

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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

AGENCY: West Virginia Solid Waste Management Board TITLE NUMBER: 54

CITE AUTHORITY W. Va. Code § 16-26-1 et seq.

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 PROPOSED: 1

TITLE OF RULE BEING PROPOSED: Rules and Regulations Governing

Disbursement of Loans and Grants to Governmental Agencies for the
Acquisition or Construction of Solid Waste Disposal Projects

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.

Harold A. Taylor

DATE: October 23, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Solid Waste Management Board

LEGISLATIVE RULE TITLE: Rules and Regulations Governing Disbursement of Loans and Grants to Governmental Agencies for the Acquisition or Construction

of Solid
Waste
Disposal
Projects.

1. Authorizing statute(s) citation W. Va. Code § 16-26-1 et seq.

2. a. Date filed in State Register with Notice of Hearing:

August 22, 1990

b. What other notice, including advertising, did you give of the hearing?

Class I legal advertisement in Charleston Gazette and Daily

Mail; Mailing list consisting of approximately 110 persons

c. Date of hearing (s): September 26, 1990

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached

X

No comments received

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing:
(be exact)

October 23, 1990

f. Name and phone number of agency person to contact for additional information:

Karen Watson

768-3933

George Chappell

768-3933

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

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

N/A

b. Date of hearing: _____

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

d. Attach findings and determinations and reasons:

Attached _____

TITLE 54
LEGISLATIVE RULES
WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD
SERIES 1
RULES AND REGULATIONS GOVERNING DISBURSEMENT OF LOANS
AND GRANTS TO GOVERNMENTAL AGENCIES FOR THE
ACQUISITION OR CONSTRUCTION OF SOLID WASTE DISPOSAL PROJECTS

§ 54-1-1. General.

1.1. Scope. - These legislative rules establish requirements governing disbursement of loans and grants to governmental agencies for the acquisition or construction of solid waste disposal projects.

1.2. Authority. - West Virginia Code § 16-26-1 et seq.

1.3. Filing Date. - _____,
19__

1.4. Effective Date. - _____,
19__

§ 54-1-2. Definitions.

Except where the context indicates otherwise, the following terms as used in these rules shall have the meanings ascribed to them as set forth below.

2.1. General definitions.

2.1.1. The "Act" means West Virginia Code § 16-26-1 et seq.

2.1.2. "Applicant" means a governmental agency which applies for a loan or grant pursuant to the provisions of Section 3 or Section 4 of these rules.

2.1.3. The "Board" means the West Virginia Solid Waste Management Board, established pursuant to West Virginia Code § 16-26-4, or its authorized representatives.

2.1.4. The terms "cost," "governmental agency," "solid waste," "solid waste disposal facilities," "solid waste disposal project" and "project" as used in Sections 3 and 4 of these rules, shall have the meanings ascribed to them in the Act.

2.1.5. "Grant" means a grant made by the Board to an applicant pursuant to Section 3 of these rules.

2.1.6. "Grant Agreement" means an agreement entered into between the Board and the applicant pertaining to a grant and as more particularly described in Section 3.6 of these rules.

2.1.7. "Loan" means a loan made by the Board to an applicant pursuant to Section 4 of these rules.

2.1.8. "Loan Agreement" means an agreement entered into between the Board and the applicant pertaining to a loan and as more particularly described in Section 4.7 of these rules.

§ 54-1-3. Grants.

3.1. Eligibility for participation in grant program.

3.1.1. Governmental agencies eligible for participation in program. - A governmental agency or any combination thereof empowered to acquire, construct and equip solid waste disposal facilities shall be eligible to participate in the program.

3.1.2. Application for participation in program. - Any eligible governmental agency or any combination thereof which desires to participate in the program shall make a separate application to the Board on forms prescribed by the Executive Director of the Board for each project for which such participation is desired.

3.1.3. Acceptance of grant applications. - Subject to Section 3.6.1 of these rules, no application which is received by the Board shall be accepted until the applicant has satisfied the following conditions:

3.1.3.a Delivered to the Board an agreement ~~for the construction, maintenance and operation of the project between the applicant and the Board~~ between the applicant and the Board providing for the construction, maintenance and operation of the project which is consistent with Section 3.7.1 of these rules, which has been authorized and approved by the legislative authority or authorities of the applicant and which has been executed by the applicant.

3.1.3.b If required by the Board, provided a feasibility study prepared by an independent engineering firm and an independent certified public accounting firm demonstrating that the project is technically and financially feasible.

3.1.3.c Provided certification that detailed plans, profiles, cross sections, estimates, specifications and such other requirements as are appropriate

have been approved by all legally required agencies.

3.1.3.d Provided written assurance that a properly certified operator will be employed upon completion of fifty percent (50%) of the project's construction.

3.3.1.f Grants will be awarded for a maximum period of one year, provided that the Board may extend this period for up to 60 days. Applicants should not depend on continued financing for long-term projects through this grant program.

3.1.4. Eligibility for participation in program if project should be combined with another project. - If the Board determines that a project for which application is made should be combined with another project or should serve governmental agencies not included as the applicant, the Board may delay the date upon which the project's priority is established in relation to other projects for which applications are received until such date as the project is expanded to include the additional project or projects or governmental agency or agencies.

3.2. Payment of costs of projects.

3.2.1. Payment of project costs by Board. - Upon entering into the agreement between the Board and the applicant referred to in Section 3.1.3.a of these rules and upon determination by the Board of a project's priority pursuant to Section 3.6.1 of these rules, the amount prescribed by Section 3.3.1 of these rules shall be paid by the Board. In the event such agreement

is terminated by the Board pursuant to, and not in breach of, the provisions of such agreement, or in the event such agreement is terminated by the applicant whether or not in breach of this agreement, such grant will be immediately withdrawn.

3.2.2. Source of payment of project costs. - Subject to Section 3.3.1 of these rules, grants shall be made from funds appropriated to the Board or from funds contained in Board accounts which provide for such use.

3.2.3. Distribution of moneys constituting project costs. - The Board shall pay directly to the applicant such payment as to those project costs which the applicant or one (1) of the governmental agencies constituting applicant has not paid from its own funds. As to those project costs which the applicant or one (1) of the governmental agencies constituting the applicant has paid from its own funds, the Board shall reimburse the applicant or such governmental agency upon an accounting to the Board of such payment and a request for reimbursement.

3.2.4. Availability of funds. - The grant funds for the purposes herein provided will be disbursed to eligible projects as set forth in Section 3.1 of these rules and will be disbursed until all such projects have been satisfied or until the funds so provided have been exhausted, whichever comes first.

3.3. Participation payments by applicant.

3.3.1. Grants. - Participation in the grant program as described in these rules is subject to the following restrictions:

3.3.1.a The grant(s) as herein provided is a grant(s) of up to fifty percent (50%) of the total project costs.

3.3.1.b Credit will be given for in-kind services when determining the amount of funding from the authority to be matched by a grant.

3.3.1.c Volunteer services will be valued at the minimum hourly wage unless the applicant can demonstrate that such services would normally be valued above that wage in the area served by the applicant's program.

3.3.1.d Donated equipment will be valued at its fair market value prorated over the life of the grant. Such equipment may only be used to determine the amount of matching funds during the first year that a grant is given to the authority involving that equipment.

3.3.1.e Applicants are only eligible for one (or more) grants totalling an amount not to exceed 10% of the estimated revenues of the Board for the fiscal year during which the grant is to be received, provided that this amount of money may be increased when the applicant consists of two or more governmental agencies acting collectively for the purposes of a grant.

3.4. Rights of access - construction requirements.

3.4.1. Rights of access to property. - In the event the applicant or one (1) or more of the governmental agencies constituting

the applicant either acquires or owns the real and personal property constituting the project, the Board and, if applicable, other legally constituted regulatory entities and agencies shall have rights of access to the project as may be reasonably necessary to inspect the construction of the project and as may be reasonably necessary to ensure the proper operation and maintenance of the project following construction. Similar rights of access shall be given by the Board to the applicant if the Board acquires or owns the real and personal property constituting the project.

3.4.2 Requirements which governmental agency must follow when constructing project. -- If the project is constructed by applicant or one (1) or more of the governmental agencies constituting the applicant, such governmental agencies shall (i) Obtain all federal, state, county and municipal approvals required under existing law in connection with the construction of the project; (ii) advertise for bids or construction contracts only after approval by the Board; (iii) require that each construction contractor furnish a performance and payment bond in an amount equal to one hundred percent (100%) of the contract price as security for the faithful performance of the contract and payment of the subcontract; (iv) require that each of its contractors and subcontractors maintain during the life of the contract workers' compensation insurance, public liability, property damage and vehicle liability insurance in the amounts and in terms satisfactory to the Board; (v) provide and maintain competent and adequate resident engineering services satisfactory to the Board covering the supervision and inspection of the development and construction of the project and

bearing the responsibility of ensuring that construction conforms with the approved surveys, plans, profiles, cross sections and specifications and certifying to the Board and the applicant at the completion of construction that construction is in accordance with approved surveys, plans, profiles, cross sections and specifications or approved amendments thereto; and (vi) provide an operation and maintenance manual for the project.

3.5. Operation and maintainance of project.

3.5.1. Option to determine who shall operate and maintain project. -- If the project serves directly only one (1) governmental agency, the project may be operated and maintained by the Board or the applicant at the option of the Board. If the project serves directly more than one (1) governmental agency, the project may be operated and maintained by the Board at the option of the Board or by one (1) or more of the governmental agencies. Whether operated by one (1) or more than one (1) governmental agency, the operation and maintenance of the project must meet Board requirements.

3.5.2. Requirements which governmental agency must follow when operating and maintaining project. If the project is operated and maintained by applicant or one (1) or more of the governmental agencies constituting the applicant, such governmental agency shall: (i) Provide adequate operation and maintenance of the project to comply with the water quality standards established for the river basin affected thereby and with all applicable rules and regulations of the West Virginia Department of Health and Human Resources and the West Virginia Department of Commerce,

Labor and Environmental Resources; (ii) retain sufficient qualified operating personnel approved by Board to operate the project and perform all operational tests and measurements necessary to determine compliance with the preceding sentence (i) to ensure proper and efficient operation and maintenance of the project from the time of commencement of operation until the approval of the discontinuance of the operation of the project by the Board and all legally required agencies; (iii) operate and maintain the project in a manner which is consistent with design capacity and capability of the project in accordance with an ordinance or resolution acceptable to the Board; (iv) provide property and casualty insurance satisfactory to the Board; (v) if the governmental agency shall fail to comply with either (i), (ii) or (iii) above, it shall permit the Board at its discretion to remedy such default and shall pay the cost of remedying such default to the Board together with interest thereon from the date of payment by the Board.

3.5.3. Requirements which governmental agency must follow when Board operates and maintains project. - If the project is operated and maintained by the Board, the applicant shall (i) agree to provide the funds necessary to pay the cost of operating and maintaining the project at such times as will permit the prompt payment of such costs by the Board from the funds of the applicant; and; (ii) cooperate fully with the Board in the operation and maintenance of the project in relation to the operation and maintenance of the project.

3.6 Determination of priority for participation in grant program.

3.6.1. Criteria for considering applications - Each application will be evaluated according to the following criteria:

3.6.1.a The Board will give preferences to projects in the following order of priority: (i) source reduction; (ii) recycling, reuse and resource recovery; and (iii) landfilling.

3.6.1.b Potential of project to further the efficient and effective collection, processing, recycling and disposal of solid waste within the area and to assist in the protection of the environment.

3.6.1.c Sustainability of the project beyond the grant period.

3.6.1.d Cost effectiveness of the project.

3.6.1.e Degree of public involvement in the project.

3.6.1.f Projects that have not received funding from this particular grant program will be considered before projects funded previously under this program.

3.6.1.g Consideration of the applicant's ability to assess and collect rentals, fees and service charges for the use or services of any solid waste disposal facilities involved in the grant application.

3.6.2. Withdrawal of grant. The Board reserves the right to withdraw a grant upon determination of unsatisfactory program compliance

with either these rules, or the specifications in the grant document, or the application for the grant.

3.6.3. Cancellation of grant. A failure to commence program activities within 90 days after receiving funding from the Board may result in the cancellation of the grant.

3.7 Miscellaneous.

3.7.1. Agreement between Board and applicant. - The agreement between the Board and the applicant referred to in Section 3.1.3.a of these rules, shall be consistent with these rules and shall contain such additional provisions which the Board determines are necessary to the implementation of these rules and ensure the proper carrying forward of the program.

3.7.2. Purposes for which grants can be obtained - Grants obtained in accordance with these rules shall be used by a governmental agency or combination thereof only for the purpose of acquiring, constructing and/or equipping solid waste disposal projects.

§ 54-1-4. Loans.

4.1. Description of loans.

4.1.1. Source of loan funds. - It is anticipated that the Board shall obtain the funds with which to make loans from the proceeds of revenue bonds and notes issued from time to time by the Board pursuant to the Act, although the Board may use funds from other sources to make such loans.

4.1.2. Evidence of and security for loans. - The loans shall be evidenced by a note or other debt

instruments issued by applicants at a discount to reflect the costs of the Board incurred in issuing its obligations to provide the funds to make the loans, and other costs related to financing such projects, and shall be secured by a pledge of the fees, charges and all other revenues of the projects to be constructed, in whole or in part, with the proceeds of the loans and any other collateral required by the Board.

4.1.3. Amount of loan. - Each loan shall be in an amount which shall cover all costs of the project to be constructed by the applicant for which funds from the aforesaid grant or other sources are not available.

4.2 Eligibility for loans.

4.2.1. Governmental agencies eligible for loans. - All governmental agencies, or any combination thereof, which have the authority under applicable law to acquire, construct and equip a project shall be eligible for a loan.

4.2.2. Application for loan. - Any eligible governmental agency which desires to obtain a loan shall make a separate application to the Board on forms prescribed by the Executive Director of the Board for each project for which a loan is desired.

4.2.3. Acceptance of loan application - Subject to Section 4.7.1 of these rules, no application which is received by the Board shall be accepted until the applicant has satisfied the following conditions:

4.2.3.a Provided documentation satisfactory to the Board that the project is eligible for a loan under the provisions of the Act.

4.2.3.b If required by the Board, provided a feasibility study prepared by an independent engineering firm and an independent certified public accounting firm demonstrating that the project is technically and financially feasible.

4.2.3.c Demonstrated to the satisfaction of the Board that it has adopted or will adopt all necessary ordinances or resolutions in form and substance satisfactory to the Board and has taken or will take all proceedings required by law to enable it to enter into a loan agreement with the Board and that it has obtained or will obtain all other necessary governmental agencies approval of user charges for the project which will provide annual net revenues to the applicant which exceed, by an amount or percentage specified in the loan agreement, the annual payments required to be made by the applicant to the Board under the loan agreement.

4.3 Loans to be subject to agreement.

4.3.1. Prior to the making of a loan, the Board shall execute and enter into a loan agreement with the applicant, pursuant to the provisions of Section 4.7 of these rules, which shall include such provisions as may be required by the Board, including, without limitation, the following:

4.3.1.a The cost of such project, the amount of the loan, the terms of repayment of the loan and the security therefor, which may include, in addition to the pledge of all fees, charges and other revenues from such project after a reasonable allowance for operation and maintenance expenses, a deed of trust or other appropriate security

instrument creating a lien on such project;

4.3.1.b The specific purposes for which the proceeds of the loan shall be expended, the procedures as to the disbursement of loan proceeds and the duties and obligations imposed upon the applicant in regard to the construction or acquisition of the project;

4.3.1.c The agreement of the applicant to impose, collect and, if required to repay the obligations of such applicant under the loan agreement, increase service charges from persons using said project, which service charges shall be pledged for the repayment of the loan together with all interest, fees and charges thereon and all other financial obligations of such applicant under the loan agreement; and

4.3.1.d The agreement of the applicant to comply with all applicable laws, rules and regulations issued by the Board or other state, federal and local bodies in regard to the financing, construction, operation, maintenance and use of the project.

4.4 Repayment of loans; interest on loans; fees and charges.

4.4.1. Payment of principal and interest on loan. -- Payments of the principal of the loan shall be made by the applicant on a monthly, quarterly, semi-annual or annual basis as scheduled by the Board and interest payments on the loan shall be made by the applicant on a monthly, quarterly, semi-annual or annual basis as scheduled by the Board, in accordance with the provisions of the loan agreement.

4.4.2. Computation of interest on loans. -- Each loan shall bear interest from the date of the delivery of the notes or other debt instruments of the applicant evidencing the loan to the applicant at a rate or rates per annum which shall be equal to the rate or rates per annum borne by the obligations of the Board issued to provide the funds to make the loan: Provided, That pursuant to the provisions of the loan agreement, the Board may purchase the notes or other evidences of indebtedness of the applicant at par or at a discount to reflect the costs of the Board incurred in issuing its said obligations and other costs relating to the making of the loan.

4.4.3. Fees and charges. -- In addition to payments of principal and interest on the loan, each applicant shall agree in the loan agreement to pay fees and charges to the Board equal to the applicant's share of the administrative expenses of the Board relating to the loan program referred to in this Section 4, including, without limitation, any fees and charges established by rule of the Board, and the fees and expenses of the trustee and paying agents for the bonds to be issued by the Board to make the loan.

4.5. Agreement of Board to make loans conditioned upon sale of bonds.

The obligation of the Board to make any loan is and shall be conditioned upon receipt by the Board of the proceeds of bonds issued by the Board or funds from other sources in such amounts and on such terms and conditions as in the sole judgment of the Board, will enable it to make the loans.

4.6. Construction of project.

Each applicant receiving a loan shall, prior to commencement of construction of the project, comply with all applicable provisions of the Act, of the loan agreement and of the resolution or ordinance authorizing the issuance of bonds or notes evidencing the loan, including, without limitation, that the applicant shall obtain all federal, state and local approvals.

4.7. Determination of priority for participation in loan program.

4.7.1. Criteria for ranking applications - Each application will be evaluated according to the following criteria:

4.7.1.a The Board will give references to projects in the following order of priority: (i) source reduction; (ii) recycling, reuse and resource recovery; and (iii) landfilling.

4.7.1.b Potential of project to further the efficient and effective collection, processing, recycling and disposal of solid waste within the area and to assist in the protection of the environment.

4.7.1.c Degree of public involvement in the project.

4.7.1.d Consideration of the applicant's ability to assess and collect rentals, fees and service charges for the use or services of the project involved in the grant application.

4.7.1.eCost
effectiveness of the project.

4.8. Miscellaneous.

4.8.1. Agreement between Board and applicant. - The agreement between the Board and the applicant referred to in Section 4.3 of these rules, shall be consistent with these rules and shall contain such additional provisions which the Board determines are necessary to the implementation of these rules and ensure the proper carrying forward of the program.

4.8.2. Purposes for which loans can be obtained - loans obtained in accordance with these rules shall be used by a governmental agency or combination thereof only for the purpose of acquiring, constructing and/or equipping solid waste disposal projects.

Solid Waste
A:Title.54
7/30/90

STATE SOLID WASTE MANAGEMENT BOARD
PROPOSED REGULATIONS: SERIES 1, 2, 3, AND 4
RESPONSIVENESS SUMMARY

The State Solid Waste Management Board filed proposed legislative rules (Series 1 through 4) with the Secretary of State on August 22, 1990. A public hearing was held on September 26, 1990, and written comments were allowed until October 5, 1990.

Approximately twenty persons attended the public hearing, four of whom spoke at the hearing. In addition, four persons submitted written comments.

Series 1 and 2

Several persons asked whether and to what extent a private person could apply for a loan or grant pursuant to the Series 1 and 2 regulations. These regulations do not allow a private person to apply for a loan or grant. However, a governmental agency which receives such a loan or grant to acquire or construct a solid waste disposal project may then contract with a private person for the operation of the project in accordance with an authority's general powers under W.Va. Code 20-9-1 et. seq. To clarify this point, the Board has changed Section 3.1.3.a. of the regulations.

Two persons commented that Section 4.2.3.b. of Series 1 would encourage out-of-state engineering and accounting firms as opposed to in-state firms to perform the referenced feasibility studies. Such is not the Board's intention. The regulation merely recognizes that there are some grant projects for which such feasibility studies are desirable before the Board decides whether to approve the grant. The regulation does not state a preference for in-state or out-of-state firms.

Series 3

One person stated that the scope and purpose section in Section 1.1. should be made stronger. The Board does not agree and believes that the present language provides clearly stated goals and standards which will apply in the development of these comprehensive plans.

One person suggested that the Board change the planning period in Sections 5.2.8. and 6.2. from ten (10) years to twenty (20) years for the reason that a bill is being considered in the United States Senate which would allow states with twenty-year solid waste plans to control the flow of waste into their states. The Board has made this change to the regulations so that this option may be available to West Virginia if the bill passes.

By so doing, however, the Board is not taking a position on whether the state should seek to control the flow of wastes into the state. The Board believes that a twenty-year planning period is a reasonable time period considering the nature of the comprehensive plan, the fact that 20 years is a common planning period for other state agencies, and the five-year review period under these regulations.

One person suggested strengthening the language in Section 5.1.3. by eliminating the word "consideration". The Board agrees and has changed the language.

One person pointed out that the local solid waste authority had been unable to obtain information on the origin of wastes from the local landfill. Section 5.2.14. has been changed accordingly.

One person suggested a minor change in language to Section 5.2.15.d. The Board agrees and has changed the regulation.

One person, in referring to Section 5.1.2., noted that it is difficult to know what funding sources are available for projects that may not start for several years. The Board understands this and does not intend to impose an impossible task on the authorities. However, the Board believes that it is important for the authorities to consider funding and resources in their plans. Thus, the language remains the same.

Similarly, one person noted that, with regard to Section 5.2.8., it is difficult to identify the parties responsible for the implementation of the plan in any but the first year. Again, the Board understands the difficulty and does not expect the authorities to perform an impossible task. However, the language remains unchanged.

One person commented that in Section 5.2.15.b., one ton is low level at which to identify an industry as "major". The Board agrees and has changed one ton to five tons.

One person requested clarification as to the scope of coverage under Section 5.2.15. Specifically, the person stated that coal ash monofills should not be included in the coverage of the cited regulation and gave several reasons in support of that position. The Board agrees with the person that coal ash monofills do not fall under the regulation but for different reasons than those given by the person commenting. The Board interprets the statute to require the local authorities to include in their comprehensive plans the proper disposal of solid waste from industrial and commercial sources, as well as

residential sources. The Board does not interpret the word "refuse" as "garbage" and looks to the entire statute and its purposes to construe the term "refuse" as "solid waste". The reason that the Board believes that coal ash landfills are excluded is because under the definition of "solid waste" in the statute, "refuse, slurry, overburden or other waste or material resulting from coal-fired electric power generation" is exempt. Therefore, the local authorities may not cover coal ash monofills in their plans.

Two persons addressed the issue of whether an authority is required to recommend the siting of a landfill within its own boundaries, pursuant to Section 5.2.3. The Board does not believe that the statute necessarily requires an authority to recommend siting a landfill within its own area. The purpose of this requirement is to ensure that the authority plans for its present and future solid waste disposal needs, whether that be by using in-county or out-of-county facilities. In either case, the authority must provide sufficient documentation in its plan that the recommended facilities will meet the future disposal needs of the authority. The Board has changed Section 5.2.3. to provide clarification on this issue.

One person noted that several authorities have already held public hearings and that they may not have taped their hearings as required in the proposal. The Board has changed the regulations in Section 7 to permit an authority to follow less stringent procedures for the first public hearing (held prior to the submission of a draft plan). However, the Board believes that more stringent procedures should apply to the second hearing (held after submission of a draft plan).

Series 4

Two persons requested the Board to establish specific requirements for the size and shape of the zones required by the siting plan. The Board does not believe that it is possible to establish a uniform standard for the size and shape of the zones. The statute requires that the authorities consider several specific criteria before establishing a zone. The nature of the criteria is factual and site-specific and does not lend itself to a "rule of thumb" approach to establishing the size or shape of zones.

Two persons suggested that the siting plan under these regulations be consistent with any comprehensive plan previously approved by the county planning commission. The Board agrees and has added language in Section 5.7. of the regulations.

Two persons requested the Board to provide more guidance on the factors involved in determining the zones under the regulations. The Board believes that Section 5.3., "Rationale for Establishing Zones," establishes sufficient standards for designating zones while at the same time recognizing that each designation of a zone depends upon the specific facts involved. Although the Board did make several changes to Section 5.3., it remains primarily as in the proposed regulations.

One person commented that Section 5.3.9. should include the term "agricultural". The Board believes that the statute must control on this issue and since that term is absent from the statute, the regulation must be consistent.

One person requested that Section 5 be amended to reference oil and gas wells as a criterion to consider in designating a zone. The Board agrees and has changed Section 5.3.6. to include all types of mining activities, not just oil and gas.

Several persons requested the Board to change the February 28, 1991, deadline in Section 3.1. for submitting a draft siting plan to a later date in order to allow the authorities more time to develop the plans. The Board has changed the date to March 31, 1991, to be consistent with the deadline for the draft comprehensive plan. The amended date is the latest date that an authority can submit a draft plan and still meet the final deadline of July 1, 1991.

One person requested that Section 5.5.1. be changed by placing the language in the definitions section. The Board believes it is more appropriate where it is in the proposal since the term "readily available information" has limited use in the regulations. The same person suggested different language be included in Section 5.5.1. The Board does not agree, since the language is taken verbatim from the statute and is thus unnecessary in the regulations.

One person commented that section 5.2. of the regulations amounts to a zoning power that cannot be delegated to a local authority and further pointed out that there will be two local bodies with jurisdiction over commercial solid waste facilities. The statute at W.Va. Code 20-9-12a is absolutely clear that the Legislature has authorized the local solid waste authorities to establish siting zones. The person commenting is basically questioning the constitutionality of the statute, which is an issue best taken up in a different forum - not by the agency charged with administering the statute.

As far as two local bodies being involved in zoning, the Board believes that the regulations in Series 3, Section 5.2.3. and Series 4, Section 5.7. will eliminate any conflicts between the two bodies.

The same person also requested that the regulations recognize that existing facilities should be allowed to continue their operations and expand their facilities. Again, W.Va. Code 20-9-12a(e) is clear on this issue. The statute states that an existing facility which on the effective date of the article, held a valid permit or order from the Division of Natural Resources, may continue to operate but may not expand beyond the permit limits.

One person requested the addition of the word "statistically" before "significant" in Section 5.3. The Board does not agree because of concern over how the term would be defined by the authorities.

One person suggested that the term "surface water" in Section 5.3.5.b. be defined to include only perennial streams and not "wet-weather" or "intermittent" streams. The Board does not agree and believes its regulations should be consistent with the Division of Natural Resources on this particular issue. Further, the distance requirements in the regulations contain an exception if in fact there will be no significant adverse impact on the resource.

One person questioned whether geologic conditions, as cited in Section 5.3.6., should be the basis for a siting factor, since landfill design requirements are intended to prevent the release of leachate into geologic formations. The Board points out that the statute in W.Va. Code 20-9-12a clearly includes geologic conditions as a siting factor and thus the regulations are sound. The person commenting further noted that the Board's proposed language on "known faults" was not consistent with the Division of Natural Resources. The Board agrees and has made the necessary change.

One person commented that certain of the criteria listed in the statute may be subjective, e.g., property values, and should not be permitted to form the sole basis for establishing a "prohibited" zone. The Board does not agree. The statute states that zones are to be established based upon "one or more" of the criteria listed and does not give any indication of how such criteria should be weighted, i.e., which are more important than others. The Board believes that the Legislature intended the authorities to make these kind of value judgments - not the Board. (See W.Va. Code 20-9-1).

One person suggested adding "existing solid waste facilities" to the list of readily available information sources in Section 5.5.1. The Board agrees and has also included the local haulers in the area to the list.

One person asked that a specific public notice of hearing be sent to each solid waste facility in the area. The Board is concerned that to single out solid waste facilities as suggested would be giving them a preferred treatment over others who may be interested in the authority's public hearing. However, the Board did change the regulations to provide for a mailing list for those who specifically request to receive public notice.

One person commented on several of the definitions in Series 4. The Board agreed to make the definitions of "Class A Solid Waste Facility" consistent with the Division of Natural Resources. The person expressed confusion over the terms "materials recovery facility" and "energy recovery facility" and how they related to "resource recovery facilities". The Board intends the terms "materials recovery facility" and "energy recovery facility" to be subsets of the term "resource recovery facility" and Section 2.20 clarifies this point. Regarding the term "recycling facility", the person questioned why the Board's definition is different from the Division of Natural Resources' term. The reason is that the Board desires to distinguish between a "materials recovery facility" (which handles garbage in addition to recyclable materials) and a "recycling facility" (which handles only recyclable materials). The Board thinks that in establishing zones, there will be different considerations applicable to the two different types of facilities.

The person also questioned the definition of "resource recovery facility" and suggested strict conformity with the Division of Natural Resources' definition. Again, the Board finds that it is important in the siting plans to distinguish between each of the facilities included under "resource recovery facility". However, the Board did agree to adopt Natural Resources' definition of "incinerator" to ensure consistency.

One person stated that the regulations should include a provision for appeals of decisions which prohibit a person from operating a solid waste facility on his property. The Board believes that the Legislature has already addressed this issue in W.Va. Code 20-9-12a(e) where the law specifically grants certain existing facilities the right to continue operations.

Series 3 and 4

Two persons questioned the inclusion of "incinerators" under certain definitions in Series 3 and 4 and questioned where such facilities should be placed in the hierarchy under W.Va. Code 20-9-1. The statute is clear in 20-9-1 that incineration, if environmentally acceptable, is included in the term "resource recovery". The Board has changed the regulations to include the words "environmentally acceptable" before the term "incinerator" wherever it is used in the regulations. The Board has also defined the term "incinerator" in the same way as the Division of Natural Resources.

One person commented that the term "disposal" be replaced with the word "management" throughout the regulations. Although the Board agrees with the basic philosophy expressed by the person commenting, the term "disposal" is the operative word throughout much of the regulations and must be defined as it is in the statute. Furthermore, the statutory definition of "solid waste disposal" is much broader than "throwing away" as the person commenting suggests.

General

One person requested that the Board hold another public hearing on the regulations in the northern part of the state. The Board believes that although it would be nice to hold several hearings around the state, it is not a wise use of limited resources. More importantly, the Board believes that it has fully complied with the letter and the spirit of the law in using all of the public notice methods it did for these regulations, i.e., Class I legal advertisement in the two state-wide newspapers and a mailing list consisting of approximately one hundred persons.

Comments of Robinson & McElwee
Regarding The West Virginia
Solid Waste Management Board's
Proposed Rules for the Development of
Commercial Solid Waste Facility Siting Plans

I. INTRODUCTION

On August 22, 1990 the West Virginia Solid Waste Management Board ("the Board") promulgated four series of rules in Title 54 of the Code of State Regulations. Series 4 of those rules sets forth guidelines for the creation of commercial solid waste facility siting plans. As part of such plans, county or regional solid waste authorities ("local authorities") are authorized to identify those portions of their jurisdictions where solid waste facilities are prohibited or authorized.

Robinson & McElwee is a law firm which represents a number of clients who could be affected by the implementation of these regulations. Consequently, Robinson & McElwee offers the following comments with regard to the rules, and a summary of the changes it is suggesting.

II. COMMENTS

A. Improper Delegation of Zoning Authority

Section 5.2 requires each plan developed by a local authority to establish zones for solid waste disposal facilities. The regulations not only allow the local solid waste authority to identify the areas in which it deems landfills are not advisable, they allow the local authority to prohibit siting of facilities in such areas. This amounts to a zoning power that cannot be delegated to local authority.

Zoning authority is given to governing bodies of a municipality in incorporated areas, or a county commission in unincorporated areas, by W.Va. Code §8-24-39. This zoning power includes the authority:

- (e) To regulate and determine the use and intensity of use of land and lot areas;
- (f) To classify, regulate and restrict the location of trades, callings, industries, commercial enterprises and the location of buildings designed for specified uses;
- (g) To regulate and control or permit in certain areas, junk yards, salvage yards, used parts yards, dumps or automobile or appliance graveyards, or the maintenance and operation of secondhand stores or outlets in residential areas;
- (h) To classify and designate the rural lands among agricultural, industrial, commercial, residential and other uses and purposes; and
- (i) To divide the municipality or county into districts of such kind, character, number, shape and area as may be deemed necessary to carry out the purposes of this section.

W.Va. Code §8-24-39. This zoning power clearly encompasses the same type of zoning determinations the Board (and W.Va. Code §20-9-12a) is attempting to give the local solid waste authorities.

Robinson & McElwee acknowledges that W.Va. Code §20-9-12a(e) seems to give the local authority the right to exercise zoning power, and even refers to "zones" where facilities are "authorized or prohibited". However, this must only be interpreted as an advisory determination, not a binding decision. To give the local authority the power contemplated by the rule would be to

create two zoning bodies with jurisdiction over commercial solid waste facilities - the local solid waste authority and the local zoning body. This could not have been the result intended by the legislature and the rule should be drafted to avoid or accommodate this potential conflict. Accordingly, we suggest at a minimum that the word "authorized" when used in this section be changed to "recommended" and that "tentatively prohibited" and "prohibited" be changed to "not recommended", or words of like import.

To the extent that the local solid waste authority has zoning power, that power is circumscribed by the limitations imposed on other zoning bodies, which may not "prohibit the continuance of the use of any land, building or structure for the purpose for which land, building or structure is used at the time [the zoning] ordinance or ordinances take effect. . . ." W.Va. Code §8-24-50. While zoning ordinances may usually control any alteration or addition to any land or building which occurs after a zoning ordinance is passed, an exception is made for "the use or acquisition of additional land which may be required for the protection, continuing development or expansion of any agricultural, industrial or manufacturing operation. . . ." Id. The local authority must acknowledge this limit on its power to prohibit the operation and expansion of existing solid waste facilities. Failure to do so may result in a finding that the zoning is a violation of W.Va. Const. Art. III, §9 as a taking without just compensation. See, e.g., Carter v. City of Bluefield, 132 W.Va. 881, 54 S.E.2d 747 (1949).

B. Siting Prohibitions

Section 5.3.5.a of the rule requires the local solid waste authority to prohibit solid waste facilities where there is a danger of "significant adverse impact" upon wetlands, groundwater or surface water. The term "significant adverse impact" is not defined in this rule or the Division of Natural Resource's Solid Waste Management Regulations, (47 CSR 38, Section 3.1), which also uses the term. The term is too imprecise and subjective to serve as a basis for denying permission to site a solid waste facility, as it presumably could be extended to include even those discharges for which an NPDES permit has been granted.

This entire section should be deleted. If it is not deleted, it should be changed to insert the word "statistically" before the word "significant" in Sections 5.3.5.a.B and 5.3.5.a.C, in order to at least make them consistent with their counterparts in the Solid Waste Management Regulations in Sections 3.1.3 and 3.1.4.

C. Location Standards

Section 5.3.5.b identifies conditions which, if present, lead to a presumption that landfills should be prohibited, absent a showing that there would be no adverse effect on ground or surface water quality. These conditions should be more carefully defined. For example, prohibiting siting of a landfill within 300 feet of "surface water" should not include a prohibition of landfills within 300 feet of wet-weather or other intermittent streams. We suggest Section 5.3.5.b.A be deleted and Section

5.3.5.b.C. be changed to read "within three hundred feet of a perennial stream;".

D. Improper Siting Considerations

Section 5.3.6 of the rule is couched in vague language that allows too much opportunity to object to landfill siting on subjective grounds. That section allows prohibition of landfills if geologic conditions will "cause a significant adverse impact on ground or surface water quality." The purpose of the DNR Solid Waste Management Regulations is to provide an ample margin of safety in landfill design and to prevent the release of landfill leachate into any sort of underground geologic formation. Consequently, the relevant landfill construction provisions in those regulations should be the means of preventing releases, rather than making geologic conditions a prohibiting siting factor. Furthermore, some of the underground formations which ostensibly could lead the local authority to prohibit siting of a landfill should not have been included in this section. For example, a fault in the area of a solid waste facility should not have any bearing on the local authority's siting decision if the fault has not been active for thousands of years. The DNR Solid Waste Management Regulations only prohibit landfill construction if the facility is within 200 feet of a fault that has had displacement in the last 11,000 years.

E. Subjective Criteria

Section 5.4 grants local authorities the power to prohibit solid waste facilities in an area based upon one or more

of the criteria listed in Section 5.3. While some of the individual factors found in Section 5.3 might be sufficient bases for denying authorization for a landfill, others are not. For example, the finding that property values of nearby property will be negatively affected cannot be the only basis for denying authorization for a commercial solid waste facility to locate in an area. To the extent that landfills are not perceived as widely desirable land uses, any local property owner could make an argument that location of a solid waste facility adjacent to that property would have a negative impact. This is tantamount to allowing public sentiment to determine where and whether a landfill may be sited, a basis already determined to be unconstitutional.

F. Identification Of Information Sources

Section 5.5.1 provides that "readily available information", which is the basis for the local authority's siting decision, includes, but is not limited to, a number of listed sources. We suggest that Section 5.5.2.k be added to include "existing solid waste facilities" as a source of such information.

G. Notice

Section 7.1.2 provides that notices of public hearings are to be published and made generally available to the public. Considering the importance of any decision by the local authority on the operation of any solid waste facility, we suggest that the rule provide that public notice of any local authority action be sent to the owner or operator of each solid waste facility in the local authority's jurisdiction.

H. Existing Facilities

No provision has been made in the rule for those facilities which were already operating at the time the local authority's plan is created, nor is there any provision made for approving the location of any commercial solid waste landfill or transfer station which held a valid permit or compliance order on April 8, 1989, as required by W.Va. Code §20-9-12a. The rule should recognize not only this statutory requirement, but also the fact that operation of a landfill under permit of the DNR is prima facie evidence that such a landfill is located in an appropriate location. Otherwise, the plans should be applied prospectively only and not to existing facilities.

I. Appeal

If the delegation of zoning power to the local authority is valid, the zoning decisions of the local authority should ultimately be subject to review in circuit court. It would be a fundamental deprivation of property without due process to effectively take away a heretofore legitimate land use from a property owner without any legal recourse.

However, there is no provision in the rule for an appeal of the local authority's siting decision. The commercial solid waste facility plan is subject to review by the Board, but there is no provision for any person to appeal a decision prohibiting him from operating a solid waste facility on his property. It is clear that, under West Virginia law, review of decisions by local agencies is obtained through a writ of certiorari to the circuit

court. Ginsberg v. Watt, 285 S.E.2d 367 (W.Va. 1981), citing Mason Cty. Bd. of Ed. v. State Super. of Schools, 234 S.E.2d 321 (W.Va. 1977). The Board's rule should acknowledge this and clearly provide that any person aggrieved by a decision of the local planning authority is appealable by writ of certiorari to the circuit court.

J. Definitions

In order to avoid confusion or contrary applications as between DNR and local authorities, it is essential that terms be given the same definitions in both programs. There are some discrepancies in the proposed rules which should be amended to conform to DNR counterparts:

2.4. "Class A Solid Waste Facility." Should be conformed to the same definition found in 47 CSR 38 §2.7. By changing the wording, the Board has implied that tonnage must be aggregated on some regional basis even if the county does not participate in a regional authority. To avoid this improper result, the DNR definition for "Class A Solid Waste Facility" must be adopted.

2.2. "Energy Recovery Facility" and 2.15. "Materials Recovery Facility." These two terms have no DNR counterparts. As a result, they may well have the effect of sweeping facilities into the siting plan which are not in fact now covered by the DNR program which reaches only "recycling facilities" and "resource recovery facilities." Are these terms meant to be subsets of either? To avoid confusion, and to limit the scope of jurisdiction

properly, we urge the deletion of these terms and similar deletions in §5.2.1. and wherever referenced.

2.18. "Recycling Facility." This term has been defined to place a limit on the definition which does not appear in 47 CSR 38 §2.48. The last sentence should be deleted to avoid inconsistency with the DNR rules.

2.19. "Resource Recovery Facility." This definition also departs from the DNR term in 47 CSR 38 §2.49 without any apparent justification. It should be conformed to the DNR definition to avoid confusion, for example, on which incinerators are included in this category. This is important because W.Va. Code §20-9-12a speaks of only four categories of facilities to be included in the siting plan:

1. Commercial landfills accepting over 10,000 tons of waste a month.
2. Other commercial landfills.
3. Commercial transfer stations.
4. Commercial facilities for the processing or recycling of solid waste.

2.22. "Solid Waste Facility." The proposed definition departs both from W.Va. Code §20-9-2(j) and 47 CSR 38 §2.56 by including the term "materials recovery facilities." Again, we urge the deletion of this term.

III. Conclusion

Robinson & McElwee appreciates the opportunity to offer these comments, and the attached summary. Please notify us if we can provide any additional information.

Respectfully submitted this 5th day of October, 1990.

Robinson & McElwee
600 United Center
P. O. Box 1791
Charleston, WV 25326

Ohio Power Company
301 Cleveland Avenue S.W.
P. O. Box 24400
Canton, OH 44701-4400
216 455 8173



West Virginia Solid Waste
Management Board
1212 Stewart Plaza
Dunbar, West Virginia 25064

Attn: Karen Watson, Esq.

Re: Solid Waste Management Regulations

October 2, 1990

Dear Ms. Watson:

Enclosed for the consideration are the Ohio Power Company's comments regarding the West Virginia Solid Waste Management Boards' recently promulgated solid waste management rules.

If there are any questions, please contact C. J. Stromsky of my staff at (216) 438-7141.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. E. Wright", written over a horizontal line.

R. E. Wright
Environmental Affairs Director

CJS/jcp/181

Enclosure

RECEIVED
OCT 5 1990
SOLID WASTE
MANAGEMENT BOARD

Ohio Power Company

Comments on

Title 54

Legislative Rules

West Virginia Solid Waste Management Board

Series 3

Rules and Regulations For The Development Of Comprehensive

Litter and Solid Waste Control Plans

October 1, 1990

Comments of Ohio Power Company on the West Virginia Solid Management
Board Rules and Regulations for the Development Comprehensive
Litter and Solid Waste Control Plans.

- - - - -

Introduction

Ohio Power Company has reviewed the proposed Rules and Regulations for the Development of Comprehensive Litter and Solid Waste Control Plans (Title 54-Series 3) and we offer the following comments. As operators of the Kammer and Mitchell electric generating stations near Moundsville, West Virginia and because the process of electric power generation results in the production of large quantities of coal ash, we are particularly interested in the effect of these regulations on our existing coal ash disposal facilities and coal ash utilization activities in West Virginia.

Discussion

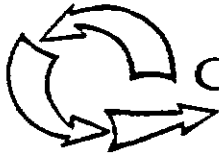
House Bill 8136, passed in 1988, requires the establishment of Solid Waste Control Plans by county and regional solid waste authorities. In part, these plans must address the safe and

sanitary disposal of all refuse from commercial and industrial sources within the county or region. Although the term "refuse" is undefined, we believe the plans are intended to address county or regional plans for the management and disposal of garbage rather than industrial solid waste disposed of in captive landfills. Since the application of the rule to the disposal of refuse from industrial sources is unclear, we are concerned whether the requirements may be mistakenly applied to captive industrial facilities.

As stated, the Company generates coal combustion by-products as a result of the combustion of coal in industrial boilers in conjunction with the generation of electricity. These coal combustion by products have distinct physical properties which lends themselves readily to various beneficial reuse applications in addition to controlled disposal in engineered monofills. Coal ash monofills are located on Company owned property where access is restricted to the landfill operator and Company employees. These monofills should in no way effect the management of garbage in the county or the region. For these reasons we believe the requirements of this section (i.e., 5.2.1.5) should clearly exclude homogenous industrial solid waste managed by the generator in captive facilities.

In addition, because our disposal facilities are captive on Company owned property and do not accept other types of waste,

public or private, and because there is sufficient remaining disposal capacity for the estimated life of the plant, neither the Company's disposal facility nor its ash waste stream should be incorporated into any solid waste management plan for the county or region.



Calhoun County Solid Waste Authority
Box 63 • Chloe, West Virginia 25235

September 28, 1990

To: West Virginia Solid Waste Management Board
1212 Stewart Plaza, Dunbar, WV 25064

The following are Calhoun County Solid Waste Authority's (CCSWA) comments on W.V. Solid Waste Management Board's (SWMB) Proposed Regulations:

Concerning Series 1, CCSWA has two questions:

1. Can a local (or regional, as the case may be) solid waste authority get a loan or grant for equipment and facilities which it then leases to a private operation?
2. Can a local (or regional, as the case may be) solid waste authority receive a loan and/or a grant for a facility which it owns and contracts with a private business to operate?

CCSWA feels that these points should be more clearly addressed, and in such a fashion that the answer to both of the above questions would be "Yes."

Concerning Series 3&4:

Definition 54-3-2.12 & 54-4-2.19 - Resource Recovery Facility

Composting and MRF's, having no emissions or ash, are so much cleaner and technologically simpler that it is unrealistic to include incineration with composting and MRF's. Also, incineration may recover some energy in the form of steam or electricity, but it is mainly a technology that deals with destroying resources.

In writing of regulations for solid waste facilities, incineration will constantly be singled out in order to address emissions wastewater treatment, and ash disposal, so it may as well be singled out at the beginning. CCSWA suggests calling a spade a spade and include a definition of incineration. We offer the following definition of incineration:

Incineration - A technology of thermal reduction that converts an amount of relatively non-hazardous solid waste into a smaller amount of relatively hazardous ash and extremely toxic air emissions.

Definition 54-3-2.13 & 54-4-2.20 - "Solid Waste"

Sludge from an air pollution control facility would seem to include ash from an incinerator. A 1988 study conducted by the Environmental Defense Fund shows that 100% of fly ash fails the EPA toxicity test for cadmium and lead. With figures like that, it would seem unwise to include these materials in with solid waste - it makes more sense to define them as hazardous waste and allow them to be considered solid waste only after testing out below the hazardous level.

It could be argued that ash be considered solid waste and classified hazardous only after failing the EPA toxicity test, but this will discourage testing whereas our proposal would provide incentive for testing and better protect the public health and safety.

CCSWA recommends re-wording the reference to nuclear material as follows: "...but does not include... special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended, including any nuclear or by product material considered by federal standards to be below regulatory concern (BRC)..."

CCSWA feels that solid waste should also not include materials separated from the waste stream and cleaned in preparation for recycling, whether delivered to a recycling center, or picked up by a recycler.

Definition 54-3-2.15 & 54-4-2.22 - "Solid Waste Facility"

If solid waste does not include materials separated from the waste stream and cleaned in preparation for recycling, then a recycling facility, as defined in 54-3-2.11 & 54-4-2.18, that deals with such materials should not be considered a Solid Waste Facility.

54-3-3.1 & 54-4-3.1 - "Submission to the Board"

It seems that to require a draft a mere 3-4 months after establishing regulations is a bit hasty. These plans require thorough research and a thorough job cannot be done in a mere 3-4 months.

If an authority hires a consultant to do their plan, it is unlikely it will be done in 3 months. (The Kelly, Gidly, Blair and Wolf feasibility study for a transfer station, is a good example.)

If an authority wishes to do it themselves, there is a lot of legwork to be done to get this information together and authorities have to juggle this with their other projects.

We are told we need only use readily available information and we are given a definition and examples of same in 54-4-3.5.1 & 2. However even though §10-2-8 states that SWMB shall provide technical assistance to local authorities, at its regular meeting on May 16, 1990, SWMB decided not to have the West Virginia Geological Survey prepare much of this material

for use by the local authorities because, among other reasons, of the cost involved. This would indicate that this information is not so readily available after all.

While it could be argued that authorities could have been working on plans all along, SWMB has not provided much incentive to do this. CCSWA submitted their comprehensive plan in the spring of this year only to learn that it would not be reviewed until after regulations were in place. Also we find that we may be required to re-submit it after regulations are in place, in order to comply with aspects that were not mentioned in the Code. For example 54-3-5.2.15 b. & specifics in 54-3-7 et seq.

Therefore, CCSWA feels that SWMB should allow ample time after regulations are in place for authorities to do an extensive, thorough, and credible job. This will, in the end, make for less work and a better job.

CCSWA suggests July 1, 1991, at the earliest, as a deadline for drafts.

54-3-5.2.2 & 54-4-3.2.2 - under "Administrative Completeness Review"

Likewise, 30 days may not be enough time to provide missing information. If the local authorities can't or don't provide it, SWMB has to do it, and given 50 plans at once, they are unlikely to do it in 30 days either, so let's be realistic. CCSWA suggests 90 days. Also, in 54-3-7.1.2 & 3, SWMB requires that local authorities give 30 days notice of public hearing after submission of their draft plan. One has to assume SWMB will find every plan incomplete, for the authority will not have had time to consider the public comment and include it in its plan.

Granted the regulations only require public comment appear in the final plan, but serious consideration of public comment could result in substantive changes in the plan. It would be best to have public comment in the draft. Perhaps a hearing should be held before the draft is submitted to SWMB.

54-3-3.4 & 54-4-3.4 - "Final Submission to the Board"

CCSWA suggests October 1, 1991 at the earliest.

54-4-5.5.1 - under "General Information"

This entry would be better placed in "Definitions". CCSWA recommends that in its place be 20-9-12a(b) from the Code. "Due to limited funds and time available the plan need not be an exhaustive and technically detailed analysis of the criteria set forth above."

54-3-3.5 & 54-4-3.5 - "Plans Developed by the Board"

CCSWA suggests October 1, 1991 at the earliest.

54-3-5.1.2 - under "General Information"

Since the plan is to cover 10 years, not all projects will start immediately. It is difficult at best to know if one's funding will be approved for projects that may not start for several years or even what funding sources will be available in several years' time. Therefore, SWMB can't expect or require more than an informal description.

54-3-5.1.5 - under General Information

Here is good example of how "resource recovery" as defined in these proposed regulations, presents a problem. Composting and MRF's, which reduce the waste stream and recover resources cleanly, simply, and with virtually no adverse environmental impact, fit logically and naturally with recycling and re-use. Incineration, however, which requires a constant supply of solid waste to pay off its disproportionately large capital investment, and which actually destroys resources by burning them, works against recycling and re-use and should not be included with composting and MRF in the #2 slot of the hierarchy.

Incineration, with its high cost, and Toxic emissions and ash, would be more appropriately placed at #4, after landfilling.

54-3-5.2.2.c.C - under "Specific Information and Data"

The use of "resource recovery" is doubly confusing here. The separate mention of materials recovery and composting facilities, and the failure to mention incineration as such, leads one to believe that "resource recovery" is referring to incineration only. CCSWA suggests the following sentence structure "... describe the existing and anticipated markets for materials recovery, recycling, composting facilities, steam or electricity generated by incineration, and RDF.

54-3-5.2.3 - under "Specific Information and Data"

In view of the fact that there are currently enough proposed landfills to handle roughly 8 times the amount of solid waste that WV produces, it hardly seems necessary to require that 50 more landfills be sited. Until there is some mechanism in place to put a cap on out of state garbage, it is irresponsible to request that every authority site a landfill.

CCSWA feels that it would be more realistic to require each Authority to identify which landfills they are using, whether or not they are in their county or region. This would give SWMB an accurate picture of WV solid waste flow and facilitate future planning.

54-3-5.2.3 - under Specific Information and Data

Over a 10 year period, many factors will change - it hardly seems possible to identify the parties responsible for any but the steps being initiated in the first year.

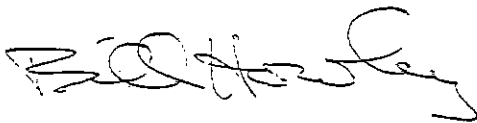
54-3-5.2.15.b - under "Specific Information and Data"

One ton of solid waste per month sounds like a very low level at which to start identifying an industry as "major".

54-3-5.2.18 - under "Specific Information and Data"

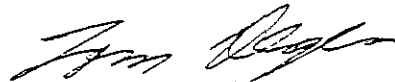
A number of authorities have already held their hearings and in the case of those that do not tape their hearings, it is plainly too late to require this. It also seems unfair for SWMB, after waiting 2 years to promulgate regulations, to penalize those authorities that submitted their plans in a timely manner by requiring them to go back and do them over.

CCSWA appreciates the opportunity to submit comments on these regulations and hopes that SWMB will give these and all other comments received, serious consideration.



Bill Howley (Chairman)

Sincerely,



Tom Degen (Secretary)

WETZEL COUNTY SOLID WASTE AUTHORITY

The State Solid Waste Management Board
1212 Stewart Plaza
Dunbar, WV

Re: Proposed Title S-4 Legislative Rules

To the Board:

The Northern Panhandle Wasteshed Assessment Committee would like to thank the Board and its staff for all of the hours that were put into these rules and regulations. It's no easy task and we appreciate it. We are respectfully submitting the following comments:

1. Throughout all 4 series of rules, the term "solid waste disposal" is used. During the 1990 legislature, West Virginia established a hierarchy of need whereby we are mandated to reduce, reuse, recycle and, as a last resort, landfill. The word "disposal" implies throwing away. Therefore, our committee recommends the word "disposal" be replaced with the word "management" throughout the entire document.
2. In Series 1, Section 4.2.2, it states, "Any eligible governmental agency shall make a separate application to the Board on forms prescribed. . . ." Are you stating that both the solid waste authority and any governmental agency shall make separate applications for the same project or are you stating that each project will require a separate application from whatever eligible governmental agency? Please clarify.
3. We agree with William Bunner of Monongalia County SWA in his comments regarding 4.2. We feel that preference should be given to in-state firms and we share his concern regarding 4.2.3.b. What looks feasible on paper can easily be disastrous when put into operation.

Series 3:

1. The scope and purpose in 1.1 is not strong enough. The State Solid Waste Management Board needs to take a strong leadership position for the state and guide the local solid waste authorities towards the objectives and intent of the Legislature. A stronger policy statement is needed to achieve this. Perhaps if you added: "Furthermore, it is the intent and purpose of this Board to use these rules and regulations to guide local solid waste authorities towards the goal of waste minimization while protecting the health and welfare of the public."

2. In section 2.12 in the last sentence, "Resource recovery facilities include composting facilities, incinerators" Incinerators are in no way resource recovery centers. A mass burn incinerator is a multi-million dollar catastrophe waiting to happen. Furthermore, the way this is worded, any power plant that uses even 1% RDF could be classified as a resource recovery facility and, therefore, deregulated. The word "incinerator" should be removed from this section.
3. In section 2.15, incinerators are properly classified as a "solid waste facility." However, an additional statement is needed here such as, "Mass burn incineration is so cost prohibitive and problematic that this Board is of the opinion that it is not a feasible means of waste management in West Virginia."
4. In section 5.1.3. it states: "Consideration of the hierarchy" The word "consider" implies that you can consider and dismiss an idea. The language of the legislature clearly states that they want this hierarchy implemented, not just considered. Therefore, the word "Consideration" should be changed to "Implementation".
5. In section 5.2.2.a., starting with "Information shall be included for all solid waste generated within the area covered by the authority from collection to final disposal" should be changed to ". . . to final destination" Not all waste is disposed, some is recovered.
6. In section 5.2.4 where it states, ". . . the efficient and effective recycling of such wastes and the reduction" should be amended to ". . . the optimum reduction"
7. In section 5.2.14 where the identification of wastes generated out of the authorities boundaries is addressed, it is advised to contact the landfill. The Wetzel County Solid Waste Authority has done so with no success. They have also appealed to the DNR to provide this information and still have been unsuccessful. In a county that generates 10,000 tons/year, that has hosted up to 27,500 tons/month, this is a source of grave concern. What recourse do they have?
8. In section 5.2.15.d., the Board asks the authority for a discussion of it's evaluation. Perhaps it should read, "The authority shall include an evaluation of this information"
9. In both sections 5.2.8 and 6.2., reference is given to a 10 year solid waste plan. A new bill was introduced in the U.S. Senate that would allow states with a 20 year solid waste plan to control the flow of waste into their state. Just to play it safe, perhaps you should increase the plan from 10 to 20 years. Considering we will be reviewing this plan every five years anyway, this seems to be a reasonable proposal.

Series 4:

1. Section 2.19 where "Resource Recovery Facility" is defined, incineration again needs to be removed from this definition for previously stated reasons.
2. The NPWAC agrees with all other comments regarding the February 28, 1991 deadline for submitting a draft plan. Considering the final draft of the rules and regulations will not be available until October or November and the importance of putting together a well thought-out plan that will have an impact on each county for generations to come, the February 28, 1991 date is too soon. Even March 31, 1991 is too soon. Perhaps the SSWMB can administratively address an extension; if not, it should be addressed legislatively.
3. In section 5, a subsection should be added to include the location of any oil or gas wells and a clear determination of whether or not they've been plugged properly.
4. The code states that each county must site a landfill in their plan, but it does not state where. We feel the legislative intent is spelled out in Series 3, section 5.2.2.a. where each county must specify which landfill they are using. The intent was to insure that waste was being properly managed and not dumped over the hill. The legislature also anticipated the formation of multi-county SWA's which didn't happen. The proposed siting of 55 landfills in West Virginia will only exacerbate a growing concern. Therefore, we strongly appeal to this Board that each SWA site where they propose to deposit their discards in lieu of requiring each county to propose a landfill. To do otherwise is in direct contradiction of HB4364's provision for the hierarchy of needs where we reduce, reuse and recycle before we landfill or incinerate.
5. Section 5.3.9. should have the word "agricultural" added to the list of land uses.
6. We agree with William Bunner's assessment that siting plans must complement existing zoning laws and that by siting these landfills, potentially we are defacto taking of people's real estate.

Thank you for your hard work in writing these rules and regulations. Please construe all comments to be constructive criticism and not a personal attack. Together we can make a better world for generations to come.

Sincerely,

NORTHERN PANHANDLE WASTESHED
ASSESSMENT COMMITTEE

Martha Huffman, ph
Martha Huffman
Chairperson

MH90258
pab

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✓ No $\frac{1}{2}$

Name and Address	Wish to Make Statement	Written Comments
Richard Stecher 6142 2100 Koppers Bldg Pittsburgh PA 15219		
Mary Lynn 432 Dorsey Ave Mokenau, Ill.	YES 1-23-4	
Joe Ross 112 East 1st St Elkins, W.Va.	no	
Harold P. Phil CNR Condemnation Div Elkins, W.Va.	YES No	
Brian Sharvate Rd. Co. SWA P.O. Box 68 Lanette, W.V.	? No	
David Steed 5003 Pennwood St. Cassowille, W.V.	No	
Paul Mattox Woolpert Consultants 609 Va. St. E. Charleston	No	
Arden J. Curry att. Alice M. Taylor	? No	
James L. Marney	No	
Ronnie D. Gurrong	No	
Butt Lammom 162 Oakwood Rd. D Charleston, Wv 25314	No	No

No

