

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Department of Commerce, Labor, and Environmental Resources
AGENCY: Division of Environmental Protection TITLE NUMBER: 47

CITE AUTHORITY WV Code § 20-5E-6

AMENDMENT TO AN EXISTING RULE: YES XX NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 35

TITLE OF RULE BEING AMENDED: "Hazardous Waste Management Regulations"

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

[Handwritten signature of David C. Callaghan]

David C. Callaghan Director

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TITLE 47
LEGISLATIVE RULES
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES
OFFICE OF WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION
SECRETARY OF STATE

SERIES 35
HAZARDOUS WASTE MANAGEMENT REGULATIONS

§ 47-35-1. SCOPE AND AUTHORITY.

1.1 Scope and Purpose. -- The purpose of these regulations is to provide for the regulation of the generation, treatment, storage, and disposal of hazardous waste to the extent necessary for the protection of the public health and safety and the environment.

1.2 Authority. -- These regulations are promulgated pursuant to the West Virginia Hazardous Waste Management Act, W. Va. Code, § 20-5E-1, et seq.

1.3 Filing Date. --

1.4 Effective Date. --

1.5 Repeal of Former Rule - This rule repeals and replaces the Hazardous Waste Management Regulations, 47 CSR 35, in effect on the date this rule becomes effective.

1.6 Incorporation by Reference. -- Whenever either federal statutes or regulations or state statutes or regulations are incorporated by reference into this rule, the reference is to that statute or regulation in effect on July 1, 1993, unless otherwise noted in the text of this rule.

1.6.1 In applying the federal requirements incorporated by reference throughout this rule, the following exceptions or substitutions apply, unless the context clearly requires otherwise:

1.6.1.a "Office of Waste Management, West Virginia Division of Environmental Protection" shall be substituted for "Environmental Protection Agency."

1.6.1.b "Chief of the Office of Waste Management, West Virginia Division of Environmental Protection" shall be substituted for "Administrator," "Regional Administrator," and "Director."

1.6.1.c Whenever the regulations require publication in the "Federal Register" compliance shall be accomplished by publication in the

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"West Virginia Register," a part of the "State Register" created pursuant to the provisions of W. Va. Code, § 29A-2-2.

1.6.1.d Whenever in the federal regulation reference is made to the Resource Conservation and Recovery Act of 1976 § 3010, as amended (42 U.S.C. § 6930), the reference should be to Section 4 of this regulation.

1.7 Whenever a reference is cited in a provision incorporated by reference which cross reference was not incorporated by reference, the provisions of the applicable state law and regulations, if any, control to the extent of any conflict or inconsistency. For example, cross reference to 40 CFR part 264 subpart O -- Incinerators, which was not incorporated by reference, would need to be referenced to the applicable West Virginia Air Pollution Control rule on incineration of hazardous waste, 45 CSR 25.

1.8 In the event a provision of the Code of Federal Regulations incorporated by reference herein includes a section which is inconsistent with the West Virginia Code, the West Virginia Code controls to the extent federal law does not preempt the state law. In the event a provision of the Code of Federal Regulations incorporated by reference herein is beyond the scope of authority granted the Division of Environmental Protection pursuant to statute, or is in excess of the statutory authority, such provision shall be and remain effective only to the extent authorized by the West Virginia Code.

1.9 The provisions of this rule are to be applied prospectively. All orders, determinations, demonstrations, rules, permits, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted, approved or allowed to become effective by the Chief, and which are in effect on the date this regulation becomes effective, shall continue in effect according to their terms unless modified, suspended or revoked in accordance with the law.

§ 47-35-2. HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL.

2.1 The provisions of 40 CFR part 260 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

2.1.1 The definitions of terms used in this regulation shall have the meaning ascribed to them in 40 CFR parts 260, 261, 262, 263, 264, 265, 266, 267, 268, 270 and 279 with the exceptions, modifications and additions set forth in this section.

2.1.1.a "Major facility" means a disposal or treatment facility which disposes or treats an amount of hazardous waste exceeding or equal to one (1000) tons during a calendar year, and any storage facility having a storage capacity for one thousand (1,000) tons of hazardous waste or more.

2.1.1.b "Full regulation" means those regulations applicable to generators of greater than one thousand (1000) kilograms of non-acutely hazardous waste in a calendar month.

2.2 The provisions of 40 CFR § 260.2 are excepted from incorporation by reference. Availability of information provided under these rules is controlled by the provisions of W. Va. Code, § 20-5E-11.

2.3 The provisions of 40 CFR § 260.21(d) are excepted from incorporation by reference.

2.4 Petitions for Waste Exclusions.

2.4.1 Persons desiring to exclude a waste at a particular generating facility from the lists set forth in 40 CFR part 261 may petition the chief for such an exclusion. The petition shall include:

2.4.1.a A copy of the petition submitted to the Administrator of the Environmental Protection Agency pursuant to 40 CFR § 260.22, including all demonstration information;

2.4.1.b A copy of the Administrator's approval granting the exclusion pursuant to 40 CFR § 260.20(d); and

2.4.1.c Any other additional information which may be required for the chief to evaluate the petition.

2.4.2 Within one hundred and twenty (120) days of the filing of the petition the chief shall decide whether to approve or to deny the petition and so advise the petitioner. Where a decision to deny a petition is made, the chief shall notify the petitioner of such action in writing, setting forth the reasons therefor.

2.4.3 The chief shall not deny a petition to exclude a waste at a particular facility that has been approved by the Administrator unless scientifically supportable reasons for such denial are advanced which had not been presented to the Administrator.

§ 47-35-3. IDENTIFICATION AND LISTING OF HAZARDOUS WASTE.

3.1 The provisions of 40 CFR part 261 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

3.1.1 In order for a mixture of a waste and one or more hazardous wastes identified in 40 CFR §§ 261.3(a)(2)(iv)(A), (B), or (C) to be exempt from the definition of hazardous waste, the owner or operator must comply with the following:

3.1.1.a Provide a certification in writing to the chief that groundwater monitoring complying with either 40 CFR part 265, subpart F or which is approved by the chief, is or will be in place at the wastewater treatment facility identified in 40 CFR §§ 261.3(a)(2)(iv)(A), (B), or (C). A time schedule for the installation of such groundwater monitoring must be

included. This requirement does not apply to wastewater treatment units or containers.

3.1.1.b Before claiming an exemption, the owner or operator of each wastewater treatment facility receiving mixtures of wastes under 40 CFR §§ 261.3(a)(2)(iv)(A), (B), or (C) shall notify the chief of the receipt of such wastes on a form prescribed by the chief.

3.1.1.c Annually submit to the chief a list of hazardous wastes that are expected to be present in the mixture to be exempted.

3.2 The provisions of 40 CFR § 261.5 are excepted from incorporation by reference and in lieu thereof the language of this Section 3.2 is inserted. All references to 40 CFR § 261.5 and subparagraphs thereof, shall be deemed references to Section 3.2 and the subparagraphs herein, as appropriate. The provisions of this Section 3.2 are the exclusive requirements for small quantity generators and conditionally exempt small quantity generators notwithstanding any provision of the Code of Federal Regulations or these regulations to the contrary.

3.2.1 Special Requirements for Hazardous Waste Generated by Small Quantity Generators and Conditionally Exempt Small Quantity Generators.

3.2.1.a. Small Quantity Generators.

3.2.1.a.A A Small Quantity Generator is a generator of hazardous waste that generates more than 100 kilograms but less than 1000 kilograms of hazardous waste per month.

3.2.1.a.B Hazardous Waste Determination. A person who generates wastes must determine if that waste is hazardous by:

(a) Applying knowledge of the waste in light of the materials or processes used and knowledge of the characteristic and listed hazardous wastes contained in 40 CFR part 261.

(b) Testing the waste according to methods set forth in 40 CFR part 261.

(c) Voluntarily declaring the wastes as hazardous and subject to regulation.

3.2.1.a.C The Small Quantity Generator must notify the chief of hazardous waste generation activities in accordance with the provisions of Section 4 of this regulation. A small quantity generator may not treat, store or dispose of, transport or offer for transportation hazardous waste without having received an EPA Identification number.

3.2.1.a.D The Small Quantity Generator may accumulate hazardous waste on site for 180 days unless the distance that waste must be shipped for proper treatment, storage or disposal is more than 200 miles in which case the generator may accumulate hazardous waste on site for 270

days provided that the quantity of waste accumulated on site does not exceed 6,000 kilograms.

(a) If, due to unforeseen, temporary and uncontrollable circumstances hazardous waste must remain on site for longer than 180 or 270 days, an extension of up to 30 days may be granted by the chief.

3.2.1.a.E Containers. The Small Quantity Generator must store hazardous waste in containers or tanks that must meet the following requirements.

(a) Containers must be in good condition as defined by Department of Transportation Regulations.

(b) Containers must be kept closed except when adding or removing waste.

(c) Containers must be handled in a way which will not cause them to rupture or leak.

(d) The owner or operator of a Small Quantity Generator facility must inspect hazardous waste container storage areas weekly for leaks and/or deterioration and must remediate these conditions, upon detection.

(e) Incompatible wastes (such as oxidizers and petroleum based degreasers) must not be placed in the same container. (Other examples of potentially incompatible wastes can be found at 40 CFR part 265, Appendix V).

(f) Storage containers for incompatible wastes must be separated by means of a dike, berm, wall or other device.

3.2.1.a.F Tanks. Small Quantity Generators who store hazardous waste in tanks must comply with 40 CFR § 265.201.

3.2.1.a.G If a Small Quantity Generator closes (permanently removes from service) a container or tank storage area 40 CFR § 265.114 must be followed to insure that no contamination exists or remains at the storage location.

3.2.1.a.H Labeling. Containers and Tanks storing hazardous waste must comply with the following labeling requirements:

(a) On containers, the date upon which each period of accumulation began must be clearly marked and visible for inspection on each container.

(b) Each container and tank must be clearly labeled or marked with the words "Hazardous Waste" while in use on site.

3.2.1.a.I Manifest. Small Quantity Generators that transport or offer for transportation, hazardous waste for off site treatment, storage or disposal must prepare a manifest on the currently approved EPA form

according to the instructions that accompany that form unless the waste is reclaimed under a contractual agreement where:

(a) The type of waste and frequency of shipments are specified in the agreement;

(b) The vehicle used to transport the waste to the recycling facility and to deliver regenerated material back to the generator is owned and operated by the reclaimer of the waste; and

(c) The generator maintains a copy of the reclamation agreement on site for a period of at least three (3) years.

3.2.1.a.J Record Keeping. The Small Quantity Generator must comply with the following record keeping requirements:

(a) A copy of each properly completed manifest must be kept on site for at least three (3) years from the date that the waste was accepted by the initial transporter.

(b) Any test results, waste analyses or other record of a method used to make a hazardous waste determination must be kept on site for at least three (3) years from the date that the waste was sent to on site or off site treatment, storage or disposal.

(c) The three (3) year record retention time is automatically extended during the course of any unresolved enforcement action regarding regulated activity or as requested by the chief.

(d) If a copy of the manifest with the handwritten signature of the owner or operator of the designated facility has not been received by the generator within 60 days of the date the waste was accepted by the initial transporter, the generator must submit a legible copy of the manifest with some indication that the generator has not received confirmation of delivery to the chief.

(e) The chief, as he deems necessary, may require generators to furnish additional reports concerning the quantities and disposition of hazardous wastes.

3.2.1.a.K Preparedness and prevention. Facilities must be maintained and operated to minimize the possibility of a fire, explosion or any unplanned sudden or non-sudden release of hazardous wastes or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

(a) Required Equipment - All facilities must be equipped with the following unless none of the hazardous posed by the wastes handled at the facility could require a particular kind of equipment specified below:

(i) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel.

(ii) A device such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments or State or local emergency response teams.

(iii) Portable fire extinguishers, fire control equipment (including special extinguishing equipment), spill control equipment and decontamination equipment.

(iv) Water at adequate volumes and pressure to supply water hose streams, or foam producing equipment or automatic sprinklers or water spray systems.

(b) All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment where required must be tested and maintained as necessary to assure its proper operation in time of emergency.

(c) Whenever hazardous waste is being handled all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another unless such a device is not required by Section 3.2.1.a.K.(a) of these regulations. If there is just one employee on the premises while the facility is operating, that employee must have immediate access to a device referenced by Section 3.2.1.a.K.(a) of these regulations.

(d) The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of facility operation in an emergency unless aisle space is not needed for any of these purposes.

(e) The owner or operator must attempt to make the following arrangements, as appropriate, for the type of waste handled at the facility and the potential need for these services of these organizations.

(i) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places when facility personnel would normally be working, entrances to roads inside the facility and possible evacuation routes.

(ii) Arrangements designating primary emergency authority to a specific police and a specific fire department where more than one police or fire department might respond and arrangements with any others to provide support to the primary emergency authority.

(iii) Agreements with State emergency response teams, emergency response contractors and equipment suppliers.

(iv) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions or releases at the facility.

(f) Where State or local authorities decline to enter into such agreements, the owner or operator must document the refusal in the operating record.

(g) At all times there must be at least one employee either on the premises or on call (i.e., available to respond to an emergency by reaching the facility in a short period of time) with the responsibility for coordinating all emergency response measures specified in these regulations. This employee is the emergency coordinator.

(h) The following information must be posted next to the telephone:

(i) The name and telephone number of the emergency coordinator.

(ii) The location of fire extinguishers and spill control equipment and, if present, the fire alarm.

(iii) The telephone number of the fire department unless the facility has a direct alarm.

(i) The generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures relevant to their responsibilities during normal facility operations and emergencies.

(j) The emergency coordinator or his designee must respond to any emergencies that arise and initiate the proper response to the emergency.

(k) In the event of a fire, explosion or other release that could threaten human health outside the facility or when the generator has knowledge that a spill has reached surface water, the generator must notify the National Response Center at 1-800-424-8802. The report must contain the following information:

(i) The name, address and EPA identification number of the generator.

(ii) The date, time and type of incident.

(iii) Type and quantity of hazardous waste involved in the incident.

(iv) Extent of injuries, if any.

(v) Estimated quantity and disposition of recovered materials, if any.

3.2.1.a.L If a Small Quantity Generator treats (other than elementary neutralization or other excluded methods), stores for longer than the time frames set forth in Section 3.2.1.a.C or disposes of hazardous waste on-site, the generator becomes subject to the permitting requirements of 40 CFR part 265, part 270 and all other applicable parts.

3.2.1.b Conditionally Exempt Small Quantity Generators.

3.2.1.b.A A Conditionally Exempt Small Quantity Generator is a generator of hazardous waste that produces no more than 100 kilograms of waste per month and that meets the requirements stipulated below.

(a) If the generator generates a total of one (1) kilogram or more of acute hazardous waste identified in 40 CFR part 261 in a calendar month, the waste shall be subject to full regulation.

3.2.1.b.B The Conditionally Exempt Small Quantity Generator must make a proper hazardous waste determination as specified in Section 3.2.1.a.B of these regulations. When determining the amount of hazardous waste generated, a generator need only include those wastes that are generated on site prior to reclamation, are not excluded under 40 CFR part 261, and are not generated, reclaimed and reused on site.

3.2.1.b.C The Conditionally Exempt Small Quantity Generator must notify the chief of its hazardous waste generation activity. No generator shall treat, store or dispose of, transport or offer for transportation hazardous waste without having received an EPA identification number.

3.2.1.b.D A Conditionally Exempt Small Quantity Generator may accumulate up to 1000 kilograms of hazardous waste on site before becoming subject to the requirements of Sections 3.2.1.a.D and 3.2.1.a.H of these regulations.

(a) A total of 100 kilograms of any residue or contaminated soil, waste or other debris resulting from the clean-up of a spill into or on any land or water of any acute hazardous wastes listed in 40 CFR part 261 may be accumulated before becoming subject to full regulation.

3.2.1.b.E Record Keeping. The generator must establish and maintain on site a written record specifying the quantity and types hazardous wastes disposed of, the dates the wastes were transported off site and the final disposition of the wastes. The preferred method for this requirement is via the manifest.

3.2.1.b.F The generator must either treat or dispose of hazardous waste in an on site facility or ensure delivery to an off site treatment storage or disposal facility which:

(a) Is permitted to treat, store or dispose of hazardous waste by a state or the federal government or both;

(b) Is permitted, licensed or registered by a state other than West Virginia to manage waste generated by conditionally exempt small quantity facilities;

(c) Beneficially uses or re-uses or legitimately recycles or reclaims the waste; or,

(d) Treats the waste prior to beneficial use or re-use of legitimate recycling or reclamation.

3.2.1.b.G Hazardous waste subject to the reduced requirements of Section 3.2.1.b may be mixed with non-hazardous waste and remain subject to the reduced requirements even though the resultant mixture exceeds the quantity limitations in Section 3.2.1.b.D of these regulations unless the mixture meets any of the characteristics of hazardous waste identified in 40 CFR part 261 with the following modifications:

(a) If any person mixes a waste with a hazardous waste that exceeds a quantity exclusion level of Section 3.2.1.b.D of these regulations, the mixture is subject to full regulations.

(b) If a conditionally exempt small quantity generator's wastes are mixed with used oil, the mixture is subject to 40 CFR part 266, subpart E if it is designated to be burned for energy recovery. Any material produced from such a mixture by processing, blending or other treatment is also so regulated if it is destined to be burned for energy recovery.

3.2.1.b.H If a Conditionally Exempt Small Quantity Generator does not meet all of the requirements set forth herein, the exemption does not apply and the generator will be subject to full regulation.

§ 47-35-4. NOTIFICATION OF HAZARDOUS WASTE ACTIVITY REGULATIONS.

4.1 Applicability. Any person that engages in a hazardous waste activity in the State of West Virginia shall notify the chief of these activities, unless such activities are exempted from the requirements of these regulations.

4.1.1 Any person as described in Section 4.1 of these regulations that has notified the EPA or is subject to the requirements to notify EPA as specified in Volume 45, Number 39 of the Federal Register, dated February 26, 1980, pages 12746 through 12754, is subject to the provision of Section 4 of these regulations.

4.1.2 The purpose of Section 4 of these regulations is to provide a means for the State of West Virginia to utilize the information provided by all who complied with the notification requirements of EPA as described in Section 4.1.1 of these regulations or all who initiated hazardous waste activities subsequent to the requirements of EPA as referenced above in Section 4.1.1 of these regulations shall notify the chief of their hazardous waste activities.

4.2 Notification. Any person that notified EPA of hazardous waste activities as referenced above in Section 4.1 of these regulations shall provide a copy of that notification to the chief.

4.2.1 Any person involved in hazardous waste activities that did not comply with the notification requirements of EPA, as referenced above in Section 4.1 of the regulations, but is subject to those requirements shall notify the chief in writing of their hazardous waste activities within thirty (30) days of the effective date of these regulations. Notification may be accomplished by the use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.2 Any person exempted from the federal notification requirements but subject to West Virginia notification requirements as specified in 40 CFR §§ 261.6(b) and 261.5 shall notify the chief in writing of their hazardous waste activities within ninety (90) days of the effective date of these regulations or the date of initiation of such activities, whichever is later. Notification may be accomplished by use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.3 One notification form is required for each generator.

4.2.4 A notification form is required for each storage, treatment, disposal, or other facility. However, if one facility site includes more than one storage, treatment, or disposal activity, only one notification form for the entire facility site is required.

4.2.5 Generators that store, treat, or dispose of hazardous waste on-site shall file a notification form for generation activities as well as storage, treatment, and disposal activities, unless such activities are exempted from the requirements of these regulations.

4.2.6 New generators and those initiating activities subsequent to the EPA notification period referenced in Section 4.1.1 of these regulations shall comply with the EPA identification number requirements and shall provide a copy of their application for an EPA identification number to the Administrator.

§ 47-35-5. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE.

5.1 The provisions of 40 CFR part 262 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

5.2 The provisions of 40 CFR § 262.10(e) shall be excepted from incorporation.

5.2.1 A person who generates a hazardous waste as defined by 40 CFR part 261 is subject to the compliance requirements and penalties

prescribed in W. Va. Code, § 20-5E-1 et seq. if he does not comply with the requirements of this regulation.

5.2.2 All references to 40 CFR § 262.10(e) shall be deemed references to Section 5.2 and the subparagraphs herein, as appropriate.

5.3 The provisions of 40 CFR part 262, subpart E -- Exports of Hazardous Waste are excepted from incorporation by reference and in addition to the requirements contained therein, any person subject to the provisions of subpart E shall file with the chief copies of all documentation, manifests, exception reports, annual reports or records, inter alia, submitted to EPA, the administrator or the regional administrator as required by and within the timeframes set forth in subpart E.

5.4 The provisions of 40 CFR part 262, subpart F -- Imports of Hazardous Waste are excepted from incorporation by reference and in addition to the requirements contained therein, any person subject to the provisions of subpart F shall file with the chief copies of all documentation, manifests, exception reports, annual reports or records, inter alia, submitted to EPA, the administrator or the regional administrator as required by and within the timeframes set forth in subpart F.

§ 47-35-6. STANDARDS APPLICABLE TO TRANSPORTERS OF HAZARDOUS WASTE.

6.1 The provisions of 40 CFR part 263 are hereby adopted and incorporated by reference insofar as said regulations relate to the transportation of hazardous waste by air and water.

6.2 Note -- The use of railroads for the transportation of hazardous waste is regulated by the West Virginia Public Service Commission rules, "Rules and Regulations Governing the Transportation of Hazardous Waste by Rail", 150 CSR 11. The use of the state highways for the transportation of hazardous waste is regulated under the West Virginia Division of Highways, "Transportation of Hazardous Wastes Upon the Roads and Highways", 157 CSR 7.

§ 47-35-7. STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES.

7.1 The standards in Section 7 of these regulations apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste except as otherwise provided by law. In addition to the standards in Section 7 of these regulations, the regulation of the Air Pollution Control Commission, 45 CSR 25, apply to management facilities which may emit hazardous waste or the constituents thereof to the atmosphere including incineration facilities except as otherwise provided by law. For purposes of Section 7 of these regulations, the following persons are considered to be incinerating hazardous waste:

7.1.1 Owners or operators of hazardous waste incinerators; and

7.1.2 Owners or operators of boilers or industrial furnaces used to destroy wastes.

7.2 The provisions of 40 CFR part 264 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

7.3 The provisions of 40 CFR part 264, subpart F -- Releases From Solid Waste Management Units are incorporated by reference with the following modifications, exceptions and additions.

7.3.1 For purposes of 40 CFR § 264.92, reference to the "Regional Administrator" shall be to the "Water Resources Board." The Water Resources Board establishes ground-water protection standards pursuant to the authority granted the Board in W. Va. Code, § 20-5M-4.

7.3.2 For purposes of 40 CFR § 264.94 and subparagraphs thereof, the Water Resource Board rule on Groundwater Protection Standards, 46 CSR 7 and the subparagraphs therein, shall apply as required pursuant to the authority granted the Water Resource Board in W. Va. Code, § 20-5M-4.

7.4 The provisions of 40 CFR part 264, subpart H -- Financial Requirements are adopted and incorporated by reference with the following modifications:

7.4.1 The provisions of 40 CFR §§ 264.149 and 264.150 are excepted from incorporation by reference.

7.5 ~~The provisions of 40 CFR §§ 264.340, 264.341, 264.342 and 264.351 relating to incinerators are incorporated by reference.~~
The provisions of 40 C.F.R. § § 264.343, 264.344, 264.345 and 264.347 relating to incinerators are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from incinerators.

7.5.1 Consult the Air Pollution Control Commission regulations, 45 CSR 25, Regulations to Prevent & Control Air Pollution from Hazardous Waste Treatment, Storage, or Disposal Facilities.

7.6 The provisions of 40 CFR part 264, subparts AA and BB are excepted from incorporation by reference.

§ 47-35-8. INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES.

8.1 The provisions of 40 CFR part 265 are adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

8.2 The provisions of 40 CFR §§ 265.149 and 265.150 are excepted from incorporation by reference.

8.3 The provisions of 40 CFR part 265, subpart J -- Tank Systems are adopted and incorporated by reference with the following modification:

8.3.1 The provisions of 40 CFR § 265.193(a)(4) is excepted from incorporation by reference and in lieu thereof the following language shall be inserted:

"(4) For those existing tank systems for which the age cannot be documented, within eight years of April 1, 1988; but if the age of the facility is greater than seven years, secondary containment must be provided by the time the facility reaches 15 years of age, or within two years of April 1, 1988, whichever comes later; and"

8.4 The provisions of 40 CFR §§ 265.340, 265.341 and 265.351 relating to incinerators are incorporated by reference. The provisions of 40 C.F.R. §§ 265.345, 265.347 and 265.352 relating to incinerators are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from incinerators.

8.5 The provisions of 40 CFR part 265, subpart P -- Thermal Treatment are incorporated by reference except for 40 CFR § 265.383 which is excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from thermal treatment units.

8.6 The provisions of 40 CFR part 265, subparts AA and BB are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding air emission standards for process vents and air emissions standards for equipment leaks.

§ 47-35-9. STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES.

9.1 The provisions of 40 CFR part 266 are hereby adopted and incorporated by reference.

§ 47-35-10. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF NEW HAZARDOUS WASTE LAND DISPOSAL FACILITIES.

10.1 The provisions of 40 CFR part 267 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

10.2 The provisions of 40 CFR part 267, subpart G -- Underground Injection are excepted to the extent the rules set forth therein conflict or are inconsistent with the provisions of West Virginia Water Resources Board, Underground Injection Control 46 CSR 9.

§ 47-35-11. LAND DISPOSAL RESTRICTIONS.

11.1 The provisions of 40 CFR part 268 are hereby adopted and incorporated by reference.

§ 47-35-12. THE HAZARDOUS WASTE PERMIT PROGRAM.

12.1 The provisions of 40 CFR part 270 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

12.2 For purposes of this section, the term "RCRA permit" means "West Virginia Hazardous Waste Permit." The following additional requirements shall apply to obtain a hazardous waste permit in West Virginia. All references in 40 C.F.R. Part 270 to 40 C.F.R. Part 124 shall be deemed to be references to the applicable provisions of Sections 12.2.2 through 12.2.9 of this regulation. To the extent of any inconsistency with 40 CFR part 270, the specific provisions contained herein shall control to the extent of the inconsistency, if any.

12.2.1 Application Fees.

12.2.1.a. Any person who applies for a permit for the construction or operation of a hazardous waste management facility, or both, shall submit as part of said application a money order or cashier's check payable to "The Hazardous Waste Management Fund" of the State Treasury. Persons required to obtain a permit-by-rule pursuant to these regulations are not required to pay a permit application fee.

12.2.1.b. Such fee shall be determined by the schedule set forth in Table I of these regulations.

12.2.1.c. The chief reserves his right to promulgate rules and regulations establishing a permit renewal fee at a later date.

12.2.2 Draft Permits.

12.2.2.a Once an application is complete, the chief shall tentatively decide whether to prepare a draft permit or to deny the application.

12.2.2.b If the chief decides to prepare a draft permit, a draft permit shall be prepared that contains the following information:

12.2.2.b.A All conditions under 40 CFR §§ 270.30 and 270.32;

12.2.2.b.B All compliance schedules under 40 CFR § 270.33;

12.2.2.b.C All monitoring requirements under 40 CFR § 270.31; and

12.2.2.b.D Standards for treatment, storage, and disposal and other permit conditions under 40 CFR part 270.

12.2.2.c A fact sheet prepared in accordance with Section 12.2.3 of these regulations shall accompany the draft permit.

12.2.3 Fact Sheet.

12.2.3.a A fact sheet shall be prepared by the chief for every draft permit for each hazardous waste management facility or activity. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The chief shall send this fact sheet to the applicant and, upon request, to any other person.

12.2.3.b The fact sheet shall include, when applicable:

12.2.3.b.A A brief description of the type of facility or activity which is the subject of the draft permit;

12.2.3.b.B The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged. A description of the type of wastes, fluids, or pollutants shall include, but not limited to, the characteristics of the waste materials and the potential effects on public health and the environment;

12.2.3.b.C A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

12.2.3.b.D Reasons why any requested variances or alternatives to required standards do or do not appear justified;

12.2.3.b.E A description of the procedures for reaching a final decision on the draft permit including:

(a) The beginning and ending dates of the comment period and the address where comments will be received;

(b) Procedures for requesting a hearing and the nature of that hearing; and

(c) Any other procedures by which the public may participate in the final decision; and

12.2.3.b.F Name and telephone number of a person to contact for additional information.

12.2.4 Public Access to Information.

12.2.4.a Any records, reports, or information and ~~may~~ any permit, permit applications, and and related documentation within the chief's possession shall be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the chief that such records, reports, permit documentation, or information, or any part hereof would, if made public, divulge methods or processes or activities entitled to protection as trade secrets, the chief shall consider, treat, and protect such records as confidential.

12.2.4.b It shall be the responsibility of the person claiming any information as confidential under the provisions of Section 12.2.4 of these regulations to clearly mark each page containing such information with the word "CONFIDENTIAL" and to submit an affidavit setting forth the reasons that said person believes that such information is entitled to protection.

12.2.4.c Any document submitted to the chief which contains information for which claim of confidential information is made shall be submitted in a sealed envelope marked "CONFIDENTIAL" and address to the chief. The document shall be submitted in two (2) separate parts. The first part shall contain all information which is not deemed by the person preparing the report as confidential and shall include appropriate cross-references to the second part which contains data, words, phrases, paragraphs, or pages and appropriate affidavits containing or relating to information which is claimed to be confidential.

12.2.4.d No information shall be protected as confidential information by the chief unless it is submitted in accordance with the provisions of Section 12.2.4.c of these regulations and no information which is submitted in accordance with the provisions of Section 12.2.4.c of these regulations shall be afforded protection as confidential information unless the chief finds that such protection is necessary to protect trade secrets. The person who submits information claimed to be confidential shall receive written notice from the chief as to whether the information has been accepted as confidential or not.

12.2.4.e All information which meets the tests of Section 12.2.4.d of these regulations shall be marked with the term "ACCEPTED" and shall be protected as confidential information. If said person fails to satisfactorily demonstrate to the chief that such information in the form presented to him meets the criteria of Section 12.2.4.e of these regulations, the chief shall mark the information "REJECTED" and promptly return such information to the person submitting such information.

12.2.4.f Nothing contained herein shall be construed so as to restrict the release of relevant confidential information during situations declared to be emergencies by the chief or his designee.

12.2.4.g Nothing in Section 12.2.4 of these regulations may be construed as limiting the disclosure of information by the division to any officer, employee, or authorized representative of the State or federal

government concerned with effecting the purposes of Section 12.2.4 of these regulations.

12.2.4.h Persons interested in obtaining information pursuant to Section 12.2.4 of these regulations should submit a request in accordance with Title 46, Water Resources Board, Series 8 (46 C.S.R. 8).

12.2.4.i Claims of confidentiality for the name and address of any permit applicant or permittee will be denied.

12.2.5 Public Participation in Permit Process.

12.2.5.a Scope. Public notice shall be given that the following actions have occurred:

12.2.5.a.A A draft permit has been prepared; or

12.2.5.a.B A hearing has been scheduled.

12.2.5.b Timing.

12.2.5.b.A Public notice of the preparation of a draft permit required under Section 12.2.5 of these regulations shall allow at least forty-five (45) days for public comment.

12.2.5.b.B Public notice of a public hearing shall be given at least thirty (30) days before the hearing.

12.2.5.c Methods. Public notice of activities described in Section 12.2.5 of these regulations shall be given by the following methods:

12.2.5.c.A By mailing a copy of the notice to the following persons:

(a) The applicant;

(b) Any federal or state agency which the chief knows has issued or is required to issue a RCRA, UIC, PSD, NPDES or 404 permit for the facility or activity including, but not limited to, the U.S. Environmental protection Agency and the U.S. Army Corps of Engineers;

(c) Each State agency having authority under State law with responsibility to the construction or operation of such facility;

(d) Any unit of local government having jurisdiction over the area where the facility is proposed to be located;

(e) Other appropriate federal or State agencies including, but not limited to, the U.S. Fish and Wildlife Service, the U.S. Forest Service, the West Virginia Department of Culture and History, the West Virginia Department of Health, other governmental authorities including any affected

states, and the Advisory Council on Historic Preservation (Suite 430, 1522 K Street, N.W., Washington, D.C. 20005); and

(f) Persons on the mailing list developed by:

(i) Including those who request in writing to be on the list.

(ii) Soliciting persons for "area lists" from participants in past permit proceedings in that area.

(iii) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in appropriate publications of the State. The chief may update the mailing list by requesting written indication of continued interest from those listed. The chief may delete from the list the name of any person who fails to respond to such a request.

(g) By publishing the public notice, in the form of a Class I legal advertisement in a qualified daily or weekly newspaper of general circulation and broadcasting the public notice over local radio stations in the area in which the facility is or is proposed to be located. A qualified daily or weekly newspaper is, for the purpose of Section 12.2.5 of these regulations, any newspaper which meets the provisions of W. Va. Code, § 59-3-1(b).

(h) By any other method reasonably calculated to give actual notice of the action in question to the person potentially affected by it, including press releases or any other forum of medium to elicit public participation.

(i) Any person otherwise entitled to receive notice under Section 12.2.5 of these regulations may waive the right to receive notice for any classes and categories of permits.

12.2.5.d Personal Notification by Facility Owner or Operator to Individual Residents.

12.2.5.d.A Following the submittal of a Part B application which is deemed complete by the chief, and before the public notice of the preparation of a draft permit as required under Section 12.2.5.a of these regulations, the facility owner or operator shall serve notice upon the residence of all persons residing within one-quarter mile of the boundaries of the specific hazardous waste management facility.

12.2.5.d.B Service of such notice as herein provided shall be made by delivering a copy to the residence of each person upon whom service must be made or by mailing it by registered mail to the last known address of each person or by such other reasonable means as the chief and the owner or operator agree will provide an effective and practical method of notification.

12.2.5.d.C Following completion of service of notice as set forth herein, and no later than the date of public notice required in Section 12.2.5.a of these regulations, the owner or operator shall certify in

writing to the chief that service has been completed, describe the method of service, and provide a copy of the written notice employed to the chief.

12.2.5.d.D The personal notice required herein shall be a written notice containing at a minimum:

- (a) The name and address of the permit applicant;
- (b) The name, location, and type of hazardous waste management facility for which the application has been submitted;
- (c) A statement advising the recipients of the notice that a complete application for permit has been submitted; and
- (d) A statement advising the notice recipients that an opportunity for public comment upon the application and draft permit will be made available to them upon completion of division review of the application and that such notice will be published as a legal advertisement in a local newspaper and broadcast over the radio.

12.2.5.e Contents.

12.2.5.e.A All public notices issued under Section 12.2.5 of these regulations shall contain the following information:

- (a) Name and address of the office processing the permit action for which notice is being given;
- (b) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;
- (c) A brief description of the business conducted at the facility described in the permit application or the draft permit;
- (d) The name, address, and telephone number of a person from whom interested persons may obtain further information including copies of the draft permit or fact sheet, and the application; and
- (e) A brief description of the comment procedures required by Sections 12.2.6 and 12.2.7 of these regulations and the time and place of any hearing that will be held, including a statement of procedures to request a hearing unless already scheduled, and other procedures by which the public may participate in the final permit decision.

12.2.5.e.B In addition to the general public notice described in Section 12.2.5.e.A of these regulations, the public notice of a hearing shall contain the following information:

- (a) Reference to the date of previous public notices relating to the permit;
- (b) Date, time and place of the hearing;

(c) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures; and

(d) Name and address of the nearest district office where the file will be available for inspection.

12.2.6 Public Comment and Request for Public Hearings. During the public comment period provided that any interested person may submit written comments on the draft permit and may request a public hearing if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in Sections 12.2.8 and 12.2.9 of these regulations.

12.2.7 Public Hearings.

12.2.7.a The chief shall hold a public hearing whenever he finds, on the basis of requests, a significant degree of public interest in a draft permit(s). The chief may also hold a public hearing at his discretion whenever, for instance, such hearing may clarify one or more issues involved in the permit decision.

12.2.7.b The chief shall hold a public hearing upon receiving written notice of opposition to a draft permit and a request for public hearing within forty-five (45) days of the public notice. Whenever possible the chief shall schedule a hearing under Section 12.2.7 of these regulations at a location convenient to the nearest population center to the nearest such proposed facility. Public notice of the hearing shall be given as specified in Section 12.2.5 of these regulations.

12.2.8 Reopening of the Public Comment Period.

12.2.8.a If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the chief may take one or more of the following actions:

12.2.8.a.A Prepare a new draft permit, appropriately modified, under Section 12.2 of these regulations.

12.2.8.a.B Prepare a revised fact sheet under Section 12.2 of these regulations and reopen the comment period.

12.2.8.a.C Reopen or extend the comment period under Section 12.2 of these regulations to give interested persons an opportunity to comment on the information or arguments submitted.

12.2.8.b Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under Section 12.2 of these regulations shall define the scope of the reopening.

12.2.9 Response to Comments.

12.2.9.a At the time that any final permit is issued, the chief shall issue a response to comments. This response shall be in writing and shall:

12.2.9.a.A Specify which provisions, if any, of the draft permit have been changed in the final permit and the reasons for change; and

12.2.9.a.B Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or hearing.

12.2.9.b The response to comments shall be delivered to any person who commented or any person who requests the same.

12.3 The provisions of 40 CFR § 270.12 are excepted from incorporation by reference. Availability of information provided under these rules is controlled by the provisions of W. Va. Code, § 20-5E-11 and Section 12.2.4 of these regulations.

12.4 The provisions of 40 C.F.R. § 270.24 are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from process vents.

12.5 The provisions of 40 C.F.R. § 270.60(b) and 270.64 are excepted from incorporation by reference. Consult the regulations of the Office of Water Resources and the Water Resources Board regarding the requirements for underground injection wells.

§ 47-35-13. DEED AND LEASE DISCLOSURE; NOTICE IN DEED TO PROPERTY.

13.1 The owner of the property on which a hazardous waste management facility is located must record, in accordance with State law, a notation on the deed or lease to the facility property -- or on some other instrument that is normally examined during title search -- that will in perpetuity notify any potential purchaser of the property that:

13.1.1 The land has been used to manage hazardous wastes; and

13.1.2 Its use is restricted under 40 CFR § 264.117(c).

13.2 Upon actual transfer of property which contains hazardous wastes that have been stored, treated, or disposed of, the previous owner shall notify the chief in writing of such transfer.

13.3 Other Requirements. Nothing contained in this Section 13 of these regulations shall relieve any person from complying with the requirements on deed and lease disclosures set forth in W. Va. Code, § 20-5E-20.

§ 47-35-14. STANDARDS FOR THE MANAGEMENT OF USED OIL.

~~13.1~~ 14.1 The provisions of 40 CFR part 279 are hereby adopted and incorporated by reference. Notwithstanding the effective date of this rule, the effective date of the provisions of this Section 14 shall be July 1, 1995.

§ 47-35-15. MISCELLANEOUS PROVISIONS.

15.1 The provisions set forth in Appendix 1 are incorporated as a part of these regulations.

APPENDIX 1

§ 1 The provisions contained in this Appendix apply to existing surface impoundments which met the demonstration requirements set forth below by January 1, 1993.

(a) Notwithstanding the provisions of 40 CFR § 264.113(b), the owner or operator of a surface impoundment used for disposal of hazardous waste ceasing the receipt of hazardous waste prior to November 8, 1988 need not close such surface impoundment within one hundred and eighty (180) days after receiving the final volume of hazardous waste but may continue to receive waste provided that the owner or operator satisfy the chief that the following requirements are or will be met:

(1) The owner or operator of such surface impoundment will complete closure activities in accordance with the approved closure plan and within one hundred and eighty (180) days after receiving the final volume of waste at the surface impoundment. The chief may approve a longer period if the owner or operator complies with all applicable requirements for requesting a modification of the permit and demonstrates that the closure activities will, of necessity, take longer than one hundred and eighty (180) days to complete;

(2) The owner or operator has a hazardous waste management permit with an approved closure plan for such facility requiring compliance with all applicable provisions of these regulations as though it were an operating hazardous waste surface impoundment;

(3) The owner or operator institutes approved operating procedures designed to minimize the head created by any liquid in the surface impoundment; and either,

(4) The owner and operator makes a demonstration which is approved by the chief under § 2(b)(9)(D); or

(5) The surface impoundment contains a liner which is either:

(A) A synthetic liner for which there is no evidence of leakage;

(B) A liner of compacted material at least three (3) feet thick with a permeability of no more than 1×10^{-7} centimeters per second; or

(C) If the owner or operator demonstrates to the chief and the chief finds for the surface impoundment that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous

constituents into the groundwater or surface water beyond the point of compliance at least as effectively as such liners.

§ 2 In addition to the design and operating requirements set forth in 40 CFR § 264.221, the following design and operation requirements shall be applicable to existing surface impoundments which made the demonstration referenced above.

Specific Design and Operating Requirements for Surface Impoundments.

(a) In the event of a conflict or inconsistency between the provisions of 40 CFR § 264.221 and this section, the provisions of this section control to the extent of any conflict or inconsistency.

(b) Design Requirements. (1) A surface impoundment must be designed and constructed to provided maintenance of sufficient freeboard, and to prevent overtopping resulting from wave or wind action; normal and abnormal operation; malfunctions of level controllers, alarms, and other equipment; precipitation; human error; or any combination thereof. The freeboard shall not be less than sixty centimeters (60 cm) (2 feet) or an amount of freeboard other than sixty centimeters (60 cm) based on documentation acceptable to the chief that the specified amount of freeboard will prevent overtopping.

(2) A surface impoundment must be designed and constructed so that any flow of waste into the impoundment can be immediately shut off in the event of overtopping or liner failure.

(3) A surface impoundment must be designed and constructed to prevent discharge into or on the land, and to State waters (except discharges authorized by an NPDES permit during the life of the impoundment) by use of a liner system and leachate detection, collection and removal system which complies with 40 CFR § 264.221.

(4) Dikes must be designed and constructed with sufficient structural integrity to prevent massive failure without dependence on any liner system included in the surface impoundment design.

(5) A leachate detection, collection, and removal system must be designed and constructed so that liquid will flow freely from the collection system to prevent the creation of pressure head within the collection system in excess of that necessary to cause the liquid to flow freely.

(6) Existing facilities are exempt from the requirements outlined in §§ 2(b)(3) and (b)(5) of this Appendix, and 40 CFR §§ 264.221(a), 264.221(d), 264.227(d)(2), provided that the provisions of § 2(b)(7) of this Appendix are complied with.

(7) The owners or operator, in order to qualify for the exemption in § 2(b)(6), must demonstrate that statistically significant increases of hazardous constituents do not occur in the groundwater or surface water during its active life and the post closure period, except as provided in § 1(a) of this Appendix.

(8) If statistically significant increases of hazardous constituents are detected in the groundwater beneath the facility (including the regulated unit) the owner or operator must comply with the corrective action outlined in 40 CFR § 264.100 (if groundwater contamination has been determined).

(9) If the owner or operator determines that the corrective action plan being implemented under 40 CFR § 264.100 is insufficient for causing cessation of hazardous waste constituents migration, then the unit must be closed. However, if it is determined that the corrective action will adequately arrest and remove the contamination, the owner may choose one of the four (4) options which will become part of the conditions of the permit:

(A) Retrofit the unit with liners in accordance with 40 CFR § 264.221(a);

(B) Stop the leak;

(C) Continue the operation of the unit, while concurrently developing and implementing an alternate treatment, storage or disposal method, for a period of five (5) years at which time the unit must be closed; or

(D) Continue the operation of the unit provided a demonstration can be made and approved by the chief that no adverse impact to human health or the environment will result from the continued operation of the unit during the active life and closure and post-closure period, provided that the facility continues to comply with an approved corrective action program. Such demonstration must include and discuss the following:

(i) Potential adverse effects on groundwater quality, considering:

(A) The physical and chemical characteristics of the waste in the regulated unit, including its potential for migration;

(B) The hydrogeological characteristics of the facility and surrounding land;

(C) The quantity of groundwater and the direction of groundwater flow;

(D) The proximity and withdrawal rates of groundwater users;

(E) The current and future uses of the groundwater in the area;

(F) The existing quality of groundwater, including other sources of contamination and their cumulative impact on the groundwater quality;

(G) The potential for health risks caused by human exposure to hazardous constituents;

(H) The potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituents; and

(I) The persistence and permanence of the potential adverse effects; and

(ii) Potential adverse effects on hydraulically-connected surface water quality, considering:

(A) The volume and physical and chemical characteristics of the waste in the regulated unit;

(B) The hydrogeological characteristics of the facility and surrounding land;

(C) The quantity and quality of groundwater and the direction of groundwater flow;

(D) The patterns of rainfall in the region;

(E) The proximity of the regulated unit to surface waters;

(F) The current and future uses of surface waters in the area and any water quality standards established for those surface waters;

(G) The existing quality of surface water, including other sources of contamination and the cumulative impact on surface water quality;

(H) The potential for health risks caused by human exposure to waste constituents;

(I) The potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituents; and

(J) The persistence and permanence of the potential adverse effects.

(iii) In making any determination under section §1(a) concerning the use of groundwater in the area around the facility, the chief will consider any identification of underground sources of drinking water and exempted aquifers made under Title 46, Water Resources Board, Series 9 (46 C.S.R. 9)

(c) Operating Requirements. (1) A surface impoundment must be operated and maintained to prevent any overtopping resulting from wind and wave action; overflowing; normal and abnormal operation; malfunctions of level controllers, alarms, or other equipment; precipitation; human error; or any combination thereof.

(2) A surface impoundment must be operated to maintain at least the amount of freeboard specified by the chief in the permit.

(3) A leachate detection, collection, and removal system installed to comply with 40 CFR § 264.221(a) must be operated so that leachate flows freely from the collection system and is removed as it accumulates or with sufficient frequency to prevent backwater within the collection system.

(4) Earthen dikes must be kept free of:

(A) Perennial woody plants with root systems which could affect the structural integrity of the dike; and

(B) Burrowing mammals which could remove earthen materials upon which the structural integrity of the dike is dependent or creates leaks through burrows in the dike.

(5) Run-on must be diverted away from a surface impoundment.

TABLE I
PERMIT APPLICATION FEE SCHEDULE

- Storage -

EPA Code	Activity	Fee	
S01	Drum	100 tons capacity \$1,000.00	<u>></u> 100 tons capacity \$3,000.00
S02	Tank	100 tons capacity \$1,000.00	<u>></u> 100 tons capacity \$3,000.00
S03	Waste Pile	100 tons capacity \$1,500.00	<u>></u> 100 tons capacity \$3,000.00
S04	Surface Impoundment	1,000 tons capacity \$2,500.00	<u>></u> 1,000 tons capacity \$3,000.00

- Disposal -

EPA Code	Activity	Fee	
D80	Landfill	1,000 tons/year \$2,500.00	<u>></u> 1,000 tons/year \$5,000.00
D81	Land Application	1,000 tons/year \$2,500.00	<u>></u> 1,000 tons/year \$5,000.00
D83	Surface Impoundment	1,000 tons/year \$2,500.00	<u>></u> 1,000 tons/year \$5,000.00

- Treatment -

EPA Code	Activity	Fee	
T01	Tank	100 tons capacity \$1,000.00	<u>></u> 100 tons capacity \$3,000.00
T02	Surface Impoundment	1,000 tons/year \$2,500.00	<u>></u> 1,000 tons/year \$3,000.00
T03	Incinerator	1,000 tons/year \$1,000.00	<u>></u> 1,000 tons/year \$3,000.00
T04	Other	(Reserved)	(Reserved)

RECEIVED

AUG 09 1993

P.O. Box 98
Ravenswood, WV 26164
1-304-273-6000Division of Environmental Protection
Office of Waste Management

August 6, 1993

Ms. Martha Barber
West Virginia Department of
Environmental Protection
Office of Waste Management
1356 Hansford Street
Charleston, WV 25301

RE: Ravenswood Aluminum Corporation's Comments on the
Proposed Hazardous Waste Management Regulations, Repeal
and Replace, 4 CSR 35 (Dated July 7, 1993)

Dear Ms. Barber:

Ravenswood Aluminum Corporation ("RAC") wishes to express its strong support for the comments on the above-referenced proposed rule by the West Virginia Manufacturers' Association.

In addition to those comments, RAC wishes to emphasize the importance of delaying the effective date of the used oil regulations until July 1, 1995. As the regulation is currently written, the used oil regulations which will be adopted are those federal rules in existence on July 1, 1993. But, the application of those rules will be prospective from the date these rules actually become effective in the State. The used oil regulations, however, are not required to be implemented by the State until July 1, 1995. This is because, where legislative action is required to update a state program to meet new federal hazardous waste management requirements, the federal rules allow the State an additional year to modify its program (see 40 C.F.R. § 271.21(e)). Thus, the State has until July 1, 1995 to revise its program to include the used oil regulations. However, because the federal used oil regulations are included in these proposed amendments,

they may become effective prior to July 1, 1995 unless the rules specifically state that the used oil provisions do not take effect until July 1, 1995.

RAC strongly emphasizes the importance of allowing as much time as possible before the used oil regulations become effective in West Virginia. This is necessary to afford companies newly regulated by these provisions sufficient time to understand and determine the applicability of the regulations to their operations, determine the availability of any exemptions for their operations (such as the applicability of the exemption for wastewaters containing de minimis amounts of used oil), and take any necessary actions to come into compliance with new regulations. It is particularly important to allow as much time as possible for implementation of the used oil regulations because this new regulation will subject a previously unregulated material (non-hazardous used oil) to regulation for the first time. Used oils are widely generated across a broad spectrum of businesses, from very small to very large companies. Significant new requirements will be imposed on used oil generators, transporters, transfer facilities, collection centers, used oil processors, used oil re-refiners, used oil burners and used oil marketers. Depending on the nature of a facility's used oil activities, these new requirements may include, among other things, labelling, record-keeping, notifications, preparedness and prevention requirements (including plans and equipment requirements), tracking requirements, storage restrictions, used oil analyses and analysis plans, tracking requirements, reporting requirements, and burning restrictions. Some companies may find that the best course of action or even a necessary course of action is to change, eliminate or implement substitutions for certain activities. In addition, there are aspects of the rule which may require co-ordination with DEP to determine their applicability, such as what constitutes a "de minimis" amount of used oil for purposes of qualifying for the exemption from the used oil requirements for wastewaters containing a de minimis amounts of used oil.

The public simply need sufficient time to understand and implement the requirements of this rule and thereby ensure compliance by the effective date of the rule. To assist the public in this regard, a tremendous educational effort will be essential

Ms. Martha Barber
August 6, 1993
Page 3

prior to implementation of the rule, particularly as it applies to small business. This effort will not be easy where limited resources are available to OWM. An effective date of July 1, 1995 would go a long way in easing the burdens of these new requirements on both the newly regulated community and the OWM. Accordingly, for these reasons RAC requests that Section 13.1 of the proposed rule be revised to read as follows:

13.1. The provisions of 40 C.F.R. part 279 are hereby adopted and incorporated by reference. The effective date of these provisions shall be July 1, 1995.

RAC appreciates the opportunity to comment on the proposed Hazardous Waste Management regulations. Please give me a call at (304) 273-6346 or Rik Melvin at (304) 273-6280 if you have any questions.

Very truly yours,

RAVENSWOOD ALUMINUM CORPORATION



Gail M. Graban
Environmental Manager

GMG/dld

cc: Eric Schweitzer, Esquire, Ogletree, Deakins, et al

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
ON PROPOSED
HAZARDOUS WASTE MANAGEMENT REGULATIONS
(REPEAL AND REPLACE)
47 C.S.R. 35**

Prepared By:

**Environmental, Safety & Health Committee
West Virginia Manufacturers Association**

and

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**Counsel for
West Virginia Manufacturers Association**

August 9, 1993

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
ON PROPOSED
HAZARDOUS WASTE MANAGEMENT REGULATIONS
(REPEAL AND REPLACE)
47 C.S.R. 35**

August 9, 1993

I. INTRODUCTION

On July 7, 1993, the Department of Commerce, Labor, and Environmental Resources, Division of Environmental Protection ("DEP"), Office of Waste Management ("OWM") filed with the Secretary of State proposed Series 35, "Hazardous Waste Management Regulations" (Repeal and Replace), of Title 47 of the West Virginia Code of State Regulations. Accompanying the proposed rule was a notice inviting written comment to end August 9, 1993 at 9:00 a.m. in lieu of a public hearing. Pursuant to this notice, the West Virginia Manufacturers Association ("WVMA") files these comments on behalf of its members.

The WVMA represents a broad cross-section of large and small industrial concerns throughout West Virginia. Because WVMA members are subject to, and significantly affected by, changes in the state hazardous waste management program, the WVMA has actively participated in the development of the state program since its inception. This participation has historically included filing comments on periodic

revisions to the Hazardous Waste Management Regulations ("HWMR") of the OWM, as well as commenting on proposed hazardous waste regulations of other agencies. These comments represent a continuation of the active and supportive role the WVMA has played in the development of a reasonable hazardous waste management program for West Virginia.

The comments that follow address general concerns with respect to the scope of HWMR as well as specific concerns on proposed changes to individual sections of the rule. Unless otherwise noted, all references to federal regulations are to Title 40 of the Code of Federal Regulations ("C.F.R."), while all references to state regulations are to Title 47 of the Code of State Regulations ("C.S.R.").

II. GENERAL COMMENTS

A. Incorporation by Reference of Federal Regulations

The WVMA commends and applauds the OWM's decision to incorporate by reference the various provisions of the federal hazardous waste regulations. This approach eliminates the squandering of limited resources of both the OWM and the regulated community which was caused by restating page after page of federal regulations. This approach simplifies the rules from the standpoint of the regulated community and should streamline the process of updating the rules as necessary to keep up with the regular revisions to the federal program. Overall, the net gain from incorporation by reference is appreciable.

B. The Need to Coordinate the HWMR with other Agencies' Regulations

The state Hazardous Waste Management Act is extremely complicated in that it assigns responsibility for various portions of the state hazardous waste program to seven different agencies. The Legislature recognized the potential for confusion in this design and throughout the Act ordered agencies to avoid duplication to the maximum extent practical, and to coordinate their rule-making and permitting activities under the Act with one another. The lead agency under the Act is the DEP acting through the OWM which is clearly given primary responsibility for the development of the state hazardous waste program. The role of other agencies is to fill in those areas of the program where the special expertise of each agency is recognized. For example, the state Water Resources Board is given authority to promulgate standards governing discharges to waters of the state from hazardous waste treatment, storage, and disposal facilities. W. Va. Code § 20-5E-7.

The DEP is the lead agency for hazardous waste management in West Virginia by statute, W. Va. Code § § 20-5E-4 and 6. Accordingly, the WVMA believes and advocates that the HWMR, which incorporate the federal regulations, should be the controlling and primary regulations for hazardous waste management regulation. It is perfectly logical that the DEP regulations should be the foundation for the state hazardous waste program, with regulations of other agencies incorporated as appropriate. While the base permit for a facility would be issued by the DEP, portions of the permit covering areas within the jurisdiction of the Air Pollution Control

Commission ("APCC") under the Act would be written by the APCC staff under a memorandum of agreement between the agencies.

The approach taken by APCC in Regulation 25 results in the incorporation by reference of provisions of the DEP rules that are clearly outside the jurisdiction of the APCC. For example, incorporation by reference standards are established for facilities that store hazardous waste in containers -- the Hazardous Waste Management Act gives no jurisdiction to the APCC in this area. Wholesale adoption of the requirements of the HWMR creates dual regulatory obligations on the part of the regulated community in violation of W. Va. Code § 20-5E-7(e) and creates the potential for dual enforcement by the APCC and OWM for the same regulatory requirement. The solution to these problems lies in coordination of OWM and APCC activities as required in the Act. The WVMA recommends and encourages greater coordination among the agencies. For purposes of this rule, the WVMA urges exclusion of those provisions not within the jurisdiction of OWM, namely performance standards for air emissions.

C. Preservation of Existing Agency Actions - Prospective Application

The WVMA applauds the OWM for including provisions which provide for consistency and continuity in the current hazardous waste management program. In particular, Section 1.9 of the rule preserves those orders, determinations, rulings, demonstrations, etc. that have been issued, approved etc. by OWM prior to incorporation by reference. The WVMA commends the OWM for including these provisions that allow for consistency in the implementation of the program.

On a related front, the rule applies prospectively only. Prospective application is essential to avoid noncompliance with rules which have not previously been effective. The WVMA appreciates OWM foresight on this issue. However, of particular concern is the implementation of the used oil regulations. As the regulation is currently written, the used oil regulations will be those in existence on July 1, 1993. But, the application will be prospective from the date these rules actually become effective in the state. The used oil regulations, however, are not required to be implemented until July 1, 1995. Thus, the WVMA urges adoption of a prospective effective date of July 1, 1995 for implementation of the used oil regulations in West Virginia.

III. SPECIFIC COMMENTS

Section 7.3 -- The WVMA requests the annual groundwater testing provisions for constituents listed in Appendix IX of 40 C.F.R. Part 264 be deleted in favor of an equally protective requirement that the entire range of Appendix IX constituents be tested prior to termination of corrective action. The cost of testing a single well for Appendix IX constituents is approximately \$1,700. This figure multiplied by several wells on an annual basis can amount to a significant sum of money without any appreciable environmental value. Clearly, neither the federal nor the current state regulations permit the termination of corrective action without performing an analysis for Appendix IX constituents. However, the purpose of performing the analysis is to determine whether further corrective action is necessary.

Annual testing for Appendix IX constituents does not contribute to the remediation of groundwater that contains constituents in concentrations that previously triggered corrective action. Moreover, the WVMA advocated change would retain the current West Virginia requirement on testing Appendix IX constituents found at 47 C.S.R. 35, § 8.13.9.e.2. Thus, the WVMA proposes a new Section 7.3.3 to read as follows:

7.3.3 The provisions of 40 CFR § 264.99(g) are excepted from incorporation by reference and lieu thereof the provisions of Section 7.3.3.a shall be inserted. Any reference to 40 CFR § 264.99(g) shall be to Section 7.3.3.a of this rule.

7.3.3.a The owner or operator must analyze samples from all monitoring wells for all constituents contained in Appendix IX of 40 CFR part 264 at least once prior to terminating the corrective action program to determine if there is a need for further corrective action. The owner or operator shall report the results of full Appendix IX sample analyses to the chief within seven (7) days after completion of the analyses.

The WVMA encourages adoption of the proposed change to retain consistency with, and prevent a substantive amendment to, the current state regulations.

Section 7.5 -- The provisions of Section 7.2 incorporate by reference the provisions of 40 C.F.R. Part 264 with certain modifications, exceptions and additions. Unfortunately, Section 7.5 also incorporates the provisions of 40 C.F.R. §§ 340, 341, 342 and 351 relating to incinerators. The reason the entire subpart of the federal regulation is not incorporated is because of the delineation of jurisdiction over incinerators with respect to emissions that are within the purview of the APCC and the DEP, Office of Air Quality. The deficiency in the proposed regulation centers upon the duplicate incorporation of those parts within the jurisdiction of OWM, rather than

exclusion of the sections within the jurisdiction of the APCC. Thus, the WVMA urges the DEP to amend the rule accordingly. The WVMA suggests the following:

7.5 ~~The provisions of 40 CFR §§ 340, 341, 342 and 351 relating to incinerators are incorporated by reference. The provisions of 40 CFR §§ 343, 344, 345 and 347 relating to incinerators are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from incinerators.~~

In essence, the proposed change simply flip-flops the manner of stating the intent of the provision; that is, the OWM and the APCC have separate, statutory jurisdictional requirements that govern the regulation of incinerators in West Virginia. The proposed modification reflects the distinction in authority and avoids confusion as to the appropriate federal requirements incorporated by reference into the OWM's rule.

Section 8.4 -- Similar to the error present in Section 7.5, the proposed regulation incorporates by reference those provisions within the jurisdiction of the OWM rather than excepting the federal provisions that are within the jurisdiction of the APCC. Therefore, the WVMA urges the DEP to modify the rule as follows:

8.4 ~~The provisions of 40 CFR §§ 340, 341 and 351 relating to incinerators are incorporated by reference. The provisions of 40 CFR §§ 345, 347 and 352 relating to incinerators are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from incinerators.~~

As noted above, this change will more accurately reflect the current statutory authority given to the OWM and the APCC.

Section 12.2 -- The current reference of this section to 40 C.F.R. Part 270 respecting any inconsistencies is insufficient as it relates to the cross-references found in Part 270. In particular, Part 270 contains numerous cross-references to 40 C.F.R. Part 124 which is the general program requirements for permit applications. The proposed legislative rule includes specific provisions modeled after Part 124; namely, Sections 12.2.1 through 12.2.9. As proposed, the regulation states that the rule will control as to any inconsistency with Part 270; however, the proposed rule fails to recognize the specific cross-references to Part 124. Because Part 124 is not incorporated by reference, any cross-reference to Part 124 set forth in Part 270 is meaningless. Therefore, the WVMA urges the DEP to make specific reference to Part 124 by adding appropriate cross-references to Sections 12.2.1 through 12.2.9 of the rule. The WVMA recommends the following change to Section 12.2:

12.2 For purposes of this section, the term "RCRA permit" means "West Virginia Hazardous Waste Permit." The following additional requirements shall apply to obtain a hazardous waste permit in West Virginia. All references in 40 CFR part 270 to 40 CFR part 124 shall be deemed to be references to the applicable provisions of Sections 12.2.2 through 12.2.9 of this regulation. To the extent of any inconsistency with 40 CFR part 270, the specific provisions contained herein shall control to the extent of the inconsistency, if any.

To avoid any confusion or misinterpretation of the applicable permit application provisions set forth in the rule and to preclude a misunderstanding regarding the federal cross-reference to 40 C.F.R. Part 124 found in Part 270, the WVMA urges the DEP modify the rule accordingly.

Section 12.2.4.a -- This section contains a minor technical error where "nay" should read "any." There is also a typographical error in the word "and". The WVMA suggests the appropriate corrections.

Section 12.4 -- A new section designated Section 12.4 should be added that excepts from incorporation by reference the provisions of 40 C.F.R. § 270.24 which address process vents. The regulation of process vents is within the purview of the APCC. Thus, the WVMA urges exception of the federal requirement and suggests the following language:

12.4 The provisions of 40 CFR § 270.24 are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from process vents.

Section 12.5 -- Similar to the previous section the provisions of 40 C.F.R. §§ 270.60(b) and 270.64 regarding permits for underground injection control are issued by the Office of Water Resources. Therefore, the WVMA urges excepting the federal regulation from incorporation and provides the following:

12.5 The provisions of 40 CFR §§ 270.60(b) and 270.64 are excepted from incorporation by reference. Consult the regulations of the Office of Water Resources and the Water Resource Board regarding the requirements for underground injection wells.

Again, the WVMA requests this modification to assure the statutory jurisdiction of the various agencies responsible for hazardous waste management is not compromised.

Section 14 -- As noted above, the used oil regulations are not required to be implemented until July 1, 1995. This is because, where legislative action is required to update a state program to meet new federal hazardous waste management

requirements, the federal rules allow the state an additional year to modify its program (see 40 C.F.R. § 271.21(e)). Therefore, the state has until July 1, 1995 to revise its program to include the used oil regulations. However because the federal used oil regulations are included in these proposed amendments, they may become effective prior to July 1, 1995 unless the rule specifically states that the used oil provisions do not take effect until July 1, 1995.

The WVMA strongly emphasizes the importance of allowing as much time as possible before the used oil regulations become effective in West Virginia. This is necessary to afford companies newly regulated by these provisions sufficient time to understand and determine the applicability of the regulations to their operations, determine the availability of any exemptions for their operations (such as the applicability of the exemption for wastewaters containing *de minimis* amounts of used oil), and take any necessary actions to come into compliance with the new regulations. It is particularly important to allow as much time as possible for implementation of the used oil regulations because this new regulation will subject a previously unregulated material (non-hazardous used oil) to regulation for the first time. Used oils are widely generated across a broad spectrum of businesses, from very small to very large companies. Significant new requirements will be imposed on used oil generators, transporters, transfer facilities, collection centers, used oil processors, used oil re-refiners, used oil burners, and used oil marketers. Depending on the nature of a facility's used oil activities, these new requirements may include, among other things, labelling, recordkeeping, notifications, preparedness and

prevention requirements (including plans and equipment requirements), storage restrictions, used oil analyses and analysis plans, tracking requirements, reporting requirements, and burning restrictions. Some companies may find that the best course of action or even a necessary course of action is to change, eliminate or implement substitutions for certain activities. In addition, there are aspects of the rule which may require coordination with DEP to determine their applicability, such as what constitutes a "de minimis" amount of used oil for purposes of qualifying for the exemption from the used oil requirements for wastewaters containing a *de minimis* amount of used oil.

The regulated community simply needs sufficient time to understand and implement the requirements of this rule and thereby ensure compliance by the effective date of the rule. To assist the regulated community in this regard, a tremendous educational effort will be essential prior to implementation of the rule, particularly as it applies to small business. This effort will not be easy where limited resources are available to OWM. An effective date of July 1, 1995 would go a long way in easing the burdens of these new requirements on both the newly regulated community and the OWM.

For these reasons, the WVMA urges the OWM to delay the effective date and adopt the following suggested language:

~~13.1~~ 14.1 The provisions of 40 CFR part 279 are hereby adopted and incorporated by reference. Notwithstanding the effective date of this rule, the effective date of the provisions of this section 14 shall be July 1, 1995.

Please note that the reference the Section 13.1 in the rule is inaccurate and should be Section 14.1.

In the alternative, the WVMA proposes to delete this section 14.1 in its entirety and renumbering the remaining sections. Ample opportunity is available to include the used oil management standards at a later date. Nonetheless, it is imperative that OWM recognize the major undertaking involved in bringing the used oil program up to speed. Prior to mandatory requirements, the OWM has the advantage of promoting the volunteer used oil collection system in West Virginia.

IV. CONCLUSION

The WVMA appreciates the opportunity to comment on proposed Hazardous Waste Management Regulations, 47 C.S.R. 35. Any questions concerning the comments should be directed to Robert L. Foster, Chairman, Environmental, Safety and Health Committee of the West Virginia Manufacturers Association at (304) 342-0161.

Submitted August 9, 1993.

COMMENTS and RESPONSES

The Division of Environmental Protection, Office of Waste Management received written comments on the proposed regulations from the West Virginia Manufacturer's Association and Ravenswood Aluminum Corporation. The following are the comments submitted and the responses thereto:

WEST VIRGINIA MANUFACTURER'S ASSOCIATION

GENERAL COMMENTS

A. Incorporation by Reference of Federal Regulations

Comment: The WVMA commends and applauds the OWM's decision to incorporate by reference the various provisions of the federal hazardous waste regulations. This approach simplifies the rules from the standpoint of the regulated community and should streamline the process of updating the rules as necessary to keep up with the regular revisions to the federal program.

Response: The OWM thanks the WVMA for the words of encouragement and commendation. Furthermore, the OWM agrees that incorporation by reference of the federal hazardous waste regulations is of great benefit to the State of West Virginia, its individual citizens and the regulated community as a whole. The implementation of a hazardous waste management program that complies with the federal mandates of consistency and equivalent stringency will insure that hazardous waste is handled in a manner that protects human health and the environment. Additionally, incorporation by reference of federal hazardous waste regulations greatly clarifies the regulatory requirements and, as a result, eases the burden of compliance with those requirements.

B. The Need to Coordinate the HWMR with other Agencies' Regulations

Comment: The state Hazardous Waste Management Act is extremely complicated in that it assigns responsibility for various portions of the state hazardous waste management program to seven different agencies. The Legislature recognized the potential for confusion in this design and throughout the Act ordered agencies to avoid duplication to the maximum extent practical, and to coordinate their rule-making and permitting activities under the Act with one another.

The DEP is the lead agency for hazardous waste management in West Virginia by statute, W.Va. Code §§ 20-5E-4 and 6. Accordingly, the WVMA believes and advocates that the HWMR, which incorporate the federal regulations, should be the controlling and primary regulations for hazardous waste management regulation. It is perfectly logical that the DEP regulations should be the foundation for the state hazardous waste program, with regulations of other agencies incorporated as appropriate. While the base permit for a facility would be issued by the DEP, portions of the permit covering areas within the jurisdiction of the Air Pollution Control Commission ("APCC") under the Act would be written by the APCC staff under a memorandum of agreement between the agencies.

The approach taken by APCC in Regulation 25 results in the incorporation by reference of provisions of the DEP rules that are clearly outside the

jurisdiction of the APCC. The solution to these problems lie in coordination of OWM and APCC activities as required in the Act. The WVMA recommends and encourages greater coordination among the agencies. For purposes of this rule, the WVMA urges exclusion of those provisions not within the jurisdiction of OWM, namely performance standards for air emissions.

Response: DEP is proud of its designation as lead agency for hazardous waste management in West Virginia and fully intends to insure that DEP regulations continue to be the foundation for West Virginia's hazardous waste program. As the comment acknowledges, the Hazardous Waste Management Act is extremely complicated due to its assignment of responsibility for various portions to several different state agencies. The complexity of the statute coupled with attempts by certain agencies charged with its implementation to simplify regulations and conserve limited resources by adopting an incorporation by reference scheme makes the coordination between the various offices and agencies very difficult. However, the DEP, and the OWM specifically, intend to lead in the coordination with other agencies/offices responsible for implementing the WV Hazardous Waste Management Act and Program.

C. Preservation of Existing Agency Actions - Prospective Application

Comment: The WVMA applauds the OWM for including provisions which provide for consistency and continuity in the current hazardous waste management program. In particular, Section 1.9 of the rule preserves those orders, determinations, rulings, demonstrations, etc. that have been issued, approved, etc. by OWM prior to incorporation by reference.

Prospective application is essential to avoid noncompliance with rules which have not previously been effective. The WVMA appreciates OWM foresight on this issue. However, of particular concern is the implementation of the used oil regulations. As the regulation is currently written, the used oil regulations will be those in existence on July 1, 1993. But, the application will be prospective from the date these rules actually become effective in the state. The used oil regulations, however, are not required to be implemented until July 1, 1995. Thus, the WVMA urges adoption of a prospective effective date of July 1, 1995 for implementation of the used oil regulations in West Virginia.

Response: The OWM acknowledges the WVMA's concern regarding the necessity to afford companies newly regulated by the proposed used oil provisions sufficient time to understand and determine the applicability of the regulations to their operations and to take necessary actions to achieve compliance. Possibly, some companies within the regulated community need more time to accomplish the above tasks, than is provided for in the proposed regulations. Therefore, the OWM agrees to delay the effective date of the used oil provisions and to propose July 1, 1995 as the effective date for the implementation of the used oil regulations.

SPECIFIC COMMENTS

Comment, Section 7.3: The WVMA requests the annual groundwater testing provisions for constituents listed in Appendix IX of 40 C.F.R. Part 264 be deleted in favor of an equally protective requirement that the entire range of Appendix IX constituents be tested prior to termination of corrective action. The cost of testing a single well for Appendix IX constituents is approximately \$1,700. This figure multiplied by several wells on an annual basis can amount to a significant sum of money without any appreciable environmental value. Clearly, neither the federal nor the current state regulations permit the termination of corrective action without performing an analysis for Appendix IX constituents. However, the purpose of performing the analysis is to determine whether further corrective action is necessary. Annual testing for Appendix IX constituents does not contribute to the remediation of groundwater that contains constituents in concentrations that previously triggered corrective action. Moreover, the WVMA advocated change would retain the current West Virginia requirement on testing Appendix IX constituents found at 47 C.S.R. 35, § 8.13.9.e.2. Thus, the WVMA proposes a new Section 7.3.3 to read as follows:

7.3.3 The provisions of 40 C.F.R. § 264.99(g) are excepted from incorporation by reference and lieu thereof the provisions of Section 7.3.3.a shall be inserted. Any reference to 40 C.F.R. § 264.99(g) shall be to Section 7.3.3.a of this rule.

7.3.3.a The owner or operator must analyze samples from all monitoring wells for all constituents contained in Appendix IX of 40 C.F.R. Part 264 at least once prior to terminating the corrective action program to determine if there is a need for further corrective action. The owner or operator shall report the results of full Appendix IX sample analyses to the chief within seven (7) days after completion of the analyses.

The WVMA encourages adoption of the proposed change to retain consistency with, and prevent a substantive amendment to, the current state regulations.

Response: The contention that the only purpose of testing for Appendix IX constituents is to determine the necessity of future corrective action is inaccurate. Section 264.99 requires facilities to establish a compliance monitoring program and the provisions of 264.99(g) require analysis of Appendix IX constituent as part of protective monitoring not just as part of a corrective action plan. Furthermore, the intent of 264.99(g) is clear in that analysis of Appendix IX constituents is required "at least annually". The OWM does recognize the significant expense of testing for Appendix IX constituents and, therefore, proposes a new Section 7.3.3 to be inserted in lieu of the proposal of the WVMA, to read as follows:

7.3.3 The provisions of 40 C.F.R. § 264.99(g) are incorporated by reference with the following modifications:

7.3.3.a The chief will specify in the facility permit the frequencies for collecting samples required under 40 C.F.R. § 264.99(g).

Comment, Section 7.5: The provisions of Section 7.2 incorporate by reference the provisions of 40 C.F.R. Part 264 with certain modifications, exceptions and

additions. Unfortunately, Section 7.5 also incorporates the provisions of 40 C.F.R. § § 340, 341, 342 and 351 relating to incinerators. The reason the entire subpart of the federal regulation is not incorporated is because of the delineation of jurisdiction over incinerators with respect to emissions that are within the purview of the APCC and the DEP, Office of Air Quality. The deficiency in the proposed regulation centers upon the duplicate incorporation of those parts within the jurisdiction of OWM, rather than exclusion of the sections within the jurisdiction of the APCC. Thus, the WVMA urges the DEP to amend the rule accordingly. The WVMA suggests the following:

7.5 ~~The provisions of 40 C.F.R. § § 264.340, 264.341, 264.342 and 264.351 relating to incinerators are incorporated by reference. The provisions of 40 C.F.R. § § 264.343, 264.344, 264.345 and 264.347 relating to incinerators are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from incinerators.~~

The proposed modification reflects the distinction in authority and avoids confusion as to the appropriate federal requirements incorporated by reference into the OWM's rule.

Response: The OWM agrees with the comment and the suggested change has been made to the regulations.

Comment, Section 8.4: Similar to the error present in Section 7.5, the proposed regulation incorporates by reference those provisions within the jurisdiction of the OWM rather than excepting the federal provisions that are within the jurisdiction of the APCC. Therefore, the WVMA urges the DEP to modify the rule as follows:

8.4 ~~The provisions of 40 C.F.R. § § 265.340, 265.341 and 265.351 relating to incinerators are incorporated by reference. The provisions of 40 C.F.R. § § 265.345, 265.347 and 265.352 relating to incinerators are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from incinerators.~~

As noted above, this change will more accurately reflect the current statutory authority given to the OWM and the APCC.

Response: The OWM agrees with the comment and the suggested change has been made to the regulations.

Comment, Section 12.2: The current reference of this section 40 C.F.R. Part 270 respecting any inconsistencies is insufficient as it relates to the cross-references found in Part 270. In particular, Part 270 contains numerous cross-references to 40 C.F.R. Part 124 which is the general program requirements for permit applications. The proposed legislative rule includes specific provisions modeled after Part 124; namely, Sections 12.2.1 through 12.2.9. As proposed, the regulation states that the rule will control as to any inconsistency with Part 270; however, the proposed rule fails to recognize the specific cross-references to Part 124. Because Part 124 is not incorporated by reference, any cross-reference to Part 124 set forth in Part 270 is meaningless. Therefore, the WVMA urges the DEP to make specific

reference to Part 124 by adding appropriate cross-references to Section 12.2.1 through 12.2.9 of the rule. The WVMA recommends the following change to Section 12.2:

12.2 For purposes of this section, the term "RCRA permit" means "West Virginia Hazardous Waste Permit." The following additional requirements shall apply to obtain a hazardous waste permit in West Virginia. All references in 40 C.F.R. part 270 to 40 C.F.R. part 124 shall be deemed to be references to the applicable provisions of Sections 12.2.2 through 12.2.9 of this regulation. To the extent of any inconsistency with 40 C.F.R. part 270, the specific provisions contained herein shall control to the extent of the inconsistency, if any.

Response: The OWM agrees with the comment and the suggested change has been made to the regulations.

Comment, Section 12.2.4.a: This section contains a minor technical error where "nay" should read "any." There is also a typographical error in the word "and". The WVMA suggests the appropriate corrections.

Response: The OWM agrees with the comment and the suggested corrections have been made to the regulations.

Comment, Section 12.4: A new section designated Section 12.4 should be added that excepts from incorporation by reference the provisions of 40 C.F.R. § 270.24 which address process vents. The regulation of process vents is within the purview of the APCC. Thus, the WVMA urges exception of the federal requirement and suggests the following language:

12.4 The provisions of 40 C.F.R. § 270.24 are excepted from incorporation by reference. Consult the regulations of the Air Pollution Control Commission regarding emissions from process vents.

Response: The OWM agrees with the comment and the suggested change has been made to the regulations.

Comment, Section 12.5: Similar to the previous section the provisions of 40 C.F.R. §§ 270.60(b) and 270.64 regarding permits for underground injection control are issued by the Office of Water Resources. Therefore, the WVMA urges excepting the federal regulation from incorporation and provides the following:

12.5 The provisions of 40 C.F.R. §§ 270.60(b) and 270.64 are excepted from incorporation by reference. Consult the regulations of the Office of Water resources and the Water Resource Board regarding the requirements for underground injection wells.

Again, the WVMA requests this modification to assure the statutory jurisdiction of the various agencies responsible for hazardous waste management is not compromised.

Response: The OWM agrees with this comment and the suggested change has been made to the regulations.

Comment, Section 14 : As noted in General Comment C, the used oil regulations are not required to be implemented until July 1, 1995. This is because, where legislative action is required to update a state program to meet new federal hazardous waste management requirements, the federal rules allow the state an additional year to modify its program (see 40 C.F.R. § 271.21(e)). Therefore, the state has until July 1, 1995 to revise its program to include the used oil regulations. However, because the federal used oil regulations are included in the proposed amendments, they may become effective prior to July 1, 1995 unless the rule specifically states that the used oil provisions do not take effect until July 1, 1995.

The WVMA strongly emphasizes the importance of allowing as much time as possible before the used oil regulations become effective in West Virginia. This is necessary to afford companies newly regulated by these provisions sufficient time to understand and determine the applicability of the regulations to their operations, determine the availability of any exemptions for their operations (such as the applicability of the exemption for wastewaters containing de minimis amounts of used oil), and take any necessary actions to come into compliance with the new regulations. It is particularly important to allow as much time as possible for implementation of the used oil regulations because this new regulation will subject a previously unregulated material (non-hazardous used oil) to regulation for the time. Used oils are widely generated across a broad spectrum of businesses, from very small to very large companies. Significant new requirements will be imposed on used oil generators, transporters, transfer facilities, collection centers, used oil processors, used oil re-refiners, used oil burners, and used oil marketers.

The regulated community simply needs sufficient time to understand and implement the requirements of this rule and thereby ensure compliance by the effective date of the rule. To assist the regulated community in this regard, a tremendous educational effort will be essential prior to implementation of the rule, particularly as it applies to small business. This effort will not be easy where limited resources are available to OWM. An effective date of July 1, 1995 would go a long way in easing the burdens of these new requirements on both the newly regulated community and the OWM.

For these reasons, the WVMA urges the OWM to delay the effective date and adopt the following suggested language:

13-1 14.1 The provisions of 40 C.F.R. Part 279 are hereby adopted and incorporated by reference. Notwithstanding the effective date of this rule, the effective date of the provisions of this section 14 shall be July 1, 1995.

Please note that the reference the Section 13.1 in the rule is inaccurate and should be Section 14.1.

Response: The OWM acknowledges the WVMA's concern regarding the necessity to afford companies newly regulated by the proposed used oil provisions sufficient time to understand and determine the applicability of the regulations to their operations and to take necessary actions to achieve compliance. Possibly, some companies within the regulated community need more time to accomplish the above task, than is provided for in the current proposed regulations. Therefore, the

OWM agrees to delay the effective date of the used oil provisions and to adopt the WVMA's suggested language.

RAVENSWOOD ALUMINUM CORPORATION

Comment, Regarding Effective Date of Used Oil Provisions: The used oil regulations are not required to be implemented until July 1, 1995. This is because, where legislative action is required to update a state program to meet new federal hazardous waste management requirements, the federal rules allow the state an additional year to modify its program (see 40 C.F.R. § 271.21(e)). Therefore, the state has until July 1, 1995 to revise its program to include the used oil regulations. However, because the federal used oil regulations are included in the proposed amendments, they may become effective prior to July 1, 1995 unless the rule specifically states that the used oil provisions do not take effect until July 1, 1995.

RAC strongly emphasizes the importance of allowing as much time as possible before the used oil regulations become effective in West Virginia. This is necessary to afford companies newly regulated by these provisions sufficient time to understand and determine the applicability of the regulations to their operations, determine the availability of any exemptions for their operations (such as the applicability of the exemption for wastewaters containing de minimis amounts of used oil), and take any necessary actions to come into compliance with the new regulations. It is particularly important to allow as much time as possible for implementation of the used oil regulations because this new regulation will subject a previously unregulated material (non-hazardous used oil) to regulation for the time. Used oils are widely generated across a broad spectrum of businesses, from very small to very large companies. Significant new requirements will be imposed on used oil generators, transporters, transfer facilities, collection centers, used oil processors, used oil re-refiners, used oil burners, and used oil marketers.

The public simply needs sufficient time to understand and implement the requirements of this rule and thereby ensure compliance by the effective date of the rule. To assist the regulated community in this regard, a tremendous educational effort will be essential prior to implementation of the rule, particularly as it applies to small business. This effort will not be easy where limited resources are available to OWM. An effective date of July 1, 1995 would go a long way in easing the burdens of these new requirements on both the newly regulated community and the OWM.

For these reasons, the RAC urges that the proposed rule be revised as follows:

13+1 14.1 The provisions of 40 C.F.R. Part 279 are hereby adopted and incorporated by reference. Notwithstanding the effective date of this rule, the effective date of the provisions of this section 14 shall be July 1, 1995.

Please note that the reference the Section 13.1 in the rule is inaccurate and should be Section 14.1.

Response: The OWM acknowledges RAC's concern regarding the necessity to afford companies newly regulated by the proposed used oil provisions sufficient time to understand and determine the applicability of the regulations to their operations and to take necessary actions to achieve compliance. Possibly, some companies within the regulated community need more time to accomplish the above task, than is provided for in the current proposed regulations. Therefore, the OWM agrees to delay the effective date of the used oil provisions and to adopt the RAC's suggested language.



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES

OFFICE OF THE SECRETARY

State Capitol, Room M-146
Charleston, West Virginia 25305-0310
Telephone: (304) 558-0400
Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

July 7, 1993

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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FILED

David C. Callaghan
Director
Division of Environmental Protection
#10 McJunkin Road
Nitro, West Virginia 25143-2506

Re: Proposed Rule - Title 47, Series 35 - Hazardous Waste Management
Regulations (Amendments)

Dear Director Callaghan:

Pursuant to West Virginia Code Section SF-2-2(a)(12), I hereby consent to the proposal of the rule specified above.

My action is based on the understanding that these amendments do not make substantive changes to the existing rule, with the exception of federally-mandated revisions which must be made periodically, on a routine basis. I note that this rule represents a substantial change in form, because it incorporates by reference the bulk of relevant Federal provisions, rather than restating them at length. While I would ordinarily prefer that a rule of this importance receive broad circulation prior to filing, I am nonetheless authorizing its filing due to the absence of substantive changes, and because the rule will now be broadly circulated during the public comment period, prior to final agency action.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
John M. Ranson
Cabinet Secretary

JMR/lab
cc: Martha E. Barber

t:\hwaste35.rul

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 47, Series 35, "Hazardous Waste Management Regulations"
Type of Rule: XX Legislative Interpretive Procedural
Agency Department of Commerce, Labor, and Environmental Resources
Address Division of Environmental Protection/ Office of Waste Management
1356 Hansford St.
Charleston, WV 25301

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS.					
EQUIPMENT					
OTHER					

2. **Explanation of above estimates:** These regulations Implement federally mandated changes to the State's hazardous waste management program. No new administrative expenditures are anticipated.
3. **Objectives of these rules:** The objective of this rule is to stay in compliance with federal guidelines when implementing the State program. The consistency achieved in these revisions assures the State of maintaining its authorization status and, in turn, the continued receipt of federal funds that are vitally needed to implement the program.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

No Impact.

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

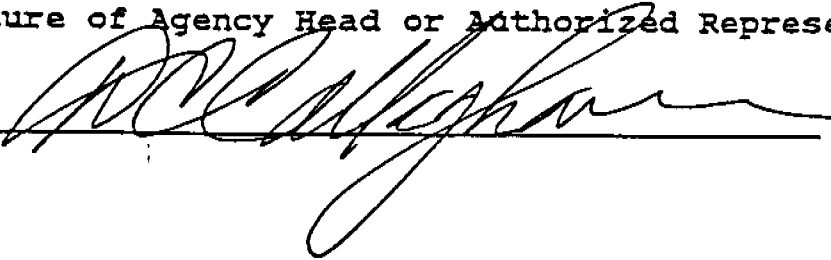
The rule adopts additional federal regulations required for the State to maintain RCRA program authorization. In some instances, those entities directly affected by the rules (i.e., generators, transporters) may require capital expenditures to come into compliance with the new provisions.

C. Economic Impact on Citizens/Public at Large.

No Impact.

Date: July 6, 1993

Signature of Agency Head or Authorized Representative



DATE: August 16, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Division of Environmental Protection
Office of Waste Management

LEGISLATIVE RULE TITLE: " Hazardous Waste Management Regulations"

1. Authorizing statute(s) citation W.Va.Code § 20-5E-6

2. a. Date filed in State Register with Notice of Hearing:
No hearing held
- b. What other notice, including advertising, did you give of the hearing?
N/A

- c. Date of hearing(s): N/A

- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments. N/A
Attached _____ No comments received _____
- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
N/A

- f. Name and phone number(s) of agency person(s) to contact for additional information:
Martha E. Barber

Office of Waste Management

1356 Hansford St.

Charleston, WV 25301-1401

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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CHARLESTON, WEST VIRGINIA 25301

MICHAEL P. McTHOMAS
DIRECT DIAL NO. (304) 347-8339

August 13, 1993

VIA TELECOPY

Mr. Ken Ellison
Division of Environmental Protection
Office of Waste Management
1356 Hansford Street
Charleston, West Virginia 25311

Re: Hazardous Waste Management Regulations,
47 CSR 35 (Repeal and Replace)

Dear Ken:

I have undertaken another review of the proposed regulations and I have found several minor technical problems with the rule that I wanted to bring to your attention. Although the official comment period for this rule has expired, I believe that the following proposed changes are both of a technical and noncontroversial nature. Thus, I believe it would be appropriate to effect the suggested changes prior to submission to the Legislative Rule-Making Review Committee on Monday, August 16, 1993.

In Section 3.1.1, a new subsection should be added designated Section 3.1.1.c to read as follows:

Annually submit to the Chief a list of hazardous wastes that are expected to be present in the mixture to be exempted.

Addition of this provision would retain the consistency with the existing hazardous waste management regulations. It appears that the failure to incorporate this requirement was an oversight.

ROBINSON & MCELWEE

Mr. Ken Ellison
August 13, 1993
Page 2

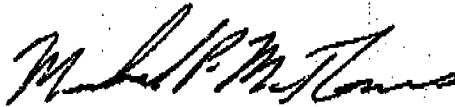
In Section 12.2.1.d, the regulation addresses the submission of a fee to be determined by a schedule set forth in Table 1 of these regulations. However, the regulation as filed did not include Table 1.

In Section 12.2.7.b, in the fifth line, the portion of the sentence which reads "population center to the nearest facility" should be changed to "population center to such proposed facility" in order to be in conformity with the provisions of W. Va. Code, § 20-5E-9.

In Section 12.3, references made to the information that is available to the public which is controlled in West Virginia by W. Va. Code, § 20-5E-11. However, in the application process contained in Section 12.2, there is a specific provision for public access to information in Section 12.2.4. Therefore, in order to be internally consistent within the regulation, Section 12.3 should include at the end of the paragraph additional language to read "and Section 12.2.4 of these regulations."

Thank you for considering these additional technical comments. If you have any questions concerning any of them, please feel free to contact me.

Very truly yours,



Michael P. McThomas

MPM:cdl

c: Martha Barber
Robert L. Foster



FILED

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1356 Hansford Street
Charleston, WV 25301-1401

MAY 16 2 17 PM '93

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE Ann A. Spaner
Deputy Director

SUMMARY OF PROPOSED LEGISLATIVE RULE CONCERNING
THE HAZARDOUS WASTE MANAGEMENT REGULATIONS

- AGENCY: Department of Commerce, Labor and Environmental Resources, Division of Environmental Protection.
- REGULATIONS: Title 47, Series 35, "Hazardous Waste Management Regulations."
- AUTHORITY: West Virginia Code Section 20-5E-6.
- ACTION: Filing of a Proposed Legislative Rule.

SUMMARY: In May of 1986, the West Virginia Division of natural Resources (DNR) received authorization from the United States Environmental Protection Agency (EPA) to implement the base program Subtitle C of the Federal Resource Conservation and Recovery Act (RCRA) of 1976, as amended. Subtitle C of RCRA establishes the hazardous waste management program on a national level. Inclusive of the program is the ability of each State to obtain the authority to implement the program in lieu of the EPA.

This proposed rule incorporates by reference 40 CFR Parts 260 through 299 into the West Virginia Hazardous Waste Management regulations. Incorporation of the federal hazardous waste regulations will facilitate greatly the implementation of the West Virginia Hazardous Waste Management Program. The incorporation will satisfy the federal requirements of consistency and equivalent stringency and thereby, ensure that significant federal funds are allotted to the West Virginia program each year. The regulated community is better served by a hazardous waste program where regulatory requirements are contained in one set of regulations. Additionally, incorporation by reference will streamline the authorization process. In the past, significant financial and manpower resources have been expended to establish the equivalency of the West Virginia program and to maintain authorization to implement it. An incorporation by reference scheme ensures that the West Virginia regulations will more closely mirror the federal regulations. Therefore, the yearly task of maintaining authorization will be simplified greatly.

This rule proposes to repeal and replace the existing Hazardous Waste Management Regulations found at Title 47, Series 35.