

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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1992 SEP 18 PM 3:00

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
Division of Environmental Protection

47

AGENCY: _____ TITLE NUMBER: _____

CITE AUTHORITY W.Va. Code 20-5H-6

AMENDMENT TO AN EXISTING RULE: YES X NO _____

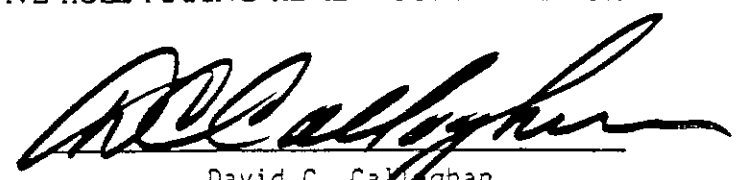
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 37

TITLE OF RULE BEING AMENDED: "Underground Storage Tank
Assessment Fees"

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.



David C. Callaghan
Director

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SEP 18 1992

Legislative Rule Making
Review Committee

3,30

FISCAL NOTE FOR A PROPOSED RULE

Rule Title: Title 47, Series 37, "Underground Storage Tank Fee Assessments."

Type of Rule: ~~XX~~ Legislative Interpretive Procedural

Agency: Department of Commerce, Labor and Environmental Resources Division of Environmental Protection, Section of Waste Management.

Address: 1356 Hansford Street, Charleston, West Virginia 25301

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase \$	Decrease \$	Current \$	Next \$	Thereafter \$
-Personal Services					
-Current Expense					
-Repairs and Alterations					
-Equipment					
-Other					

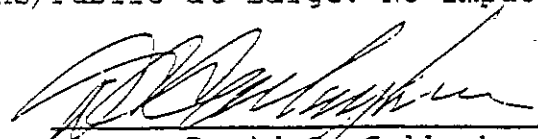
NO CHANGE

2. Explanation of Above Estimates: These regulations impose penalties upon delinquent assessment fees concerning underground storage tanks. No new administrative expenditures are anticipated.

3. Objectives of These Rules: The objective of this rule is add a procedure which allows the collection of a late fee for all delinquent assessment fees.

4. Explanation of Overall Economic Impact of Proposed Rule.

- A. Economic Impact on State Government: No impact.
- B. 1. Economic Impact on Political Subdivisions: No impact.
- 2. Economic Impact on Specific Industries: No impact.
- 3. Economic Impact on Specific Groups of Citizens: No impact.
- C. Economic Impact on Citizens/Public at Large: No impact.


 David C. Callaghan
 Director

Date: July 14, 1992

PREAMBLE TO A PROPOSED RULE CONCERNING
UNDERGROUND STORAGE TANKS

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

REGULATION: Title 47, Series 36, "Underground Storage Tank Regulations"

AUTHORITY: West Virginia Code 20-5H-6

ACTION: Filing of an Agency Approved Rule with the Legislative Rule
Making Review Committee

SUMMARY: Today's filing amends the Underground Storage Tank Regulations
by imposing new requirements when notifying the Division of
Environmental Protection of the sell or purchase of
underground storage tanks.

Response to comments:

- #1. We agree with the suggestion made by the WVMA and would recommend that the change to Section 2.1 be made to read as follows: "The Director hereby adopts and incorporates by reference the provisions contained in 40 CFR part 280 as published in the Code of Federal Regulations on July 1, 1992."
- #2. 20-5H-6(16) states that the Director shall promulgate rules, regulations, or standards necessary and appropriate for the effective implementation and administration of the article. The mandate of Article 5H is to protect human health, safety and the environment. In order to achieve this there must be adequate protection to prevent future releases from new systems. As the regulations now stand the Division is not required to be notified until 30 days after a system is brought into use. This means that the system is completely installed and covered with concrete before the agency is notified. The Division needs prior notification so that the owner and/or operator may be informed of the requirements for a new system including corrosion protection, leak detection and spill and overflow protection. The owner and/or operator may avoid added expense in having to retrofit their equipment to meet the existing regulations if they are given this information and/or if an inspector is given the opportunity to inspect the system before it is covered. A clause has been added to allow for no down time when a new UST is installed to replace a leaking UST. The new provision is not intended to be punitive but to prevent future releases.

- #3. Section 4.6.1 requires notification by any person who sells an existing tank. The Division believes that this provision is necessary because the current ownership of a UST is important in determining the responsible party when there is a release. This should not be a hindrance in ownership transfers as most property transfers would require a least 45 days to be completed. The provision is intended to help resolve current problems which are impeding the enforcement of the Article and the regulations.
- #4. Section 5.2 has been changed to read as follows:
"Any carrier who violates the provision of Section 5.1 of these regulations shall be subject to enforcement action under Chapter 20 Article 5H (20-5H et seq)

TITLE 47
LEGISLATIVE RULES
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

SERIES 37
UNDERGROUND STORAGE TANK FEE ASSESSMENTS

§47-37-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes procedures for the assessment and collection of fees for the Underground Storage Tank Administrative Fund and the Leaking Underground Storage Tank Response Fund pursuant to W. Va. Code §§20-5H-20 and 20-5H-21.

1.2. Authority. -- W. Va. Code §20-5H-6.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Incorporation by Reference. -- Whenever federal statutes or regulations are incorporated by reference into these regulations, the reference is to the statute or regulation in effect on ~~the date on which these regulations were proposed (September 28, 1988)~~ July 1, 1992.

1.6. Tanks Excluded From Fee Assessments. -- The following categories of underground storage tanks are excluded from the fee assessment provisions of Section 3 of these regulations.

1.6.1. Any underground storage tank holding hazardous wastes listed or identified under Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended, or a mixture of such hazardous waste and other regulated substances;

1.6.2. Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under Section 402 or 307(b) of the federal Clean Water Act;

1.6.3. Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks;

1.6.4. Any underground storage tank system whose ~~with a~~ capacity ~~of~~ is one hundred and ten (110) gallons or less;

1.6.5. Any underground storage tank system that contains a de minimis concentration of regulated substances; and

1.6.6. Any emergency spill or overflow containment underground storage tank system that is expeditiously emptied after use.

§47-37-2. Definitions.

2.1. "Act" means the West Virginia Underground Storage Tank Act (W. Va. Code §20-5H et seq.).

~~2.2. "Department" means the West Virginia Department of Natural Resources.~~

2.2. "Change-In-Service" means when an underground storage tank system has undergone a "change-in-service" pursuant to 40 C.F.R. §§280.71 and 280.72.

~~2.3. "Division" means the Division of Environmental Protection, Waste Management of the West Virginia Department of Natural Resources.~~

2.4. "Owner" means:

2.4.1. In the case of an underground storage tank system in use on November 8, 1984, or brought into use after that date, a person who owns an underground storage tank used for the storage, use, or dispensing of a regulated substance.

2.4.2. In the case of an underground storage tank system, in use before November 8, 1984, but no longer in use on that date, a person who owned such a tank immediately before the discontinuation of its use.

2.5. "Person" means any individual, trust, firm, joint stock company, federal agency, corporation (including government corporations), partnership, association, state, municipality, commission, political subdivision of a state, interstate body, consortium, joint venture, commercial entity, or the United States government.

~~2.6. "Presently-in-Use" means an underground storage tank that is being used or could be used for the storage, use, or dispensing of a regulated substance at any time during the current calendar year.~~

2.6. "Permanent Closure" means the closure of an underground storage tank in the manner specified under 40 C.F.R. §§ 280.71 and 280.72.

2.7. "Regulated Substance" means:

2.7.1. Any substance defined in Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability

Act of 1980, but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended; or

2.7.2. Petroleum, including crude oil or an fraction thereof which is liquid at a temperature of sixty (60) degrees Fahrenheit and a pressure of fourteen and seven-tenths pounds per square inch absolute (14.7 psia).

2.8. "Underground Storage Tank" means any one tank or a combination of tanks, and the underground pipes connected thereto, that is used to contain an accumulation of regulated substances and the volume of which, including the volume of underground pipes connected thereto, is ten percent (10%) or more beneath the surface of the ground. The term underground Storage tank does not include:

2.8.1. Farms or residential tanks with a capacity of eleven hundred gallons (1,100) gallons or less and used for storing motor fuel for noncommercial purposes;

2.8.2. Tanks used for storing heating oil for consumptive use on the premises where stored;

2.8.3. Septic tanks;

2.8.4. A pipeline facility, including gathering lines, regulated under the Natural Gas pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979, or an intrastate pipeline facility regulated under state laws comparable to the provisions of either of those acts;

2.8.5. Surface impoundments, pits, ponds, or lagoons;

2.8.6. Storm water or wastewater collection systems;

2.8.7. Flow-through process tanks;

2.8.8. Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

2.8.9. Storage tanks situated in an underground area such as basement, cellar, mine working, drift, shaft, or tunnel if such storage tank is situated upon or above the surface of the floor; and

2.8.10. Any pipes connected to any tank which is described in Section 2.8.1 through 2.8.9 of these regulations.

§47-37-3. Fee Assessment.

3.1. Registration Fees.

3.1.1. The Division will collect an annual registration fee from each owner of an underground storage tank presently-in use which has not undergone permanent closure or change-in-service in this State. The registration fee will not exceed twenty-five dollars (\$25) per tank per year.

3.2. Response Fees.

3.2.1. The division will collect an annual response fee from each owner of an underground petroleum storage tank presently--in-use which has not undergone permanent closure or change-in-service in this State. The response fee will not exceed twenty-five dollars (\$25) per tank per year.

3.3. Fee Calculation.

3.3.1. The division will calculate the fees assessed pursuant to these regulations based upon the maximum assessment allowable under the Act divided-by--the-number-of-tanks-known--to exist-in-West-Virginia-

3.3.2. Owners of -new--tanks USTs, the use of which commenced on or after January 1 of the current calendar year must pay the full annual fees assessed under Sections 3.1 and 3.2 of these regulations (i.e., fees assessed will not be prorated).

3.3.3. Owners of USTs that have completed permanent closure or a change-in-service during the calendar year must pay the full annual fees assessed under Sections 3.1 and 3.2 of these regulations.

3.4. Fee Consolidation.

3.4.1. The fees assessed pursuant to these regulations will be consolidated so-that-no--more-than-one--payment-shall-be due-from-any-tank-owner-in-any-one-calendar-year-

§47-37-4. Fee Collection.

4.1. An invoice for the fees assessed pursuant to these regulations will be provided by the division to each tank owner upon whom a fee is assessed. Such invoice will include an itemized list of fees assessed and the date upon which such fees are due and payable. The invoice will be provided in the form and manner prescribed by the division.

4.2. Fees assessed pursuant to these regulations must be paid by check, money order, or bank draft payable to the West Virginia Department --of--Natural--Resources Division of Environmental Protection. Payment of the entire amount of the fees assessed, as calculated on the assessment invoice, must be made in a single payment.

4.3. Fee payments must be sent to the address on the assessment invoice provided by the division by the date specified on the invoice. If such fee payment is mailed, then the payment must be postmarked by the date specified on the invoice.

4.4. Correcting Fee Assessment Errors.

4-4-4.4.1. Undercharges that appear on the assessment invoices issued by the division will be corrected on the assessment--invoices--issued-for--the--next--calendar-year by the issuance of a corrected invoice.

4-5-4.4.2. Overcharges that appear on the assessment invoices issued by the division will be corrected on the assessment invoices issued for the next calendar year unless the tank owner submits a written request for a refund to the division. Said request, along with documentation supporting the claim of erroneous assessment, must accompany the payment of the assessed fee. The division shall investigate the tank owner's claim and issue a refund for the amount in excess of the proper assessment if the tank owner's claim proves to be valid.

4.4.3. Any errors made in the calculation of assessment fees, whether by the division or as a result of inaccurate information submitted by the owner or operator pursuant to the notification requirements under Section 4 of The Underground Storage Tank Regulations (47 C.S.R. 36 §4) and Section 8 of The Underground Storage Tank Act (W. Va. Code §20-5H-8), must be corrected within one (1) year of the due date posted on the invoice except for the following:

4.4.3.a. Within one (1) year after the effective date of these regulations, the division or the owner or operator may correct assessment fee errors for all invoices with due dates specified within the previous two (2) years of the effective date under Section 1.4 of these regulations.

4.4.4. All fee assessments shall be as originally assessed if no errors are identified within the one (1) year period.

4-6-4.5. A tank owner who does not make a full, timely payment of the fees pursuant to these regulations, or who otherwise fails to comply with the provisions of these regulations, is subject to the penalties provided under W. Va. Code §§20-5H-20 and 20-5H-21.

4.6. Penalties shall be assessed on fee payments not received by the specified due date on the invoice. Late fees shall be a cumulative sum based on the following penalty assessment:

4.6.1. Fifty percent (50%) of the balance assessed for delinquent fees in excess of thirty (30) days after the due date

specified on the invoice.

§47-37-5. Fee Deposit.

5.1. Fees collected by the Department division pursuant to these regulations will be deposited into the State treasury in accordance with W. Va. Code §§20-5H-20 and 20-5H-21.

5.1.1. The deposit of a fee payment into the State treasury is not an admission by the Department division of an assessment for the correct number of tanks. Each tank owner is obligated to notify the division if the number of tanks assessed is incorrect. Corrections will be made in accordance with Section 4.4 of these regulations.

5.1.2. Deposits into the Underground Storage Tank Administrative Fund will include:

5.1.2.a. All registration fees collected pursuant to Section 3.1 of these regulations;

5.1.2.b. The net proceeds of all fines, penalties, and forfeitures collected under the Act; and

5.1.2.c. All interest accruing on investments and deposits of this Fund.

5.1.3. Deposits into the Leaking Underground Storage Tank Response Fund will include;

5.1.3.a. All response fees collected pursuant to Section 3.2 of these regulations;

5.1.3.b. Any registration fee monies received by the Department division that exceed the maximum annual balance for the Underground Storage Tank Administrative Fund as prescribed under W. Va. Code §20-5H-20(a).

5.1.3.c. All interest accruing on investments and deposits of this Fund.



**WEST VIRGINIA
MANUFACTURERS ASSOCIATION**

SUITE 503
405 CAPITOL STREET
CHARLESTON, WV 25301
TELEPHONE (304) 342-2123

September 8, 1992

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SEP 8 1992

Division of Environmental Protection
Office of Waste Management

HAND DELIVERED

David C. Callaghan, Director
West Virginia Division of Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301

Dear Director Callaghan:

On August 3, 1992, the Division of Environmental Protection ("Division" or "DEP") filed with the Secretary of State proposed revisions to the Division's underground storage tank regulations of 47 C.S.R. Series 36. Accompanying the proposed rule was a notice requesting public comment.¹ Pursuant to this notice, the West Virginia Manufacturers Association ("WVMA") files these comments on the August 3, 1992 proposed rule.

The WVMA represents a broad cross-section of both large and small industrial concerns in West Virginia. Members of the WVMA are heavily impacted by the underground storage tank ("UST") regulations. These comments represent a continuation of the WVMA's active and supportive position with respect to the development of a responsible and protective UST program in West Virginia. In this spirit of cooperation, the WVMA offers the following comments on the August 3, 1992 proposed rule for Series 36:

1. Section 2.1 - Date of Incorporation by Reference

As proposed, Section 2.1 states that the federal UST rules of 40 C.F.R. Part 280 are incorporated by reference as published on the date on which the August 3,

¹The notice for public comment accompanying the August 3, 1992 proposed rule indicated the period for public comment would end on September 7, 1992. As September 7, 1992 fell on a public holiday, these comments are filed on September 8, 1992, the next possible business day.

David C. Callaghan, Director
September 8, 1992
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1992 proposed rule becomes effective. Given that Section 2.1 presently indicates that the federal UST regulations are incorporated by reference as of the date the existing state UST regulations were proposed (December 16, 1988), the effect of this change is to include any changes to the federal UST program which occur between the date of the proposed revisions to Series 36 (i.e., August 3, 1992) and the date the proposed revisions would become effective (i.e., Spring of 1993). This change thus has the effect of incorporating by reference future revisions to the federal regulations. Under West Virginia law, future revisions to federal regulatory programs cannot be prospectively incorporated by reference. For this reason, the WVMA requests that Section 2.1 be revised to state that "The Director hereby adopts and incorporates by reference the provisions contained in 40 C.F.R. Part 280 as published in the Code of Federal Regulations on the date in which these regulations were proposed (August 3, 1992), with the following modifications"

2. Section 4.3 - Notification of UST Installation

This new provision would require owners or operators of new UST systems to notify the Director in writing 30 days prior to the beginning of installation. Under the existing UST rules, owners and operators of new UST systems need only notify the Director *within 30 days of bringing such tanks into use*. See 40 C.F.R. §280.22(a), as incorporated by reference at 47 C.S.R. 36-2.1. Section 4.3 is thus more stringent than the federal notification requirement, and should be deleted in its entirety. Alternately, Section 4.3 could be revised to indicate that notification need only be given within 30 days of placing the new UST in use, consistent with the federal requirements of 40 C.F.R. §280.22(a). At a minimum, Section 4.3 should be revised to state that the Director may waive the 30-day notice requirement "in response to a release from an existing UST system on the site, *or for other good cause as determined by the Director.*"

3. Section 4.6.1 - Notification of Sale of USTs

Again, the requirement of notification prior to transfer of ownership of a UST is more stringent than the corresponding federal requirements. This provision should also be deleted. At a minimum, the provision should be revised by adding a second sentence to Section 4.6.1 stating that "This 30-day notification period may be waived for a good cause as determined by the Director."

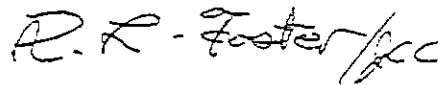
David C. Callaghan, Director
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4. Section 5.2 - Authority of the Director to Assess Civil Penalties Against Carriers

As added in the August 3, 1992 proposed rule, Section 5.2 states that "any carrier who violates the provision of Section 5.1 of these regulations shall be subject to a civil penalty, to be levied by the Director, of not more than ten thousand dollars (\$10,000) for each day of the violation." The WVMA objects to Section 5.2 on the basis that the West Virginia Underground Storage Tank Act, W.Va. Code §20-5H-1 et. seq., does not grant the Director authority to assess civil penalties against carriers. Section 5.2 is directly inconsistent with W.Va. Code §20-5H-16(a), which indicates that civil penalties shall only be assessed for violations of an Order issued by the Director, upon commencement in the appropriate Circuit Court of a civil action by the Director.

The WVMA appreciates this opportunity to comment on the Division's August 3, 1992 proposed rule. If you so desire, we would welcome the opportunity to discuss these comments in further detail at your convenience.

Very truly yours,



Robert L. Foster

JCC/blc
cc: Gil Sattler