

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

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1988 NOV -7 PM 12:56

SECRETARY OF STATE

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

AGENCY: WV Department of Natural Resources TITLE NUMBER: 47

CITE AUTHORITY: W. Va. Code §20-5F-4

RULE TYPE: PROCEDURAL INTERPRETIVE

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

AMENDMENT TO AN EXISTING RULE: YES _____, NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

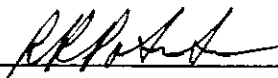
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 38A

TITLE OF RULE BEING ADOPTED: _____

Solid Waste Assessment Fee Exemptions

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS January 1, 1989



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PREAMBLE TO AN ADOPTED PROCEDURAL RULE
CONCERNING SOLID WASTE ASSESSMENT FEE EXEMPTIONS

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STATE AGENCY: West Virginia Department of Natural Resources

REGULATIONS: Title 47, Series 38A, "Solid Waste Assessment Fee Exemptions"

AUTHORITY: W. Va. Code §20-5F-4

ACTION: Adopted Rule

SUMMARY: The Enrolled Committee Substitute for House Bill 3146, passed during the 1988 Regular Session, creates a new solid waste fee assessment to be collected by the operators of solid waste facilities and remitted to the State Tax Commissioner. Section 20-5F-5a(e) of the West Virginia Code establishes three exemptions from the assessment fee collection. Of particular interest to many West Virginians, W. Va. Code §20-5F-5a(e)(3) provides that the disposal of residential solid waste by an individual not in the business of hauling or disposing of solid waste is exempted from solid waste assessment fee collection "on such days and times as designated by the director of the department of natural resources by regulation as exempt from the solid waste assessment fee."

On June 30, 1988, the State Tax Department filed an emergency rule with the Secretary of State to impose solid waste assessment fees pursuant to W. Va. Code §20-5F-5a. In order to provide the exemptions allowed by law, the Director of the Department of Natural Resources is today adopting a procedural rule to implement the exemptions.

RESPONSE TO COMMENTS: A public hearing on the proposed procedural rule was held on August 10, 1988 in Charleston; written comments were received until 4:30 p.m. on that day. Twenty individuals attended the public hearing and oral or written comments were received from ten individuals, associations, or companies. The comments received and the Department's responses appear below:

Sections 2.1 and 2.2

Comment: One commenter asked the Department to provide an application form to be used for the submission of the information required under these sections.

Response: Appendix A has been added to these regulations in order to provide the requested application form.

Sections 2.1 and 2.2 (continued)

Comment: Several commenters expressed the opinion that the solid waste fee assessment exemptions set forth in W. Va. Code §§20-5F-5a(e)(1) and 20-5F-5a(e)(2) are self-executing. Consequently, they asserted that the Department has neither the authority nor the need to promulgate Sections 2.1 and 2.2 of the proposed Series 38A regulations. These commenters further argued that the statute does not condition an exemption upon obtaining certification from the Director and, therefore, the regulations improperly impose conditions upon persons who are intrinsically exempt from assessment fee payment under the statute.

Response: The Department disagrees with the commenters. Proper authority does exist under W. Va. Code §20-5F-4 for the promulgation of these regulations. Furthermore, the assessment fee collection contemplated by the new law is not self-executing. A self-executing program would entail serious enforcement problems in regard to verification and proper collection of assessed fees. In addition, the new law defines a broad mandate for the Department to detail the type, amount, and origin of wastes handled by disposal facilities in this State. A self-executing program would not provide such information to the Department. In sum, a assessment fee exemption program premised upon certification by the Director protects the interests of both the State and owners and operators of exempt facilities. The procedures outlined in the Department's regulations provide such owners and operators with a document that certifies their exemption from payment of an assessment fee.

Comment: One commenter suggested the inclusion of a new section in these regulations to establish as formal policy that industrial operations are excluded from the assessment fee collection:

§47-38A-4. Exclusions.

4.1. Any industrial facility excluded by the definition set forth in Chapter 20, Article 5F, Section 2(e) of the West Virginia Code is not subject to these regulations.

Response: Each industrial facility in this State is different and some may accept solid waste for disposal on a commercial basis. Therefore, a demonstration by each facility owner or operator of his qualification for exempt status is necessary.

Section 2.1

Comment: Several commenters objected to the requirement that companies obtain certification from the Director in order to receive an exemption for certain private facilities, such as power generation stations, that dispose of their wastes at their own facilities. One of these commenters asserted that the Legislature intended House Bill 3146 to apply to commercial landfills and not to "captive private facilities." Furthermore, this commenter argued, the proposed regulations would unduly require "captive private facilities" to duplicate and submit information readily available through the Department's existing solid waste management permit program.

Response: Again, as in the response above, the Department cannot ascertain the possible exempt status of a particular facility without a proper demonstration by the facility owner or operator. Such a demonstration is made through the submission of specific information to the Department. While the submission of some information may prove to be duplicative, the Department believes that the assembly of pertinent information is best accomplished through the procedures enacted by these regulations.

Section 2.1.1.g

Comment: As proposed, Section 2.1.1.g required the submission of all legal documents that describe the relationship between the owner, operator, or lessee of an approved facility and the other person or persons disposing of solid waste at the facility. Several commenters stated that this requirement was too burdensome due to the potentially large number of legal documents involved. They requested that this subsection be revised to require only the submission of a summary of the legal documents.

Response: The Department accepts the commenters' request and has revised this subsection accordingly.

Section 2.2

Comment: Several commenters objected to the requirement that companies obtain certification from the Director in order to obtain an exemption for reuse or recycling of waste materials that are by-products of manufacturing or other operations such as electric power generation. These

commenters argued that by-products and other materials which are directly reused or recycled are not discarded materials and do not fall under the definition of "solid waste" subject to regulation by the Department.

Response: All facility owners and operators in this State have a duty to comply with the applicable provisions of the new solid waste law. If the by-products of a manufacturing or other operation are directly reused or recycled rather than discarded and do not fall under the definition of "solid waste" subject to the provisions of the new law, then the assessment fee collection and exemption provisions of the law will not apply to such an operation.

Comment: One commenter suggested that the Department create a list or description of presumptively exempt reuse or recycling activities in lieu of the requirement that certificates of exemption be obtained from the Director.

Response: The determination by the Department of what is or what is not a commercial solid waste facility is, necessarily, a case-by-case determination premised upon the specific activities practiced at a particular facility. A list of presumptively exempt activities is inappropriate.

Section 2.2.1

Comment: Two commenters objected to the information submission requirements of this subsection, stating that some of the required information would be "impossible to obtain" due to the nature of their business operations.

Response: The Department believes that the information submitted under the requirements of this subsection is appropriate, necessary, and easily obtainable. The commenters were unable to explain how or why such information would be "impossible to obtain" but instead merely reported that they do not currently collect such information.

Section 3.2.1

Comment: One commenter stated that the application of appeal procedures provided under the State Administrative Procedures Act (W. Va. Code §29A-5-4) was inappropriate

and suggested that appeals should be governed by W. Va. Code §20-5F-7 (i.e., appeal to the State Water Resources Board).

Response: The Department accepts the commenter's request and has revised this subsection accordingly.

Section 3.3

Comment: One commenter objected to the change of information notice requirement set forth in Section 3.3 as being "unduly burdensome since it will require persons clearly entitled to exemption under the statute to provide written notice to the Department of changes of even the most insignificant nature, which will not in any way alter the status or entitlement of the facility to be considered exempt." Another commenter suggested that Section 3.3 be revised by inserting either "significantly" or "materially" before the word "modifies" (e.g., "Whenever a change occurs which significantly modifies the information submitted under Section 2.1 or 2.2 of these regulations...") Finally, two commenters requested that the notification period be extended to thirty (30) days.

Response: The information submitted under the requirements of this subsection is critical to the determination of the applicability of an exemption. The Department feels the requirement for submitting updated information is not burdensome and that all changes are significant enough to report. However, the Department does accept the commenters' request to extend the notification period to thirty days and has modified this subsection accordingly.

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TITLE 47
PROCEDURAL RULES
DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE ATTORNEY
SECRETARY OF STATE

SERIES 38A
SOLID WASTE ASSESSMENT FEE EXEMPTIONS

§47-38A-1. Scope and Authority.

1.1. Scope and Purpose. -- This rule establishes procedures to be followed in obtaining solid waste assessment fee exemptions provided under W. Va. Code §20-5F-5a(e).

1.2. Authority. -- W. Va. Code §20-5F-4.

1.3. Filing Date. -- November 7, 1988.

1.4. Effective Date. -- January 1, 1989.

§47-38A-2. Solid Waste Assessment Fee Exemptions.

2.1. Exemptions for Certain Facility Owners, Operators, and Lessees. A person who owns, operates, or leases an approved solid waste disposal facility is exempt from the payment of solid waste assessment fees, upon the receipt of a certificate of exemption from the director, if that facility is used exclusively to dispose of waste originally produced by such person in his regular business or personal activities or by persons utilizing the facility on a cost-sharing or nonprofit basis.

2.1.1. In order to obtain a certificate of exemption under Section 2.1 of these regulations, a person must submit the following information to the Department on the form provided in Appendix A of these regulations:

2.1.1.a. The name, address, and telephone number of the person applying for the exemption;

2.1.1.b. A notation of the status of the person applying for the exemption as either the owner, operator, or lessee of the approved solid waste disposal facility;

2.1.1.c. The location and permit number of the facility;

2.1.1.d. A description of the origins, types, and estimated amounts of all wastes disposed of at the facility;

2.1.1.e. A brief description of each business or activity that produces the wastes disposed of at the facility;

2.1.1.f. The name, address, and telephone number of each person utilizing the facility on a cost-sharing or nonprofit basis; and

2.1.1.g. A summary of the legal documents that describe the relationship between the owner, operator, or lessee of the approved facility and the other person or persons disposing of solid waste at the facility. Copies of the actual documents may be requested by the director.

2.2. Exemption for Reused or Recycled Solid Waste. A person who segregates and delivers his solid waste to an approved resource recovery or recycling facility for the purpose of reuse or recycling of that waste is exempt from the payment of solid waste assessment fees upon the receipt of a certificate of exemption from the director.

2.2.1. In order to obtain a certificate of exemption under Section 2.2 of these regulations, a person must submit the following information to the Department on the form provided in Appendix A of these regulations:

2.2.1.a. The name, address, and telephone number of the person applying for the exemption;

2.2.1.b. The location and permit number of the facility to which the waste is delivered for reuse or recycling;

2.2.1.c. A description of the origin, type, and estimated amount of the waste delivered for reuse or recycling;

2.2.1.d. A brief description of the process or method of reusing or recycling the delivered waste; and

2.2.1.e. A notarized statement from the owner or operator of the approved facility that certifies that a reuse or recycling process is in operation at his facility and that the delivered waste will in fact be reused or recycled.

2.3. Exemption for Residential Solid Waste. An individual who is not in the business of hauling or disposing of solid waste is exempt from the payment of solid waste assessment fees when disposing his residential solid waste at an approved solid waste facility on such days and times

as designated by the owner or operator of that facility and approved by the director.

2.3.1. Days and times for the exempt disposal of residential solid waste must be designated by the owner or operator of each approved facility in the State and submitted to the director for approval. The owner or operator must designate at least ten (10) hours per week for the exempt disposal of residential waste.

2.3.2. Changes in either the days or the times for the exempt disposal of residential waste at an approved facility may be made by the director at his discretion.

2.3.3. Upon receiving approved days and times for the exempt disposal of residential waste from the director, the owner or operator must post a sign at the entrance to the facility that lists those approved days and times.

§47-38A-3. Certificates of Exemption.

3.1. After reviewing the information submitted by a person seeking an exemption under Section 2.1 or 2.2 of these regulations, Department personnel will recommend to the director that:

3.1.1. A certificate of exemption be granted;

3.1.2. A certificate of exemption be denied; or

3.1.3. A letter requesting additional information be sent to the person seeking the exemption.

3.2. If the director accepts a recommendation to deny the granting of a certificate of exemption, he will notify the person who sought the exemption of the denial and the reasons therefor.

3.2.1. A decision of the director to deny the granting of a certificate of exemption is appealable under the provisions of W. Va. Code §20-5F-7.

3.3. Whenever a change occurs which modifies the information submitted under Section 2.1 or 2.2 of these regulations, the person granted a certificate of exemption must, within thirty (30) days, submit written notice to the Department detailing the change.

3.3.1. Failure by a person granted a certificate of exemption to submit the change of information notice required under Section 3.3 of these regulations constitutes cause for revoking the certificate.

APPENDIX A

Solid Waste Assessment Fee Exemption Application

WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES
SOLID WASTE ASSESSMENT FEE EXEMPTION APPLICATION

PLEASE COMPLETE AND RETURN TO:

WV Department of Natural Resources
Assessment Fee Exemption
Building 3, State Capitol Complex
Charleston, WV 25305

1. NAME, ADDRESS, AND TELEPHONE NUMBER OF APPLICANT:

Please indicate whether you are a facility owner (), facility operator (), facility lessee (), or a person delivering his waste to a resource recovery or recycling facility ().

2. LOCATION OF THE FACILITY AND ITS PERMIT NUMBER:

3. BRIEF DESCRIPTION OF THE TYPE AND ESTIMATED ANNUAL AMOUNT OF WASTE DISPOSED AT THIS FACILITY:

4. BRIEF DESCRIPTION OF THE BUSINESSES OR ACTIVITIES WHICH GENERATE THE WASTE DISPOSED AT THIS FACILITY:

NOTE: If you are seeking an exemption for a facility that disposes of waste on a cost-sharing or nonprofit basis, please complete item 5. If you are seeking an exemption for reuse or recycling, please complete item 6.

5. BRIEF SUMMARY OF THE LEGAL DOCUMENTS WHICH DESCRIBE THE RELATIONSHIP BETWEEN YOUR FACILITY AND THE INDIVIDUALS DISPOSING WASTE THERE ON A COST-SHARING OR NONPROFIT BASIS:

Please attach an additional sheet listing the name, address, and telephone number of each person using the facility on a cost-sharing or nonprofit basis.

6. BRIEF DESCRIPTION OF THE PROCESS OR METHOD EMPLOYED TO REUSE OR RECYCLE YOUR DELIVERED WASTE:

Please attach a notarized statement from the facility owner or operator that certifies that a reuse or recycling process is in operation at his facility and that the delivered waste will in fact be reused or recycled.

I hereby declare that the information in this application is accurate and true to the best of my knowledge and belief. I understand that the filing of false, inaccurate, or misleading information is grounds for the revocation of my exemption.

Signature of Applicant

Date