

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Do Not Mark In this Box

FILED  
1990 MAR 28 PM 1:40  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Form #7

NOTICE OF AN EMERGENCY RULE

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

CITE AUTHORITY: W. Va. Code §20-5H-6

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 37A

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_


Underground Storage Tank Insurance Trust Fund.

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Please see attached sheets.

Use Additional Sheets If Necessary.

  
J. Edward Hampick III  
Director

DATE: March 28, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Department of Commerce, Labor, and Environmental Resources,  
Division of Natural Resources.

EMERGENCY RULE TITLE: Underground Storage Tank Insurance Trust Fund

1. Emergency rule was filed on: March 28, 1990
2. Statutory authority for promulgating the emergency rule:  
West Virginia Code, Chapter 20, Article 5H, Section 6
3. Proposed legislative rule was filed on: March 28, 1990
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
  
Adopts new language.
5. Has the same or similar emergency rule previously been filed and expired?  
  
No.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety, or welfare.  
  
Not applicable.
7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute, or federal regulation and time limit established therein.

On October 26, 1988, the Environmental Protection Agency promulgated rules and regulations to establish a financial assurance requirement for owners or operators of underground storage tanks (USTs) (40 C.F.R. Part 280 Subpart H). This rule became effective on January 24, 1989. However, owners or operators are required to comply with this regulation by the date assigned to their appropriate compliance category in the rule. These categories are based on ownership and are as follows:

Category I consists of owners or operators of 1,000 or more USTs; Category II consists of owners or operators of 100-999 USTs; Category III consists of owners or operators of 13-99 USTs; Category IV consists of owners or operators of 1-12 USTs.

The compliance date requirement for categories I and II are in effect. However, owners or operators of 13-99 USTs must show compliance with the financial assurance requirement by April 26, 1990. Due to the substantial amount of financial responsibility required by the owners or operators, categories III and IV have found it difficult to establish a means of adequate financial assurance to satisfy the requirement.

Chapter twenty, article five-H, section ten of the W.Va. Code adopts the financial responsibility requirement for USTs. Chapter twenty, article five-H, section twenty-two of the W.Va. Code gives the Director of the Division of Natural Resources the authority to establish an insurance fund for the purpose of satisfying the financial responsibility requirement for those who are unable to otherwise meet this requirement. The Director of the Division of Natural Resources has determined the promulgation of rules establishing a financial assurance mechanism to be a necessity for owners and operators of USTs to be in compliance with federal requirements and remain in operation. Therefore, the Director is promulgating these rules under an emergency basis.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See discussion above under Item 7.

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

FILED  
1990 MAR 28 PM 1:41  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 37A  
UNDERGROUND STORAGE TANK INSURANCE TRUST FUND

§47-37A-1. General.

1.1. Scope and Purpose. -- These regulations establish a Underground Storage Tank Insurance Trust Fund pursuant to W. Va. Code §20-5H-22 and as set forth under the financial responsibility requirements of W. Va. Code §20-5H-10.

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

1.3. Filing Date. -- March 28, 1990.

1.4. Effective Date. -- March 28, 1990.

§47-37A-2. Applicability.

2.1. Owners or operators of underground storage tanks are required by statute to establish a means of financial assurance necessary for taking reasonable corrective action and for compensating third parties for bodily injury and property damage caused by sudden or nonsudden accidental releases arising from the operation of USTs. These regulations apply to UST owners and operators who do not show evidence of meeting the financial assurance requirements set forth in W. Va. Code §20-5H-10 and to any UST owner or operator with an established means of financial assurance who desires to participate in the state program.

§47-37A-3. Definitions.

3.1. "Accidental Release" means a release arising from extrinsic causes or occurring unexpectedly, by chance, without intent, or through carelessness.

3.2. "Advisory Committee" means a committee composed of seven (7) members, which shall include:

3.2.1. One member of the West Virginia Petroleum Council;

3.2.2. One member of the West Virginia Service Station Dealers Association;

3.2.3. One member of the West Virginia Petroleum Marketers Association;

## EMERGENCY RULE

3.2.4. The director of the Division of Natural Resources of the West Virginia Department of Commerce, Labor and Environmental Resources;

3.2.5. One member of the West Virginia Manufacturers Association;

3.2.6. The West Virginia Insurance Commissioner; and

3.2.7. A representative from the citizenery-at-large who shall be appointed by the Governor.

3.3. "Board" means the West Virginia Board of Risk and Insurance Management.

3.4. "Damages" means bodily injury or property damage caused by a release or accidental release as defined in these regulations.

3.5. "Director" means the director of the Division of Natural Resources of the West Virginia Department of Commerce, Labor and Environmental Resources.

3.6. "Deductible" means an amount of money paid by the insured that relieves the insurer of responsibility for an initial specified loss.

3.7. "Division" means the Division of Natural Resources of the West Virginia Department of Commerce, Labor and Environmental Resources.

3.8. "Premium" means the payment made for a contract of insurance.

3.9. "Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an underground storage tank into groundwater, surface water, or subsurface soils.

3.10. "Regulated Substance" means:

3.10.1. 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

3.10.2. Petroleum, including crude oil or any 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). The term "petroleum" includes, but is not limited to, petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and

**.EMERGENCY RULE**

finishing such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

3.11. "Underground Storage Tank" or "UST" means means 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 the underground pipes connected thereto, is ten percent (10%) or more beneath the surface of the ground. The term "underground storage tank" does not include:

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

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

3.11.3. Septic tanks;

3.11.4. 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;

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

3.11.6. Storm water or wastewater collection systems;

3.11.7. Flow-through process tanks;

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

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

3.11.10. Any pipes connected to any tank which is described in Sections 3.11.1 through 3.11.9 of these regulations.

**§47-37A-4. Applying For Coverage.**

4.1. Application for Coverage. The owner or operator of an underground storage tank shall submit an application for coverage to the Board on forms supplied by the Board.

4.2. The application shall include a sworn statement that all information and records are accurate and in compliance with all applicable federal, state, and local requirements.

## EMERGENCY RULE

### §47-37A-4. Capitalization Fees.

5.1. A capitalization fee shall be assessed against all owners or operators of underground storage tanks to be used for initial establishment of the Underground Storage Tank Insurance Trust Fund.

5.2. The capitalization fee shall be paid to the Board and shall be deposited into the State treasury into a special fund designated the "Underground Storage Tank Insurance Trust Fund."

5.3. Interest accrued on moneys in the Underground Storage Tank Insurance Trust Fund shall be credited to that fund.

### §47-37A-6. Powers and Duties of the Board.

6.1. The Board shall have the power, duty, and responsibility to establish and maintain the premium rate for the UST insurance program.

6.2. The annual premium rate, as determined by the Board, shall be paid by the owners or operators requesting coverage and may include administrative expenses.

6.3. The premium shall be paid to the Board and deposited into the Underground Storage Tank Insurance Trust Fund.

6.4. The UST insurance program shall be assessable. The Board may implement assessments once the insurance premium pool reaches a level of two million dollars (\$2,000,000) or less. The assessment shall be subject to approval of the director and the Advisory Committee. The insurance premium pool does not include the capitalization.

### §47-37A-7. Cancellation of Coverage.

7.1. The division may request a cancellation of coverage for:

7.1.1. An owner or operator who is not in compliance with the provisions of 40 C.F.R. Part 280 or 47 C.S.R. 36;

7.1.2. An owner or operator who fails to install overfill/spill prevention if two (2) incidents are reported within a twelve (12) month period in excess of the insured's deductible; or

7.1.3. An owner or operator who fails to pay the premium.

### §47-37A-8. Emergency Claims.

8.1. The Division shall notify the Board of a potential claim.

**-EMERGENCY RULE**

8.2. The owner or operator shall comply with the initial response requirements set forth in 40 C.F.R. §280.61.

8.3. The owner or operator shall immediately submit written itemization of projected contract costs to the Board.

8.4. Upon compliance with the provisions of 40 C.F.R. §280.61, the owner or operator shall secure three (3) bids to perform site activities necessary to comply with the requirements set forth in 40 C.F.R. §280.66.

8.5. The owner or operator is required to accept the lowest bid.

8.6. The Board is responsible for reimbursing the owner or operator at an amount no greater than the lowest bid less the owner or operators deductible.

8.07. The Board will not reimburse the cost of the initial site assessment.

**§47-37A-9. Non-Emergency Claims.**

9.1. The Division shall notify the Board of a potential claim.

9.2. The owner or operator shall secure three (3) bids to perform site activities necessary to comply with the requirements set forth in 40 C.F.R. §280.66.

9.3. The owner or operator is required to accept the lowest bid.

9.4. The Board is responsible for reimbursing the owner or operator for all eligible damages less the owner or operator deductible.

9.5. The Board will not reimburse pay the cost of the initial site assessment.

**§47-37A-10. Tank Certification.**

10.1. Owners or operators of an underground storage tank shall not dispense regulated substances unless:

10.1.1. The underground storage tank is registered with the Division pursuant to W. Va. Code §20-5H-9; and

10.1.2. The owner or operator meets the financial responsibility requirements pursuant to W. Va. Code §20-5H-10.

**EMERGENCY RULE**

**§47-37A-11. Powers and Duties of the Advisory Committee.**

11.1. In addition to all other powers, duties, and responsibilities aforementioned in these regulations, the Advisory Committee shall:

11.1.1. Have the authority to review all claims of fifty thousand dollars (\$50,000) or more;

11.1.2. Have the authority to function as an appeals board for resolving the disputes that may arise from the operation of the underground storage tank insurance program established under W. Va. Code §20-5H-22; and

11.3.3. Have the authority to authorize the Board to use funds from the premium pool to pay for corrective action upon application to said committee by owners or operators for hardship status if owners or operators cannot afford the cost of cleanup, refuse to pay, or for any other reason fail to take corrective action.

**§47-37A-12. Severability of Requirements.**

12.1. If any requirement of these regulations or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other requirements or applications of these regulations and to this end the requirements of these regulations are declared to be severable.

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

ROBERT E. WILKINSON  
Deputy Secretary of State

CATHERINE FREROTTE  
Executive Assistant

Telephone: (304) 345-4000  
Corporations: 342-8000



STATE OF WEST VIRGINIA  
SECRETARY OF STATE  
Charleston 25305

WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

SHEREE COHEN  
Special Assistant

(Plus all the volunteer  
help we can get)

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE

May 9, 1990

THIS DATE May 9, 1990  
ADMINISTRATIVE LAW DIVISION

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Natural Resources

RULE: New Rule, Series 37A; Underground Storage Tank Insurance  
Trust Fund

DATE FILED AS AN EMERGENCY RULE: March 28, 1990

DECISION NO. 4-90

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

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER  
Secretary of State

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

ROBERT E. WILKINSON  
Deputy Secretary of State

CATHERINE FREROTTE  
Executive Assistant

Telephone: (304) 345-4000  
Corporations: 342-8000



## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

SHEREE COHEN  
Special Assistant

(Plus all the volunteer  
help we can get)

#### DECISION      EMERGENCY RULE DECISION (ERD 4-90)

AGENCY : Division of Natural Resources  
RULE:    New Rule, Series 37A, Underground Storage Tank In-  
          surance Trust Fund  
FILED AS AN EMERGENCY RULE: March 28, 1990

- par. 1    The Division of Natural Resources (DNR) has filed a new rule as an emergency.
- par. 2    West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3    Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4    (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5    If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6    DNR has filed this emergency rule with supporting documents with the Secretary of State on March 28, 1990 and with the LRMRC on March 28, 1990.

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

par. 8 (B) Statutory Authority -- WV Code §20-5H-6 reads:

*§20-5H-6. Promulgation of rules, regulations and standards by director.*

*(a) The director has overall responsibility for the promulgation of rules and regulations under this article. In promulgating and revising such rules and regulations the director shall comply with the provisions of chapter twenty-nine-a (29A-1-1 et seq.) of this code. Such rules and regulations shall be no more stringent than the rules and regulations promulgated by the United States environmental protection agency pursuant to Subtitle I.*

*(b) The director shall promulgate rules and regulations applicable to owners or operators of underground storage tanks or other affected persons, as appropriate, as follows:*

*(1) A requirement for a yearly registration fee for underground storage tanks;*

*(2) A requirement that an owner or operator register with the director each underground storage tank after the effective date of the regulations and than an owner or operator report annually on changes in status of any underground storage tank;*

*(3) Such release detection, prevention and correction rules applicable to underground storage tanks as may be necessary to protect human health and the environment;*

*(4) Requirements for maintaining a leak detection system, inventory control systems together with tank testing, or a comparable system or method designed to identify releases from underground storage tanks in a manner consistent with the protection of human health and the environment;*

*(5) Requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing system;*

*(6) Regulations for procedures and amount of fees to be assessed for the underground storage tank administrative fund, the leaking underground storage tank response fund and the underground storage tank insurance fund established pursuant to this article: Provided, That except for those regulations assessing fees for calendar year one thousand nine hundred eighty-eight, none of the regulations authorized under this subsection shall become effective until one hundred and eighty days after the date of final promulgation: Provided, however, That fees assessed pursuant to said regulations shall be consolidated so that no more than one payment shall be due from any tank owner or operator in any one year.*

*(7) Procedures for making expenditures from the underground storage tank administrative fund, the leaking underground storage tank response fund and the underground storage tank insurance fund;*

*(8) Acceptable methods by which an owner or operator may demonstrate financial responsibility;*

(9) Requirements for reporting of releases and corrective action taken in response to a release;

(10) Requirements to taking corrective action in response to a release from an underground storage tank;

(11) Requirements for the closure of tanks to prevent future releases of regulated substances to the environment;

(12) Requirements for certification of installation, removal, retrofit, testing and inspection of underground storage tanks and leak detection systems by a registered professional engineer or other qualified person;

(13) Requirements for public participation in the enforcement of the state underground storage tank program;

(14) Procedures establishing when and how the director shall determine if information obtained by any agency under this article is confidential;

(15) Standards of performance for new underground storage tanks; or

(16) Any other rules, regulations or standards necessary and appropriate for the effective implementation and administration of this article

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

par. 10 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

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

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

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

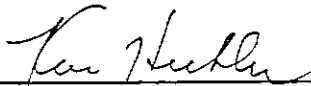
On October 26, 1988, the Environmental Protection Agency promulgated rules and regulations to establish a financial assurance requirement for owners or operators of underground storage tanks (USTs) (40 C.F.R. Part 280 Subpart H). This rule became effective on January 24, 1989. However, owners or operators are required to comply with this regulation by the date assigned to their appropriate compliance category in the rule. These categories are based on ownership and are as follows:

Category I consists of owners or operators of 1,000 or more USTs; Category II consists of owners or operators of 100-999 USTs; Category III consists of owners or operators of 13-99 USTs; Category IV consists of owners or operators of 1-12 USTs.

The compliance date requirement for categories I and II are in effect. However, owners or operators of 13-99 USTs must show compliance with the financial assurance requirement by April 26, 1990. Due to the substantial amount of financial responsibility required by the owners or operators, categories III and IV have found it difficult to establish a means of adequate financial assurance to satisfy the requirement.

Chapter twenty, article five-H, section ten of the W. Va. Code adopts the financial responsibility requirement for USTs. Chapter twenty, article five-H, section twenty-two of the W. Va. Code gives the Director of the Division of Natural Resources the authority to establish an insurance fund for the purpose of satisfying the financial responsibility requirement for those who are unable to otherwise meet this requirement. The Director of the Division of Natural Resources has determined the promulgation of rules establishing a financial assurance mechanism to be a necessity for owners and operators of USTs to be in compliance with federal requirements and remain in operation. Therefore the Director is promulgating these rules under an emergency basis.

- par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in 29A-3-15(g) . . . "to comply with a time limitation" and "to prevent substantial harm to the public interest".
- par. 14 This decision shall be cited as Emergency Rule Decision 4-90 or ERD 4-90 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with DNR, the Attorney General and the Legislative Rule Making Review Committee.

  
\_\_\_\_\_  
KEN HECHLER  
SECRETARY OF STATE

Entered May 9, 1990

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE May 9, 1990  
ADMINISTRATIVE SERVICES DIVISION