



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

September 19, 1986

ARCH A. MOORE, JR.
Governor

RONALD R. POTESTA
Director

MICHAEL A. FOTOS
Deputy Director

NOTICE OF PUBLIC HEARING
OR COMMENT PERIOD ON A PROPOSED RULE
COMMENT PERIOD

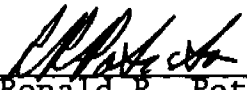
AGENCY: West Virginia Department of Natural Resources
RULE TYPE: Procedural and Interpretive
RULE TITLE: Hazardous Waste Emergency Response Fund Regulations

A COMMENT PERIOD ON THE ABOVE PROPOSED RULE HAS BEEN SCHEDULED
AND WILL END ON FRIDAY, OCTOBER 24, 1986 AT 5:00 P.M.

WRITTEN COMMENTS ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Department of Natural Resources, Room 842
1800 Washington Street East, Charleston, WV 25305
Attention: Mr. Ronald A. Shipley

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THE PROPOSED RULE.



Ronald R. Potesta
Director



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

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J. R. POTESTA, JR.
SPECIAL ASSISTANT TO THE DIRECTOR

ARCH A. MOORE, JR.
Governor

September 19, 1986

RONALD R. POTESTA
Director

MICHAEL A. FOTOS
Deputy Director

The Honorable Ken Hechler
Secretary of State
Capitol Complex, Suite 157-K
Charleston, West Virginia 25305

Re: Filing of Proposed Rules (Hazardous
Waste Emergency Response Fund Regula-
tions, Series 20A and 20B), Notice of
Public Hearing, and Notice of Comment
Period by the Department of Natural
Resources

Dear Mr. Hechler:

Enclosed please find for your filing a copy of proposed
procedural and interpretive rules of the Department of
Natural Resources, a Notice of Public Hearing, and a Notice
of Comment Period for the proposed rules.

If you have any questions, please contact Mr. Ronald A.
Shipley, Special Assistant to the Director, at 348-2761.

Sincerely,

Ronald R. Potesta
Director

RRP/jhb

Enclosures

FISCAL NOTE FOR PROPOSED RULES

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Rule Title: Hazardous Waste Emergency Response Fund Regulations

Type of Rule: Legislative X Interpretive X Procedural

Agency: Department of Natural Resources

Address: 1800 Washington Street East, Charleston, West Virginia 25305

| 1. Effect of Proposed Rule (Estimated Total Cost) | Increase \$ | ANNUAL | | Current \$ | FISCAL YEAR | |
|--|----------------|----------------|--|---------------|-------------|------------------|
| | | Decrease \$ | | | Next \$ | Thereafter \$ |
| Personal Services | \$3-4,000 | | | 0 | \$3-4,000 | \$3-4,000 |
| Current Expense | | | | | | |
| Repairs and Alterations | | | | | | |
| Equipment | | | | | | |
| Other | | | | | | |

2. Explanation of Above Estimates:

The above estimates reflect the administrative cost of issuing an annual fee schedule and processing collected fees.

3. Objectives of These Rules:

The proposed rules implement the provisions of Chapter 20, Article 5G of the West Virginia Code related to the collection of hazardous waste generator fees.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government:

The proposed rules provide procedures for the collection of up to \$500,000 annually from the generators of hazardous wastes for the Hazardous Waste Emergency Response Fund. An estimated \$3-4,000 per year will be required for program administration.

B. Economic Impact on Political Subdivisions; Specific Industries;
Specific Groups of Citizens:

The West Virginia chemical industry will be impacted by a maximum annual collection of \$500,000 from generators of hazardous wastes as required by statute and a maximum of \$20,000 per year per generator for the completion of measurement plans required by the proposed rules.

C. Economic Impact on Citizens/Public at Large:

The proposed rules may produce an increase in costs to consumers of goods produced by generators of hazardous wastes.

Date: September 19, 1986



Director

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OFFICE OF THE
SECRETARY OF STATE

PREAMBLE TO HAZARDOUS WASTE
EMERGENCY RESPONSE FUND REGULATIONS

PROGRAM: Hazardous Waste Emergency Response Fund

REGULATIONS: Hazardous Waste Emergency Response Fund Regulations,
Series 20A (Procedural) and 20B (Interpretive)

AUTHORITY: West Virginia Code, Chapter 20, Article 5G, Section 5(d)

ACTION: Proposed Rulemaking

TOPIC: Procedural and Interpretive Regulations on Fee Assessment

SUMMARY: The Director is proposing two sets of regulations concerning the fee assessment program under the Hazardous Waste Emergency Response Fund (Chapter 20, Article 5G). The first set of regulations (Series 20A) contains procedures for reporting the amount of waste generated and subject to fee (developing a hazardous waste measurement plan); the reporting of 1984 and 1985 hazardous waste quantities; and the procedures for clarifying, correcting, or providing additional information to supplement information received by the Department. In addition, procedures for separating the measurement of hazardous waste from the measurement of nonhazardous constituents are set forth. Finally, this series also sets forth the procedure for disseminating the fee schedule, the procedure for paying assessed fees, and the method used for reconsideration of fee amounts.

The second set of regulations (Series 20B) contains interpretations of the provisions of Article 5G for such issues as the establishment of payment schedules, the accrual of interest, and the categories of hazardous waste not subject to fee assessment.

DATES: A public hearing on these regulations will be held October 21, 1986 at 3:00 p.m. in the Director's Conference Room 674, 1800 Washington Street, East, Charleston, West Virginia 25305. Comments will be received until the close of business on October 24, 1986.

CONTACT: For further information contact Mr. Ron Shipley, Special Assistant to the Director, Director's Office of Regulatory Affairs, Room 842, 1800 Washington Street East, Charleston, West Virginia 25305, phone (304) 348-2761.

SUPPLEMENTARY INFORMATION

I. Background and History

These two series are designed to replace former regulations governing the same subject originally promulgated as Chapter 20, Article 5G, Series XX. The Series XX regulations were promulgated on an emergency basis on May 9, 1985; identical regulations were proposed and filed as a procedural rule on that date. The comment period ended June 26, 1985 and a public hearing was held on that date.

The Department received comments from four groups or companies. A principal comment was that the July 1, 1985 deadline for the submission of hazardous waste management plans did not provide adequate time in which to compile the plans. Accordingly, the Department amended its emergency rules on July 8, 1985 to require generators to file the hazardous waste measurement plan by October 1, 1985.

The Department intended to proceed towards approval of the proposed procedural rule. The Department delayed responding to comments and finalizing the procedural rule because it wanted to evaluate the submitted measurement plans in light of the comments received. Unfortunately, due to a lack of resources, the Department was unable to hire an individual to examine the measurement plans. The emergency rule expired because the Department failed to approve a rule and submit it to the Legislative Rulemaking Review Committee. The procedural rule had to be withdrawn on December 26, 1985 because the Department did not file a notice of adoption within six months of the close of the public comment period.

II. Today's Rulemaking

Today's proposed rulemaking is not identical to the emergency rule implemented on May 9, 1985 or the procedural rule proposed on that date. Instead, the Department has evaluated the comments received and modified the previously promulgated rule based upon those comments.

The Department is providing the following table as a guide to the revisions made in the Series XX regulations of May 9, 1985 based upon comments received by June 26, 1985. Unlike the May 9 rulemaking proposal, the Secretary of State's Office no longer accepts rules which combine procedural and interpretive elements. Thus, we have split apart the formerly proposed procedural rule into both a procedural and an interpretive rule.

Comments on Series XX
Hazardous Waste Emergency Response Fund Regulations

| Section | Summary of Comments | DNR's Position |
|--|---|--|
| Definition (now 2.4, Series 20A) | Should redefine "hazardous constituents" to obviate the possibility of DNR requiring the generator to analyze for hazardous constituents listed in Appendix VIII of 5E regs. "Hazardous constituent" should be defined as a hazardous waste listed or identified in section 3 of 5E regs. | This has been done to avoid confusion. |
| Definition (now 2.6, Series 20A) | Definition of "non-hazardous constituents" said that water when mixed with a hazardous waste "may be" a nonhazardous constituent. Water defined as nonhazardous constituent under section 5(d) of Article 5G. Change the language in the definition from "maybe" to "is." | The recommended change has been adopted. |
| Definition (now 2.7, Series 20A) | Use of the term "Point of Generation" should be consistent with definition in sections 3.1.2(b) and 3.1.3(c) of 5E regs. | The recommended change has been adopted. |
| 4.01 (now 4.1, Series 20A) | Hazardous Waste Measurement Plan: July deadline for submitting measurement plans much too short. | This deadline was extended to 10/1/85. Most plans have been received. Letter sent to those who failed to submit. |
| 4.03 (now 5.3.3, Series 20A) | Overpayment: If excess fee is over \$200, the generator should be allowed the choice of taking a credit to next fee assessment or receiving a refund. | The recommended change has been adopted. |

| Section | Summary of Comments | DNR's Position |
|----------------------------------|--|--|
| 4.04 (now 4.3, Series 20A) | Submission of the Sampling Analysis: Commenters felt the requirement to submit sampling analysis results done for measurements with the annual report was not reasonable. Believed that the availability of this information for inspection by DNR should suffice. | The Department has adopted this recommendation but a brief description of the methods used to determine results must be submitted. |
| 4.04 (now 4.6, Series 20A) | Measurement Plans: Commenters felt plans required and system of approval too complicated. They objected to a formal process of plan approval. Felt the regs should provide a mechanism for modifying submitted plans. Supported updating of the plan once a year if changes in the processes have occurred. | The Department does not consider the regs complex. The Director should have the authority to require alternate plans if review of the plan shows problem. Language of the regulations modified to reflect "review" instead of formal approval. Special updating in case of a change in plan has been incorporated into the regs. |
| 4.04 (now 4.6, Series 20A) | Points of Measurement: Commenters did not believe that the point of generation was best place to measure waste; for a facility such as a R&D laboratory, this method was very cumbersome. Felt generator should have flexibility in determining the points of measurement without having to submit a detailed justification. | The regs did allow for measurements to be taken at other points if justification was submitted. The Department does not believe submission of a justification is a burden on the generator. |

| Section | Summary of Comments | DNR's Position |
|------------------------------------|--|--|
| 4.05 (now 4.7, Series 20A) | Separation of Hazardous Waste and Nonhazardous Constituents: Commenter felt this provision would cause a lot of confusion. Would be preferable to submit detailed justification for exclusion of nonhazardous constituent. Should change language to "determined by chemical analysis or computed from knowledge..." | Justification alone will not suffice. Certain wastes have to be measured before mixing. The change in language as suggested has been made. |
| 5.02 (now 5.2.2, Series 20A) | Method of Payment: The fee payment should be accepted in the form of personal or company checks. | The recommended change has been adopted. |
| 6.01 (now 6.2.1, Series 20B) | Use of the Annual Report: Commenters objected to language which indicated that a failure to comply with submission of annual report will be deemed a failure to comply with section 6.4.2 of 5E regs. Failure to submit 5G report must be dealt with under 5G only. Definition of annual report must make reference to section 6.4.2 of 5E regs. | The recommended change has been adopted. |

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OFFICE OF THE
SECRETARY OF STATE

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

CHAPTER 20-5G

1986

SERIES 20B

HAZARDOUS WASTE EMERGENCY RESPONSE FUND REGULATIONS

INTERPRETIVE RULES

REGULATIONS CONCERNING FEE ASSESSMENT

West Virginia Administrative Regulations
Chapter 20-5G
Series 20B
Hazardous Waste Emergency Response Fund Regulations
Interpretive Rules
Regulations Concerning Fee Assessment

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Section 1. General

1.1 Scope and Purpose

The purpose of these regulations is to provide interpretations for implementing the powers, duties, and responsibilities vested in the Director pursuant to Chapter 20, Article 5G of the West Virginia Code as they relate to the assessment of hazardous waste generator fees.

1.2 Authority

These regulations are promulgated under authority of the West Virginia Code, Chapter 20, Article 5G, Section 5(d) and Chapter 29A, Article 3.

1.3 Applicability

The regulations in this series provide interpretations for generators of hazardous waste. The Hazardous Waste Emergency Response Fund requires generators to pay a fee based upon the amount of hazardous waste generated as reported to the Director in the generator's most recent annual report submitted pursuant to the Hazardous Waste Management Act.

1.4 Filing Date

These regulations were filed in the Office of Secretary of State on _____.

1.5 Effective Date

These regulations shall become effective 30 days after adoption.

1.6 Incorporation By Reference

Whenever either federal statutes or regulations or state statutes or regulations are incorporated by reference into this series, the reference is to the statute or regulation in effect on the date of enactment of the legislation authorizing these regulations.

1.7 Promulgation History Legislative rules on this subject were originally promulgated on May 9, 1985 on an emergency basis. Such rules expired on November 9, 1985. The current interpretive rule was promulgated on _____.

Section 2. Definitions

Unless the context dictates otherwise, the following words and their meanings as used in these regulations are defined below.

2.1 "Annual Report" means that report required to be submitted to the Chief pursuant to the annual reporting requirements of the DNR Hazardous Waste Management Regulations, Section 6.4.2.

2.2 "Chief" means the Chief of the Division of Water Resources of the Department of Natural Resources.

2.3 "Generator" means any person, corporation, partnership, association, or other legal entity, by site location, whose act or process produces hazardous waste as identified or listed by the Director in regulations promulgated pursuant to Section 6 of Chapter 20, Article 5E of the West Virginia Code in an amount greater than twelve thousand kilograms per year.

2.4 "HWERF" or "the Act" means the Hazardous Waste Emergency Response Fund, Chapter 20, Article 5G of the West Virginia Code.

2.5 "HWMA" means the Hazardous Waste Management Act, Chapter 20, Article 5E of the West Virginia Code.

2.6 "HWMR" or "DNR Hazardous Waste Management Regulations" means the West Virginia Administrative Regulations, Series 15, promulgated pursuant to Chapter 20, Article 5E of the West Virginia Code.

2.7 All other terms shall have the meaning as prescribed in the DNR Hazardous Waste Management Regulations and Chapter 20, Article 5G of the West Virginia Code.

Section 3. List of Provisions and Issues Interpreted

3.1 Hazardous Wastes Not Subject to Fee Assessment under Chapter 20-5G-4(a) of the West Virginia Code (Section 4).

3.1.1 Exclusion of discharges to the waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or state law (Section 4.2.1).

3.1.2 Exclusion of hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks (Section 4.2.2).

3.2 Interest Accrual and Surcharge Imposition Under Chapter 20-5G-4(d) of the West Virginia Code (Section 5).

3.2.1 Ability to Establish a Payment Schedule (Section 5.2.1).

3.2.2 Interest Accrual (Section 5.2.2).

3.2.3 Surcharge Imposition (Section 5.2.3).

3.3 Enforcement under Chapter 20-5G-5(f) of the West Virginia Code (Section 6).

3.3.1 Failure to Report (Section 6.2.1).

3.3.2 Failure to Remit Fee (Section 6.2.2).

Section 4. Hazardous Wastes Not Subject to Fee Assessment

4.1 Provision Interpreted: W. Va. Code §20-5G-4(a)

HWERF establishes a fee schedule designed to encourage environmentally sound treatment and disposal practices. Accordingly, the Act establishes a graduated fee assessment whereby the generator pays less per ton of generated hazardous waste if the selected treatment or disposal practice conforms to the Act's preferred practices. These practices and their associated fee levels are as follows: full assessment for generated hazardous waste treated or disposed off-site; ninety percent of the full assessment for generated hazardous waste treated or disposed on-site; seventy-five percent of the full assessment for generated hazardous waste treated off-site so that such waste is rendered nonhazardous; and twenty-five percent of the full assessment for generated hazardous waste treated on-site so that such waste is rendered nonhazardous.

In addition to graduated fee assessments, HWERF exempts from fee assessment certain types of hazardous waste or hazardous waste which is handled in a specific manner. The exclusions are a part of the Act's goal to not only provide the State with funds for emergency response but to also provide an incentive to the generator to utilize the most environmentally sound handling practice. Accordingly, the Act enumerates categories of hazardous waste which are excluded from fee assessment.

The first group includes those wastes listed in W. Va. Code §20-5E-6(a)(2)(A) and enumerated in Sections 4.1.1 - 4.1.4 below. These wastes are currently excluded from regulation as hazardous waste under HWMA until the completion of studies by the United States Environmental Protection Agency that are required by the federal Solid Waste Disposal Act. The second group encompasses either hazardous waste which is not regulated as a hazardous waste under HWMA or hazardous waste which is handled in a manner which HWERF is designed to encourage. These are enumerated in Sections 4.1.5 - 4.1.9 below.

For the purpose of determining and reporting the amount of hazardous waste generated under the Hazardous Waste Emergency Response Fund, the following wastes shall not be included:

- 4.1.1 Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.
- 4.1.2 Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.
- 4.1.3 Cement kiln dust waste.
- 4.1.4 Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy.
- 4.1.5 Sludge from any publicly owned treatment works in the State.
- 4.1.6 Any discharge to waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or state law. (Note: This exclusion applies only when the point of generation is the actual point of discharge specified for such valid permit.)
- 4.1.7 Any hazardous wastes which are beneficially used or reused or legitimately recycled or reclaimed.
- 4.1.8 Hazardous wastes which are created or retrieved pursuant to an emergency or remedial action.
- 4.1.9 Hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks.

4.2 Issues Interpreted

4.2.1 Exclusion of discharges to the waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or state law (W. Va. Code §20-5G-4(a), Proviso 3)

This proviso is designed to exempt from fee assessment only the discharge to waters of the State of a treated hazardous waste when the point of generation is the actual point of discharge specified in a valid water pollution control permit. Hazardous waste which is sent to a wastewater treatment facility for treatment is included in the fee assessment calculation.

4.2.2 Exclusion of hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks (W. Va. Code §20-5G-4(a), Proviso 6)

This proviso is designed to eliminate from inclusion in the fee assessment those hazardous wastes which are not subject to regulation under HWMA because they are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks. Neutralization which occurs in a pipe transporting a corrosive waste off-site does not satisfy the requirements of this proviso. A pipe is designed and used for transporting material from one point to another and not for the accumulation and treatment of a hazardous waste. A mixing of wastes in a pipe does not constitute a planned neutralization of corrosive wastes and may be incomplete.

Section 5. Interest Accrual and Surcharge Imposition

5.1 Provision Interpreted: W. Va. Code §20-5G-4(d)

Section 4(d) of HWERF contains specific provisions concerning accrual of interest and imposition of surcharges in cases where the payment of an assessed fee is overdue. If a fee assessed upon a generator has not been paid in full by the date prescribed under the Act, interest accrues upon the unpaid amount until full payment is made. If a generator fails to pay the fee assessment in full within 75 days of the prescribed date, that generator must also pay a surcharge equivalent to the total amount of the fee assessed.

5.2 Issues Interpreted

5.2.1 Ability to Establish a Payment Schedule

The Department believes that the establishment of payment schedules is possible under the provisions of Section 4(d) of the Act. Payments are due on the 175th day after the publication of the annual fee schedule by the Department. A generator unable to make full payment by this date may request, in writing, that a payment schedule be approved by the Department which provides for full payment of the fee and all interest accrued within a specified period of time. The Department will not allow such schedules to exceed 180 days beyond the original due date. An approved payment schedule will be an agreement signed by the Director and the generator and does not constitute a waiver from the imposition of a surcharge as required by the Act and interpreted in Section 5.2.3 of these regulations.

5.2.2 Interest Accrual

Under Section 4(d) of HWERF, if a fee assessed upon a generator has not been paid by the prescribed date, "interest shall accrue upon the unpaid amount at the rate of ten percent per annum from the date due until payment is actually made." The Department interprets this provision to mean that interest on unpaid fees, or portions thereof, should accrue starting the day after the payment due date and continue until the full fee assessment, excluding any surcharge, is paid. Interest will be calculated only on the fee assessed, excluding any surcharge or accrued interest. Interest will accrue monthly as simple interest at a rate of 0.8333...% on the unpaid balance of the fee. This monthly rate is equivalent to the ten percent (10%) per annum rate imposed under the Act.

Interest accrual is required by law to be applied to any unpaid balance of the fee assessed and may not be waived by the Department due to a "good faith" partial payment or any other reason. Partial payments will be applied to the retirement of the fee principal first to minimize the amount of interest accrued. Once the fee amount has been paid, interest accrual will cease.

5.2.3 Surcharge Imposition

Section 4(d) of the Act provides for the automatic imposition of a surcharge equivalent to the total amount of the fee assessed if that fee is not paid within 75 days of the prescribed due date. The Department believes that this provision does not provide the Department with the discretion to waive or extend surcharge imposition. The surcharge is intended to be an incentive for timely fee payment as well as a penalty for late payment.

Section 6. Enforcement

6.1 Provision Interpreted: W.Va. Code §20-5G-5(f)

Under Section 5(f) of HWERF, the Director is authorized to institute a civil action against any generator for failure to pay any fee assessed pursuant to the Act. Such action against a generator may be brought in either Kanawha County or the county in which the generator does business. The generator must pay all attorney fees and costs of such action if the Director prevails.

6.2 Issues Interpreted

6.2.1 Failure to Report

Failure by the generator to accurately report information as required in Section 4.2 of the Hazardous Waste Emergency Response Fund Regulations, Procedural Rules, Series 20A, in the manner prescribed in that section, shall result in fee assessment for the total generated amount of hazardous waste reported elsewhere in the annual report

pursuant to Section 6.4.2 of the DNR Hazardous Waste Management Regulations at the full rate of assessment.

6.2.2 Failure to Remit Fee

If an assessed fee is not paid by the date prescribed pursuant to Section 5.2 of the Hazardous Waste Emergency Response Fund Regulations, Procedural Rules, Series 20A, interest shall accrue as interpreted in Section 5.2.2 of these regulations. Such interest will be deposited in the Fund.

If any generator subject to fee assessment pursuant to these regulations fails to pay the fee imposed within seventy-five (75) days of the prescribed payment remittance date, there shall be imposed, in addition to the fee and interest determined to be owed, a surcharge equivalent to the total amount of the fee assessed, which shall also be collected and deposited in the Fund.