

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

RECEIVED
112 SEP 15 PM 1:23

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY: 19-16A-4

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 22A

TITLE OF RULE BEING ADOPTED: Best Management Practices at Temporary
Operational Areas for Non-Bulk Pesticide Mixing and Loading Locations

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS November 1, 1992



RECEIVED

SEP 17 PM 1:28

DEPT OF AGRICULTURE
STATE

TITLE 61, SERIES 22A

BEST MANAGEMENT PRACTICES AT TEMPORARY OPERATIONAL AREAS FOR NON-BULK PESTICIDE MIXING AND LOADING LOCATIONS

Summary and Description of the rule

This rule establishes requirements for the operation of areas where large quantities (over 300 lbs of liquid or 3,000 lbs of dry) of pesticides (that are not in containers larger than 55 gallons or 100 lbs net wt) are stored on a temporary basis and establishes rules for the recovery, storage and use of any discharge from the containment area.

Circumstances requiring this rule

This rule is required to comply with the mandates of the Groundwater Protection Act which states that the Department of Agriculture is the groundwater protection agency for the use and application of pesticides and that each groundwater protection agency shall take action necessary to assure that facilities under their jurisdiction maintain and protect groundwater at existing quality.

AMENDMENTS TO TITLE 61, SERIES 22A
MADE TO THE RULE AS A RESULT OF COMMENTS RECEIVED

Amendments were made to the following paragraphs as a result of written and oral comments received: Paragraphs 2.1, 2.2, 2.3, 2.6, and 2.7.

The changes made and the reasons for the changes are explained in the "Summary of Comments".

RECEIVED

Title 61
WEST VIRGINIA PROCEDURAL RULE
State Department of Agriculture

SEP 15 PM 1:29

DEPT. OF AGRICULTURE
STATE OF WEST VIRGINIA

SERIES 22 A

Title: Best Management Practices at Temporary Operational
Areas for Non-bulk Pesticide Mixing and Loading Locations

61-22A-1 General

1.1 Scope - This best management practice establishes the guidelines governing the operation of locations used for the storage and mixing and loading of non-bulk pesticides in temporary operational areas.

1.2 Authority - West Virginia Code 19-16A-4

1.3 Filing Date -

1.4 Effective Date -

61-22A-2 Definitions

2.1 "Bulk Pesticide " means any registered pesticide which is transported or held in an individual container in undivided quantities of greater than fifty-five (55) U.S. gallons liquid measure or one hundred (100) pounds net dry weight. Such term does not apply to those pesticides packaged in containers approved by the U.S. Department of Transportation for interstate transportation.

2.2 "Discharge" means any spill, leak, deposit, dumping or emptying, either accidental or otherwise, that results in a release of pesticide outside a contained portion of an operational area. Discharge does not include lawful transfer, mixing, loading, unloading, repackaging or refilling of a pesticide provided such transfer, mixing, loading, unloading, repackaging, refilling or other similar activity, if carried out within an operational area containment. In addition, discharge does not include lawful distribution, use, disposal or application of a pesticide.

2.3 "Non-bulk Pesticide" means any liquid or non-liquid pesticides distributed, sold, offered for sale, packaged or repackaged in containers of less than 55 U.S. gallons liquid or 100 pounds net dry weight and includes all pesticides not meeting the definition of bulk pesticides.

2.4 "Operational Area" means in the case of non-bulk pesticides storage or handling facilities or locations, and area or

areas where the contents of pesticide containers are transferred between containers, including transfer to application equipment, loaded, unloaded, mixed, repackaged, refilled or where pesticides are cleaned, washed or rinsed from containers or application, handling, storage or transportation equipment. An operational area does not include a facility or location that receives and/or distributes pesticides in the manufacturer's original unbroken container and where such containers remain sealed or other wise unopened or areas not falling within the definition of permanent or temporary operational areas defined in this rule.

2.5 "Operational Area Containment" means in the case of non-bulk pesticide storage or handling facilities or location, any structure or system effectively designed and constructed to intercept and contain discharges, including container or equipment wash water, rinsates, and rainwater, and to prevent escape, run-off and leaching from an operational area.

2.6 "Permanent Operational Area" means an operational area where either pesticide concentrates or use dilution mixtures in excess of 300 U.S. gallons of liquid or 3,000 pounds of net dry weight are transferred, loaded, unloaded, mixed, repackaged, refilled, or cleaned, washed or rinsed from containers or application, handling, storage or transportation equipment over a 30 day period either consecutive or cumulative during a calendar year. Permanent non-bulk operational areas are addressed by legislative rule WV61CSR 12H.

2.7 "Temporary Operational Area" means an operational area that is not a permanent operational area. A temporary operational area does not include the operational area activities carried out within the field or site of application provided these activities occur no more than three times per calendar year at the same location for a period not exceeding 36 hours total and does not include the area in and around a private dwelling where a resident of that dwelling is conducting incidental activities associated with pesticide use in and around such dwelling that otherwise fall within the scope and definition of an operational area.

61-22A-3 Recommendations for Temporary Operational Areas

3.1 General. The commissioner recommends that any person storing, mixing, or repackaging pesticides, or refilling pesticide containers perform these activities in the following manner.

3.1.a All operational area activities should be conducted or carried out within operational area containment. Such containment should be properly maintained at all times when operational activities are occurring.

3.1.b Operational area activities should be carried out on an impervious surface, such as a concrete pad or other similar pad approved by the Commissioner, that is suitably coated with a

material to retard absorption of discharges and to facilitate recovery of any discharged materials.

3.1.c The operational area containment should be constructed of materials and in a manner that will withstand the weight and movement of any equipment that may be placed or parked within the operational area containment.

3.1.d The operational area containment should be designed to catch and contain any discharges that are occurring in the operational area and should be constructed of materials and in a manner that will contain reasonably foreseeable discharges.

3.1.d.A For liquid pesticides, including container and equipment rinsates and those mixed with a liquid or dry carrier, the operational area containment should be curbed or sloped to contain discharges so as to facilitate recovery of discharged materials. Discharges should be immediately recovered from the operational area containment. Rainfall or other liquids should not be allowed to flow either onto or out of the operational area containment unless a suitable recovery or storage facility is provided to collect, divert or manage the rainfall. The operational area containment should be capable of holding 125% of the capacity of the single largest container or vehicle operated within the operational area. A minimum containment capacity of 250 U.S. gallons should be provided.

3.1.d.B For non-liquid pesticides, the operational area containment should extend beneath any conveyers or augers used in operational area activities unless such conveyers or augers are fully enclosed and constructed to prevent discharge. Operational area containment should be of adequate dimension (area) to contain reasonably foreseeable discharges from the largest container or equipment operated within the operational area containment. The operational area containment for non-liquid pesticides may consist of a tarpaulin made of nonabsorbent materials which is of adequate thickness and construction to withstand all foreseeable loading conditions, and is generally compatible with the materials stored or placed thereon. Discharges should be immediately recovered from the operational area containment. Rainfall or other liquids should not be allowed to flow either onto or out of the operational area containment unless a suitable recovery or storage facility is provided to collect, divert or manage rainfall.

3.1.e Underground storage of recovered discharges from the operational area containment is highly discouraged and may be regulated by underground storage laws.. This does not preclude the use of approved sumps, which meet applicable state and federal requirements, that are incorporated into the design of the operational area and are maintained and operated according to a plan approved by the commissioner.

3.2 Ground Operations. The commissioner recommends the

following additional specifications should apply for ground operational area activities conducted or carried out within a temporary operational area:

3.2.a For containers or equipment with holding capacity of 10 gallons or less volume, or 50 pounds of net dry weight or less, the operational area containment should contain 100% of these capacities.

3.2.b For containers or equipment with liquid material holding capacity of greater than 10 gallons volume, the operational area containment should contain a minimum volume of 25 gallons plus 10% of the total capacity of the container or equipment. All discharges should be immediately recovered.

3.2.c For containers or equipment with non-liquid material holding capacity of greater than 50 pounds net dry weight, the operational area containment surface should be of adequate dimension (area) to contain reasonably foreseeable discharges from the container or equipment and provide containment for discharges that may occur at various points along conveyers or handling equipment and provide containment for discharges that may occur at various points along conveyers or handling equipment. All discharges should be immediately recovered. Tarpaulins or other suitable synthetic materials may be utilized for non-liquid materials provided they are made of non absorbent materials which are of adequate thickness and construction to withstand all foreseeable loading conditions and are generally compatible with the materials to be contained.

3.2.d Operational area containment provided at temporary operational areas may be portable and should be capable of allowing discharges to be immediately and fully recovered, to the extent practicable, and be easily cleaned or washed after use.

3.2.e Rainfall or other liquids should not be allowed to flow either onto or out of the temporary operational area containment while it is in use. Suitable protective measures should be implemented to protect non-liquid materials stored out-of-doors from rainfall.

3.3 Aerial Operations. The commissioner recommends the following additional specifications should apply for aerial operational area activities conducted or carried out within a temporary operational areas.

3.3.a All operational area activities, including those associated with non-aircraft pesticide handling equipment, should be conducted or carried out within operational area containment. Such containment may be permanent or portable and should meet all of the following requirements:

3.3.b Operational area containment should contain any discharge that may occur from any portion of the aircraft's

pesticide application system.

3.3.c The capacity of the operational area containment should be at least 125% the maximum volume of the aircraft's pesticide application system capacity.

3.3.d The operational area containment should be constructed of concrete, steel or synthetic materials that are resistant to corrosion, puncture or cracking, and that are chemically compatible with the pesticides handled within the operational area. A written confirmation of compatibility of synthetic materials should be kept at the operational area or at the nearest local office of the person responsible for operation of the aircraft.

3.3.e The operational area containment should be designed and constructed to withstand the weight and movement of any equipment that may be placed or parked within the operational area containment.

3.3.f Rainfall or other liquids should not be allowed to flow either onto or out of the operational area containment unless a suitable recovery or storage facility is provided to divert or to manage the rainfall.

61-22A-4 Recovery, Storage and Use of Discharges

4.1 All discharges within the operational area containment shall be immediately and fully recovered, to the extent practicable, using appropriate absorbent materials, pumps or other acceptable means. Operational area surfaces exposed to pesticides (concentrate or dilute) should be periodically cleaned with all rinsates recovered and properly stored or disposed of according to state requirements. Recovered discharges should not be stored below ground except as provided in 3.2.c, but could be stored in suitable containers above ground provided secondary containment provisions are considered. Recovered discharges may be used according to applicable product label (s) if appropriate.



STATE OF WEST VIRGINIA
DEPARTMENT OF AGRICULTURE

State Capitol
Charleston, WV 25305

Cleve Benedict
Commissioner

SUMMARY OF COMMENTS
WEST VIRGINIA LEGISLATIVE RULE
TITLE 61 SERIES - 22A

Best Management Practices at Temporary Operational
Areas for Non-Bulk Pesticide Mixing and Loading Locations

Notices of public hearing of this rule were sent to all licensed pesticide application business and licensed pesticide dealers in the state. In addition, a general news release was made concerning the proposed rule. Public hearings were conducted in Charleston on July 29, 1992 and in Morgantown on July 23, 1992. Oral comments specific to this rule were received at the hearings from Mr. Jerry Gass of the Southern States Cooperative Incorporated. In addition written comments were received from the West Virginia Farm Bureau and the CIBA-GEIGY Corporation.

The West Virginia Farm Bureau commented they felt the rule was satisfactory. They emphasized the need for an educational program. Education is the key to most regulatory programs and has been a key component of all Department of Agriculture pesticide programs since their inception in 1975. Educational programs are included in the Departments overall generic management plan to protect groundwater from pesticides (proposed Series 22).

PARAGRAPH 2.1- Mr. Jerry Gass suggested the term "Bulk Pesticide" be amended by adding the following words, "Such term does not apply to those pesticides packaged in containers approved by the U.S. Department of Transportation for interstate transportation." This request was felt to be acceptable and the requested change was incorporated in the proposed rule.

PARAGRAPH 2.2- Mr. Gass suggested the term "Discharge" be amended by changing the word "into" on line three to the word "outside" or by deleting the term "discharge" and adding an additional term of "release". The intent of Mr. Gass's comment was directed at addressing material discharged or released outside of a contained area. Although the current language addressed material

discharged "into an uncontained portion of an operational area" and already addressed his concern, the language was changed to read "outside a contained portion of as operational area" to add clarity.

PARAGRAPH 2.3- The CIBA-GEIGY CORPORATION suggested the definition of "non-bulk pesticide" be clarified by changing the number of "56" to "55". The resulting change reads "... containers of 55 U.S. gallons or less liquid..." A concern was also expressed that the title was unclear. The title has been changed to reflect that concern.

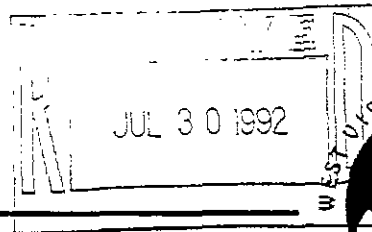
PARAGRAPH 2.6- Mr. Gass felt the inclusion of a reference to 1,500 pounds of active ingredient in the definition of the term of the term "Permanent Operational Area" was confusing and suggested that reference be deleted. Based on his comment and conversations with other people prior to the hearing about the meaning of the term in question, it was felt to be appropriate to delete this reference.

PARAGRAPH 2.7- Mr. Gass suggested the definition of "Temporary Operational Area" be amended by changing the word "twice" to "three" in line 5 and "24" to "36" in line 6. He suggested this was needed in that it is difficult or impossible to determine the out breaks of insect or disease incidence in a crop situation. As such, an individual may have an occasion to go back to a particular field more than two times. The recommendation was reasonable and was accepted.

PARAGRAPH 3.1.e- Mr. Gass suggested the words "...highly discouraged..." in line 2 be changed to reflect a direct prohibition. As the rule is a voluntary best management practice, it was felt a direct prohibition was not appropriate. No change was made to this paragraph.

West Virginia Farm Bureau

Member of American Farm Bureau Federation

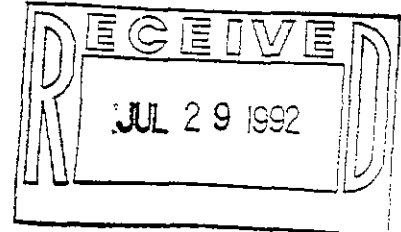


1 Red Rock Road, Buckhannon, WV 26201

304/472-2080

July 27, 1992

The Honorable Cleve Benedict
Commissioner of Agriculture
West Virginia Department of Agriculture
1900 Kanawha Blvd., East
Charleston, WV 25305



RE: COMMENTS ON PROPOSED REGULATIONS

Title 61 - Series 6A - General Groundwater Protection
Rules for Fertilizer and Manures

Title 61 - Series 6B - Primary and Secondary
Containment of Fertilizers

Title 61 - Series 12H - Bulk Pesticides Operational Rules

Title 61 - Series 12I - Non-Bulk Pesticide Rules
for Permanent Operation Areas

Title 61 - Series 12G - General Groundwater Protection
Rules for Pesticides

Title 61 - Series 22A - Best Management Practices
for Temporary Operational Areas of Non-Bulk Pesticides

Title 61 - Series 22 - Generic State Management Plan for Pesticides
and Fertilizers in Groundwater

Dear Commissioner Benedict:

This is to respectfully comment on the proposed above-cited rules as they pertain to agriculture in West Virginia.

First, we would like to make some general comments on the regulations.

While we appreciate your decision to fully comply with the Groundwater Protection Act particularly 20-5M-5(c) which requires the various agencies and departments to promulgate rules as they may be necessary to implement the authority granted them, we feel that the regulations filed by your department exceed the intent of the law.

We can certainly understand your desire to take the lead on this important issue; but we believe that it will be difficult to implement some of these regulations until the Water Resources Board establishes standards as provided in 20-5M-6(a)(2). Obviously, there is chronological ambiguity in the statute.

Copies sent to:
• Brenda Harper
• Barbara Smith

-N

Honorable Cleve Benedict
Commissioner of Agriculture
Page -2-

We are also very concerned with the economic impact these regulations will have on the agricultural industry as well as state and local government. In several instances, the impact is not clear, however "significant".

Given the scope and impact of these regulations, adequate study must be done to determine as nearly as possible the financial impact these regulations will have on individuals, companies, state, county and local government.

The Groundwater Protection Act capped fees at \$1 million and therefore did not intend to expand the cost to citizens, businesses and government.

We compliment you on the approach that was used in the Generic State Management Plan for Pesticides and Fertilizer in Groundwater. We feel these regulations comply with the law, particularly 20-5M-6(c) (1) thru (5), where voluntary cooperation is encouraged, to conduct studies, research, experiments, demonstrations, and to develop public education programs.

Following are the specific comments on each set of Regulations:

**Title 61 - Series 6A - Groundwater Protection
Rules for Fertilizer and Manures**

The fiscal note provides for an expenditure of \$28,000 by the Department of Agriculture. Since the authority cited is 20-5M, we believe that these expenditures should be included in the Groundwater Protection Act Fee Schedule Regulations 47-CSR-55 which have been filed as emergency regulations by the Department of Natural Resources, and not taken out of the department's budget.

We are also very concerned about the economic impact on those farms that need to install manure holding facilities. The projected costs range from \$12,000 to \$100,000 with additional auxiliary equipment cost of \$20,000 to \$50,000. This could put some farms out of business. We would suggest that an in depth study be made on each site to determine if alternative methods are available.

We concur with your assessment that the impact on the agricultural community by using Best Management Practices will be low. However, we believe it will take an extensive education program by the Department of Agriculture, the Cooperative Extension Service and Soil Conservation Service. The West Virginia Farm Bureau is willing to provide any assistance that we can in this matter.

61-6A-6 Protection of Groundwater from Point Source

6.3 and 6.3a - We recommend that these two sub-sections be deleted. We feel that sections 6.2 and 6.2a adequately cover those areas that are most likely to cause pollution. The description in 6.3 and 6.3a are vague and leaves room for different interpretation by different people. These items would best be covered under voluntary best management practices.

6.4 - It is recommended that this sub-section be deleted. This statement is unclear. It is very difficult to determine the volume of manure that would be produced. It is also unclear as to what time frame is covered. Again, this item would best be covered under voluntary best management practices.

6.5 thru 6.11 - It is recommended that these sub-sections be deleted. These are generally considered to be non-point source and not point source. Again, we feel these areas would best be addressed under the voluntary best management program.

61-6A-7 - Protection of Groundwater from Non-Point Sources

7.1 thru 7.3g - It is recommended that these sub-sections be deleted and replaced by reference to the Soil Conservation Service Technical Guide.

The SCS manual provides a complete list of Best Management Practices. The BMP are developed so that they may be used for site specific locations.

The SCS also updates this manual as new technology is developed.

We believe that if the manual is referenced rather than listing a few of the items that are listed in the regulations, the farm community and the environment will be better served.

Title 61- Series 6B - Primary and Secondary Containment of Fertilizers

Fiscal note - Again, we point out that if the regulations are being promulgated under the authority of Groundwater Protection Act, funds should come from that act and not from the budget of the Department of Agriculture.

Economic Impact - We are very concerned with the "very high" impact these regulations will have on the agricultural industry.

The \$50,000 to \$150,000 cost that retail firms will be required to spend is a considerable investment. If these firms do spend this kind of money, we believe that the cost of fertilizer to farmers will increase more than the \$10-\$20 that has been projected. Southern States Co-op projects \$75/Ton if the capitol costs are amortized over a 10 yr. period.

Honorable Cleve Benedict
Commissioner of Agriculture
Page -4-

The other alternative that these businesses have is to not make the expenditure and not provide the service to farmers. If this happens, farmers may need to purchase fertilizer from out-of-state, incurring additional transportation cost and terrific inconvenience.

As is pointed out in the Economic Impact Statement, "As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules." We, therefore, recommend that these regulations be withdrawn until:

1. The Division of Natural Resources develops a central groundwater data management system, as provided in 20-5M-6(a) (2).
2. The Department of Agriculture develops procedures to identify currently unknown farmers and firms that will be affected by these regulations.
3. The Department of Agriculture develops a procedure to determine an accurate estimate of the cost to farmers and firms for the installation of the facilities required.

Title 61 - Series 12H - Bulk Pesticide Operational Rules

61-12-H-2 Definitions - 2.7 Recommends changing the definition of discharge to mean any spill, etc. outside of the secondary containment area. The purpose of the secondary containment is to prevent such "spills" from escaping.

Title 61 - Series 12I - Non-Bulk Pesticide Rules for Permanent Operational Areas

Fiscal Note: The Groundwater Protection Act Fee Schedule establishes \$75,000 from the Department of Agriculture for pesticides. These regulations as well as Series 12G indicate that \$75,000 will be needed for each 12I and 12G.

We do not believe that the extra \$75,000 should come from the Department of Agriculture's general funds.

Economic Impact on State Government

One must ask the question, "With the state in dire economic times and no indication that pesticides have contaminated groundwater, is the cost benefit ratio justified?"

Economical Impact on Political Subdivisions

Specific Industries and Groups of Citizens (Same as above.)

Honorable Cleve Benedict
Commissioner of Agriculture
Page -5-

Economic Impact on Citizens/Public at Large

With an estimated total cost of implementation these regulations at \$11,520,000 and the statement that "these costs would cause some small businesses to close", we respectfully request that these regulations be withdrawn.

We do not believe that it was ever the intent of the Legislature in passing the Groundwater Act to put people out of business, especially when there has been no indication that a problem exists.

Title 61-12G - General Groundwater Protection Rules for Pesticides

Fiscal Note: \$75,000 - We recommend that this money come from the Groundwater Protection Act Fees.

We totally agree with the program and policy statement listed in 61-12G-4.1 thru 4.4.

We would encourage the Department of Agriculture in Cooperation with other State and Federal Agencies to develop an aggressive education program on the use of Best Management Practices.

As stated in 4.4, we also agree that other steps may be necessary, but only after "valid predictive technology or valid groundwater data indicates that pesticides are contaminating the groundwater of the state and when technology develops to indicate the mandatory best management practices will be effective in the protection of groundwater".

Title 61 - Series 22A - Best Management Practices for Temporary Operational Areas of Non-bulk Pesticides

In general, these regulations are satisfactory. However, we are somewhat concerned by the lack of information that the department has on the number of sites that will be affected. Again, an educational program would be most beneficial.

Title 61 - Series 22 - Generic State Management Plan for Pesticides and Fertilizer in Groundwater

Fiscal Note: \$75,000 as stated previously, there is only a total of \$75,000 in the Groundwater Protection Act Fee Schedule for use by the Department of Agriculture.

General Comments: It is our belief that it is this type of regulations that was intended by the Legislature. That is to say, prior to adopting other very costly regulations, one must first put in place an educational program, provide for an assessment and planning phase mandated in 61-22-8 and establish a monitoring program as mandated in 61-22-11.

Honorable Cleve Benedict
Commissioner of Agriculture
Page -6-

In summary, we feel that the regulations are chronologically not possible to implement at this time. If other agencies have not performed their statutory responsibility then these agencies should be held accountable for such non performance.

The 13,000 member West Virginia Farm Bureau considers itself and its individual members to be very environmentally responsible and our comments should be construed as constructive criticism. We trust you and your agency will view these comments favorably.

Sincerely,



Richard S. (Steve) Hannah
Executive Secretary

RSH/vg

CIBA-GEIGY

Agricultural Division
CIBA-GEIGY Corporation
P.O. Box 18300
Greensboro, North Carolina 27419
Telephone 919 632 6000

July 24, 1992

Mr. Robert Frame
West Virginia Department of
Agriculture
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Mr. Frame:

SUBJECT: COMMENTS FOR THE RECORD
WV 1204 - GROUNDWATER PROTECTION RULES FOR PESTICIDES
WV 1205 - BULK PESTICIDE OPERATION RULES
WV 1206 - NON-BULK PESTICIDE RULES FOR PERMANENT
OPERATIONAL AREAS
WV - BEST MANAGEMENT PRACTICE FOR TEMPORARY
OPERATIONAL AREAS
WV 1207 - GENERIC STATE MANAGEMENT PLAN FOR PESTICIDES
AND IN GROUNDWATER


The Agricultural Division of CIBA-GEIGY Corporation is a major producer and supplier of pesticides to West Virginia's important agricultural industry. As such, the Division is interested in regulatory proposals and management plans that may impact the users of these pest management tools. The purpose in this correspondence is to offer comment for the record on the above noted proposals as identified by sequence number and title.

The Agricultural Division is supportive of rules and practices that promote environmental protection while allowing the benefits of pesticides to be received by the public. CIBA-GEIGY supports the above subject proposals and encourages their collective adoption. We also commend you and your Department for the vision and wisdom illustrated by the balance seen in the proposals between environmental protection, reliance on education and best management practices to achieve Department environmental protection goals.

Enclosed are specific comments on the respective proposals that should be included in the hearing record.

Thank you for the opportunity to comment and to lend support for adoption of these proposals.

Sincerely,



Charles G. Rock
Manager, State Government Relations

L502CCG0724CGR

Specific Comments on Proposed Rules

*Submitted by
CIBA-GEIGY, Agricultural Division
(Underline Connotes Suggested Revisions)*

WV-1204 - General Groundwater Protection Rules for Pesticides
(Title 61, Series 12-G)

S61-12G-3 Definitions

3.5 "Non-bulk pesticide" (Page 2)

The definition as proposed creates a gap between itself and the "Bulk Pesticide" proposed definition of 3.3. The non-bulk definition covers containers of less than 56 gallons liquid and 100 pounds dry while the bulk definition addresses quantities of greater than 35 gallons liquid or 100 pounds dry. This creates a "no-mans-land" for containers of 55 gallons 1 ounce to 55 gallons 15 ounces as meeting both definitions or neither. Similarly, a 100 pound weight container would follow outside either definition or meet both.

Suggested revision:

3.5 "Non-bulk pesticide" means any liquid or non-liquid pesticides distributed, xxx or repackaged in containers of fifty-five (55) gallons or less liquid or one hundred (100) pounds or less net dry weight and includes all pesticides not meeting the definition of bulk pesticides.

S61-12G-4 Program and Policy Statements

Subsection 4.4 (Page 3) provides for the phrase "mandatory best management practices" while in 4.2 speaks to "voluntary" plans. In order to ensure a clear and reasoned distinction between mandatory and voluntary, we strongly recommend that voluntary practices and plans be associated with best management plans while mandatory practices be termed agricultural chemical management plans or practices. This may necessitate definitions for the respective terms.

This suggestion further illustrates in policy outlined in subsection 4.2 and 4.3 as being the foundation of the West Virginia approach. Appropriate changes would be needed in subsection 4.4.

Suggested revision:

4.4 (Page 3) - The Commissioner reserves the right to develop mandatory agricultural chemical management plans either chemical specific or generic in nature by rule xxx

Specific Comments on Proposed Rules

Submitted by
CIBA-GEIGY, Agricultural Division
(Underline Connotes Suggested Revisions)

WV-1205 - Bulk Pesticide Operational Rules

3.2.e. (Page 4) Change the word "distributing" in the first sentence to "distribution."

3.4. (Page 4) Strike the phrase "appropriate state" at end of sentence.

\$61-12H-4 Bulk Pesticide Storage Facility Registry

4.1 (Page 4) - The proposal provides that the Commissioner "may" require annual notification by the product manufacturer or registrant without specifying the reason for such notification. This provision should either be deleted or further explanation citing such conditions as to when the Commissioner would require notice. The vagueness and ambiguity of the subsection would hopefully be removed. In addition, the phrase "appropriate state regulatory agency" (Page 5) should be deleted and replaced with "Department."

\$61-12H-5 Bulk Storage Facility Requirements

5.1 Storage (Page 5)

5.1.b - Primary Containments: Strike the phrase "shall be" from the end of the fourth line replacing it with the word "are." Strike the phrase "shall be" from the sixth line as it is inappropriate.

5.1.c.B. (Page 5 and 6) - The proposal provides for 110% and 100% containment capacities for storage outside and under roof, respectively. You may wish to consider increasing these to 125% and 110%, respectively to be more consistent with U.S. EPA directions and current thinking. In so doing, the future may be less uncertain for these facilities.

5.1.c.D (Page 6) - The wording of the subpart implies that the Commissioner is to approve "floor designs" and "coatings" while such designs and coatings are only "encouraged." This should be clarified as to the principal intent.

5.1.c.E (Page 6) - A need for recognition of the use of "automatic sump pumps" as provided in 5.1.c.D is apparent. These pumps can be utilized under a defined set of circumstances in 5.1.c.D while in 5.1.c.E "approval of the Commissioner" is required. Approval by the Commissioner in this case appears warranted.

Suggested revision:

5.1.c.E - Floor or in-wall drains ~~xxx~~ sump pumps shall be prohibited within the secondary containment area unless installed in accordance 5.1.c.D or if approved by the Commissioner.

5.2 Operations

5.2.a (Page 6) - Change the word "operation" to "operating" in the first line.

5.2.b (Page 7) - The proposal provides for a 3-year effective date of the operational area containment requirement yet provides 5 years for the secondary containment requirements (5.1.c) at a bulk facility. The differentiation is not without justification; however, it appears that the intervals are opposite what would make good business and construction sense. The secondary containment is likely to be the most expensive part but fitting secondary containment to operational area containment already in existence may prove to be a tremendous challenge ending in environmental compromise. You may wish to consider a compromise of 4 years from enactment if 3 years for both requirements proves unacceptable per other testimony.

5.2.d (Page 7) From the second sentence strike the word "appropriate."

5.3.b.A (Page 8) - The proposal for inspection of containers and appurtenances weekly during the use-season should be expanded to include inspections while the bulk pesticide is in storage. It is a common practice to "warehouse" bulk pesticide during the non-use season on a contract basis. Inspections should likewise occur.

Suggested Revision:

5.3.b.A for bulk pesticide containers and appurtenances, at least weekly during the use season and whenever pesticide is stored therein.

Specific Comments on Proposed Rules

*Submitted by
CIBA-GEIGY, Agricultural Division
(Underline Connotes Suggested Revisions)*

WV-1206 - Non-Bulk Pesticide Rules for Permanent Operational Areas
(Title 61, Series 12-I)

§61-12I-3 Permanent Operational Areas

3.1 - The 5-year effective date of the proposal should be consistent with other implementation requirements for permanent operational and bulk containment. Again, 4 years, as suggested in §61-12G-5 appears to be reasonable. Three years may prove to be sufficient to allow for implementation in all cases.

Specific Comments on Proposed Rules

*Submitted by
CIBA-GEIGY, Agricultural Division
(Underline Connotes Suggested Revisions)*

WV-____ - Best Management Practices for Temporary Operational Areas
of Non-Bulk Pesticide

The title is unclear and does not reflect the intent of the guidelines.

Suggested revision: Retitle to Best Management Practices Guidelines at
Temporary Operational Area at Non-Bulk Pesticide Storage, Mixing and Loading
Locations.

§61-22A-2 - Definitions

2.1 "Bulk Pesticide" and 2.3 "Non-Bulk Pesticide." See comments and
suggested revisions noted §61-12G-3.5 to clarify respective definition gap.

Specific Comments on Proposed Rules

*Submitted by
CIBA-GEIGY, Agricultural Division
(Underline Connotes Suggested Revisions)*

WV-1207 - Generic State Management Plan for Pesticides and
Fertilizer in Groundwater

It is suggested that plan include a clearer distinction between voluntary best management practices and mandatory practices by identifying the latter as agricultural chemical management plan either generic or specific. See comments under §61-12G-4 - Programs and Policy Statements.



SIERRA CLUB WEST VIRGINIA CHAPTER

P. O. Box 4142
Morgantown, WV 26504



July 23, 1992

Barbara Smith
Compliance Division
West Virginia Dept. of Agriculture
1900 Kanawha Blvd., East
Charleston, WV 25305

Dear Ms. Smith:

I am submitting the following comments regarding the proposed groundwater regulations on behalf of the West Virginia Chapter of the Sierra Club. We have long advocated strong groundwater protection legislation for West Virginia and are strong supporters of West Virginia's Groundwater Protection Act of 1991. Thus it is disappointing to see such weak and ineffective rules being promulgated to enforce the Act. We believe that these proposed regulations violate the intent of the Legislature in passing the Groundwater Protection Act.

The Act states "it is the public policy of the state of West Virginia to maintain and protect the state's groundwater so as to support the present and future beneficial uses and further to maintain and protect groundwater at existing quality where the existing quality is better than that required to maintain and protect the present and future beneficial uses." It further states "Pollution of groundwater shall not be considered a beneficial use." The Legislature intended that the regulations proposed under the Act "provide for the establishment of groundwater protection programs consistent with this Article;" and "provide for such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program." I cannot believe that these proposed regulations will even come close to fulfilling the intent of the law.

I wish to first cite several major gaps which exist in groundwater regulations currently being developed that are relevant to these regs. Specific comments on the weaknesses of the proposed regs and suggestions for their amendment will follow.

1. The issue of land application of various sludges, soil amendments, fly ash, and other solid wastes being applied as beneficial uses has not been addressed, in spite of frequent requests to do so. While many of these materials are actually solid wastes that are being disposed of on land, their organic matter or mineral nutrient content allows them to be exempted from solid waste regs under the beneficial use provisions. Although we do not wish to impede the application of those

"Not blind opposition to progress, but opposition to blind progress."

materials that truly do present benefit to the land, many of these substances produce a leachate that may be high in heavy metals, toxic organic compounds, or strongly alkaline or acid forming constituents. The definition of fertilizers and manures must be expanded to include these so-called beneficial materials into a regulatory program in order to assure that these beneficial uses are in fact beneficial and not just a convenient way for industry to avoid solid waste regulations.

2. Underground storage tanks for fuels used on farms were not included in regulations proposed by DNR to regulate groundwater impacts from these tanks because "Dept. of Ag will handle those" or so environmentalists were told. While the volume of these tanks is generally smaller than for many commercial facilities, their potential to contaminate groundwater is still very significant. An enforceable maintenance and monitoring program is needed.

3. These regs do not contain adequate remediation requirements if contamination should occur. Furthermore, no mention is made of how victims of pollution are to be compensated. As such, there is very little enforcement incentive to encourage voluntary compliance with these regs. Obviously, prevention is considerably cheaper than remediation, unless the cost of remediation is borne only by downstream users and not the polluter. Without the "stick" of remediation and cleanup costs, there is no incentive to follow the carrot of prevention by complying with these regs. Thus the Dept. is left with an enforcement nightmare.

4. These regs also lack any mention of a monitoring program. Without even a semblance of a monitoring program, the regs are totally unenforceable. Section 5 Paragraph (d) of the Act clearly states that agencies shall develop practices to prevent groundwater contamination and states specifically that such practices shall include "remediation and monitoring".

Areas discussed in these regs which must be amended include:

5. Enforcement. Regulatory actions by the Commissioner are discretionary. The regs should be amended to make regulatory action by the Commissioner mandatory when pollution is occurring. Citizens must have some assurance that their groundwater will be protected and that action to stop pollution will be forthcoming. A regulatory agency should not have the discretion to knowingly ignore pollution which violates West Virginia's groundwater protection law. Other states, such as Wisconsin, have adopted regulations which require regulatory agencies to evaluate, among other regulatory responses, "the practicality of stopping the further release" of a pollutant that exceeds groundwater standards, and "the risks and benefits of continued operation of a facility, practice, or activity." Unless these enforcement options are spelled out and made mandatory when pollution is occurring, the enforcement program simply is not credible.

6. Definitions of regulated facilities. Series 12-I defines "non-bulk permanent operational areas" as those exceeding 300 gallons liquid, 3000 pounds dry weight, or 1500 pounds active ingredient handled over thirty days. Areas smaller than these are not regulated. Series 6A defines feedlots to be regulated as those with more than 1000 animal units (500 in vulnerable areas). Facilities handling much smaller volumes of pesticides, or feedlots with many fewer animal units, could present very serious risks to groundwater, yet these regs do not provide for any mandatory enforcement activities for these facilities. As such, these regs clearly fail in their legislatively-mandated purpose of "providing such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program".

7. Timetable for implementation. Various timetables are proposed for mandatory portions of these regs, ranging from three years for bulk pesticide storage facilities, up to ten years for feedlots. I believe that these timetables are simply too long to provide any incentive for a credible groundwater protection program. Our experience has shown that, if given three years to implement a rule, nothing will be done for two and a half years. If given ten years, nothing will get done for nine and a half years. Is there any credible justification for delaying implementation of these rules more than two years?

8. Findings. Many of the policy statements not only contradict those of the Act, but are contradicted internally within the regs as well. For example, in Series 6A and in 12-G, paragraph 4.1, the Commissioner finds that current knowledge is not sufficient to develop mandatory practices that will effectively protect groundwater. Yet in the next paragraph, 4.2, he believes voluntary practices will be effective in protecting groundwater. How can voluntary practices be effective, while mandatory ones won't?

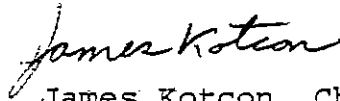
9. Making voluntary regs mandatory. Paragraphs 4.4 and 4.5 of series 6A and 12-G reserves the right of the Commissioner to make mandatory various practices when monitoring data indicate that pollution has occurred. This provision is directly contrary to the provisions of the law and to the principle of prevention. After contamination has occurred, it is too late to prevent it through mandatory rules. The Legislature mandated a policy to protect and maintain existing groundwater quality "unless it is established that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives." If the mandatory provisions are technically feasible after contamination has occurred, they are also feasible before. If the provisions are made mandatory after contamination has occurred, then the contamination clearly is not justified based on economic or societal objectives, otherwise mandatory provisions would not be needed. While I recognize the value of a phased in regulatory program, the

procedures identified in this section are clearly inconsistent with the intent of the Act as well as the processes spelled out in the Act.

10. Penalties. This section needs to spell out specific penalties for specific acts, or alternatively, indicate the liability incurred for contaminating groundwater. Paragraph 9.1 in particular clearly limits the Commissioner's ability to assess penalties and, furthermore, places a substantial burden of proof on him to show that violations were "grossly negligent, reckless or intentional". This is directly contrary to the need, which I have expressed above, for nondiscretionary enforcement actions for violations. The language throughout this section seems to imply that just about any excuse will relieve a polluter of any liabilities for penalties.

In conclusion, we urge the Dept. of Agriculture to revise and strengthen these regs to address our concerns and to bring them into compliance with the Groundwater Protection Act. We cannot support these regs as currently drafted because they undermine both the intent and the letter of the law. We anticipate submitting additional comments regarding specific language before the close of public comment. Thank you for the opportunity to present our views.

Sincerely,



James Kotcon, Chair
West Virginia Chapter of the Sierra Club

cc:
Chuck Chambers, Speaker, WV House of Delegates
Dr. Eli McCoy, Chief, Water Resources Section

BEST MANAGEMENT PRACTICES FOR TEMPORARY OPERATIONAL
AREAS OF NON-BULK PESTICIDES (61-22A)

Public Hearing to Consider Proposed Rule
Oral Comments

Building 2, Guthrie Agricultural Center
Charleston, West Virginia

July 21, 1992
11:00 a.m.

Present: Jerry H. Gass, Southern States Coop., Inc.
John McCallister, Southern States Coop., Inc.
W. B. Buffaloe, Rhone-Poulenc, Inc.

Barbara Smith, Director of Compliance Division, WVDA
Bob Frame, Director of Pesticides Division, WVDA
Dwayne O'Dell, Marketing & Development, WVDA
Paula Moore, Compliance Division, WVDA

Note: Due to the number of people present at the hearing held
July 20 at 9:00 a.m. and to expedite the hearing schedule,
Mr. Gass requested and was allowed the opportunity to
comment on this rule earlier.

1 MR. GASS: I am Jerry Gass with Southern States. I
2 appreciate the opportunity to comment on Series 22A.

3 Paragraph 2.1., we recommend adding the following
4 sentence to the definition of bulk pesticides would improve it.
5 "Such term does not apply to those pesticides packaged in
6 containers approved by the U. S. Department of Transportation for
7 interstate transportation."

8 Paragraph 2.2., if this definition of "discharge" is to
9 be retained, we would suggest that an additional definition of
10 "release," as defined by the Comprehensive Environmental Response
11 Compensation and Liability Act, be included in these definitions.

12 Alternatively, the definition of "discharge" could be
13 changed by changing the word "into" in line three to the word

1 "outside."

2 Paragraph 2.6., we believe the reference to 1,500 pounds
3 of pesticides as active ingredients is confusing. Our
4 recommendation would be to eliminate the wording, "...or where a
5 total of 1,500 pounds of pesticides as active ingredients."

6 Paragraph 2.7., line five, we would recommend changing
7 the word "twice" to "three times." I have not looked at that, but
8 we may need to change that twenty-four hours to thirty-six, also,
9 in that paragraph. Yes, let's change the twenty-four hours to
10 thirty-six hours for the same reasoning that I covered earlier.

11 Paragraph 3.1.d.(a), we would suggest changing the
12 operational area containment size reference to agree with the
13 requirements in paragraphs 3.2.a. and 3.2.c.

14 Then in paragraph 3.1.e., we would recommend deleting the
15 words "...highly discouraged and may be regulated by underground
16 storage laws..." and inserting the word "prohibited" after the word
17 "is." In other words, that first sentence then would read,
18 "Underground storage of recovered discharges from the operational
19 area containment is prohibited."

20 That is all of my comments on 22A. Thank you very much.

21 (Hearing recessed on July 20 at 10:05 a.m. and

22 was reconvened July 21 at 11:00 a.m.)

23 MS. SMITH: No one has appeared to make comments and I
24 will now close this hearing.

25 (Hearing closed at 11:30 a.m.)
26
27

BEST MANAGEMENT PRACTICES FOR
TEMPORARY OPERATIONAL AREAS OF NON-BULK PESTICIDES (61-22A)

Public Hearing to Consider Proposed Rule
Oral Comments

Room 315/316 Percival Hall, Forestry Building
Evansdale Campus, West Virginia University
Morgantown, West Virginia

Friday, July 24, 1992
2:30 p.m.

Present: Barbara J. Smith, Director of Compliance Division, WVDA
Bob Frame, Director of Pesticides Division, WVDA

No other persons in attendance.

No comments were made.

(Hearing concluded 2:45 p.m.)



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

TO: Bob MORRIS

AGENCY: Agriculture

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: April 19, 1993

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 22A TITLE: 61 Agriculture

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: Robert E. Frank

TITLE OF PERSON SIGNING: Director, Pesticide Division

DATE: April 26, 1993

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.