

SUMMARY RESPONSE TO PUBLIC COMMENTS
CONCERNING PROPOSED LEGISLATIVE REGULATIONS
FOR
SOLID WASTE MANAGEMENT
CHAPTER 20-5F, SERIES XVIII, SUBPART II (1984)

By The

West Virginia

Department of Natural Resources
January 1984

Introduction

1. The Proposed Legislative Regulations
 - (a) General Scope and Purpose

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE Jan 20, 1984
Administrative Law Division

The Proposed Legislative Regulations were proposed under rulemaking powers granted to the Director of the West Virginia Department of Natural Resources in Chapter 20, Article 5F, Section 4(a), of the West Virginia Code. The purpose of Chapter 20, Article 5F are to transfer regulatory authority over solid waste management from the State Department of Health to the Department of Natural Resources, and to establish a comprehensive program for controlling solid waste management in the State.

The Proposed Legislative Regulations were filed with the Secretary of State on December 12, 1983, and a public hearing was held thirty (30) days hence on January 11, 1984. Written comments were received by the Department of Natural Resources during the thirty (30) day period from December 12, 1983, through January 11, 1984.

The proposed regulations are intended to establish the framework and requirements to develop the department's solid waste regulatory program under Chapter 20, Article 5F of the Code. The proposed regulations are Subpart II of Series XVIII of the department's regulations. Three additional subparts are anticipated to be promulgated at a future date, covering procedural and interpretive matters establishing the remaining details of the solid waste management regulatory program.

The total Series XVIII regulations package, of which the proposed legislative regulations are the cornerstone, will consist of:

- (1) Subpart I - Preamble - containing introductory information concerning the scope and content of the total regulations package;
- (2) Subpart II - Legislative Regulations - establishing the framework of the program;
- (3) Subpart III - Procedural Regulations - containing permit application procedures and forms, public participation and other procedural requirements; and
- (4) Subpart IV - Interpretive Regulations - Primarily containing facility design and operating standards.

The Proposed Legislative Regulations are intended to apply throughout the entirety of the Series XVIII Regulations.

2. Scope of Response to Comments

This document is intended to summarize and respond to public comments, concerning the Proposed Regulations received in writing or at the January 11, 1984, public hearing. Comments and responses have been summarized for the sake of brevity. This response is arranged in order of the major sections and subsections contained in the Proposed Regulations. Additionally general comments which apply to multiple sections of the Proposed Regulations or to the general form and content of the entire document are included in the following sections of this introduction.

The summary contained herein has several abbreviations used throughout. They include:

- (a) Department, meaning the State Department of Natural Resources;
- (b) Division, meaning the Division of Water Resources;
- (c) State WPCA, meaning the State Water Pollution Control Act (Chapter 20, Article 5A of the Code); and
- (d) SWMA, meaning the State Solid Waste Management Act (Chapter 20, Article 5F of the Code).

The responses of the department are in many cases positive and have resulted in revisions to the Proposed Regulations which are meaningful and beneficial. The department wishes to express its appreciation to those individuals and organizations who commented on the Proposed Regulations.

General Comments

Several comments were received which were of a general nature concerning the scope, intent or other general issues related to the proposed regulations. These general comments and responses thereto are summarized in this section.

1. Opportunity for Comment

Several commentors requested an extension of the public comment period since limited time was available to develop comments and the proposed regulations are of sufficient importance. Other comments were received stating that the regulation contain an important new program relating to open dumps and that the department should vigorously pursue promulgation of the proposed regulations. The latter comment was followed by a suggestion that the department move quickly to resolve remaining issues which it has reserved for a later date.

The department believes it has fulfilled its obligations for receiving public comment, as described in the State Administrative Procedures Act. However, the department also agrees that public participation is necessary and beneficial in the resolution of currently reserved sections of the regulations. The department agrees with the need of further public participation in its rule-making under the SWMA, but desires to promulgate final regulations to implement the important new initiatives contained in the SWMA at this time (open dump section and the transfer of and consolidation of permitting).

2. Resources Available for the Solid Waste Program

Several comments were received that additional resources should be committed to the regulation of solid waste management in West Virginia. We agree with these comments.

3. Duplicative Regulation

Comments indicated a perception of duplicative regulation under the proposed regulations and the State WPCA with regard to industrial solid waste facilities. These comments have been carefully reviewed. Revisions have been made in the final regulations Sections 2 and 5 to eliminate the potential for such duplication and phase in industrial solid waste facility regulation under the SWMA. The SWMA contains a clear mandate to consolidate the SWMA and the State WPCA for regulation of industrial solid waste facilities. Further discussion of these comments is also contained in later sections of this document.

5. Other General Comments..

Five other comments were brought forward during the comment period and are discussed herein. These comments are:

- (a) A request to consider a requirement to record land disposal activities on deeds when applicable. The department keeps sufficient records of the location and extent of solid waste facilities for public recordkeeping purposes. Such records are available to the public upon request. The department has therefore not included such language in the final regulations.
- (b) A request for the department to designate in the regulations, a person who is financially responsible for closure and post-closure activities at solid waste disposal facilities. The SWMA and the proposed regulations require that facility closure be performed under a valid permit issued under the SWMA. The permit will define the responsible entity for such activities. Therefore designation of financial responsibility appears to be superfluous..
- (c) The department was urged to replace all references to "abandon" or "abandonment" with "close" or "closure" since such wording yields a perception of unplanned abandonment. Statutory language is "abandon," and permitting of abandonment is required by the SWMA. These elements of the SWMA are paralleled in the proposed regulations, and indicate an intent for planned abandonment of solid waste facilities. This comment was therefore implemented only in Section 6.03 (revocation of permit).
- (d) A request to consider requiring a "closure bond" for solid waste disposal facilities. We are deferring any decision on such a request until we operate the program for a while and gain more experience with post-closure problems.
- (e) A request to consider defining ownership of solid waste after it has left the generator of the waste. The SWMA does not appear to regulate solid wastes from point of generation to point of final deposit; but rather implements regulation of solid waste facilities.

Section 1 - General

1. Editorial and clarification comments were received concerning sections 1.01 (Scope) and 1.03 (Applicability). Revisions were made to these sections to clarify the scope and applicability of these regulations. The revisions include:
 - (a) Elimination of the reference to "open dumping" in section 1.01. This phrase is undefined.
 - (b) Adding to the end of section 1.01 the phrase: "that is covered under Chapter 20, Article 5F of the Code." This phrase is intended to focus the scope of the regulations on those activities which the SWMA addresses.
 - (c) Editorial revisions are included in Section 1.03 to focus applicability on solid waste facilities and other solid waste processing, recycling, and disposal activities.
2. It was urged that Section 1.01 include an exemption of solid waste facilities permitted under the State WPCA. The primary intent of regulation under the State Water Pollution Control Act is to regulate the water pollution aspects of landfills and not all of the environmental effects covered by Article 5F. While the department and division do not intend to operate redundant or duplicative permitting programs for such solid waste facilities, the act does cover all solid waste facilities. The department has granted an exemption for facilities which already have a permit under the SWPCA to allow it time to develop a proper transition program with adequate input from the regulated community.
3. A comment was made to substantially alter Section 1.03 to make these regulations applicable only to those who own or operate a solid waste management facility with specific exemptions. The act applies to open dumps and open dumping of solid waste and recognizes that open dumps may not be "facilities" and that open dumping is an activity. The suggested exemptions delineated are primarily those contained in the statutory definition of solid waste and are, therefore, somewhat redundant.
4. A comment was made to place enforcement of these regulations solely with the Director to eliminate ambiguity concerning enforcement authority, especially related to the review of an issued permit under Section 9. The act specifically delegates permit denial authority under specific conditions to the Director. No such clarification is necessary; the Act grants enforcement authority to the Director and the Chief.

Section 2 - Definitions

1. Sections 2.03 and 2.04.

- (a) A suggestion was made to include a definition of "sanitary landfill" to indicate that it is an "approved" solid waste facility for land disposal of solid waste. However, a Class A, Class B, or Class C sanitary landfill only becomes an approved solid waste facility when a valid permit is issued or in effect. Class A sanitary landfills, Class B sanitary landfills, and Class C sanitary landfills are specific types of solid waste facilities which are eligible to become "approved solid waste facilities" via the permitting processes.
- (b) An "inconsistency" was suggested between Class A and Class B sanitary landfill definitions arising from the condition of population served and the dual test for each facility type. Such inconsistency does not exist. A Class A sanitary landfill either serves a population of 40,000 people or more or receives an average daily quantity of 100 tons of waste. A Class B sanitary landfill must receive less than 100 tpd of solid waste daily and serve less than 40,000 persons. e.g., A disposal facility receiving 95 tons per day of mixed solid waste, but serving 42,000 persons is a Class A sanitary landfill. This situation fits neither definition if the conjunction "and" is used in both definitions. The definitions are worded in this manner to account for potentially large variations in the amount of solid waste generated by industry, commercial establishments, and individuals depending on locality and other factors.
- (c) A suggestion was made to add a definition for Class C sanitary landfill since it is reserved in Sections 3 and 4. This comment was accepted and Section 2.05 is reserved for a definition of Class C sanitary landfill if a third, smaller class of mixed solid waste disposal facility is determined to be needed at a later date. Subsequent subsections have been renumbered to reflect the added subsection in Section 2.
- (d) The Class A sanitary landfill and Class B sanitary landfill definitions have been modified to exclude industrial solid waste facilities. This revision partially addresses the desire to eliminate duplicative permitting of industrial solid waste facilities under the SWMA and the State WPCA.

2. Section 2.06 - "Construction/Demolition Landfill"

A comment was made to include the word "permanent" before "disposal" in this definition to eliminate potential overlap with other solid waste facility definitions, particularly "transfer station." It is believed that "disposal" is sufficiently clear without a modifier for this purpose since "transfer station" is explicitly defined as an intermediate processing step. A transfer station is a solid waste processing or recycling facility and not a solid waste disposal facility.

3. Section 2.08 - "Cover Material"

A suggestion was made to remove approval by the division from the definition of cover material and describe a purpose for the use of cover material. Methods for approval and conditions will be developed in procedural and interpretive regulation. The primary purpose of cover material is delineated in a later section of the regulations (7.02).

4. Section 2.14 - "Incinerator"

Several comments were received concerning the definition of incinerator. They included suggestions to delete it and all other references to incinerators and a suggestion to use the definition currently employed by the W. Va. Air Pollution Control Commission. The department agrees that regulation of the actual combustion of solid waste and air emissions related to it is the responsibility of the W. Va. Air Pollution Control Commission. There is no intent to duplicate the APCC's jurisdiction. Incinerators commonly have solid waste handling systems prior to combustion; residue, requiring adequate processing and disposal and other environmental effects which should be regulated. It is the intent of these regulations to establish a regulation system for these handling systems and effects surrounding incinerators, not to regulate air emissions or combustion. The proposed definition serves that purpose.

5. Section 2.15 - "Leachate"

It was recommended that the definition of leachate be limited to only liquids which have contacted solid waste and exempt uncontaminated surface water from the leachate definition. We agree. Uncontaminated surface runoff has been exempted from this definition.

6. Section 2.17 - "Open Dump"

A comment was proffered regarding the phrase "in violation of state law" being too broad. The definition of open dump is a statutory definition from the SWMA. The department is somewhat persuaded by the argument that non-payment of a worker's compensation premium could constitute grounds for classifying an otherwise complying solid waste facility as an open dump. While this example is true, several other laws such as the highway litter, stream litter, public nuisance and salvage yard laws are directly related to solid waste management. An effort will be made in interpretive regulations to further interpret the primary environmental, health and safety intent of the SWMA and circumscribe the limits of this phrase. A comment suggested that it was possible for complying approved solid waste facilities to be classified open dumps. Permitting of a solid waste facility is not an exclusive condition rendering a facility environmentally acceptable. Operation, construction and other activities must be maintained to assure

environmental soundness. Exemption of permitted facilities per se will not accomplish this assurance. The department does not intend that an approved solid waste facility operating in compliance with an adequate permit will be classified as open dump.

7. Section 2.18 - "Permit"

A comment was made that the term "permit" as defined in Section 2.18 is not sufficiently broad to include "permits by rule" covered in Section 8 of the regulations. We agree. A separate definition of the term "permit by rule" has been provided as Section 2.19. The added definition is intended to include those permits covered under Section 8 of the regulations which do not require a written approval of the department. Section numbering has been altered to reflect additional definition.

8. Section 2.19 - "Persistent Violation"

A comment was made to add language in this definition that clarifies that violations of permits and orders are limited to such violations of permits or orders under the SWMA and these regulations. This suggestion was accepted and such language included in the final regulations.

9. Section 2.20 and Section 2.21 - "Recycling Facility" and "Resource Recovery Facility"

A suggestion was made by a commentator to clarify these definitions to include only facilities for which the primary purpose is recycling or resource recovery. Alteration of the definition of "recycling facility" has been made in the final regulations to clarify this point. However, nationally, several resource recovery facilities have been developed which have multiple "primary" purposes (e.g., Processing of solid waste and production of energy for specific purposes). The department therefore felt that it is necessary to maintain the proposed definition to allow sufficient flexibility to assure proper and sound handling, processing and disposal of solid waste at such multi-purpose facilities.

10. Section 2.23 - "Sludge"

A commentator requested clarification of whether the term sludge includes septage (materials removed from septic tanks). The intent of the definition of sludge is to include, without limiting the term, such wastes as septage insofar as they also qualify as solid waste under that definition (e.g., the septage is not a hazardous waste as defined or classified under Chapter 20, Article 5E of the Code). Specific approval for disposal of such waste at landfills will be available under the permitting program.

11. Section 2.24 - "Solid Waste"

Three comments were made regarding the definition of "solid waste":

- (a) A question of coverage of industrial solid waste facilities under SWMA and these regulations, and
- (b) A suggestion that the State WPCA be included in the portion of definitions exempting mine-related wastes regulated under Chapter 20, Article 6 of the Code.
- (c) Another comment pointed out the definition of solid waste is too broad since it includes "liquids...resulting from industrial...operations." We agree. The intent of the SWMA is to regulate solid not liquid waste that results from industrial operations. The definition of solid waste does cover contained liquids such as those disposed of in a drum. We have deleted the word liquid since it broadens the scope of the term solid waste to any liquid waste coming from an industrial operation. This would result in jurisdiction equal to the SWPCA. The SWMA however, was intended to cover liquids emanating from the solid waste facility and not those liquids resulting from a commercial or industrial process.

The definition of "solid waste" included in the proposed (and final) regulations is the statutory definition from the SWMA. The department has included a definition of industrial solid waste facilities and has elected to not require permitting of these facilities at this time so it can develop a program for combining the permitting program under the SWMA and SWPCA.

The exemption of mine-related wastes from the definition of "solid wastes" is felt to be sufficient to address the comment regarding their regulation under the State WPCA. Particular waste types are exempted from the definition. The fact that some of these mine-related waste types are regulated under both Articles 5A and 6 of Chapter 20 of the Code is incidental since the waste type is exempted.

12. Section 2.30 - "Transfer Station"

A comment was made that the term "transfer station" might be interpreted to include individual solid waste storage containers at industrial or commercial plants. We agree. It is not intended that such equipment be construed as transfer stations requiring permits. The department has added language to clarify the definition of "transfer station" by excluding such on-site storage equipment.

13. Comments to Add Definitions

- (a) It was suggested that some 83 terms be considered to be added, with definitions. Ten of the suggested definitions are either defined or reserved for later definitions in the final regulations. Most of the remaining suggested terms are not used in the regulations or may require definition in other subparts of Series XVIII.

- (b) It was suggested that the term "resource recovery landfill" be defined since it is used in Section 4.05(a). However, the term as used in Section 4.05(a) of the Proposed Regulations was in error and has been changed to "resource recovery facility" in the final regulations.
- (c) It was suggested that the term "permit modification" be defined. The final regulations include no use of the term.

14. Section numbers have been altered in the final regulations to reflect added terms as described above.

Section 3 - Solid Waste Facilities

1. General

Section 3 of the regulations is intended to describe those types of solid waste facilities for which the department is requiring permits or approvals under the regulations. Comments were received that the use of the words "acceptable" and "approved" in this section is confusing and, perhaps, superfluous. The department agrees that the language is somewhat confusing. Revisions in the language have been included in the final regulations to clarify the meaning of this section by removing the confusing uses of "approved" and "acceptable" and substituting clearer language.

2. Section 3.03 - "Acceptable Solid Waste Processing or Recycling Facilities"

A comment was received requesting deletion of solid waste processing or recycling facilities from regulation under this section. Reasons given for deleting them from regulation were: (a) they are adequately regulated under other regulations such as those of the West Virginia Air Pollution Control Commission, (b) that the department's solid waste program does not have sufficient resources to regulate them, and (c) that solid waste disposal is the most pressing environmental solid waste problem.

Solid waste processing or recycling facilities are expressly regulated by the SWMA via the definition of "solid waste facility" (S20-5F-2(g)) and the prohibition of solid waste facility construction without a valid permit from the division (S20-5F-5(6)). Regulation of these types of facilities, when done by other agencies, does not address the special problems of solid waste handling and processing. Availability of resources at the agency does not change the perceived legislative intent or language requiring solid waste facility regulation. The stated purpose of the SWMA is to establish a comprehensive program of controlling solid waste disposal. A comprehensive program in solid waste should address those types of facilities at which solid wastes are concentrated in relatively large quantities to assure that potential environmental and other problems are minimized at intermediary or final disposal facilities.

The department agrees that land disposal facilities and open dumps are the most pressing environmental problems. However, regulation of land disposal facilities and open dumps should not exclude the regulation of processing or recycling facilities since some of the same environmental insults may be created by improper solid waste processing or recycling. It is intended that solid waste processing or recycling facilities will be regulated in a manner commensurate with expected potential effects of these facilities.

Section 4 - Permits

1. General Comments

- (a) Several commentators suggested that the regulations should include language requiring that the division complete its review of a complete permit application within a mandatory period of time. Time periods suggested range from sixty (60) days to six (6) months. Each permit application will contain specific, detailed technical information which will be different for each site and is likely to vary widely in complexity and review time necessary to recommend an appropriate action. The resources available to the division for its solid waste program activities are severely limited. Additionally, the division cannot predict accurately the number of permit applications which may be submitted at any time. For these reasons the department does not consider a time limit for final permit application review a responsible requirement and has not included such provision.

2. Section 4.02 - Single Permit

- (a) A comment was received requesting deletion of this section due to perceived duplication and overlap with the State WRCA permitting processes, particularly for industrial solid waste facilities. This comment has been addressed by adding a Section 5.02 and will be discussed further in addressing comments on Section 5 of the Proposed Regulations. The single permit requirement is statutory for solid waste facilities.
- (b) A commentator requested that language be included in Section 4.02 to clarify that the single permit is a single permit "issued by the department" rather than overriding all permitting requirements of other agencies. The department agrees and has clarified the single permit to be a single permit issued by the Division of Water Resources of the Department of Natural Resources.

The requirement of Section 4.02 is intended to mean that when a solid waste facility permit is issued under the regulations that it comply with the requirements of the SWMA and the State WPCA and their applicable regulations. The measure is intended to consolidate a currently bifurcated permitting program for solid waste facilities, not to require additional permits for facilities which are already adequately regulated by the department.

3. Section 4.03 - Permit Term

Comments were received requesting clarification of the extension of permit expiration dates for up to one year. This provision is included in the statute and is interpreted that a permittee may obtain as many extensions of a permit expiration date as long as the expiration date is not extended beyond one year past the original expiration date. Therefore, a permit term may be no longer than six (6) years unless it is renewed by the division.

4. Section 4.04 - Permit Application

- (a) A comment was received suggesting that time for completeness review by the division be reduced to thirty (30) days, from the proposed sixty (60) days. Short completeness review time may lead to hasty review of complex applications. Resource limitations essentially preclude such short review time. The sixty (60) day time for review of completeness has been maintained in the final regulations.
- (b) A suggestion was made that a provision be included requiring submission of the permit application at least 180 days in advance of facility construction. The permit requirement (Section 4.01) is that the permit be issued prior to construction. Division experience in permitting solid waste facilities indicates that facilities may not be constructed for six to twelve months after permit issuance. Additional resources would be necessary to assure adequate review of applications for permit received only 180 days prior to construction.
- (c) Comments also requested that the division be required to notify the applicant concerning the completeness of the application. This comment was accepted and language requiring such division notification of completeness of application is included in the final regulations. Included in this language is a requirement on the division to itemize application deficiencies to further define what is meant by "administratively complete."

5. Section 4.05 - Permit Application Fees

- (a) Several commentators indicated that application fees required in Section 4.05(a) are unfounded or excessive. The SWMA allows application fees to be assessed up to an amount sufficient to defray the costs of permit review. While the department believes the proposed fee schedule is justifiable, it also recognizes the weight of comment in favor of reduced application fees. The application fee schedule has therefore been reduced in the final regulations. The final fees represent approximately 50% of originally proposed fees. The department believes a graduated fee schedule more accurately represents the amount of department effort applied

to review of applications for permit for the various facility types. The department believes that a single "filing" fee does not adequately implement the implied statutory intent of defraying the costs of permit review.

- (b) A comment was received indicating that more than one application fee may apply to a particular facility. This comment is believed to be a procedural matter of assuring that only one application fee is required at the time of application.
- (c) Several comments requested language directing application fees for use in the division's solid waste program. While this concept meets with the approval of the department, the department recognizes that such a provision is a legislative matter and cannot be addressed in these regulations since it is not enabled in the SWMA.
- (d) Comments were received requesting deletion of Section 4.05(b), instituting a fee of 50% for refiling an application which has been properly deemed incomplete. The department incurs additional cost for reviewing refiled applications. The general intent of this section is to attempt to assure that complete applications are received initially insofar as possible and that the division use discretion in requiring refiling of applications.
- (e) A commentator recommended instituting a \$100 fee for applying for a permit transfer under Section 4.08. This recommendation was rejected since the required application is relatively simple and does not result in significant costs to the department for review.

6. Section 4.06 - Public Participation in the Permit Application Process

- (a) Comments were made objecting to requiring the applicant operate the public participation program during the permit application process and requesting the department to operate it in a manner similar to that required in the State WPCA. The department experience with applicant-operated public participation under Chapter 20, Article 6 has been very good. Such a public participation program is workable and forces the operator and local public to work out their differences.
- (b) Comments were also received in favor of an applicant-operated public participation program in the application process.
- (c) A comment suggested including the phrase "if deemed necessary by the Chief" at the end of the first sentence of Section 4.06(b) allowing the division to convene a public hearing on an application for solid waste facility permit. The suggested

language is considered unnecessary since the Chief supervises the operations of the division and would normally participate in any decision to hold a public hearing on an application.

- (d) A comment recommended that the applicant be required to allow a minimum thirty (30) day period for public comment. This suggestion conforms to the wishes of the department. However this matter can best be described in procedural rules governing the process of applying for a permit under these regulations.

7. Section 4.07 - Permit Denial

- (a) Suggestions were made to clarify Section 4.07(a) to assure that permits are not denied because of incompleteness of the application. The department agrees with the suggestion. Revision has been made to subsection 4.07(a)(1) to include applicant refusal to submit complete information, and to delete subsection 4.07(a)(2). A revision has been made to proposed subsection 4.07(a)(5) to include technical inadequacy of proposed measures and practices as conditions allowing denial of permit. The subsection numbers have also been revised in the final regulations.
- (b) A comment indicated that the evaluation of site conditions implied in proposed subsection 4.07(a)(4) must incorporate some objective standards. Standards defining acceptable site soils, geologic and hydrologic characteristics will be promulgated by the department separately as a part of the interpretive facility standards at a future date.

8. Section 4.08 - Transfer of Permit

- (a) It was suggested that transferable permits should be limited in Section 4.08(a) to only permits issued pursuant to the SWMA. The department agrees and has included clarifying language to that effect.
- (b) The department disagrees that the reference to subsection 4.08(a)(2), contained in subsection 4.08(a)(1), is superfluous. There is no other location where the transfer date is previously defined and the notification of transfer is required a specified time in advance of that date.
- (c) Recommendations were made to include a provision in 4.08(b) requiring the division to supply reasons for refusing to transfer a permit when the provision is utilized. The department concurs and has included such provision in the final regulations.
- (d) Comments were received concurring with the concept of transferring permits under the SWMA as described in Section 4.08.

Section 5 - Existing Approved Solid Waste Facilities

Several comments were received concerning the implied duplicative regulation of industrial solid waste facilities that are currently permitted pursuant to the State WPCA. The department considers these comments to be of great value. It is not the intent of these regulations, nor of the SWMA, to create a duplicative permitting program under two statutes administered by the same division of the department. Rather the intent of the SWMA was to consolidate the two permitting programs. The department has added new language in Section 5.02 and limited Section 5.01 to pre-existing solid waste facility permits issued by the West Virginia Department of Health. ✓

The department believes that the SWMA provides clearer authority to regulate industrial solid waste facilities than does the State Water Pollution Control Act via the general purpose of the SWMA and the definitions and prohibitions contained in the statute. However, it is also recognized that several industrial solid waste facility permits are in effect under the State WPCA.

A new Section 5.02 addresses industrial waste landfill permitting. This section continues permits issued for such facilities until permits under the SWMA are issued for them. It requires the department to establish a permitting program under the SWMA for industrial waste landfills. This program must also establish an orderly transition of permits issued under the State WPCA to permits under the SWMA.

The department believes that Section 5.02 allows the department sufficient time to develop the most effective and least burdensome program for these facilities. Section 5.02 also provides for the orderly transition of permits, consolidated division permits for industrial solid waste facilities, and no disruption of or duplicative permitting of them in the interim.

Sections 2.16 and 2.17 have been added to the definitions to clarify Section 5.02.

The department believes that the addition of Sections 5.02, 2.16, and 2.17 aligns these regulations with the basic intent and format of Sections 20-5F-5(b) and (c) of the statute. This is accomplished by establishing permitting programs under the SWMA and consolidating solid waste facility permitting requirements of that act and the State WPCA into a single permit program.

Section 6 - Compliance

1. Commentors suggested limiting requiring compliance with "orders" in Section 6.02 and 6.03 to orders issued pursuant to the SWMA and these regulations. The department concurs and language has been revised to clarify that point.

2. Comments requested clarification of Section 6.03(a)(2) "interference" with a representative of the division, especially as it relates to an individual's right to require a search warrant. An individual's right to require a search warrant in most situations is a constitutional right and the regulations cannot override that right. The intent of the section is believed to be clear and further clarification unnecessary.
3. It was suggested that the word "relevant" used in Section 6.03(a)(4) and (b)(3) be changed to "significant." The department concurs and such changes are included in the final regulations.
4. It was recommended to change Section 6.03(b)(1) to allow revocation of permit only for "imminent and substantial endangerment of public health." The department believes that such a change would limit its ability to protect the waters of the State from detrimental effects that do not endanger health but pose other potential environmental hazards. Additionally, we note that such authority is still retained by the State Health Department in Section 20-5F-3.
5. Comments were received concerning a perceived need for the department to provide, by regulation, a specific time, during which the permittee could improve deficiencies, prior to suspension or revocation of permit. The reasons given for the need for time to comply are that dislocations may occur due to lack of available solid waste facilities and facilities construction and deficiency improvement will normally require time for their institution at any particular facility. The department agrees that time to comply with the department's requirements is necessary. Compliance orders have been provided in Section 6.02 for such contingency. Time to comply may be made available through interaction with the department and time schedules issued in compliance orders. Department policy is in effect that permit suspension and revocation will be used only in the most severe cases of deficiencies or violations. The department believes that the availability of such radical enforcement measures as suspension or revocation should be maintained. Sections 6.02 and 6.03(a) and (b) have been changed to provide for compliance, suspension or revocation orders being issued only by the Chief of the division or the Director of the department. The department believes that this protocol provides for more accountability on the part of the Department.
6. Comments were made concerning appeals and their effect on facility continuation. It was recommended that discontinuation of operations be stayed until any appeals of orders issued under Section 6 are heard by the Water Resources Board. Such stay is available under the appeal provision of the statute. Therefore additional language to that effect is unnecessary and has not been included.

A second comment requested rapid resolution of appeals. The department cannot control the time in which an appeal of an order is heard and acted upon by the Water Resources Board.

7. It was recommended that a permitter should also be allowed to reapply for a solid waste facility permit upon issuance of an order revoking a permit. The department concurs and has included such provision in Section 6.03(c)(2).
8. It was also recommended that the requirement to apply "for a permit to abandon the facility" under Section 6.03(c)(2), include the phrase "or close." Proper closure of discontinued solid waste facilities is very important. Therefore the recommended clarification has been included in the final regulations.

Section 7 - Open Dumps

1. Section 7.02(c) - Minimum Performance Standards - State Law

Comment was received indicating that Section 7.02(c) is unnecessarily broad and may cause facilities which are complying with the environmental and health protection intent of the SWMA to be classified open dumps for unworthy reasons. The department is somewhat persuaded by the argument that non-payment of worker's compensation premiums could be cause to classify an otherwise complying solid waste facility as an open dump. The department believes that the intent of the SWMA in this regard is directed toward violations of State environmental, nuisance, health, safety and beautification statutes. It is the department's intent to focus its attention on these types of statutes when classifying facilities as open dumps. The department also hopes that solid waste facilities will, in fact, comply with all state laws.

The language included in Section 7.02(c) parallels the SWMA language and has not been revised in the final regulations.

2. Section 7.02(d) - Site and Operating Standards

- (a) Comments indicated that the opening statement of Section 7.02(d) was confusing and difficult to understand. The intent of the statement is to establish that Subsections 7.02(d)(1) through (10) provide the technical standards upon which classification of solid waste facilities as open dumps will be based. This statement has been revised to clarify it in the final regulations.
- (b) Comments were received that Section 7.02(d)(1) concerning the use of cover material be revised (1) to apply only to land disposal facilities, and (2) to apply only where necessary to protect public health. The department agrees that Section 7.02(d)(1) should be limited to apply only to solid waste disposal facilities and has revised it accordingly. Cover material is necessary to protect public health at solid waste facilities. The department has revised Section 7.02(d)(1) to indicate the public health protection purposes for requiring cover material at solid waste disposal facilities.

- (c) A recommendation was made to delete Section 7.02(d)(2) concerning water pollution because it attempts to regulate ground water quality when it is reviewed under Section 7.02(d)(4). The intent of Section 7.02(d)(2) is to evaluate solid waste facilities with regard to water pollution discharges. The department does not view this section as beyond its purview or mission under the SWMA. Therefore the proposed language has been maintained.
- (d) Comments recommending clarification of Section 7.02(d)(3) have been accepted and included in the final regulations. The comments clarify the approval authorities of the West Virginia Air Pollution Control Commission and the department's Division of Forestry concerning open burning.
- (e) A standard equivalent to the Federal standard expressed in 40 CFR 257.3-4 has been recommended. The department considers ground water quality at solid waste facilities a part of the broader issue of unified statewide ground water quality policy. Statewide ground water quality policy has not been established; nor has the department sufficiently evaluated this issue vis a vis solid waste facilities. Therefore Section 7.02(d)(4) has been reserved in the final regulations. The comment has been taken under advisement by the department.
- (f) A recommendation was received to delete all references to open burning in the regulations since the West Virginia Air Pollution Control Commission regulates burning of solid waste. Open burning of solid waste is only included in Section 7.02(d)(3) of these regulations. The department considers open burning of solid waste an environmentally unsound practice and adequate grounds for classification of a solid waste facility as an open dump. Section 7.02(d)(3) has been maintained in the final regulations.
- (g) A recommendation was made to indicate hazards to be evaluated under Section 7.02(d)(7) to render it substantially equivalent to the Federal standard of 40 CFR 257.3-1. The department concurs and has included the recommended language in the final regulations.
- (h) It was also recommended that the Federal definition of "taking," as used in Section 7.02(d)(8) be included in that section. The department also concurs with this recommendation and has revised Section 7.02(d)(8) in the final regulations.

- (i) A sixty (60) day period to establish compliance schedule terms and conditions was suggested under Section 7.03. The department believes establishment of a minimum or maximum period for establishing compliance activities and schedules would limit the department's flexibility in obtaining compliance with the open dump prohibition of the SWMA. The proposed language has been maintained.
- (j) A comment indicated that a three year compliance period is too long a period for such flagrant violations of the SWMA as open dumps. This period is the maximum period allowed by the statute. The three year maximum compliance period recognizes that many open dumps will require significant on-site corrective actions, sufficient lead time to acquire funds for such actions, or time to site and obtain a permit for replacement solid waste facilities. The proposed language has been maintained in the final regulations for those reasons.

Section 8 - Permits By Rule

- 1. Comments were received that question the advisability of regulating recycling facilities. The department's response to this comment has been made above in the response to comments concerning Section 3. The department agrees that recycling facilities are to be encouraged and has therefore made a simple, expedited approval mechanism available through Section 8.
- 2. A comment recommended instituting the standards reserved as Section 8.03 in these regulations. The department believes that such standards need to be evaluated in concert with the recycling industry of the State to assure that they are equitable and well-conceived. Resource limitations have precluded such an evaluation. Therefore the reservation of Section 8.03 has been continued in the final regulations.

Section 9 - Permit Review By The Director

1. General

Comments indicated that the review of permits included in Section 9 is needless and will show the permitting process. The SWMA (Section 20-5F-4(b)) expressly authorizes the Director to deny permits issued by the division for certain causes. Section 9 interprets and establishes the basic process enabled by that section of the SWMA.

2. Section 9.02 - Commencement of Review of Permit Issuance

Comments concerning this subsection included:

- (a) The department is better able to evaluate and monitor solid waste facility effects than by individual comment.
- (b) The Chief and Director should act in accord on permit issuance.
- (c) Establishing minimum condition under which the Director may commence a permit review is counter to the discretionary intent of the SWMA.
- (d) Initiation of review of an issued permit based on public request should require that the requests show likely adverse effects and who may be affected.

The department has responded by removing proposed Section 9.02 and revising Section 9.01 by establishing a time frame in which review of issued permits by the Director will occur. The time frame include commencement of review within thirty (30) days of permit issuance by the division and completion of such review and action by the Director within ninety (90) days of permit issuance. The department considers a ninety (90) day review period sufficient and believes prospective permittees should be given a specific period for this action.

3. Proposed Section 9.04 and 9.05

Comments concerning Sections 9.04 and 9.05 include:

- (a) Request for deletion of subsections 9.04(a), (d) and (e) since the stated criteria are too broad, vague, subjective, and could cause rejection of any or all solid waste facility permits.
- (b) Sections 9.04 and 9.05 should be clarified to assure that permits are denied by the Director only after he has performed a review of the permit issued.

The department concurs with the recommendation to clarify the timing of permit review and action by the Director. A revision combining proposed Sections 9.04 and 9.05 has been included as Section 9.03 in the final regulations.

The criteria or reasons which the Director may use for denial of an issued permit, given in proposed Section 9.04, parallel the language in the SWMA. The department has therefore maintained that language but transferred it to Section 9.03(b).

4. Other Comments on Section 9

- (a) A commentor suggested allowing the permitter to operate the permitted facility until the Director's decision is rendered. The department does not believe that any language in Section 9 prevents such interim operation at the risk of the permitter.
- (b) A thirty (30) day period was recommended for completion of permit review and action by the Director. The department believes that a maximum time period should be established for such final action, but believes thirty (30) days to be too brief a period in which to perform the task. The department therefore revised Section 9.01 to include a maximum period of 90 days for completion of such a review.

Section 10 - General Administration and Enforcement

1. Section 10.01

- (a) A request was made to clarify the phrase "any person responsible" in Section 10.01(b). The department believes that the description of that phrase is contained in Section 1.03 concerning the applicability of the regulations as a whole. No further clarification is required in Section 10.01(b).
- (b) It was suggested that the phrase "as the division may reasonably require" in Section 10.01(b)(5) be moved to the next line to clarify its inclusiveness. The department concurs and such revision is included in the final regulations.
- (c) It was indicated that the powers, expressed in Section 10.01(b), to require actions will be too expensive for the regulated community and redundant if the department will also be performing monitoring and testing activities. The department believes that these powers are necessary to obtain an accurate record of facility performance, to adequately enforce the provisions of the SWMA. The department does not believe them to be expensive. The department intends to perform monitoring and testing activities on an occasional basis to support investigative activities only. Regular monitoring and reporting are considered, by the department, to be the responsibility of those operating or responsible for the solid waste facility.
- (d) It was recommended that the phrase "at reasonable times" be inserted in subsections 10.01(c)(1), (3) and (4) and the phrase "at the department's expense" be inserted in subsection 10.01(c)(2) (covering costs of obtaining copies of records). The department concurs and has made the recommended revisions in the final regulations.

- (e) It was indicated that the regulations cannot infringe upon the right of an individual to require a search warrant. The department concurs and does not believe that these regulation infringe on that right as stated previously.