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(Plus all the volunteer
help we can get)

August 28, 2000

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

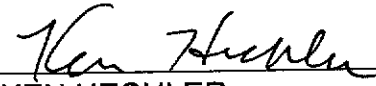
AGENCY: Division of Highways

RULE: Amendments, Series 7, Transportation of Hazardous Wastes Upon the Roads and Highways

DATE FILED AS AN EMERGENCY RULE: July 17, 2000

DECISION NO. 10-00

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **disapproved**. A copy of the complete decision with required findings is available from this office.


KÉN HECHLER
Secretary of State

OFFICE OF THE
SECRETARY OF STATE

AUG 28 2 35 PM '00

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EMERGENCY RULE DECISION
(ERD 10-00)

AGENCY: Division of Highways
RULE: Amendments, Series 7, Transportation of Hazardous Wastes Upon the Roads and Highways
FILED AS AN EMERGENCY RULE: July 17, 2000

- par. 1 The Division of Highways (DOH) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The DOH filed this emergency rule with supporting documents with the Secretary of State July 17, 2000 and with the LRMRC July 17, 2000.

par. 7 It is the determination of the Secretary of State that the DOH has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §21-18-7(a) reads:

The commissioner of the division of highways, in consultation with the director, and avoiding inconsistencies with and avoiding duplication to the maximum extent practicable with legislative rules required to be promulgated pursuant to this article by the director or any other rule-making authority, and in accordance with the provisions of §29A-1-1 et seq. of this code, shall promulgate, as necessary, legislative rules governing the transportation of hazardous wastes by vehicle upon the roads and highways of this state. Such legislative rules shall be consistent with applicable rules issued by the federal department of transportation and consistent with this article: Provided, That such legislative rules apply to the interstate transportation of hazardous waste within the boundaries of this state, as well as the intrastate transportation of such waste.

par. 9 It is the determination of the Secretary of State that the DOH has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the DOH are as follows:

This filing is necessary to comply with time limitations established by changes to federal statute 40 CFR and 49 CFR, effective July 1, 1999. Subsequently, 33CSR20, Hazardous Waste Management Rule was changed, effective July 1, 2000.

This rule, as a part of the State's Hazardous Waste Management Program, must reference current versions of the hazardous waste management statutes and rules to ensure compliance with program requirements and to ensure authorization of the State's program by the U.S. Environmental Protection Agency. Non-compliance will jeopardize full federal funding of the program, which could impact the public health and safety.

- par. 13 It is the determination of the Secretary of State that this proposal does not qualify as an emergency under the definition of an emergency as defined in §29A-3-15(f).
- par. 14 Although DOH has documented the need to change the rule to comply with federal regulations, it failed to show any emergency exists.
- par. 15 This decision shall be cited as Emergency Rule Decision 10-00 or ERD 10-00 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Highways, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
Secretary of State

Entered _____

Aug 28 2 36 PM '00
OFFICE OF THE SECRETARY OF STATE

FILED

West Virginia: RCRA Regulation of Transportation of Hazardous Waste by Highway

RCRA Regulatory Citation	Corresponding State Regulatory Citation	Comments
EQ 1/		
MS		
LS		
BIS		
NIS		
CL		
UK		
INC		

General Comments:

- A. The Division of Highways (DOH) regulates the transportation of hazardous waste on West Virginia's roads and highways. The DOH regulations at 157 CSR 7 require compliance with the Division of Environmental Protection's hazardous waste regulations for transporters, 40 CFR Parts 262 and 263, 49 CFR Part 171, as well as various other Federal DOT regulations. As indicated in the ORC review of West Virginia's authorization package, the language at § 157-7-5.1 does not clearly indicate that Federal regulations are actually incorporated into the DOH regulations. The Office of Legal Services should certify in the OLS Statement that 157 CSR 7 does in fact incorporate by reference 40 CFR Parts 262 and 263 and 49 CFR Part 171 and indicate the effective date of the incorporation by reference. Otherwise, DOH may want to revise the provision at § 157-7-5.1 to specifically "incorporate by reference" the listed statutes and regulations.

- B. West Virginia is not seeking authorization for Revision Checklist 31 which has affected both 40 CFR Parts 262 and 263. The principal change made by that checklist is the addition of Subparts E and F of 40 CFR Part 262 related to the importation/exportation of hazardous waste. The DOH regulations incorporate by reference Parts 262 and 263 at § 157-7-5.1 as well as the DEP hazardous waste regulations. DEP, however, excludes Subparts E and F from its incorporation by reference of 40 CFR Part 262 at § 33-20-5. DOH may want to use a similar approach in its own regulations so as to be consistent with the DEP hazardous waste regulations. Otherwise the State is incorporating two different versions of 40 CFR Part 262. DOH can accomplish this by adding paragraphs which are equivalent to those at § 33-20-5.3 and § 33-20-5.4 in the OWM regulations.

- C. The Federal code contains non-delegable provisions in 40 CFR Parts 262 and 263 related to the importation/exportation of hazardous waste as introduced by Revision Checklist 152. Although the State may adopt equivalent requirements, the enforcement of import/export requirements remains a Federal responsibility. States may not receive authorization for Revision Checklist 152 as indicated in the guidance on that checklist and in the Revision Checklist 152 Summary.

West Virginia: RCRA Regulation of Transportation of Hazardous Waste by Highway

RCRA Regulatory Citation	Corresponding State Regulatory Citation	Comments
		EQ 1/ MS LS BIS NIS CL UK INC

D. Under the Federal program, any person may petition the Administrator to modify or revoke any provision in the hazardous waste regulations. At 33-20-2.1, the DEP hazardous waste regulations incorporate by reference the rulemaking petition provision of § 260.20. However, because transportation by highway is regulated by DOH it remains unclear whether a person may petition DOH to modify or revoke any provision in the DOH regulations. If not, the State may be more stringent.

Specific Comments:

1. 263.10(a) 157-7-1.1 INC
This provision does not reflect changes made to the DEP regulations. The parenthetical at the end of this provision should be revised to reflect these changes. It is suggested that the sentence read as follows: "(Title 33 of the West Virginia Legislative Rules, Division of Environmental Protection, Office of Waste Management, Series 20)".
2. No direct analog 157-7-1.2 INC
The authority for promulgation of hazardous waste regulations should be updated to be consistent within the West Virginia Code. The correct citation for the authority given DOH by the Hazardous Waste Management Act is now "§22-18-7(a)" instead of "§20-5E-7(a)".

West Virginia: RCRA Regulation of Transportation of Hazardous Waste by Highway

RCRA Regulatory Citation	Corresponding State Regulatory Citation	Comments
3. No direct analog	157-7-1.6	The DOH regulations incorporate by reference the DEP regulations and several Parts of the CFR at § 157-7-5.1. The provision at § 157-7-1.6 states that the reference to the DEP hazardous waste regulations and the Federal regulations is to the version in effect on the date of enactment of the legislation authorizing the DOH regulations. The DOH regulations have not changed since they became effective on April 22, 1988. This creates inconsistency between the DOH regulations and the DEP hazardous waste regulations. Both agencies should incorporate by reference the same version of the CFR to avoid inconsistencies between different versions of the CFR. There are two options for correcting this problem. First, DOH could change § 157-7-1.6 to explicitly give the dates of the DEP hazardous waste regulations and of the CFR the Division is incorporating by reference. The second option is that DOH change § 157-7-1.6 to reference the "current" version of the DEP hazardous waste regulations, and then provide that the version of the CFR incorporated by reference is the version incorporated by reference in the DEP hazardous waste regulations. This would be a prospective incorporation by reference which would not require revision every time the Division changes its regulations.
4. 260.10 "Manifest"	157-7-2.1.10	DOH refers to "the Appendix to 40 CFR Part 262.20(a)". The appendix is actually an appendix to 40 CFR Part 262. For clarity, DOH may want to remove ".20(a)" so that the reference reads "the Appendix to 40 CFR Part 262".

West Virginia: RCRA Regulation of Transportation of Hazardous Waste by Highway

RCRA Regulatory Citation	Corresponding State Regulatory Citation	EQ I/ MS LS BIS NIS CL UK INC	Comments
5. No direct analog in Part 263 (Closest analog is 262.20(a))	157-7-3.1.1	CL	The language used in this provision is similar to the language at 40 CFR 262.20(a). DOH references Sections 6 and 10 of the DEP hazardous waste regulations, the analogs to 40 CFR Parts 263 and 268 respectively. It is not clear why DOH references the analog to 40 CFR Part 268 because that Federal Part does not regulate transportation or the use of the manifest. DOH may have intended to reference the analog to 40 CFR Part 262 which does include manifest requirements. If that is the case, the reference should be to "Sections 5 and 6" of the DEP hazardous waste regulations. In any case, for clarity, the reference to Section 10 should be removed.
6. 263.21(a)	157-7-5.3	CL	For clarity, in line 5 of this provision, DOH may want to insert "regulations" prior to "implementing".

RCRA Cluster VII Comments:

A. Revision Checklist 156 is the only checklist in RCRA Cluster VII which includes revisions to 40 CFR Part 263. The checklist added paragraphs 263.10(e) & (f). If DOH makes the necessary revisions to § 157-7-1.6, then the highway regulations will not need to be revised to include the Revision Checklist 156 changes. The provision at § 157-7-1.1 explains that the DOH regulations are applicable to transportation which requires a manifest under Section 6 of the DEP hazardous waste regulations. The State also incorporates Section 6 and 40 CFR Parts 262 and 263 into its regulations at § 157-7-5.1.

EQ	=	Equivalent	MS	=	More Stringent
LS	=	Less Stringent	BIS	=	Broader in Scope
NIS	=	Narrower in Scope	CL	=	Clarity Issue
UK	=	Unknown how equivalency is affected	INC	=	Inconsistent

it is acceptable that the State has excluded the Part 273 export requirements from its incorporation by reference.

B. TRANSPORTATION REQUIREMENTS

1. Exclusion of 263.20(g)(4) and 263.20(h) from the State's Authorization Package [Comment 32]

40 CFR 263.20(g)(4): The Federal provision at 40 CFR 263.20(g)(4) was added by **Revision Checklist 31**. West Virginia is not seeking authorization for this checklist; therefore, it is acceptable that the State exclude the paragraph from its incorporation by reference.

40 CFR 263.20(h): This provision, which was added by **Revision Checklist 23**, was originally excluded from the authorization application because the State had problems with its small generator requirements and, therefore, was not seeking authorization for that checklist. The State is now seeking authorization for this checklist; therefore, the Consolidated Checklist will be revised to reflect this.

2. Railroad Transportation Requirements

The Federal transportation provisions are largely **Base Program requirements**. Therefore, problems with these requirements affect the State's Base Program authorization. If the problems are not resolved, West Virginia would not be able to receive a recertification of its Base Program authorization. Problems identified in the ORC comments which must be corrected in the PSC regulations and/or the OLS Statement, include the following:

- Missing effective date of rail regulations [Comment 35]
- Incorrect references to the OWM regulations when addressing conditions under which a transporter is subject to the generator requirements [Comments 36 and 37]
- Missing PSC analog to 40 CFR 263.20(h) [Comment 32]
- Missing PSC analog to 40 CFR 263.21(a)(4) missing [Comment 39]

The State's PSC regulations are currently under review. Review comments and suggestions for cleanup of the State's PSC regulations will be submitted to EPA by May 5.

3. Department of Highways (DOH) regulations

As indicated above, the Federal transportation requirements are largely **Base Program requirements**; therefore, if the problems identified in the ORC review are not corrected, the State's Base Program authorization will be jeopardized. Problems identified on the ORC review include the following:

- The DOH regulations reference obsolete versions of the hazardous waste management statutes and regulations. If DOH does not amend its regulations to refer to the correct version of the State's hazardous waste statutes and regulations, the State cannot receive a recertification of the Base Program authorization. [Comment 33]
- The State's provision at §157-7-5.1 is such that it is not clear (1) whether the State incorporates by reference 40 CFR Parts 262, 263 and 49 CFR Part 171, and (2) if so, which version of the Federal regulations the State is incorporating by reference. The DOH regulations should be amended to address this issue in order for the DOH requirements to be consistent with the State's hazardous waste regulations and equivalent to the Federal code. [Comment 34]

The State's DOH regulations are currently under review. The review comments and suggestions for cleanup of the State's DOH regulations will be submitted to EPA by May 5.

C. GROUNDWATER REQUIREMENTS

All the problems identified by the ORC review relative to West Virginia's groundwater provision affect **Base Program requirements**. Therefore, if the problems are not resolved, they will affect the recertification of the State's Base Program authorization.

1. West Virginia's analog to 40 CFR 264.99(g) [Regulations Comment 2]

40 CFR 264.99(g) is a **Base Program provision**. ORC requires the State to agree in the MOA that analysis of samples will be required at least annually (rather than at least once every 5 years, as stated in the State's hazardous waste regulations). The OLS Statement should also certify that the State has the authority to agree to such a commitment. Because 40 CFR 264.99(g) is a Base Program provision, the problem must be resolved in order for the State to be recertified for its Base Program authorization.