



STATE OF WEST VIRGINIA  
DEPARTMENT OF NATURAL RESOURCES  
CHARLESTON 25305

ARCH A. MOORE, JR.  
Governor

April 14, 1987

RONALD R. POTESTA  
Director


ROBERT K. PARSONS  
Deputy Director

NOTICE OF AGENCY ADOPTION

RULE TITLE: Hazardous Waste Emergency  
Response Fund Regulations

RULE TYPE: Procedural

The attached rule constitutes the official rule adopted by the West Virginia Department of Natural Resources on the 14th day of April 1987 and filed with the West Virginia Secretary of State.

  
\_\_\_\_\_  
Ronald R. Potesta  
Director

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1987 APR 14 PM 3:45  
SECRETARY OF STATE



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DEPARTMENT OF NATURAL RESOURCES  
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The Honorable Ken Hechler  
Secretary of State  
Capitol Complex, Suite 157-K  
Charleston, West Virginia 25305

Re: Filing of Adopted Rules  
(Hazardous Waste Emergency  
Response Fund Regulations,  
Interpretive Rules, Series  
40B) by the Department of  
Natural Resources

Dear Mr. Hechler:

Enclosed please find for your filing a copy of adopted interpretive rules of the Department of Natural Resources. Please note that these rules were originally proposed as Series 20B. Title 47, the compilation of Department regulations, has since been renumbered; Series 20B became Series 40B and has been so renumbered in this filing.

If you have any questions, please contact Mr. Ronald A. Shipley, Special Assistant to the Director, at 348-2761.

Sincerely,

Ronald R. Potesta  
Director

RRP/jhb

Enclosures

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3:45 PM  
SECRETARY'S OFFICE

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FISCAL NOTE FOR PROPOSED RULES

1989 SEP 19 AM 11:28

Rule Title: Hazardous Waste Emergency Response Fund Regulations

Type of Rule:            Legislative            X Interpretive            X Procedural

Agency:    Department of Natural Resources

Address:    1800 Washington Street East, Charleston, West Virginia 25305

1. Effect of Proposed Rule (Estimated Total Cost)	Increase \$	ANNUAL		FISCAL YEAR	
		Decrease \$	Current \$	Next \$	Thereafter \$
Personal Services	\$3-4,000		0	\$3-4,000	\$3-4,000
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of Above Estimates:

The above estimates reflect the administrative cost of issuing an annual fee schedule and processing collected fees.

3. Objectives of These Rules:

The proposed rules implement the provisions of Chapter 20, Article 5G of the West Virginia Code related to the collection of hazardous waste generator fees.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government:

The proposed rules provide procedures for the collection of up to \$500,000 annually from the generators of hazardous wastes for the Hazardous Waste Emergency Response Fund. An estimated \$3-4,000 per year will be required for program administration.

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

The West-Virginia chemical industry will be impacted by a maximum annual collection of \$500,000 from generators of hazardous wastes as required by statute and a maximum of \$20,000 per year per generator for the completion of measurement plans required by the proposed rules.

C. Economic Impact on Citizens/Public at Large:

Address: 1600 Washington Street East, Charleston, West Virginia 25301  
The proposed rules may produce an increase in costs to consumers of goods produced by generators of hazardous wastes.

Date: September 19, 1986

  
\_\_\_\_\_  
Director

PREAMBLE TO HAZARDOUS WASTE  
EMERGENCY RESPONSE FUND REGULATIONS

PROGRAM: Hazardous Waste Emergency Response Fund

REGULATIONS: Hazardous Waste Emergency Response Fund Regulations,  
Interpretive Rules Concerning Fee Assessment, Series 40B

AUTHORITY: Chapter 20, Article 5G, Section 5(d) of the West  
Virginia Code

ACTION: Adoption of Interpretive Rules

TOPIC: Interpretive Rules Concerning Fee Assessment

SUMMARY: The Department of Natural Resources is adopting two sets of regulations concerning the fee assessment program under the Hazardous Waste Emergency Response Fund (Article 5G). The first set of regulations (Series 40A), which is published separately, contains procedures for assessing fees.

The second set of regulations (Series 40B), published herein, contains interpretations of the provisions of Article 5G for such issues as the establishment of payment schedules, the accrual of interest, and the categories of hazardous waste not subject to fee assessment.

CONTACT: For further information contact Mr. Ron Shipley, Special Assistant to the Director, Director's Office of Regulatory Affairs, Room 842, 1800 Washington Street East, Charleston, West Virginia 25305, phone (304) 348-2761.

SUPPLEMENTARY INFORMATION: On September 19, 1986, the Department proposed procedural and interpretive rules concerning fee assessment under the provisions of Article 5G. Those proposed rules were designed to replace former regulations governing the same subject originally promulgated as Series XX. The Series XX regulations were promulgated on an emergency basis on May 9, 1985; identical regulations were also proposed and filed as a procedural rule on that date. The emergency rule expired because the Department failed to approve a rule and submit it to the Legislative Rulemaking Review Committee. The proposed procedural rule was withdrawn on December 15, 1985 because the Department did not file a notice of adoption within six months of the close of the public comment period.

The proposed rule of September 19, 1986 was not identical to the emergency rule implemented on May 9, 1985 or the procedural rule proposed on that date. Instead, the Department evaluated the comments received in response to the May 9th proposal and drafted a new proposal to reflect our response to those comments. Because

the Secretary of State's Office no longer accepts rules which combine procedural and interpretive elements, the Department split apart the May 9th proposed procedural rule into both a procedural and an interpretive rule.

RESPONSE TO COMMENTS: A public hearing was held in Charleston on October 21, 1986 and comments were received until the close of business on October 24, 1986. The hearing was attended by and comments were received from two parties. Comments on the interpretive rule and the Department's responses are as follows:

Exclusion of discharges to the waters of the State of hazardous waste pursuant to a valid water pollution control permit issued under federal or State law (W. Va. Code §20-5G-4(a), Proviso 3) (Section 4.2.1 of the proposed regulations)

Comment: The commenter argues that this exclusion is improperly interpreted and renders this exclusion a "nullity" because there will never be a time when the actual point of generation is the point of discharge for an NPDES permitted facility. The commenter further states that a regulation designed to control the method of generation under the HWMR program should not be imposed on the system to assess fees on the generation of hazardous waste. The commenter recommends that the Department remain silent on its interpretation and allow each generator to work out an appropriate interpretation with the Department. In addition, the commenter asserts that the meaning of the sentence "(h)azardous waste which is sent to a wastewater treatment facility for treatment is included in the fee assessment calculation" is unclear.

Response: The Department disagrees with the commenter's assertion that the rule is improperly interpreted. The commenter correctly notes that the interpretation is consistent with the exclusion under the State's Hazardous Waste Management Act (HWMA). The Department's interpretation is intended to parallel the regulatory scheme of the HWMA.

Under the HWMA, the Department has promulgated regulations which exclude "industrial wastewater discharges that are point source discharges subject to regulation under Section 402 of the Clean Water Act" from the definition of wastes. See Section 3.1.3.a.2 of the DNR Hazardous Waste Management Regulations (HWMR). The HWMR contains a note that "this exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored, or treated before discharge nor does it exclude sludges that are generated by industrial wastewater treatment." A second regulation exempts "wastewater treatment units" (i.e., facilities which need permits under the Clean Water Act) from permit requirements under the HWMA.

These two regulations must be viewed in their proper context. Under the HWMA, an owner or operator of a facility which will either treat, store, or dispose of a hazardous waste needs a permit for such activity.

The purpose behind the first exclusion is to exclude the activity of discharging (which constitutes disposal and would normally require a hazardous waste management permit if the material being discharged is a hazardous waste) from coverage under the HWMA, if the discharge is already regulated under the National Pollutant Discharge Elimination System. The exclusion, however, does not include the storage and treatment of the material being discharged if it is a hazardous waste. The second exclusion exempts the wastewater treatment facilities from the permitting requirements.

Thus, material disposed through a discharge regulated by the Clean Water Act is not a waste and therefore cannot be deemed to be a hazardous waste. In addition, any wastewater treatment unit which treats hazardous waste and then disposes the waste through a regulated discharge is exempt from permitting and the performance standards under the HWMA.

First, it must be noted that the HWMA declares that the discharge is not a waste but specifically states that such material may be considered a waste during the treatment and disposal process. Thus, the owner or operator will have generated a hazardous waste. He would be subject to generator standards and reporting requirements for the hazardous waste generated. Therefore, a person who utilizes this method of treatment and disposal is a generator under the both the HWMA and Article 5G and must include such hazardous wastes in their annual and biennial generator reports.

Second, Article 5G is designed to rely upon the reporting of hazardous waste generated as defined and reported under the State's Hazardous Waste Management Act. Thus the Department needs to carry over rules from the HWMA into the Series 40A and 40B regulations being adopted today. It is our interpretation that the third proviso in W. Va. Code §20-5G-4(a) was a legislative mandate to incorporate a particular exclusion. We understand that the reason behind this proviso was the same as the reason behind other provisos in this section -- to only assess a fee on the hazardous waste that is declared to be hazardous waste under the HWMA. Thus, many of the exclusions under the HWMA have been carried forward into the Series 40A and 40B regulations being adopted today (e.g., Section 4 of Series 40B).

Finally, we should note that to leave interpretation to a case-by-case basis could mean that the proviso will be interpreted inconsistently for different generators.

Exclusion of hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks (W. Va. Code §20-5G-4(a), Proviso 6)  
(Section 4.2.2 of the proposed regulations)

Comment: The statements regarding neutralization in pipes are inaccurate and bear no relation to an interpretation of the exclusion. Since in no instance is a pipe ever considered to be a "container" or a "tank," there is no need for such an interpretation.

Response: The Department understands the confusion expressed in this comment. We reacted with a similiar expression of confusion when first asked to rule on a request for fee exclusion by a generator. Because of the complexity of the issues involved the Department is reserving the promulgation of an interpretive rule on this issue.

Fee Assessment Date  
(Sections 5.1, 5.2.1, and 5.2.3)

Comment: In Sections 5.1, 5.2.1, and 5.2.3 of the proposed regulations, the date of payment of the fee assessed is characterized in various descriptive language. This causes confusion. The uniform date of January 15 should be used as much as possible.

Response: Uniform dating language has been adopted.

Accurate Reporting  
(Section 6.2.1)

Comment: Use of the term "accurately" in the subsection opens up an entire universe of liability not contemplated by the terms of Article 5G. "Accuracy" is a subjective term and this may lead to inconsistent enforcement. A fee assessment on the local waste generated as a penalty for a failure to report accurately is not consistent with the provisions of Article 5G and is without statutory authority. Therefore, this term should be deleted from Section 6.2.1 of these regulations.

Response: Suggestion accepted.

In addition to the above changes we have altered the definition of the word "Chief" so that the rule applies to the Chief of the Division of Waste Management rather than to the Chief of the Division of Water Resources and made other miscellaneous amendments. A copy of the proposed rules, with strike-throughs and underlines showing changes made to the proposed rule, follows.

West Virginia Administrative Regulations  
Department of Natural Resources  
Series 40B  
Hazardous Waste Emergency Response Fund Regulations  
Interpretive Rules Concerning Fee Assessment

Section 1. General.

1.1. **Scope and Purpose.** The purpose of these regulations is to provide interpretations for implementing the powers, duties, and responsibilities vested in the director pursuant to Chapter 20, Article 5G of the West Virginia Code as they relate to the assessment of hazardous waste generator fees.

1.2. **Authority.** These regulations are promulgated under authority of the West Virginia Code, Chapter 20, Article 5G, Section 5(d) and Chapter 29A, Article 3.

1.3. **Applicability.** The regulations in this series provide interpretations for generators of hazardous waste. The Hazardous Waste Emergency Response Fund requires generators to pay a fee based upon the amount of hazardous waste generated as reported to the director in the generator's most recent annual report submitted pursuant to the Hazardous Waste Management Act.

1.4. **Filing Date.** -- April 14, 1987.

1.5. **Effective Date.** -- May 14, 1987.

1.6. **Incorporation By Reference.** Whenever either federal statutes or regulations or State statutes or regulations are incorporated by reference into ~~this series~~ these regulations, the reference is to the statute or regulation in effect on the date of enactment of the legislation authorizing these regulations.

1.7. **Promulgation History.** Legislative rules on this subject were originally promulgated on May 9, 1985 on an emergency basis. Such rules expired on November 9, 1985. The current interpretive rules were filed on April 14, 1987 and became effective on May 14, 1987.

Section 2. Definitions.

~~Unless the context dictates otherwise, the following words and their meanings as used in these regulations are defined below:~~

2.1. "Annual Report" means that report required to be submitted to the chief pursuant to the annual reporting requirements of the DNR Hazardous Waste Management Regulations, Section 6.4.2.

2.2. "Chief" means the chief of the Division--of--Water--Resources  
Division of Waste Management of the Department of Natural  
Resources.

2.3. "Generator" means any person, corporation, partnership,  
association, or other legal entity, by site location, whose act or  
process produces hazardous waste as identified or listed by the  
director in regulations promulgated pursuant to Section 6 of  
Chapter 20, Article 5E of the West Virginia Code in an amount  
greater than twelve thousand kilograms (12,000 kg) per year.

2.4. "HWERF" or "the Act" means the Hazardous Waste Emergency  
Response Fund, Chapter 20, Article 5G of the West Virginia Code.

2.5. "HWMA" means the Hazardous Waste Management Act, Chapter 20,  
Article 5E of the West Virginia Code.

2.6. "HWMR" or "DNR Hazardous Waste Management Regulations" means  
the--West--Virginia--Administrative--Regulations--Series-15, West  
Virginia Administrative Regulations, Department of Natural  
Resources, Series 35, promulgated pursuant to Chapter 20, Article  
5E of the West Virginia Code.

2.7. "Series 40A" means West Virginia Administrative Regulations,  
Department of Natural Resources, Series 40A, Hazardous Waste  
Emergency Response Fund Regulations, Procedural Rules Concerning  
Fee Assessment.

2-7 2.8. All other terms shall have the meaning as prescribed in  
the DNR Hazardous Waste Management Regulations and Chapter 20,  
Article 5G of the West Virginia Code.

### Section 3. List of Provisions and Issues Interpreted.

3.1. Hazardous Wastes Not Subject to Fee Assessment under Chapter  
20-5G-4(a) of the West Virginia Code (Section 4).

3.1.1. Exclusion of discharges to the waters of the State of  
hazardous wastes pursuant to a valid water pollution control  
permit issued under federal or State law (Section 4.2.1).

3.1.2. Exclusion of hazardous wastes which are hazardous wastes  
based solely on the characteristic of corrosivity and which are  
subjected to on-site elementary neutralization in containers or  
tanks (Section 4.2.2). (Reserved).

3.2. Interest Accrual and Surcharge Imposition Under Chapter  
20-5G-4(d) of the West Virginia Code (Section 5).

3.2.1. Ability to Establish a Payment Schedule (Section 5.2.1).

3.2.2. Interest Accrual (Section 5.2.2).

3.2.3. Surcharge Imposition (Section 5.2.3).

3.3. Enforcement under Chapter 20-5G-5(f) of the West Virginia Code (Section 6).

3.3.1. Failure to Report (Section 6.2.1).

3.3.2. Failure to Remit Fee (Section 6.2.2).

#### Section 4. Hazardous Wastes Not Subject to Fee Assessment.

4.1. Provision Interpreted: W. Va. Code §20-5G-4(a).

The HWERF establishes a fee schedule designed to encourage environmentally sound treatment and disposal practices. Accordingly, the Act establishes a graduated fee assessment whereby the generator pays less per ton of generated hazardous waste if the selected treatment or disposal practice conforms to the Act's preferred practices. These practices and their associated fee levels are as follows: full assessment for generated hazardous waste treated or disposed off-site; ninety percent (90%) of the full assessment for generated hazardous waste treated or disposed on-site; seventy-five percent (75%) of the full assessment for generated hazardous waste treated off-site so that such waste is rendered nonhazardous; and twenty-five percent (25%) of the full assessment for generated hazardous waste treated on-site so that such waste is rendered nonhazardous.

In addition to graduated fee assessments, the HWERF exempts from fee assessment certain types of hazardous waste or hazardous waste which is handled in a specific manner. The exclusions are a part of the Act's goal to not only provide the State with funds for emergency response but to also provide an incentive to the generator to utilize the most environmentally sound handling practice. Accordingly, the Act enumerates categories of hazardous waste which are excluded from fee assessment.

The first group includes those wastes listed in W. Va. Code §20-5E-6(a)(2)(A) and enumerated in Sections ~~4.1.1~~ ~~4.1.4~~ below Sections 4.1.1 through 4.1.4 of these regulations. These wastes are currently excluded from regulation as hazardous waste under the HWMA until the completion of studies by the United States Environmental Protection Agency that are required by the federal Solid Waste Disposal Act. The second group encompasses either hazardous waste which is not regulated as a hazardous waste under the HWMA or hazardous waste which is handled in a manner which the HWERF is designed to encourage. These are enumerated in Sections ~~4.1.5~~ ~~4.1.9~~ below Sections 4.1.5 through 4.1.9 of these regulations.

For the purpose of determining and reporting the amount of hazardous waste generated under the Hazardous Waste Emergency Response Fund, the following wastes shall not be included:

4.1.1. Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

4.1.2. Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.

4.1.3. Cement kiln dust waste.

4.1.4. Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy.

4.1.5. Sludge from any publicly owned treatment works in the State.

4.1.6. Any discharge to waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or State law. (Note: This exclusion applies only when the point of generation is the actual point of discharge specified for such valid permit.)

4.1.7. Any hazardous wastes which are beneficially used or reused or legitimately recycled or reclaimed.

4.1.8. Hazardous wastes which are created or retrieved pursuant to an emergency or remedial action.

4.1.9. Hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks.

#### 4.2. Issues Interpreted.

4.2.1. Exclusion of discharges to the waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or State law (W. Va. Code §20-5G-4(a), Proviso 3).

This proviso is designed to exempt from fee assessment only the discharge to waters of the State of a treated hazardous waste when the point of generation is the actual point of discharge specified in a valid water pollution control permit. Hazardous waste which is sent to a wastewater treatment facility for treatment is included in the fee assessment calculation.

4.2.2. Exclusion of hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks (W. Va. Code §20-5G-4(a), Proviso 6). (Reserved).

## Section 5. Interest Accrual and Surcharge Imposition.

### 5.1. Provision Interpreted: W. Va. Code §20-5G-4(d).

Section 4(d) of the HWERF contains specific provisions concerning accrual of interest and imposition of surcharges in cases where the payment of an assessed fee is overdue. If a fee assessed upon a generator has not been paid in full by the due date, prescribed under--the--Act interest accrues upon the unpaid amount until full payment is made. In addition, if a generator fails to pay the fee assessment in full within seventy-five (75) days of the prescribed date established under Section 5.2.1 of Series 40A, that generator must also pay a surcharge equivalent to the total amount of the fee assessed.

### 5.2. Issues Interpreted.

#### 5.2.1. Ability to Establish a Payment Schedule.

The Department believes that the establishment of payment schedules is possible under the provisions of Section 4(d) of the Act. Payments are due on ~~the 175th day after the publication of the annual fee schedule by the Department~~ the prescribed date established under Section 5.2.1 of Series 40A. A generator unable to make full payment by this date may request, in writing, that a payment schedule be approved by the Department which provides for full payment of the fee and all interest accrued within a specified period of time. The Department will not allow such schedules to exceed one hundred and eighty (180) days beyond the original due date. An approved payment schedule will be an agreement signed by the director and the generator and does not constitute a waiver from the imposition of a surcharge as required by the Act and interpreted in Section 5.2.3 of these regulations.

#### 5.2.2. Interest Accrual.

Under Section 4(d) of the HWERF, if a fee assessed upon a generator has not been paid by the prescribed date, "interest shall accrue upon the unpaid amount at the rate of ten percent per annum from the date due until payment is actually made." The Department interprets this provision to mean that interest on unpaid fees, or portions thereof, should accrue starting the day after the payment due date and continue until the full fee assessment, excluding any surcharge, is paid. Interest will be calculated only on the fee assessed, excluding any surcharge or accrued interest. Interest will accrue monthly as simple interest

at a rate of 0.8333...% on the unpaid balance of the fee. This monthly rate is equivalent to the ten percent (10%) per annum rate imposed under the Act.

Interest accrual is required by law to be applied to any unpaid balance of the fee assessed and may not be waived by the Department due to a "good faith" partial payment or any other reason. Partial payments will be applied to the retirement of the fee principal first to minimize the amount of interest accrued. Once the fee amount has been paid, interest accrual will cease.

### 5.2.3. Surcharge Imposition.

Section 4(d) of the Act provides for the automatic imposition of a surcharge equivalent to the total amount of the fee assessed if that fee is not paid within seventy-five (75) days of the prescribed due date established under Section 5.2.1 of Series 40A. The Department believes that this provision does not provide the Department with the discretion to waive ~~or extend~~ surcharge imposition or extend its payment. The surcharge is intended to be an incentive for timely fee payment as well as a penalty for late payment.

## Section 6. Enforcement.

### 6.1. Provision Interpreted: W. Va. Code §20-5G-5(f).

Under Section 5(f) of the HWERF, the director is authorized to institute a civil action against any generator for failure to pay any fee assessed pursuant to the Act. Such action against a generator may be brought in either Kanawha County or the county in which the generator does business. The generator must pay all attorney fees and costs of such action if the director prevails.

### 6.2. Issues Interpreted.

#### 6.2.1. Failure to Report.

Failure by the generator to accurately report information as required in Section 4.2 of the ~~Hazardous-Waste-Emergency-Response Fund-Regulations, Procedural-Rules, Series 40A,~~ in the manner prescribed in that section, shall result in a fee assessment ~~for the total generated amount of hazardous waste reported elsewhere in the annual report pursuant to Section 6.4.2 of the DNR Hazardous-Waste-Management-Regulations at the full rate of~~ assessment based on the amount of hazardous waste generated, as reflected in the generator annual report required under Section 6.4.2 of the HWMR or the facility annual report required under Section 8.5.6 of the HWMR, and other information available to the director to reasonably ascertain the total amount of hazardous waste generated. However, in no event may the fee assessed exceed

the fee assessment for the total amount of hazardous waste reported in the annual reports filed pursuant to the HWMR provisions at the full rate of assessment.

6.2.2. Failure to Remit Fee.

If an assessed fee is not paid by the date prescribed pursuant to Section 5.2 of the--Hazardous--Waste--Emergency--Response--Fund Regulations,--Procedural--Rules, Series 40A, interest shall accrue as interpreted in Section 5.2.2 of these regulations. Such interest will be deposited in the Fund.

If any generator subject to fee assessment pursuant to these regulations fails to pay the fee imposed within seventy-five (75) days of the prescribed payment remittance date, there shall be imposed, in addition to the fee and interest determined to be owed, a surcharge equivalent to the total amount of the fee assessed, which shall also be collected and deposited in the Fund.