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March 19, 1984

The Honorable Greg Lunn  
Arizona State Senate  
Arizona State Capitol  
Phoenix, Arizona 85007

Re: I84-044 (R84-021)

Dear Senator Lunn:

In your letter of February 8, 1984, you inquire about the authority of the Director of the Department of Health Services ("the Director") to promulgate rules and regulations under the Arizona Hazardous Waste Management Act, A.R.S. § 36-2821, et seq., which are "more stringent or more extensive" than the federal regulations promulgated pursuant to the Resource Conservation and Recovery Act of 1976 as amended ("RCRA"), 42 U.S.C.A. § 6901, et seq. While clearly not mandating or requiring more stringent standards, we believe the language of the pertinent federal and state laws authorizes the Director, if he chooses, to adopt such standards not fully dependent on the dictates of Washington thereby allowing Arizona more authority to meet its own special environmental needs.

RCRA establishes a comprehensive federal program for the treatment, storage and disposal of hazardous wastes. Under Subtitle C of RCRA, a state may qualify to administer its own hazardous waste management program in lieu of the federal program if the state program is "equivalent" to the federal program and "consistent" with both the federal program and other proved state programs. 42 U.S.C.A. § 6926(b).<sup>17</sup> Arizona's Hazardous Waste Management Act ("the Arizona Act") reciprocally requires the Director to establish a state hazardous waste

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1. 42 U.S.C.A. § 6926(b) imposes a third requirement, that the state program provide adequate enforcement of compliance, which is not relevant to the issue here.

program "equivalent to and consistent with" the federal hazardous waste regulations promulgated pursuant to Subtitle C of the federal act. Whether this interlocking statutory framework permits "more stringent or more extensive" state regulations thus requires an analysis of both the federal and state laws.

#### I. Federal Laws

From the federal standpoint, there can be little question that RCRA does not prohibit more stringent regulation by the states. Congress' intent to neither preempt the field of hazardous waste management nor bar more stringent statute regulation is manifest in the federal act itself and is incorporated in the regulations that have been promulgated under that act. RCRA commences with congressional findings which include the statement that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies . . . ." 42 U.S.C.A. § 6901(a)(4). More explicitly, 42 U.S.C.A. § 6929, entitled "Retention of State Authority", states:

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirement less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations . . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

(Emphasis added.) The federal regulations reiterate this Congressional mandate:

Except as provided in § 271.4,<sup>2</sup> nothing in this subpart precludes a State from:

- (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;

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2. Section 271.4 is the "consistency" requirement which is discussed below.

(2) Operating a program with a greater scope of coverage than that required under this subpart. Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.

40 C.F.R § 271.1(i) (1983)

Finally, although RCRA imposes a "consistency" requirement on deviating state programs, 42 U.S.C.A. § 6926(a), both the United States Supreme Court and the federal Environmental Protection Agency ("EPA") have interpreted this requirement narrowly. In City of Philadelphia v. New Jersey, 437 U.S. 617, 620 (1978), the Court held that New Jersey's total ban on the importation of hazardous waste was not inconsistent with RCRA, although the Court ultimately struck down the state law on Commerce Clause grounds. The federal regulations which were adopted after City of Philadelphia<sup>3</sup> approved of the decision and generally incorporated the same narrow Commerce Clause test. 40 C.F.R. § 271.4 (1983) accordingly defines "consistency" as follows:

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

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3. 45 Fed. Reg. 33395 (1980).

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

In short, we conclude that, subject to the above narrow consistency requirement, federal law does not prohibit more stringent or extensive hazardous waste regulations by Arizona.

## II. State Laws

The determination of whether Arizona law permits more stringent regulations is a closer question. In resolving this question affirmatively, we rely on several independent and well settled principles of statutory construction.

First, the legislative history of the Arizona Act provides strong evidence that the Legislature did not intend to narrowly prescribe the Director's regulatory powers. Rather, the record establishes that the Legislature expressly rejected statutory language which would have had this effect. As originally introduced, House Bill 2326 stated:

[I]t is the intent of the legislature that the director of the department of health services shall have those powers necessary to adopt rules and regulations equivalent to, but no more stringent than, the federal hazardous waste program . . . .

H.B. 2326, 36th Leg., 1st Reg. Sess. (1983) (emphasis added)  
The original bill further provided for a new § 36-2822 to read:

A. The director of [The Department of Health Services] shall promulgate rules and regulations to establish a hazardous waste management program equivalent to, but no more stringent than, the federal hazardous waste program promulgated pursuant to subtitle C of the federal act . . . .

Id. (emphasis added).

Although this language was initially approved by the House of Representatives, it was rejected by the Senate. Instead, the Senate amended the House Bill to expressly enlarge the powers of the Director beyond the scope of federal

regulations.<sup>1/</sup> The Senate then struck all references to "but no more stringent than". While retaining the phrase "equivalent to", the Senate substituted "consistent with" for the deleted language. The Senate amendments were approved by the House and the bill as amended was signed into law by the Governor on April 29, 1983. Ch. 310, 1982 Ariz. Sess. Laws, 1st Reg. Sess. (Codified at A.R.S. §§ 36-2821 et seq.)

The Legislature's express refusal to prohibit more stringent state regulation cannot be ignored under the rules of statutory construction which govern our analysis. As the Arizona Supreme Court stated in State Board of Barber Examiners v. Walker, 67 Ariz. 156, 164, 192 P.2d 723 (1948), "'Omission on final enactment of a clause of a bill originally introduced is strong evidence that [the] Legislature did not intend [that the] omitted matter should be effective . . .'" (quoting Mayo v. American Agricultural Chemical Co., 101 Fla. 279, 133 So. 885 (1931)); accord, Roberts v. Spray, 71 Ariz. 60, 66, 223 P.2d 808 (1950) (refusing to construe a statute in a way that would give effect to language deleted from the bill on final passage); State v. Barnard, 126 Ariz. 110, 612 P.2d 1073 (App. 1980).

In short, an interpretation of the Arizona Act which would prohibit more stringent state regulation would require us to resurrect the precise language considered and rejected by the Legislature.<sup>2/</sup>

Second, we note that the language which Arizona did adopt to define the Director's authority, "equivalent to and consistent with" is directly derived from the federal statute.

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4. For instance, see the provisions relating to the identification of hazardous wastes and small quantity generators, now set forth in A.R.S. § 36-2822.A and D, discussed infra.

5. Additional legislative history, moreover, suggests that the deleted language was not insignificant. An earlier bill, passed by the 35th Legislature and containing the prohibition that hazardous waste regulations "not be more stringent than regulations adopted by the federal government . . . nor regulate persons, activities or substances not regulated under or covered by Subtitle C of the Federal Act", was vetoed by the Governor. H.B. 2185, 35th Leg., 1st Reg. Sess. (1981). The veto message expressly objected to language in the bill which would have restricted state regulatory authority:

Accordingly, it is appropriate to turn to the federal law, both as written and as interpreted, to ascertain the meaning of these terms. In referring to federal law for guidance, we follow the clear mandate of Uhlmann v. Wren, 97 Ariz. 366, 379, 401 P.2d 113 (1965) in which the Arizona Supreme Court observed in a highly parallel situation:

From this historical survey it becomes apparent that the Federal and State legislation are part of a comprehensive scheme designed to effectuate the reclamation policies of the State. To understand how these policies can best be made effective, it is necessary to examine the purpose of the legislation in enacting the respective statutes. When state legislation is enacted to take advantage of federal legislation, this Court will refer to congressional legislative history to aid it in ascertaining the legislative intent.

(Emphasis added.) Accord, Arizona Civil Rights Div. v. Olson, 132 Ariz. 20, 643 P.2d 723 (App. 1982); 2A Sand, Sutherland Statutes and Statutory Construction (4th ed.), § 51.06.

At the time the Arizona Legislature was debating passage of the Arizona Act, the terms "equivalent" and "consistent" had already acquired clear, well publicized meanings under RCRA. Nearly three years earlier, in promulgating the first federal regulations governing state programs, the EPA extensively analyzed the terms. See 45 Fed. Reg. at 33377, 33381, 33385, 33395-96 (1980). The agency's

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5. (Cont'd)

House Bill 2185 would prohibit the Department of Health Services from adopting rules relating to air pollution, water pollution, and waste disposal which are 'more restrictive' than those adopted by the federal government. Even if the obvious difficulties in measuring so ephemeral a standard as 'restrictive' are put to one side, the bill represents an unacceptable approach to the proper role of a state in our federal system."

1981 Ariz. Sess. Laws, Veto messages, 1259-1260.

definition of "consistency", now set forth in 40 C.F.R. § 271.4 (1983), has been previously quoted. "Equivalent" was interpreted in the EPA commentary as meaning "at least as stringent". See, e.g., 45 Fed. Reg. at 33377, 33381, 33385, 33395-96, 33466 (1980). In arriving at this interpretation, the agency considered and rejected interpretations which would have required state programs to be identical or of equal, but no greater, force.<sup>6</sup> 40 C.F.R. § 271.1(i) (1983), previously quoted, incorporates the agency's interpretation of "equivalent" as a minimum standard. See also note accompanying 40 C.F.R. § 271.14 (1983). Indeed, this interpretation is fully supported by the language of the RCRA itself,<sup>2</sup> as well as its legislative history.<sup>3</sup>

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6. See, e.g., 45 Fed. Reg. at 33385 (1980), which indicates that the EPA reported that the issue generated considerable comment, with industry and the states expressing opposing viewpoints.

7. Since 42 U.S.C.A. § 6929 prohibits a state from imposing hazardous waste regulations which are "less stringent", the inference is that "equivalent" as used in § 6926(b) means "no less stringent", as opposed to identical.

8. House Report No. 94-1491, which outlines the federal law as it was ultimately enacted, establishes "equivalent" as a minimum standard:

Therefore, a state retains the primary authority to implement its hazardous waste program so long as such program remains equivalent to the federal minimum standards. If the program does not remain equivalent to the federal minimum standards then the Administrator is authorized to implement the hazardous waste provision of this Act in each state.

H.Rep. 94-1491, 94th Cong., reprinted in 1976 U.S. Code Cong. & Admn. News 6238, 6269 (emphasis added). Indeed, virtually every reference to "equivalent" in this report occurs in conjunction with "minimum standards". Id. at 6244, 6267, 6268, 6269.

In short, since the Arizona Act was enacted with specific reference to the RCRA and the Legislature chose the precise terminology used in RCRA, we must presume that the Legislature intended to adopt the federal interpretations as well. See Lever Bros. v. Erbe, 87 N.W.2d 469, 475 (Iowa 1958) (where state law was obviously copied from federal law, "[t]he presumption would be that our legislature was cognizant of the federal regulations interpreting the act and intended that our definition should have a similar meaning.") See also 82 C.J.S. Statutes § 371 (1959) (citing cases). Thus, Arizona's "equivalent to and consistent with" language simply translates into a mandate to create a state hazardous waste program at least as stringent as, and not impermissibly in conflict with, the federal regulations.

Third, provisions in the Arizona Act itself establish that the Legislature did not intend to narrowly restrict the state program to federal levels. For example, Subsection A of § 36-2822 assumes that the Director can enlarge the list of hazardous wastes and Subsection D expressly empowers the Director to require additional reports of small quantity generators. Neither provision is consonant with an interpretation of "equivalent to and consistent with" which would be restricted to federal levels or scope.

Fourth, it is a cardinal rule of statutory construction that the legislature "is presumed to express its meaning in as clear a manner as possible". Mendelsohn v. Superior Court, 76 Ariz. 163, 169, 261 P.2d 983 (1953). In instances where the legislature desired to restrict state regulation to federal levels, it has expressed that intent clearly. For example, the Arizona Air Pollution Control Act states that Arizona's ambient air quality standards "shall not be more restrictive than that prescribed by federal law". A.R.S. § 36-1707.A. The Arizona Water Pollution Control Act states that the Director's authority to adopt rules and regulations "shall not exceed that necessary to obtain approval, by the administrator, of this state's permit program." A.R.S. § 36-1859.A. The Legislature's failure to adopt similar language and, indeed, its express rejection of such language in the Arizona Act, leads to the inescapable conclusion that it did not intend to narrowly circumscribe the Director's powers under this legislation.

In construing the scope of the Arizona Act, we are mindful of the rule that statutes enacted for the protection of the public health and welfare are to be liberally interpreted to effectuate their objectives. State v. Scanner Contracting Co., 109 Ariz. 522, 514 P.2d 443 (1973) (air pollution

The Honorable Greg Lunn

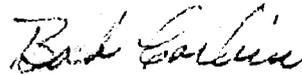
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regulation); Longbridge Investment Co. v. Moore, 23 Ariz.App. 353, 533 P.2d 564 (1975) (a delegation of rulemaking power should be liberally construed in matters affecting the public health and welfare). The Arizona Act was enacted for the express purpose of enabling the state to substitute a state program for the federal program. Ch. 310, § 1, 1983 Ariz. Sess. Laws, 1st Reg. Sess. It is reasonable to conclude, therefore, that this very objective contemplates deviation from the federal regulations, both in terms of stringency and scope. A narrow interpretation of the statute and, specifically, one which would preclude regulations adopted to meet Arizona's own geographical and local needs, would defeat this objective.

In conclusion, all of the foregoing considerations lead to our opinion that the Director may, subject to a narrow federal consistency requirement, promulgate state hazardous waste regulations which are more stringent or more extensive than the federal regulations.

Sincerely,



BOB CORBIN  
Attorney General

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