and local government concerns will be on an equal footing with everyone else's in their public hearing. In state legislation, we can also spell out how to relieve impacts on local government for road, fire, police, health, environmental, added incident response and other services (last year's SB 56 proposed state-established fees returnable to local government to offset such costs and an alternative amendment was offered whereby local government could collect up to 2 percent of gross receipts to offset such costs). Such activities and an active role by the Health Department in identifying disposal needs assure that health and environmental requirements are met. Working with industry and local government would, I believe, provide the disposal capacity we need to serve the State's needs.

The RCRA regulations provide for considerable judgment in issuing permits, approving monitoring plans, approving contingency plans, approving security plans, and reporting and followup of manifests. These judgmental decisions are best made by the State since we know our needs, our industry, and our environment; thus, we can best tailor these decisions to Colorado's interests even with the EPA regional office monitoring our activities. If the EPA regional office conducts the program, the Washington office will be monitoring them, and Colorado industries would be forced to compete for EPA resources allocated to several states for its permit questions. Such a complex program will generate a lot of requests for assistance from the general public and small companies. I believe we would provide more direct and better service for these people than EPA would.

With respect to subsection 5(f), I don't see how a state-owned site could avoid local land use considerations under current law; thus, legislation is needed to specify local land use roles regardless of whether state or private land is used. Since 10 companies have expressed interest to us in developing a disposal site, I don't believe it is necessary to use state lands. If we are prepared to bypass local land use control, it would be just as applicable to private land as state land. Regardless, we have obtained a map of state lands and have drawn in the optimal site areas from the SB 336 study report. This was given to Mr. Elofson last week for presentation to the Interim Committee. There is a substantial quantity of state land that could meet the criteria in the SB 336 report.

VIII. Departmental Authority to Enter into a Cooperative Arrangement with the Environmental Protection Agency

(See memorandum on the following page.)

J.D. MacFarlane
Attorney General
Richard F. Hennessey
Deputy Attorney General
Mary J. Mullarkey
Solicitor General

The State of Colorado

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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July 23, 1980

M_E_M_O_R_A_N_D_U_M

TO: James E. Martin, Ph.D.
Chief
Hazardous and Solid Wastes Section
Colorado Department of Health

FROM: Janice L. Burnett
Assistant Attorney General
Natural Resources Section

RE: State authority to assist implementation of Resource Conservation and Recovery Act pursuant to a cooperative agreement with EPA
AG Alpha No. HL OR HTVM
AG File No. DNR/1264/CW

You have inquired as to whether or not the State of Colorado may accept federal monies pursuant to a cooperative agreement with EPA to assist that agency in the implementation of a hazardous wastes program under the Resource Conservation and Recovery Act. In my opinion, the state is so authorized within certain limitations.

The determination as to the presence of authority of a state to implement a federal program is found in state, not federal law. Colorado Polytechnic College v. State Board for Community Colleges, 476 P.2d 38 (Colo. 1970). Colorado has no specific hazardous waste enabling legislation.

C.R.S. 1973, 25-1-108(1)(f), however, does provide that the State Board of Health has the authority

> To accept and, through the division of administration, use, disburse, and administer all federal aid or other property, services, and moneys allotted to the department for state and local public works or public health functions, or allotted without designation of a specific agency for purposes which are within the functions of the department; and to prescribe, by rule or regulation not inconsistent with the laws of this state, the conditions under which such property, services, or moneys shall be accepted and administered. On behalf of the state, the board is empowered to make such agreements, with the approval of the attorney general, not inconsistent with the laws of this state, as may be required as a condition precedent to receiving such funds or other assistance.

C.R.S. 1973, 25-1-108(1)(f). It is my opinion that the term "public health functions" as utilized in this statute would encompass a hazardous waste program.

Further, the executive director of the Department of Health has the authority, among other things, to administer the Department of Health. C.R.S. 1973, 25-1-102(1). The Department of Health has, among other things, the authority:

> To establish and enforce standards for exposure to toxic materials in the gaseous, liquid, or solid phase that may be deemed necessary for the protection of public health;

C.R.S. 1973, 25-1-107(s); and

> To establish and enforce standards for exposure to environmental conditions, including radiation, that may be deemed necessary for the protection of the public health;

C.R.S. 1973, 25-1-107 (t). Both of these sections appear to cover the subject of hazardous waste control.

It is my further opinion that the state does not, at the present time, have the authority to adopt a hazardous waste regulatory program. Thus, all functions assumed by the state pursuant to a cooperative agreement can extend only to that which can be achieved through voluntary compliance.

I am responding to your inquiry in general terms because that was the nature of your request. If you provide me with a draft of the cooperative agreement with EPA, I will review it more specifically with reference to any particular provisions about which you have questions.

cc: Dr. Frank Traylor
Albert J. Hazle
Orville Stoddard

APPENDIX D

MEMORANDUM ON SOLID WASTE FROM THE ATTORNEY GENERAL'S OFFICE

J.D. MacFarlane
Attorney General

Richard F. Hennessey
Deputy Attorney General

Mary J. Mullarkey
Solicitor General

The State of Colorado

DEPARTMENT OF LAW

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October 27, 1980

The Honorable Anne McGill Gorsuch
State Representative
Chairman, Committee on Hazardous Waste
State Capitol Building
Denver, Colorado 80203

RE: Solid waste facility siting and waste disposal
AG Alpha No. LE GA AGAEL
AG File No. CNR/AGAEL/DS

Dear Representative Gorsuch:

I am writing in response to your September 8, 1980 request for an attorney general's opinion on the interpretation of language relating to solid waste facility siting and disposal and on the interpretation of language pertaining to the authority of the Department of Health to administer federal monies.

QUESTIONS PRESENTED AND CONCLUSIONS

You have presented the following questions:

1(a) Under the provisions of C.R.S. 1973, 30-20-106, what constitutes the "... private dumping of one's own solid wastes on one's own property ...."?

1(b) Under said section, what type of generator of solid waste, which dumps its own solid wastes on its own property, would be subject to the provisions of the solid waste disposal law, part 1, article 20, title 30, C.R.S. 1973? What is the legal basis for your distinction between types of generators?

My conclusion is that the exception provided in C.R.S. 1973, 30-20-106 for "private dumping of own's own

solid wastes on one's own property" refers to the on-site disposal by an individual of wastes resulting from his own residential, noncommercial activities. All other persons or entities if not otherwise exempted are subject to the provisions of the solid waste law.

(2) What regulatory authority, if any, do the boards of county commissioners and the Department of Health have with respect to the disposal of liquid hazardous waste under the solid waste disposal law (part 1, article 20, title 30, C.R.S. 1973)? Please explain the source of any such authority.

My conclusion is that the Department of Health and the boards of county commissioners have the authority to control, limit and preclude the disposal of liquid hazardous waste at a solid waste disposal site. This includes requiring the proper design and engineering of a solid waste disposal site which is to receive or is receiving liquid hazardous wastes.

(3) Are discarded liquid materials included in the definition of "solid wastes" contained in C.R.S. 1973, 30-20-101(6).

No. It is my conclusion that discarded liquid materials are not included in the definition of "solid wastes" contained in section 30-20-101(6), C.R.S. 1973.

(4) Does section 25-1-108(1)(f), C.R.S. 1973, in addition to authorizing the Department of Health to accept, use, disperse, and administer federal monies, authorize the Department of Health to incur any future obligation on behalf of the state? If so, please define in detail the nature of such obligations which are authorized.

No. Section 25-1-108(1)(f) does not authorize the Department of Health to incur any future obligation on behalf of the state insofar as the Department of Health cannot assume a hazardous waste program under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq. (RCRA) without additional enabling legislation.

ANALYSIS

(1)(a) and (b)

C.R.S. 1973, 30-20-106 provides:

> 30-20-106. Private disposal prohibited -- when. No private dumping of solid wastes shall be made on any property within the unincorporated portion of any county except on or at an approved site and facility; but private dumping of one's own solid wastes on one's own property shall not be subject to the provisions of this part 1 as long as it does not constitute a public nuisance endangering the health, safety, and welfare of others and as long as such dumping is in accordance with the rules and regulations of the department.

Under that statute, all "private dumping" of solid wastes within the unincorporated areas of a county must be done at an approved disposal site and facility. However, the statute also provides that private dumping of one's own solid wastes on one's own property may be done without obtaining a certificate of designation from the board of county commissioners as long as such dumping does not constitute a public nuisance or fail to comply with the rules and regulations of the Department of Health. The term "private dumping" is not defined in the statute nor has the term been defined by the Colorado courts. In addition, Colorado has no other legislation which contains this phrase.

In my opinion, the phrase "private dumping of one's own solid wastes on one's own property" is ambiguous. It is fundamental that in construing an ambiguous statute, the following may be considered in order to ascertain legislative intent: (1) the objective of the statute; (2) the circumstances under which the statute was enacted; (3) the legislative history; and (4) the consequence of a particular construction. C.R.S. 1973, 2-4-203. Further, public interest is to be favored over private interest. Conrad v. City of Thornton, 36 Colo. App. 22, 536 P.2d 855 (1975), rev'd on other grounds, 191 Colo. 444, 553 P.2d 822 (1976).

The Solid Waste Disposal Site and Facilities Law, C.R.S. 1973, 30-20-101 et seq., was first passed in 1967 in order to provide standards for the location and operation of landfills for the disposal of solid wastes. The act provides county commissioners with the authority to regulate and restrict landfill activities in the unincorporated portions of their respective counties. In essence the act requires that any person who desires to operate a solid waste facility in the unincorporated portion of a county must obtain a certificate of designation from the relevant board of county commissioners with the approval of the Department of Health. C.R.S. 1973, 30-20-102, 103, 105. The statute also gives municipalities control over solid waste disposal sites within their jurisdiction. C.R.S. 1973, 30-20-107, 108. The construction and operation of the site must be in conformity with the pertinent rules and regulations promulgated by the Department of Health. C.R.S. 1973, 30-20-104, 109, 110. The only exception to this broad grant of authority is found in C.R.S. 1973, 30-20-106, which pertains to "private dumping."

In the act as it originally was passed in 1967, the phrase in question referred to "private dumping of solid wastes on one's own property." In 1971, that phrase was specifically amended by the legislature with the addition of the words "one's own." 1971 Session Laws, p. 343. The phrase now refers to "private dumping of one's own solid wastes on one's own property." C.R.S. 1973, 30-20-106, as amended.

Each and every word of a statute must be given meaning, if possible. Thomas v. Grand Junction, 13 Colo. App. 80 (1889). Private disposal of one's own wastes on one's own property, then, means something more restrictive than disposal of one's own wastes on one's own property. Permitting the "dumping of one's own wastes on one's own property" would clearly allow anyone to dispose of its own wastes on its own property; by limiting the exception to those engaged in "private dumping", the statute was clearly intended to apply to more limited circumstances.1/

There are two arguments advanced in favor of a restrictive interpretation of the phrase "private dumping of one's own solid wastes on one's own property."

One suggested interpretation is that the term "private dumping of one's own solid wastes on one's own property" refers to all on-site disposal of solid wastes by one whose site

is private, e.g., not open to the public to dispose of their wastes. Under this interpretation, on-site disposal would be basically unrestricted so long as the person dumping the waste did not receive others' wastes for disposal.

I have rejected this interpretation of the statute since such interpretation would undermine the entire thrust of the Solid Waste Disposal Sites and Facilities Act, which is to control and to regulate the siting and operation of solid waste disposal sites and facilities. If all on-site disposal were basically unregulated, except on-site disposal by those accepting wastes commercially, e.g., in the waste disposal business, then no commercial or industrial operation, regardless of its size or the amount or type of waste which it generates, would be subject to general control under state law insofar as the disposal of its waste is concerned.

Industries which practice on-site disposal include, but are not limited to: precious metal mining, the operation of which results in formation of such chemicals as sodium cyanide and sodium hypochloride. Sodium cyanide leaches cyanide if it is deposited in streams; sodium hypochloride is deadly to aquatic life. Nonprecious metal mining, e.g., molybdenum, results in the deposit of heavy metals such as arsenic, lead, iron, magnesium, cadmium and nickel. Without the proper design of a facility, all of these chemicals could be discharged. Coal power plants, of which there are 5 or 6 large ones in Colorado, generate flyash. Flyash contains such radioactive minerals as thorium and uranium, in addition to other heavy metals such as arsenic, lead, sodium, potassium, calcium, chloride, sulphates, iron, magnesium, cadmium, mercury. It also causes acid (pH) imbalance in water. The oil shale industry produces processed oil shale residues (waste rock) which is 70% of the total volume of oil shale. It contains, among other things, fluoride, boron, molybdenum, and selenium, and causes changes in pH. Industrial sludges, resulting from water quality and air quality treatment facilities, contain cadmium, arsenic, sulfates and chlorides.

In addition to these industries, there are hundreds of others, e.g., the petrochemical industry and pesticide manufacturers, which would be permitted, under this interpretation, to dispose of their wastes on site, without approval by the state or local authorities under the Solid Wastes Law. For example, sludges from solutions used for cattle dipping, to eradicate

scabies, contain the highly toxic pesticide, toxaphene. The landowner could dump these sludges on the ground and walk off and leave them causing potential damage to drinking water supplies and surrounding flora and fauna.

I note also that in 1971 the legislature specifically deleted the exemption for mining wastes, metallurgical slag and mill tailings from the coverage of the Solid Waste Act, C.R.S. 1973, 30-20-101(6). See also, C.R.S. 1973, 30-20-102(2) (Repealed, L.77 p. 286). It seems incongruous that the legislature would add mining wastes, mill tailings and metallurgical slag to the coverage of the Solid Waste Act in sections 101 and 102 while at the same time allowing them to remain exempt under section 106 and such a construction should be avoided. C.R.S. 1973, 2-4-203(1)(e). I do not think that the legislature would engage in a meaningless act.

In addition to allowing all on-site disposal to operate without approval, this interpretation would completely divest the local governments of the authority they were otherwise granted under the Solid Waste Act to determine the number, size, location and type of operation of each and every disposal site within their respective jurisdictions. This statute should not be interpreted in such manner so as to result in the removal of authority which is otherwise so specifically granted. C.R.S. 1973, 2-4-203(1)(e).

In reaching my conclusion, I have also considered the general rule of statutory construction that a change in language usually imports a change in the meaning of a statute. By adding the words "one's own" in 1971, the legislature was apparently restricting the exception for private disposal to an even narrower class of persons. Interpreting the phrase "private dumping of one's own wastes on one's own property" to permit on-site disposal by everyone except those who are in the commercial waste disposal business, e.g., those who open their sites to the disposal of others' wastes, renders the term "private" to be without significance. The legislature, by adding the words "one's own" to the phrase in 1971, clearly restricted the application of that phrase to those who dispose of only their own wastes, and who are, e.g., not open to the public to receive their wastes. If the words "private dumping" had referred to "those who are not in the commercial disposal business," then the addition of the words "one's own" would have been unnecessary and merely redundant.

I note further that the title of the section in question is Private disposal prohibited -- when. This indicates that the purpose of the section is in general to prevent private disposal. An interpretation of the statute which permits almost all on-site disposal to be operated without approval conflicts with that title. Considering the intent of the legislature to regulate and to control solid waste disposal, and the ambiguity of the section, the title should control. See Davis v. Conour, 178 Colo. 376, 497 P.2d 1015 (1972).

I also consider that it is highly questionable as to whether "private dumping of one's own wastes" could refer to the generation and disposal of wastes in the course of one's business. Wastes generated in the commercial production of goods and services which are available to the general public do not appear to be "private" or "one's own" within the plain meaning of those terms.

The second suggested interpretation is that the statute at issue refers to on-site disposal done by a nongovernmental agency. In my opinion, the foregoing considerations apply with equal force to this interpretation.

As stated above, public policy requires a limited reading of that exception. Interpreting the word "private" to refer to "nongovernmental" would permit all persons other than governmental agencies, including all business and industries, to engage in unapproved on-site dumping. This interpretation would permit hundreds of disposal sites of all types and quantities of waste to go basically unregulated and this is clearly against the public interest. It is well-accepted that:

> (I)n construing a grant of legislative powers, if there be an ambiguity or doubt arising from the terms used, or if the grant be susceptible of two constructions, the doubt must always be resolved, and the grant constructed in favor of the public.

Thomas v. Grand Junction, 13 Colo. App. 80 (1889).

This interpretation would, as stated above, divest the local authorities of the ability to control the size, location

and type of operation of each disposal site as is otherwise granted specifically to them in the statute, and is inconsistent with the rest of the statute insofar as disposal by governmental agencies is specifically discussed in C.R.S. 1973, 30-20-107 and 108.

I can ascertain no logical reason why the legislature would bother to distinguish "private" as opposed to "governmental" or "public" disposal of one's own wastes on one's own property. Public agencies that run disposal operations, e.g., county dumps, are not disposing of their own wastes under any circumstances. Again, if the intent of the statute was to permit all on-site disposal except that done by a governmental entity, then the word "private" would be totally unnecessary. 2/

Considering this, and the rules of statutory interpretation which require that in interpreting a statute the interests of the general public be favored over any specific interest, C.R.S. 1973, 2-4-201(e), and that all phrases and terms in a statute should be given a liberal construction, C.R.S. 1973, 2-4-212, it is my opinion that the exemption for private dumping of one's own waste on one's own property creates an exception for the individual to dispose of his own residential, noncommercial trash on his own property.

Because the statute and the pertinent amendments were enacted prior to the institution of taping all legislative hearings, there is no formal legislature history to examine. However, the Legislative Drafting Office does have copies of the original version of the bill which was sent to that office in 1966, and which ultimately was introduced on the floor and passed in 1967. I have examined this document in reaching my conclusion.

The reference to "private dumping" first appears in this initial draft of the bill submitted to the Legislative Drafting Office by State Senators Bradley and Jackson as follows:

> Section 1. Designation and approval of solid waste collection and disposal sites and facilities required.
>
> (4) No waste collection and disposal site or facility shall be operated in the unincorporated area of any county

> unless such site or facility has been designated as an approved solid waste collection and disposal site or facility by the board of county commissioners of the county in which such site or facility is located. No private dumping or disposal of trash or rubbish shall be made on any property within the unincorporated portion of the county except on a site approved by the board of county commissioners; but private dumping of trash or rubbish on one's own property shall not be prohibited so long as such practice shall not constitute a public nuisance endangering the health, safety, and welfare of others.

(emphasis added.)

The draft bill does not contain a "definitions" section. However, in a later section of the draft, the proposed bill states:

> The State Department of Public Health shall establish and enforce sanitary standards relating to the public health aspects involved in the temporary storage, collection, transportation and final disposal of solid wastes, to include but not be limited to refuse, garbage, asnes, rubbish, toxic substances and flammable substances, hereinafter referred to as solid wastes, ...3/

(emphasis added.)

When the bill was reorganized by the Legislative Drafting Office, the above definition was adopted, incorporating the exception for mill tailings, etc. cited below. The bill as passed contained this definition. C.R.S. 1963, 36-23-1(2).

The drafting office then took all references to specific solid wastes in the draft and substituted the general term "solid wastes." The exemption for private disposal was con-

formed to read:

> Section 6. Private disposal prohibited - when. No private dumping of solid wastes shall be made on any property ... but private dumping of solid wastes on one's own property shall not be prohibited 4/

What apparently was overlooked in conforming the language in section 6 was that "trash and rubbish" was a term of art utilized in the regulation of garbage collection; it was not synonymous with and encompassed a much narrower category of wastes than the definition which was taken from the longer list of wastes which came later in the draft bill. "Trash and rubbish," as the term was commonly used, referred to nontoxic, nonliquid junk, i.e., paper, household garbage, refuse, etc. The intent of the original private disposal section, in my opinion, was to exempt the disposal of common trash on one's own property.

This would not be the only time the legislature has recognized the distinction between private and commercial operations concerning their respective impact upon environmental health and quality. In 1979, the legislature amended the Solid Waste Act to allow counties to permit the noncommercial burning of trash under certain circumstances. Burning of trash had theretofore been generally prohibited. C.R.S. 1973, 30-20-110(1)(f), as amended. The legislature has indicated, in separate areas of the Solid Waste Act, that certain activities which it deems should otherwise be regulated, are permissible, but only on a small scale.

(2)

C.R.S. 1973, 30-20-101 et seq. provides authority for the board of county commissioners and the Department of Health to regulate the selection of solid waste disposal sites and to regulate the design, engineering and operation of the site. The Health Department has the specific obligation to insure that the facility is operating in accordance with its rules and regulations.

The rules and regulations specify requirements which, for example, pertain to: siting of facilities, control of sur-

face and ground water quality, vector control, odor control, rodent control, control of air quality, proper design and engineering, proper operation, and standards for closure. 6 C.C.R. 1007-2.

The jurisdiction of the board of county commissioners and the Department of Health is triggered if the disposal site accepts and/or disposes of solid wastes. 5/ As long as the site proposes to accept or does accept solid wastes, the board of county commissioners and the Department of Health have the explicit authority to regulate all aspects of the siting decision, including the determination as to whether the site is appropriate for the receipt of liquid hazardous wastes according to the criteria set forth in C.R.S. 1973, 30-20-104. Similarly, the Department of Health has the duty to regulate the operation of the facility as it affects health and the environment. Once a facility receives solid wastes for disposal, everything that is disposed at that site is subject to regulation pursuant to the certificate of designation issued to that site.

I also conclude, however, that according to C.R.S. 1973, 30-20-101 et seq., because the definition of solid wastes does not include liquid wastes (see analysis of response to question 3 herein, infra at pp. 11-12), that a facility which did not and/or does not presently accept any solid wastes is not subject to regulation under the Solid Waste Disposal Sites and Facilities Act.

This interpretation is consistent with the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq. (RCRA), and its regulations insofar as EPA has determined that solid waste sites and facilities receiving small quantities of (liquid) hazardous wastes do not fall within the jurisdiction of RCRA. It was anticipated that the regulation of the disposal of these small quantities of waste would remain under the state solid waste disposal laws.

(3)

C.R.S. 1973, 30-20-101(6) defines solid wastes as:

> (G)arbage, refuse, sludge of sewage disposal plants, and other discarded solid materials, including solid waste

> materials resulting from industrial, commercial, and community activities but does not include agricultural wastes.

The meaning of the word "solid" as utilized in 30-20-101(6) is plain and unambiguous. The common, accepted meaning of the word is "having an interior filled with matter; not gaseous or liquid." Webster's Seventh New Collegiate Dictionary, p. 831. The legislature clearly was aware of the distinction between solid and liquid and knew how to include liquids if it saw fit. See, e.g., C.R.S. 1973, 25-8-805; C.R.S. 1973, 25-13-103(10).

Moreover, the original Solid Waste Disposal Sites and Facilities Act, as passed by the legislature in 1967, defined solid wastes as:

> refuse, garbage, ashes, rubbish, toxic or inflammable substances, ...

C.R.S. 1963, 36-23-1(2) (emphasis added).

Although the term "toxic substances" would appear to include liquids as well as solids, this definition was amended in 1971 to omit any references to "toxic substances." It is evident, that in reenacting that section the legislature intended to omit liquid materials from the purview of the act. 6/

(4)

As a result of conversations between my staff and Martha King, an employee of the Legislative Council, it is my understanding that you wish to know whether or not the entry into a cooperative agreement by the state pursuant to C.R.S. 1973, 25-1-108(1)(f) can oblige the state to enter into a state-administered federal RCRA program sometime in the future. Specifically, it is my understanding that you are concerned with a phrase in the cooperative agreement which indicates that that agreement would be entered into by the state with the intent to seek final authorization from the Environmental Protection Agency to administer the hazardous waste program under RCRA.

In that context, C.R.S. 1973, 25-1-108(1)(f) does not authorize the Department of Health to incur any future obligation on behalf of the state. Although the department has the authority to indicate that it could seek final authorization under RCRA (a statement of that intent is required by the Environmental Protection Agency), final authorization to operate a hazardous waste program cannot be actually assumed unless the legislature has enacted the requisite enabling legislation. If such legislation is not forthcoming within the time-period of the cooperative agreement, the agreement would end with no further consequences.

SUMMARY,

To briefly summarize my opinion, on-site disposal by an individual of wastes resulting from his own residential, non-commercial activities is generally exempted from the Solid Waste Sites and Facilities Law. I also conclude that although "liquid wastes" is not covered by the definition of "solid waste" contained in C.R.S. 1973, 30-20-101(6), the Department of Health and the boards of county commissioners have the authority to regulate the disposal of liquid wastes at a solid waste site and facility. Finally, without additional enabling legislation, the Department of Health is without authority to oblige the state to enter into a state-administered federal RCRA program.

1/ In the context of the statute, "dumping" and "disposal" appear to be synonymous.

2/ I note that in the definition section of the act, the term includes "private or municipal corporations." I do not find that the use of the term "private" in that context has any relevance here.

3/ In section 5(2) of the draft, the bill states:

> the term solid wastes as used herein shall not apply to mill tailings piles, agricultural wastes, mining operations or junk automobiles and parts thereof.

4/ Similarly, section 9 was changed to read that the

department shall promulgate regulations involving temporary storage, collection, transportation and final disposal of solid wastes.

5/ The term "solid wastes" as utilized in the act does not include "liquid wastes". See analysis of response to question 3, infra at pp. 11-12.

6/ I note that the current definition of solid wastes includes "sludge." C.R.S. 1973, 30-20-101(6). Although sludge is often referred to as a "semi-solid," it is technically defined as "a muddy or slushy mass, deposit or sediment" or "precipitated solid matter." Webster's Seventh New Collegiate Dictionary, p. 821. It is not a "liquid."

Very truly yours,

J. D. MacFARLANE
Attorney General

JDM:3152:wp

APPENDIX E

Statement Presented to the

COLORADO LEGISLATIVE INTERIM COMMITTEE ON HAZARDOUS WASTE

Thursday, June 26, 1980
by
O. L. Webb, Director of Environmental Affairs
Colorado Association of Commerce & Industry

My name is O. L. "Olie" Webb and I serve as director of environmental affairs for the Colorado Association of Commerce & Industry (CACI) located at 1390 Logan Street, Denver, Colorado 80203.

CACI is a diversified voluntary membership organization of some 1,200 member firms which includes approximately 35% engaged in manufacturing and processing and includes an unknown number who might be affected by the hazardous waste management program.

The federal regulatory program under RCRA is now fairly complete. This massive regulatory program gives the option of a hazardous waste program administered either by the state or the federal government. As we testified before the interim legislative committee on HEWI in October, 1979, and again before standing committees during the 1980 legislative session, Colorado industry prefers a state administered regulatory program rather than a federally administered one for a number of basic reasons.

1. A state administered program, although it must parallel or be equivalent to the federal program, will give the state flexibility in evaluating individual permit applications. The EPA intends to build into its permitting regulations the concept of the use of "best engineering judgment," a flexible standard, in evaluating these applications. A parallel or equivalent state program would incorporate this standard. Colorado industry would prefer that

state rather than federal officials apply the best engineering judgment standard to Colorado industry. Therefore, a state program can meet the specific needs of Colorado terrain, Colorado local government and Colorado industry.

2. We believe that attention to differences in operation and circumstances peculiar to our geographic area would be more readily given by state personnel already familiar with the area, because Colorado Department of Health administrative personnel are more responsive to needs and problems of "constituent" industries; they're closer to the population regulated. There is less likelihood of buck-passing such as "that's coming out of Washintgton so there's nothing we can do about it" type of responses. In contrast, the permitting and enforcement policies and activities of federally administered programs tend to be applied equally regardless of geography or local variation in operations of a given type of industry.
3. Although there was testimony to the contrary in the last meeting, the committee should note that under a state program, industry is not subject to federal agency veto of their permits, as in the water quality and air quality programs. With a state program, EPA will only have review powers.
4. A state program could include a commission (similar to Mined Land Reclamation Board and Air & Water Quality Control Commissions) to provide technical expertise and special knowledge to issue permits and to respond to problems as necessary.
5. In the event of an appeal or challenge or a ruling or regulation, industry believes that it is less expensive to go through the state court system than through the federal courts and that the state

courts would have greater knowledge of and appreciation for problems in their own state.

Other reasons mentioned by industry representatives in support of a state administered program over a federal program are as follows:

1. A state program could impose time limits on review and issuance of permit applications. EPA has no provisions for timely review of permits.
2. Since many industries hold either NPDES Water Quality permits or Air Quality permits or both from the state, it would be more convenient and less costly to industry to deal with one agency. Also state issuance of the RCRA permit would eliminate the possibility of the requirement for a federal environmental impact statement.
3. Industry would be willing to pay reasonable state permit fees and receive some certainty as to operation, rather than pay no fee and wait indefinitely for permits from EPA.
4. The statute authorizing a state hazardous waste program could also authorize the Department of Health to develop compliance schedules for solid waste management. With such a compliance schedule, industry will have five years to upgrade an open dump to a sanitary landfill or to close it. Without a state plan, open dumps could be immediately closed. As an aside, we note that without a state approved compliance schedule, municipal dumps may also be shut down.
5. The attention of EPA personnel, under a federally administered program, would be divided among the six states in the Region VIII EPA jurisdiction.
6. The state would be able to enforce RCRA regulations on federal facilities.
7. Colorado will need a new or revised "siting act" under either a state

or federal program, and such an act can be part of a statute authorizing a state program.

For the above reasons, we recommend that the Interim Committee on Hazardous Waste review the requirements for state programs and determine what steps will be necessary to develop state legislation for a state administered hazardous waste program for Colorado.

SOLID WASTE
ADVISORY COMMITTEE

August 25, 1980

Representative Anne McGill Gorsuch, Chairman
Interim Committee on Hazardous Waste
Colorado State Capitol
Denver, Colorado 80203

Dear Representative Gorsuch:

At its meeting of August 22, 1980, the Governor's Solid Waste Advisory Committee discussed and endorsed a resolution in support of a State program (in lieu of EPA control) for hazardous waste. I am pleased, on behalf of the Solid Waste Committee, to make you and the Interim Committee aware of our belief that Colorado's interests will be best served if the State assumes primacy for hazardous waste control from EPA and to recommend that the Interim Committee support the development of appropriate legislation to accomplish this goal as soon as possible.

We would be pleased to assist the Interim Committee any way we can on this important subject.

Sincerely,

A. J. Madonna

A. J. Madonna, Chairman
Solid Waste Advisory Committee
929 Parkview Street
Louisville, Colorado 80027

AJM:JEM:ew

cc: Dr. Traylor

APPENDIX F

Hazardous Waste Study

In 1979 the Colorado General Assembly enacted Senate Bill 336 which required the Colorado Department of Health to conduct a statewide study of disposal of hazardous wastes.

The Department of Health responded to the directive of the General Assembly in January, 1980, with "A Report to the Legislature Concerning Hazardous Waste Generation and Disposal in the State of Colorado". The study encompassed three issues of concern to the state in regard to hazardous wastes: the amounts and types of wastes being generated and the disposal needs for them; the criteria that disposal sites should meet and the availability of sites in the state that could meet such criteria; and the legal ramifications of restricting disposal of out-of-state wastes at Colorado sites. Contributing parties to the report were the Health Department, the Colorado Geological Survey, and the Attorney General's Office.

The executive summary of the department's report begins on the next page. A copy of the publication is available in the Legislative Council library.

EXECUTIVE SUMMARY

A major side effect of our technology-oriented society is the need to provide secure disposal of hazardous wastes. Across the nation it has been realized that the indiscriminate dumping of toxic materials will eventually create disastrous consequences including widespread groundwater contamination and other critical public health hazards. In 1979, the Colorado General Assembly ordered a study of this problem in Colorado in order to assess the hazardous waste disposal situation in the State.

The Colorado Department of Health began and is continuing to inventory industrial waste generation in the State. Potential generators of hazardous waste in the State, including those with fewer than ten employees, were sent questionnaires. A total of 1562 questionnaires were distributed and 955 or 61 percent thus far have been returned. Ninety two percent (92%) of the firms with greater than 250 employees responded; thus, the reported figures represent at least the minimum quantity of wastes generated in Colorado.

More than 855,000 tons of potentially hazardous wastes are generated annually in the State. Approximately 86,000 tons (or about 10 percent) would be considered extremely hazardous due to their inherent characteristics. Over 402,000 tons of the reported wastes are considered to be bulk, low toxicity wastes. 99.7 percent of the total industrial waste stream is generated along the Front Range and almost 40 percent (or about 313,000 tons), is generated in Region 3 which includes the Denver metro area and Clear Creek and Gilpin Counties.

Final disposition of hazardous wastes currently includes: 1) landfilling at inadequately designed facilities, the most common disposal method; 2) storage/disposal on-site; 3) landfarming/recycling/reclaiming, and 4) incineration at private facilities.

The information collected thus far provides a good beginning for developing a hazardous waste management program in Colorado. The results of the survey indicate:

- That a hazardous waste disposal site is urgently needed in the State to properly dispose of hazardous wastes without creating serious public health problems.

- That the large majority of hazardous wastes generated in Colorado are presently being disposed of at inadequately designed landfills and serious environmental consequences may result from this practice. Steps should be taken immediately to alleviate this situation.

- That inspection and subsurface monitoring should be performed at those existing sites determined to have the greatest potential for environmental contamination and clean-up measures should begin.

- That at least one hazardous waste facility, if any are constructed, should be located along the Front Range within reasonable access to the metropolitan areas.

- That a waste exchange program may be a viable option in Colorado considering the volume of wastes generated in the State. The technology is presently available for the recycling, reclaiming and reuse of certain wastes and these alternate approaches should be actively encouraged.

Long-term secure burial, which isolates these wastes from the human environment, is presently the most efficient and cost effective disposal method available. Evaluation of a site for such use should include the collection of extensive hydrologic, geologic, and physiographic data on the particular site and the following criteria should be followed in this selection process:

- Contaminants from waste disposal sites should not degrade ground or surface water quality. The wastes must be separated from groundwater aquifers by no less than 150 vertical feet of strata whose average permeability is less than 10^{-7} cm/sec.

- Disposed hazardous wastes should be at least one mile from the probable maximum floodplain of perennial surface waters.

- Sites should be located in suitable geologic strata including the Pierre, Mancos, Lewis, and San Jose formations in the State. These formations comprise large areal extents of thick, homogeneous, relatively impermeable shale or claystone.

- Disposed wastes should be placed in excavations developed completely within the bedrock units and sealed from overlying surficial material with an engineered, impermeable cap.

- The location should be in seismically and structurally sound areas and isolated from geologic hazards and erosional problems associated with extremes in slope, wind conditions, precipitation, and runoff.

- The ultimate suitability of any formation will be dependent upon the geochemical reactions between the clay-rich host rock and the wastes received.

This report represents a statewide evaluation of geologic formations which may be suitable for location of a hazardous waste disposal facility. Several areas of the State contain sites that would suitably meet the stringent criteria for disposal of hazardous wastes. (See enclosed map for the distribution of the geographically suitable areas of the State). Guidelines are also presented to aid in the preparation and review of acceptable engineering reports required on any proposed site.

Finally, the legislature required a study of the legal ramifications of legislation which would maintain hazardous waste disposal sites for the exclusive use of wastes originating in Colorado. There has been an entire series of U.S. Supreme Court cases which are closely analagous to the situation described. They demonstrate clearly that attempts by the State to either exclude outright the use of its hazardous wastes disposal facilities, or to exclude the use <u>de facto</u> by charging exorbitant fees to out-of-state users will

be challenged and usually successfully.

Any proposed legislation must contain the specific facts as discussed below to withstand constitutional scrutiny.

1) For outright exclusion, the legislation should include facts which demonstrate that the movement of hazardous wastes over long distances is inherently dangerous to the health and safety of the people of the State. The chances of successful exclusion are enhanced greatly if the extreme danger involved is stressed and in-state disposers of hazardous waste are distinguished by their proximity to the site rather than by their residency in the State.

2) Exclusion through the use of differential fees may be possible if it can be shown conclusively that the fee distinction is imposed as a partial cost equalization. Obviously the larger the difference in fees between in-state and out-of-state users, the greater is the burden on the State to justify the differentiation.

STATE LANDS SUITABLE FOR HAZARDOUS WASTE DISPOSAL

ANTHONY SABATINI
Administrator

THOMAS E. BRETZ
Minerals Director

ROBERT L. HAPGOOD
Chief Accountant

BOARD OF LAND COMMISSIONERS
Department of Natural Resources
620 Centennial Building
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(303) 839-3454

21 July 80

Honorable Mrs. Anne Gorsuch
Chairwoman
Interim Committee on Hazardous Waste
Colorado State Capitol
Denver, Colorado 80203

Re: Hazardous Waste

Dear Representative Gorsuch:

Thank you for the opportunity of presenting to your Committee the results of our study of the availability of state lands for hazardous waste disposal purposes.

Replying to your question at your 26 June Committee meeting, the number of acres and location by county of state lands suitable for hazardous waste deposits according to the Colorado Geological Survey office data on erosion, hydrology and seismicity are shown on the attached report titled "State Lands Suitable for Hazardous Waste Storage". Such areas total 546,461 acres for the state.

Counties not shown in the report have no state land, or at least none suitable for hazardous waste disposal sites.

We appreciate the help and advice from the State Geological Survey and the State Department of Health in the preparation of this study.

Please let us know if you have other questions that we might help answer.

Respectfully,

STATE BOARD OF LAND COMMISSIONERS

Wm H Claire
Commissioner-Engineer
cc: Dr. Frank Traylor
Mr. John Rold

WHC:ish
Enc.

STATE LANDS SUITABLE FOR HAZARDOUS WASTE STORAGE

	Most Suitable Formations Acres		Marginally Suitable Formations Acres		
County	Low Erosion	Moderate Erosion	Low Erosion	Moderate Erosion	Total Acreage
Adams	1,160	740	640	5,000	7,540
Arapahoe	3,280	--	20,944	--	24,224
Baca	--	--	960	--	960
Bent	800	--	76,048	800	77.648
Cheyenne	1,120	640	3,920	880	6,560
Crowley	10,415	--	4,600	3,240	18,255
Dolores	640	--	--	--	640
Douglas	--	--	3,040	--	3,040
El Paso	15,461	300	3,800	2,320	21,881
Elbert	7,700	2,120	8,187	4,360	22,367
Fremont	--	640	1,820	--	2,460
Grand	3,578	3,960	--	--	7,538
Huerfano	--	3,180	6,690	2,240	12,110
Jackson	5,520	--	--	--	5,520
Kiowa	1,280	--	19,577	4,460	25,317
Kit Carson	--	--	160	320	480
La Plata	480	--	--	--	480
Larimer	2,405	550	--	--	2,955
Las Animas	2,080	3,320	16,574	20,629	42,603
Lincoln	31,006	6,560	2,240	1,760	41,566
Logan	4,320	320	--	--	4,640
Moffat	--	4,412	620	13,903	18,935
Montezuma	240	935	--	--	1,175
Morgan	5,420	640	--	--	6,060
Otero	--	--	29,668	3,680	33,348
Ouray	161	--	--	--	161
Park	3,240	1,439	--	--	4,679
Prowers	--	--	560	320	880
Pueblo	4,295	1,600	81,671	18,991	106,557
Routt	2,722	5,841	--	6,917	15,480
San Miguel	2,120	320	--	--	2,440
Washington	4,120	4,020	--	--	8,140
Weld	2,680	240	13,302	3,600	19,822
Totals 33	116,243	41,777	295,021	93,420	546,461

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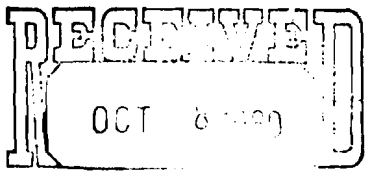
October 7, 1980



Dr. Frank H. Traylor, Jr. or
Mr. Bob Arnott
Department of Health
4210 East 11th Avenue
Denver, Colorado 80220

Re: Interim Committee on Hazardous Waste
Colorado Legislative Council

Dear Frank:

In reflecting on the testimony which you have heard concerning a state program for hazardous waste management, we believe that there remains a conflict, or at least doubt, as to the role which EPA would play in that program, particularly regarding permitting decisions, once the program had been authorized by state legislation and implemented.

In our view, once a state program is in place, the oversight authority which EPA retains is limited and would not be duplicative of the state program. Nor could EPA be the final arbiter of the adequacy of the state program.

In support of these conclusions, we enclose herewith a memorandum on the subject. We hope that you will find it useful. The first two pages summarize the later discussion. If after studying the memorandum you have questions, we shall be happy to try to answer those questions at your convenience, including addressing those questions at the October 27 meeting of the Committee, if that is the Committee's desire.

This letter and the memorandum are being sent to each member of the Interim Committee.

Very sincerely yours,

John Fleming Kelly

cc: Legislative Council Staff

M E M O R A N D U M

RE: EPA Oversight of the RCRA Permitting Process in States With Authorized Hazardous Waste Programs

DATE: September 4, 1980

The issue of retained EPA authority over permitting in states with authorized RCRA hazardous wastes programs has been central to the deliberations of the Colorado Legislature's Interim Committee on Hazardous Waste ("Committee") regarding the efficacy and desirability of establishing such a hazardous waste program in Colorado. In testimony before the Committee, industry representatives have stated that such EPA oversight in the permitting area is severely limited by the Act and the regulations. EPA's narrowly circumscribed authority to "second-guess" state permitting decisions is outlined in detail below.

EPA representatives, however, in testimony before the Committee, have painted a picture of a far more powerful and obtrusive EPA than the Act and their own regulations in fact will allow the Agency to be in states with an authorized hazardous waste program. Particularly disturbing have been statements which suggest that EPA will be the "ultimate arbiter" of any disputes between EPA and the state over permit terms and enforcement, and that EPA retains the right to

unilaterally "supplement" permit terms and conditions. No basis for these statements can be found in either EPA's own regulations or the Agency's official statements on these matters. These misstatements mar what we feel to be a generally fine, intelligent, and straightforward presentation by Messrs. Yeagley and Schroeder of the EPA Regional Office to the Committee about how authorized state programs will work and a commendable effort on the part of the Committee to tackle the myriad of problems surrounding this emerging and complex area of environmental law. Unfortunately, these errors in the record cut to the very heart of the state program debate and need to be corrected if the Committee is to make an informed judgment on the state program issue.

The discussion below sets out, in as succinct a manner as the subject matter allows, the limited EPA retained oversight authority in the area of facility permitting in states with authorized hazardous wastes programs. We also raise several other issues discussed at last Tuesday's (August 26, 1980) meeting which may require further clarification. Hopefully, these materials will prove helpful in supplementing the Committee's record on the issues addressed.

I. EPA's Oversight of Authorized State Program Facility Permitting.

Industry's case for a state program is based largely on the flexibility to be afforded the state permit writer, through the application of the concept of "best engineering judgment," in permitting individual hazardous wastes management facilities. Testimony before the Comimittee has been unanimous that the amount of flexibility to be afforded such a permit writer in an authorized state is substantial.

EPA, in the preamble to the Phase I Hazardous Wastes Regulations, describes how this "best engineering judgment" flexibility will be applied in practice:

> Distinctions in management requirements can also be made based on the local site conditions and the peculiarities of the waste involved. Factors such as hydrogeology, rainfall and soil type can be considered on a case-by-case basis as a part of the permitting process given appropriate flexibility in the regulations. Such a case-by-case consideration of site conditions and, to some extent, waste properties is feasible and desirable and the Agency plans to adopt such a system in its Phase II Regulations. 45 Fed. Reg. 33,165 (May 19, 1980).

EPA states that this "best engineering judgment" flexibility will allow the permit writer to consider site-and waste-specific factors in determining specific design and operating permit requirements.[1] 45 Fed. Reg. at 33,174. Testimony has

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1 The Committee has seemed understandably confused about how

also been unanimous that in a state with an authorized

(footnote continued)
a state program could be judged "substantially equivalent" and still retain a substantial degree of flexibility in permitting. EPA clarified this issue in its preamble to the Consolidated Permit regulations, promulgated the same day as the RCRA Phase I regulations, where it stated:

> EPA now defines substantial equivalence as "to a large degree, or in the main, equal in effect." "Effect," of course, could mean either effect in protecting health and the environment or effect in the sense of requirements imposed on regulated industries and others. EPA has and intends to keep both these meanings in mind, as well as concerns about State autonomy, in judging the substantial equivalence of State programs. So, for example, variations in the manifest system, which calls for eventually creating a single accounting system to track wastes from State of origin to State of deposition, could be extremely burdensome to the companies that would have to cope with the inconsistencies, and to the governments that would have to regulate taking the differences in the manifest systems into account. Here, both concern for the environment and concern for avoiding regulatory burden argue for a relatively high degree of similarity. Permitting standards, by contrast, will be applied in local decisions, and the initial Federal standards will leave a good deal of discretion to permit-writers. Here the arguments for uniformity are weaker, . . . 45 Fed. Reg. 33,391. (Emphasis added)

The current EPA "RCRA State Authorization Guidance Manual" reflects this EPA commitment to state flexibility in the permitting area. The chapter dealing with "substantial equivalence" of RCRA § 3004 state facility permitting schemes is replete with references to state permit program

hazardous waste program, it is the state's (and not EPA's) "best engineering judgment" which will be applied in the permitting process.[2]

Some confusion, however, has arisen over the issue of when, if ever, EPA is allowed to "second-guess" the state permit writer's application of "best engineering judgment" to a specific site. Only one avenue for potential EPA "second-guessing" of state permitting decisions has been identified in testimony: EPA's right to comment on draft permits established

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(footnote continued)
requirements for which EPA not only allows flexibility, but actually explicitly encourages flexibility. See RCRA State Authorization Guidance Manual, Chapter 3.4-1 (June 1980). As stated above, the permitting regulations wilx require "substantial equivalence" only with performance standards, and not with specific design and operating standards. In EPA's words, this will allow the permit writer "flexibility . . . to consider site- and waste-specific factors in determining specific design and operating permit requirements." 45 Fed. Reg. 33,174. The flexibility to generate design and operating requirements to adapt performance standards to local conditions is the cornerstone of the RCRA permitting scheme. Therefore, any statement that suggests that the state will lack the flexibility to deal with variances in local conditions because of the "substantial equivalence" language simply reflects a misunderstanding of that term's meaning in the RCRA context.

2 See, for example, "Questions to and Responses from EPA Regarding Issues Raised at the Committee Meeting of June 26, 1980, (hereinafter "June 26 Questions") Question 3 (ii).

at 40 C.F.R. § 123.38. Also discussed has been the EPA Regional Administrator's limited post-permit right to seek injunctive relief under RCRA § 7003 in "imminent hazard" cases and to enforce state permit conditions if the state refuses to enforce its own permits. See, 45 Fed. Reg. at 33,467. It is industry's legal opinion (and, based on private conversations with EPA officials in Washington, EPA's also) that all of these avenues for oversight are so narrowly circumscribed by the Act and the regulations that they will have minimal impact on the state's flexibility in applying this "best engineering judgment" concept. These oversight provisions, and their respective limitations, are described below.

A. EPA's authority to comment on draft permits. 40 C.F.R. 123.38(a)-(e).

40 C.F.R. § 123.38(a) provides that EPA "may comment on permit applications and draft permits as provided in the Memorandum of Agreement ("MOA") . . . ." with the state. If, in so commenting, EPA indicates that the issuance of the permit would be in any way inconsistent with the approved state program, EPA must state the reasons for its comment, outline the actions that the state could take in order to address the comment, send a copy of the comment to the permit applicant, and must withdraw the comment if the state "has met or refuted" EPA's concerns. 40 C.F.R. § 123.38(d). (Emphasis added).

Once the state permit that it has commented on is issued, EPA may seek enforcement or termination of the permit if the permitee does not comply with a condition that EPA had suggested in comments was necessary to implement approved state programs requirements, whether or not that condition was actually included in the final permit. If EPA has not commented during the draft permit stage that a given condition required by the state program should be included in the permit, then it is barred by the regulations from attempting to enforce that condition after the permit is issued. 40 C.F.R. § 123.38(e).

Although on its face, Section 123.38 may appear to provide EPA with a substantial opportunity to "second-guess" the state permitting process, EPA's oversight is in fact limited greatly by the following legal and practical considerations.

(1) EPA will be strictly limited by the Memorandum of Agreement with Colorado as to the number of permits it will be allowed to comment on and thereby trigger the "second-guessing" enforcement provision described above. 40 C.F.R. Section 123.6(b)(2) provides that the MOA will contain "provisions specifying classes and categories of permit applications, draft permits and proposed permits that the state will

send to the Regional Administrator for review, comment and, where applicable, objection." 45 Fed. Reg. at 33,459. That regulation goes on to state that EPA and the state may agree to other limitations regarding the review and comment on permits for all non-major hazardous waste management ("HWM") facilities. 40 C.F.R. 123.6(d)(2). EPA's RCRA State Authorization Guidance Manual ("Manual") provides that the list of major facilities will be developed on the basis of the size and location of a state's hazardous waste management facilities and the hazard characteristics of the wastes to be managed at each site. Manual at Chapter 2.4-5. EPA anticipates that "major" facilities will generally number only approximately 10 percent of all facilities to be permitted in a given state. Hazardous Waste Management: A Guide to the Regulations, EPA (August, 1980). The MOA can limit EPA to commenting on only major facilities and EPA's Jon Yeagley testified that most MOAs will so limit EPA.[3] The practical result of such a limitation will be that the vast majority of small or relatively low hazard disposal sites, such as most mining and mill tailings ponds, will be permitted solely by the best engineering judgment of the state permit writer and without the opportunity for EPA to

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3 See June 26 Questions, Question 2(b).

comment. In all such cases where EPA is not afforded the opportunity to comment, any EPA enforcement activity would necessarily be limited to the terms of the state-issued permit.

(2) This sole opportunity for "second-guessing" ends with the issuance of the permit. Even for "major" facilities, if EPA fails to comment during the draft permit process, it is forever estopped from attempting to enforce provisions not included in the state permit. 40 C.F.R. Section 123.38(e)(3). In EPA's own words, where EPA makes "no comments on a state permit or where the comments are successfully accommodated, compliance with the state permit will be deemed compliance with the requirements of the state program in Subtitle C for federal enforcement purposes . . . ." 45 Fed. Reg. at 33,385. EPA states that this "shield" provision is "one of the central features of EPA's attempt to provide permittees with maximum certainty during the fixed terms of their permits." Id. at 33,311.

(3) The post-permit "second-guessing" enforcement action is itself limited only to comments raised at the pre-permit stage on conditions which were not included in the permit but which were "necessary to implement approved state program requirements." The term "state program requirements" is the key here. EPA is, therefore, limited to making only

comments suggesting that the state is not providing the level of environmental protection, in regard to the specific facility being permitted, that it agreed to provide in the MOA. The only state program requirements for the permitting of HWM facilities currently listed in EPA's regulations for approval of state programs are a number of procedural requirements contained at 40 C.F.R. Section 123.7 as well as the substantive requirements contained at 40 C.F.R. Section 122.29. The only substantive requirement listed in Section 122.29 is that the state "shall include each of the applicable requirements specified in" EPA's facility permitting regulations. As stated above, EPA's facility permitting regulations will have, as their core concept, the flexible idea of "best engineering judgment." This concept provides the permit writer with discretionary powers to establish permit operating and design terms and conditions. As stated at Note 1 above, EPA's RCRA State Authorization Guidance Manual encourages states to adopt flexible standards as "state program requirements" in the RCRA § 3004 permitting area. As a result, for EPA to successfully bring an action for enforcement or termination based on the "second-guess" provision set out above, the Agency is faced with the difficult legal prospect of establishing in a judicial hearing that the state permit writer abused his discretion in

finding that the terms and conditions included in a given permit met the agreed to levels of environmental protection contained in the MOA.

Furthermore, contrary to the impression some Committee members were apparently left with as a result of EPA testimony at last week's meeting, in either a comment-based enforcement or termination action, EPA is definitely not the "final arbiter" of a permitting dispute between the state and EPA.[4] In each instance, the regulations provide for a full evidentiary hearing on the issues involved in the enforcement or termination action, and the decisions reached in such hearings are appealable first to the EPA Administrator, and then to the federal courts. In its preamble to the Consolidated Permit regulations, EPA explicitly recognizes this opportunity for judicial review in the case of termination actions when it states:

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4 Some members of the Committee were astonished when EPA's attorney appeared to them to be suggesting that EPA would be the "ultimate arbiter" in disputes between EPA and Colorado over what the MOA required. Basic contract law dictates a different result and so do EPA's own regulations. Mr. McClare's later testimony clearly identified those portions of EPA's regulations which establish review procedures for enforcement and termination actions, but the misimpression of EPA as "ultimate arbiter" appeared to remain with several Committee members.

> EPA believes that these administrative provisions and ultimately, the possibility of judicial review should provide the protection which commenters are seeking against arbitrary application of broadly worded causes for terminations. Thus, permittees will have an opportunity to refute claims such as that there is an endangerment to human health or the environment, or that permit violations were significant. 45 Fed. Reg. 33,316

Thus, if EPA believes that the state has not lived up to its agreement as contained in the MOA in that the state permit writer has abused the "best engineering judgment" concept in writing operating and design conditions into a permit, and the state disagrees, EPA is simply not the "ultimate arbiter" of that dispute. EPA must establish its allegations in a full judicial proceeding in order to enforce conditions that the Agency commented on. As a practical matter, EPA will likely make every effort to resolve differences with the state at the pre-permit issuance stage rather than expend the resources necessary to establish the failure of the state to live up to state program requirements in this flexible permitting area. As EPA states in the preamble to the Consolidated Permit regulations:

> EPA's resources will at most be barely sufficient to issue and renew RCRA permits, and review State permits, at the time of their initial issuance and periodic renewal. EPA and States are likely to make much better use of their resources if they

> restrict examination of permits between issuance and renewal to monitoring compliance and taking enforcement action where necessary. 45 Fed. Reg. 33,312

That position is consistent with Jon Yeagley's numerous statements before the Committee that it will be the state, not EPA, who will be applying the best engineering judgment standard in states with authorized hazardous waste programs.

(4) Finally, it should be noted that it is quite likely that EPA will eventually have to face a legal challenge to its claimed authority to comment on permits on the grounds that it simply does not have statutory authority to review state permits. As representatives of the American Mining Congress in its suit challenging the RCRA Phase I and Consolidated Permit regulations, we are aware that some of the litigants in those cases are considering raising this issue in the context of the current lawsuits. In a submittal to the Committee, the Attorney General's Office in Colorado recognized the possibility of such a challenge on the grounds that "EPA authority is not as clearly and explicitly set forth in RCRA" as in other environmental statutes.[5] We have not researched the issue, but others have informed us that the argument has

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5 See Memorandum of Janice L. Burnett dated June 25, 1980, pages 2 and 4.

real merit.

In conclusion, therefore, in regard to EPA's authority to "second-guess" state permitting decisions, I would like to re-emphasize two points. First, EPA does not have the right to "supplement" state permits. It only retains the narrowly limited right to comment on draft applications. Secondly, EPA is not the "ultimate arbiter" of any disputes between the state and EPA over permits. Such disputes are subject to full judicial review.

B. EPA's authority to enforce a state permit.

As stated above, once a state permit is issued, the regulations foreclose any attempt by EPA to add to the conditions contained in that permit. The regulations do allow EPA to enforce state permit conditions, however, if the state fails to enforce its own permits. Once the state permit is issued, EPA may:

(1) seek enforcement of the conditions contained in the state-issued permit, and on only those conditions, if the state refuses to enforce its own permit; or,

(2) seek injunctive relief in federal district court under RCRA § 7003 against facilities presenting "an imminent and substantial endangerment to health or the environment." RCRA § 3008 and RCRA § 7003.

As a general rule, EPA intends to utilize these oversight provisions only after first notifying the state and only if the state fails to take necesary enforcement action. 45 Fed. Reg. 33,385.

It should be noted that these post-permit oversight provisions--the RCRA § 7003 suit and EPA's RCRA § 3008 enforcement authority in situations where the states refuses to enforce their own permits--are, as the EPA comment provisions discussed above, also very limited oversight tools. The RCRA § 7003 suit requires EPA to go directly to federal district court and to meet an extremely tough legal standard. When seeking to enjoin activity at a permitted facility, EPA must show that the facility is creating "an imminent and substantial endangerment to health or the environment." Anthony Roisman, the head of the Department of Justice's Hazardous Waste Section, has stated that the resources needed to marshal such an argument are so great that they place an imminent hazard suit outside of the capabilities of virtually all the major environmental groups.[6] As a result, EPA to date has used RCRA § 7003 suits only rarely to enforce against existing facilities, and there is no indication that the utilization of

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6 Statements at the Energy Bureau RCRA seminar, Washington, D.C., April 14, 1980.

this section will increase.

As for the other provision, industry views the use of RCRA § 3008 by EPA to enforce where the state is lax as a legitimate oversight activity. If the state fails to enforce the conditions of its own permits, as a matter of public policy EPA probably should have the right to step in. EPA does state, however, that it "intends that states should have primary enforcement responsibility, but the Agency retains independent enforcement authority in an approved state and will use it to the extent a state fails to take necessary enforcement action." 45 Fed. Reg. at 33,385.[7]

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7 As was the case with EPA utilization of the "second-guessing" provisions discussed above, EPA admits that practical considerations will limit its use of these noncompliance enforcement tools. In the preamble to the Consolidated Permit regulations, the Agency states:

> The Director of a permit program must carefully exercise discretion in allocating scarce "enforcement" resources. Because of these limitations on resources it makes no sense to enforce against trivial infractions when unremedied substantial infractions exit. This alone in most cases should prevent the Director from reading the termination cases too broadly. 45 Fed. Reg. 33,316.

These practical considerations, coupled with the legal limitations discussed above, make an obtrusive EPA an extremely remote possibility in a state with an authorized hazardous waste program.

Therefore, in conclusion, it is our opinion that EPA's oversight is in fact limited by both legal and practical constraints and will not impinge greatly on the states' flexibility in permitting. There were also several other issues raised last Tuesday which I feel deserve some clarification, and those issues are addressed below.

II. Time Limitations for Permitting.

Another reason advanced by industry in support of the establishment of a state hazardous waste program has been that a state program could include provisions for specifically limiting the time in which a permit could be issued. In response to a question regarding the amount of time EPA expects it will take to issue permits, Jon Yeagley stated that he expected that all permits could be issued within three to six months. We believe he understated the time EPA expects to take to process permit applications.

EPA's regulations require that permits be submitted at least six months prior to the time the final approval is needed by the facility. EPA, in its preamble to the Consolidated Permit regulations, explains why six months or more will be needed to process permit applications:

> Some commenters objected to the requirement for submitting a permit application for new facilities 180 days before physical

> construction is expected to commence . . . EPA believes that the 180-day period is necessary in order to provide adequate time to provide for public notice and comment, hold the public hearing if necessary and complete an evaluation of the application which in some instances may be quite lengthy and complex. If on a case-by-case basis the permitting process can be completed in less than 180 days, it will be. However, 180-day period will be necessary for many facilities and will be used as the general rule. 45 Fed. Reg. 33,323. (Emphasis added).

EPA states that it may take "up to several years" to permit all existing facilities. 45 Fed. Reg. 33,158. In a response submitted to the Committee, EPA states that a state program could set a time limit for permit issuance in an attempt to shorten this permit response time. One suggested method would include the utilization of a "permit by rule" mechanism until final permit issuance to allow a facility to continue operation or begin construction while its permit is considered.[8]

III. EIS Requirements.

Another industry point in support of the establishment of a state hazardous waste program has been that, with a state program, only in the rarest of cases would a state-issued

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8 See June 26 Questions, Question 5(ii).

permit require the completion of an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act, while it is considerably more likely that such an EIS would be required prior to the issuance of an EPA-issued permit. It has been our understanding that there currently exists a disagreement in the federal establishment over whether EPA would be required to complete an EIS prior to issuing a RCRA permit for facilities which significantly affect the human environment. EPA has steadfastly taken the position that EPA-issued permits are exempt from NEPA requirements. Officials of the Council on Environmental Quality, the White House agency charged with administering NEPA, have made statements to the contrary, however.

The testimony of the EPA attorney at last Tuesday's meeting essentially confirmed our understanding. He testified repeatedly that, in the vast majority of cases, state-issued permits would not require an EIS. In his opinion, under an authorized state program, only hazardous waste management facilities built with federal funding might require an EIS. He also confirmed that it is EPA's position that its permits also would not require an EIS, but admitted that that position was a matter of controversy. The Memorandum he submitted to the Committee on the issue, written by EPA's ranking waste attorney,

relies on the application of a growing but inconclusive line of cases in other environmental areas stating that EPA's procedures are equivalent to NEPA-mandated procedures, and, therefore are appropriate substitutes for the generation of an EIS.[9]

Our understanding of the counterargument runs something like this: NEPA does not specifically exempt EPA from NEPA requirements; Congress has specifically exempted EPA from NEPA requirements in issuing permits under other environmental statutes but chose not to exempt EPA from NEPA requirements under RCRA; so, therefore, NEPA applies to EPA-issued RCRA permits that otherwise meet the NEPA threshold test. That argument strikes us as being somewhat compelling, but we have not independently researched the issue. The Committee might be well served to research the issue further.

IV. Citizens' Suits.

Finally, Mr. Whit Field of Coors raised an interesting issue late in Tuesday's session. Whit pointed out that RCRA § 7002 provides for citizens' suits to enforce the regulations, and that an unexplored advantage of a state program might be the insulation of state permit writers and

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9 Undated memo from James Rogers to Steffen Plehn. Submitted to the Committee with June 26 Questions in response to Question 6.

permit holders from post-permit attempts by citizen groups to add conditions to the permit. Whit asked EPA whether an approved state program would be required to contain provisions matching the federal cause of action contained in RCRA § 7002 and received no response.

The answer to Whit's question is: no, the approved state program is not required to contain provisions creating a state cause of action matching the RCRA § 7002 provisions.[10] The state program is required, however, to provide for public participation in state enforcement process by either allowing citizen intervention in state enforcement actions or by providing various procedures for state action on citizen complaints. 40 C.F.R. § 123.9(d), 45 Fed. Reg. 33,463; RCRA State Authorization Guidance Manual, Chapter 2.3-11.

An even more basic question, however, may be whether the existence of a citizen suit provision in either a state or

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10 Perhaps an even more relevant question is whether RCRA § 7002 creates a federal cause of action for a citizen of a state against the administrator of his own state's approved hazardous waste program or against a citizen of his own state. That question would, at first blush, appear to present questions of constitutional law, the jurisdiction of the federal courts, and statutory interpretation which, however easy or difficult, we have not researched, and which are also beyond the scope of this memo. Let it suffice to say, however, that it appears that Whit's concerns will not be fully answered unless this second question is addressed as well.

EPA-administered program presents the "evil" that Whit and others in industry and government fear: citizens groups as the ultimate overseer of the permit process, forever lurking in the background seeking to force new permit terms on the state and the permitted facility long after the immediate participants in the permitting process consider the matter closed. The existence of such power would make a shambles of the so-called "shield" provision announced by EPA and mentioned above. That "shield" provision states that once a final permit is issued, enforcement actions will be based solely on permit terms and will not involve attempts to enforce other terms that RCRA arguably requires but which were not, for whatever reason, included as conditions in a given facility's permit. EPA thinks it has eliminated by regulation the citizen suits' use as such a third overseer, having reduced it to merely an enforcement prod for existing permit terms. EPA sets out the rationale for this position in the following Consolidated Permit preamble section:

> For all programs, the shield provision applies to enforcement actions by EPA or an approved State, as well as to enforcement through citizen suits. EPA recognizes that the RCRA "citizen suit" provision allows private enforcement actions against RCRA permittees without limitation. However, because EPA plans to specify all the regulatory requirements applicable to an individual facility in the permit for that

> facility, as a practical matter there will be nothing beyond the permit conditions for a citizen suit to enforce. Indeed, if a plaintiff in such a suit argued that regulatory requirements outside the conditions of the permit should be applied and enforced, that would probably amount to an improper collateral attack on the conditions of the permit. 45 C.F.R. 33,312. (Emphasis added).

If EPA is correct in the above interpretation, then citizen suits will probably not be a large concern regardless of who runs the program. The Committee should probably satisfy itself, however, that EPA's interpretation is, in fact, a correct one.

V. Conclusions and Recommendations.

Nothing has been said in the first three Committee meetings to shake our original strong recommendation that industry seek a Colordo authorized hazardous waste program. We think that position remains a correct one, in terms of both self-interest and public policy. EPA, by its own admission, lacks the resources and the specialized regional knowledge to run an effective nationwide RCRA program without near unanimous participation on the part of the states. As a result, across the country and in Colorado, we are seeing the almost unprecedented coalition of industry, environmentalists, EPA, and state and local governments all lobbying for the same

result: state-administered RCRA hazardous waste programs. The major stumbling block in such efforts is convincing state legislatures that EPA will not be controlling those state programs like so many puppets. As stated above, we are convinced that the Act and the regulations effectively limit EPA's power in this regard.