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# SUMMARY OF RCRA §3006(f) ISSUES

## INTRODUCTION

RCRA §3006(f) requires States with authorized RCRA programs to provide for the availability of hazardous waste information "in substantially the same manner, and to the same degree" as EPA. Since the legislative history did not indicate explicitly how EPA was to interpret this, the Agency examined the Federal Freedom of Information Act (FOIA) and 40 CFR Part 2. A workgroup was also formed consisting of EPA and State staff, environmental groups, and Congressional staff to develop guidance in interpreting this requirement. The guidance was issued as OSWER Directive 9541-00-1 on August 22, 1986.

The following is a summary of the major issues that have been raised in reference to compliance with RCRA §3006(f). Discussions of representative State cases are included for illustration--a number of these have yet to be finally resolved.

## ISSUE 1: ATTORNEY'S FEES REQUIREMENT

EPA has determined that the attorney's fees requirement in the FOIA must be met by the State in order to satisfy §3006(f). This FOIA requirement provides that "the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed" [5 U.S.C. 552(a)(4)(E)]. In other words, the State must have a provision that allows parties that have been denied access to information the ability to recover the costs of taking the State to court, if the party wins the lawsuit.

The State of Arizona regulations require that the court must find that the custodian of the records acted in bad faith or in an arbitrary or capricious manner before fees are awarded. The Arizona language is more restrictive than the FOIA language--a requester may be prevented from obtaining attorney's fees under Arizona's rule which would otherwise be obtainable under the FOIA requirements. EPA believes that Arizona can not be authorized with this language as the provision may deter aggrieved parties from challenging denials of information requests. Under the State of Rhode Island's statute, parties whose net worth is greater than $250,000 or any entity which employs more than 100 people are precluded from recovering attorney's fees even if they substantially prevail. Rhode Island believes that the number of non-small businesses and non-individuals which this statute would limit is very small. In a Notice of Tentative Determination published in the Federal Register in September 1989, EPA tentatively determined that the Rhode Island provision was not less stringent,

even though the State law places limitations on which entities can seek to recover attorneys' fees. EPA agreed that Rhode Island's limitations do not place an undue burden on the public seeking information from state agencies. However, EPA will take public comment on the decision and issues raised by those comments may be the basis for a decision to deny authorization of Rhode Island's program revision.

In the State of New Jersey, the plaintiff/requestor may recover up to $500 in attorney's fees. The New Jersey's provision is more restrictive than the Federal provision, since there is no limit to the fees that can be awarded under FOIA. The limiting of awards may deter parties from challenging denials of information requests in court and, even if they do prevail, will not allow them to recover all fees. EPA believes that New Jersey cannot be authorized for 3006(f) without eliminating this attorney fee limitation.

**ISSUE 2: THE LIMIT TO RESPOND TO INFORMATION REQUESTS**

Both 40 CFR 2.112 and the §3006(f) Guidance Checklist set a maximum time limit for response to information requests. 40 CFR 2.112 requires that a written determination be issued within ten working days after receipt of a request, with a possible ten-day extension. The OSWER Directive allows a 20-day response period and does not specify that the response must be written.

The State of Arizona specifies no time limit for responses to requests for information. EPA believes that Arizona cannot be authorized without providing a 20-day limit as failure to do so hinders a requester from seeking timely judicial review for failure to respond to a request.

The State of Maryland allows the State 30 calendar days to respond to a request for information. The State believes its requirement is equivalent to EPA's ten working day limit, since an EPA extension of ten days is allowed. To resolve this issue, the State was advised to review its statutory authority and regulations, and revise then as necessary, to ensure equivalency with RCRA §3006(f) and 40 CPR 2.112.

A general question was raised by Region V on the issue of time limits to respond to requests for information. The question concerned whether States whose statutes or regulations do not contain a time limit requirement could agree to it in a Memorandum of Agreement. EPA considered that the 20-day deadline under 40 CPR 2.112 is not a procedural requirement. It is instead a substantive requirement triggering a right to judicial review and must, therefore, be included in statutes or regulations. Subsequent to this determination, Minnesota revised its statute to specify a time limit and then received authorization.

Another question has been raised about whether an interim response within 20 days would satisfy the time limit requirement. EPA's guidance does not require that responses be final; some requests will take longer than 20 days to completely research and therefore warrant an interim reply.

**ISSUE 3: CONFIDENTIAL BUSINESS INFORMATION**

Items 3.1, 3.2, and 3.3. of the §3006(f) checklist deal with Confidential Business Information (CBI). Item 3.1 requires that if a State has CBI regulations, CBI not be defined any more broadly than it is defined in 40 CFR 2.100 through 2.311. Item 3.2 requires that if no claim of CBI is made at the first opportunity by the business that submits the information, the agency will release such information. Item 3.3. requires that the agency notify anyone who requests information within 20 days of his request that his request has been denied, if the agency cannot earlier resolve any claim of CBI.

Washington, D.C.'s requirements have been questioned on all three CBI items of the checklist. Although D.C. allows claims of confidentially, it does not appear that D.C. has an analogue to 40 CFR 2.208, which sets criteria by which a claim for confidentiality can be determined. The determination of confidentiality is made by the D.C. Government. EPA believes it is unclear how the requirements of item 3.1, 3.2, and 3.3 have been met by D.C.'s code, without specific regulations governing procedures and criteria for determining confidentiality. EPA is seeking clarification from D.C. on these requirements.

The State of Florida's rule did not recognize CBI; but instead referred to that which is or is not considered a "trade secret" and did not apply to all records. To resolve this issue, the rule was rewritten to apply to all records.

**ISSUE 4: RESTRICTION TO ACCESS OF INFORMATION**

This issue deals with whether or not a State can restrict who may have access to information under RCRA §3006(f). The State of Virginia code grants access to information to "....citizens of this Commonwealth, representatives of newspapers and magazines with circulation in this Commonwealth, and representatives of radio and television stations broadcasting in and into this Commonwealth." This requirement appears to exclude non-residents and many media representatives. EPA is seeking clarification from the Attorney General.

**ISSUE 5: COPYING FEES**

40 CFR 2.120(d) requires that where a State charges a copying fee, the State be able to consider a fee waiver or reduction for the press or public interest groups for duplicating released information. The State of Florida, however, has a statute that requires that all requesters of information be charged for photocopying. Since the copying fee was minimal (5 cents), EPA agreed to take public comment on whether it placed an undue burden on citizens or public interest groups requesting information from the State. No adverse public comments were received. Consequently, EPA granted §3006(f) final authorization to the State of Florida.