

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-10-5 and 11-6A-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Pollution Control Facilities

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


James H. Paige III
State Tax Commissioner

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DEPARTMENT OF STATE

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Pollution Control Facilities

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Division

Address: State Capitol
Charleston, WV 25305

1. Effect of Proposed Rule

	ANNUAL			FISCAL YEAR	
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The amendments to the subject rule should have no effect.

3. Objectives of these rules:

The rule authorizes the separation from the value of the total facility that value which is attributable to the pollution control activity.

Rule Title: Pollution Control Facilities

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Any economic impact on State government should be negligible at best.

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

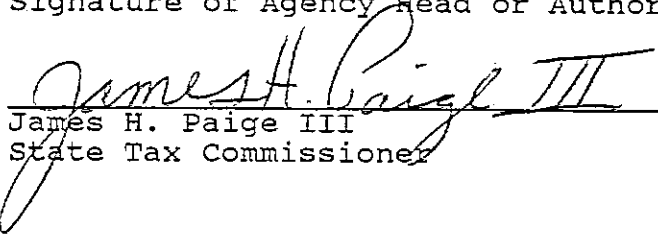
There may be an increase in property tax revenues at the local level.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact on this group.

Date: August 13, 1993

Signature of Agency Head or Authorized Representative


James H. Paige III
State Tax Commissioner

DATE: August 16, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

LEGISLATIVE RULE TITLE: Pollution Control Facilities

1. Authorizing statute(s) citation W.Va. Code §§ 11-10-5, and
11-6A-4

2. a. Date filed in State Register with Notice of Public
Comment Period: July 13, 1993

b. What other notice, including advertising, did you give of
the public comment period?

None

c. Date of Public Comment Period: July 13, 1993 -

August 12, 1993

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

Attached No Comments received

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

August 16, 1993

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

Bob Hoffman - 558-5330

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 _____

STATEMENT OF CIRCUMSTANCES

This rule as amended authorizes the separation from the value of the total manufacturing facility, when the pollution control facility produces a profitable by-product, that portion of value attributable to the pollution control activity. Additionally, disputes as to what qualifies as a pollution control facility are deemed to be appealable under W. Va. Code § 11-3-24a.



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AUG 16 2 01 PM '93

GASTON CAPERTON
GOVERNOR

State of West Virginia
Department of Tax and Revenue

TAX DIVISION

P. O. Box 2389

Charleston, WV 25328-2389

OFFICE JAMES H. PAIGE III
SECRETARY SECRETARY

CONSENT TO FILE RULE

August 16, 1993

To Whom It May Concern:

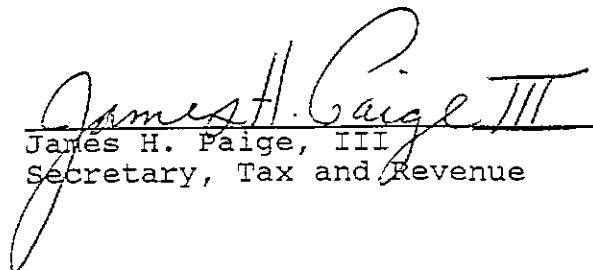
Title of Rule: Pollution Control Facilities

Title Number: 110

Series Number: 6

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 16th day of August, 1993.


James H. Paige, III
Secretary, Tax and Revenue

FILE

APR 19 5 07 PM '33

RECORDS SECTION
U.S. DEPARTMENT OF JUSTICE

DEPARTMENT RESPONSE TO COMMENTS ON PROPOSED
AMENDMENTS TO LEGISLATIVE REGULATION § 110-6-1 ET SEQ.

Comment: The definition of facilities eligible for salvage treatment should not be given a strict construction, but simply given their ordinary meaning. The statute does not exempt or except eligible property from tax, but provides a statutory manner of taxation.

Department Response: We agree. Section 110-6-2.2 has been amended.

Comment: Coal waste-fired electric generating facilities should be specifically identified as a pollution control facility. Federal law provides incentives for the construction and operation of facilities that burn coal waste and categorize these facilities as solid waste disposal facilities.

Department Response: The disposal of coal waste is recognized as an efficient and beneficial activity. Presently, the use of fluidized bed technology to remove coal gob has been recognized by the Department as meeting the statutory definition of W. Va. Code § 11-6A-2. However, the Department is reluctant to specifically identify items or processes within the regulations. The application of the statutory and regulatory language is felt to be a more logical administrative tool in the judgment process, allowing avenues to embrace new technological developments.

Comment: The proposed amendments to Section 110-6-2.2 and 110-6-4 are appropriate and tend to make the regulations more consistent with Article 6A.

Department Response: We agree. Reasonable people could too easily disagree on the interpretation of current statute and regulation. The proposed changes are intended to bring clarity to the regulations.

Comment: The Proposed Section 110-6-7 provides clarification of the avenues for administrative resolution of disputes. This proposed section should be narrowed further by characterizing a dispute under Article 6A as one of "classification."

Department Response: We fail to see the benefit of characterizing the dispute as one exclusively involving classification. The characterization is unnecessary since nothing seems to limit the use of the term under W. Va. Code § 11-3-24a to classification for levy purposes.

Comment: The requirement to obtain written approval from the appropriate environmental agencies as a precondition to eligibility for salvage valuation purposes may be cumbersome and should not be required for items previously listed as eligible by the Department.

Department Response: The clear separation of responsibilities between the Tax Commissioner and environmental agencies is necessary. The possibility of "blanket" approval for items previously deemed eligible could be accommodated within the proposed language of Section 110-6-6.

Comment: The allocation of value, as proposed, contemplates a component-by-component judgment. This process could be streamlined by an allocation based on the capital costs associated with the tax exempt financing or a maximum percentage based on coal waste consumed.

Department Response: We agree that the method of allocating value is not specifically identified. We also feel the existing proposed language of Section 110-6-4.1 does not preclude such method of allocation. However, the proposed language is amended to require an allocation where the facility produces a profitable by-product.

LD:RH/lr

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August 12, 1993

WRITER'S DIRECT DIAL NUMBER

The Honorable James H. Paige, III
Secretary
WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE
State Capitol, West Wing, Room 300
Post Office Box 2389
Charleston, West Virginia 25328

RE: Comments of NB Partners, Ltd. Concerning Proposed
Pollution Control Facility Regulations

Dear Mr. Paige:

Proposed regulations have been filed by the West Virginia Department of Tax and Revenue (the "Tax Department") relating to the valuation of pollution control facilities for West Virginia Ad Valorem property tax purposes ("Proposed Regulations") on July 14, 1993. The existing regulations, Leg. Reg. Section 110-6-1 et seq. (the "Existing Regulations") were promulgated in 1981 under W. Va. Code § 11-6A-3. This letter provides comments of NB Partners, Ltd., which owns a coal waste-fired electric generation facility ("NB Partner's Facility") located in Grant County, West Virginia.

INTRODUCTION

It is critical at the outset to point out that gob-fired electric generation facilities as described in W. Va. Code § 13-2c-21(a) are unique facilities which have been encouraged by both the federal government and the State of West Virginia. The utilization of gob to fuel these generation facilities requires state-of-the-art technology and massive capital contributions. These facilities serve the purpose of disposing of gob, a solid waste, and also generating electricity. Federal and state financial incentives are provided for such facilities because they serve critical environmental purposes and require massive outlays of capital in an era of budgetary constraint. It is important to note that in order to receive the favorable federal tax-exempt bond financing for well over half of NB Partners Facility met the definition or requirement of a solid waste disposal facility under federal laws.

BOWLES RICE
McDAVID GRAFF & LOVE

The Honorable James H. Paige, III
Page 2
August 12, 1993

SPECIFIC COMMENTS

In general, the proposed regulations provide much needed changes to the existing regulations. The following specific comments are provided as additional amendments.

1. The last sentence of section 110-6-2.2 of the Proposed Regulations should be deleted in its entirety. This sentence reads as follows:

"The definition of facilities eligible for salvage treatment shall be strictly construed so as to include only such equipment and devices as are installed primarily and immediately to abate air or water pollution."

This sentence should be deleted because the pollution control methodology for property taxation set forth in W. Va. Code § 11-6A-1 et seq. ("Article 6A") is a mode or method of assessment, and is not an exclusion from property taxation. The pollution control facilities are clearly subject to property taxation, and Article 6A only addresses the mode or method by which this property is valued for property tax purposes. In the case of Cherry River National Bank v. Lorenson, 406 S.E. 2d 714 (W. Va. 1991) the West Virginia Supreme Court of Appeals validated a long-standing principle that the West Virginia Legislature is to be given great discretion in determining methods or modes of assessment for various types of property, (special-use property, or property used in heavily regulated industries, etc.). Thus, exclusions from taxation must be strictly construed, however, modes or methods of assessment are simply given their ordinary meaning. Thus, there is clearly no requirement in Article 6A, or in the wide array of other legislative modes of assessments which would require or contemplate a strict construction. See Cherry River National Bank.

2. Section 110-6-3 of the Proposed Regulations should be amended to provide that a coal waste-fired electric generation facility should be viewed in its entirety as a pollution control facility. In this manner, under Section 110-6-4 of the Proposed Regulations, the Tax Commissioner would have discretion to look at the facility as a whole and determine what percentage of the facility related to solid waste disposal as a pollution control function, and what percentage of the facility related to the for-profit activity of generating power.

BOWLES RICE
McDAVID GRAFF & LOVE

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As such, Section 110-6-3.1 of the proposed regulations should be amended to add the following sentence:

"All machinery and equipment which functionally comprises a facility which meets the requirements of a solid waste disposal facility as defined in section 142 of the Internal Revenue Code of 1986, or any success or provision, and burns predominately coal waste as contemplated by Section 13-2C-21a of the W.Va.Code, and which meets air and water quality or effluent standards prescribed under the laws of this state or United States, shall be viewed collectively as one pollution control facility, subject to allocation under section 4 of these regulations."

This change is necessary as it recognizes the fact that the coal waste fired generation facilities are viewed predominately as pollution control solid waste disposal facilities and which also produce a profitable by-product. This principle is recognized under federal and state laws. See Treasury Reg. § 1.103-8(f)(2) and Treas. Temp. Reg. § 17.1(CCH Standard Federal Tax Reports paragraph 7745) and W. Va. Code § 11-6A-4. The fact that these are unique facilities which serve as pollution control facilities and also generate electricity must be recognized and dealt with accordingly. This is greatly different than a standard manufacturing or production plant where a certain additional items of pollution control equipment are added purely for pollution control purposes. In the case of a coal waste-fired generation facility it is often difficult, if not impossible, to take each specific item of equipment and determine whether it is predominately used for pollution control or for the production of electric power.

This analysis is very similar to the determination which takes place under the federal income tax laws. Solid waste disposal facilities, such as NB Partners Facility, is encouraged under federal laws as it recycles and disposes of a solid waste-gob in the instant situation. Under federal income tax laws, only the portion of the facility which is used for the collection, storage, treatment, utilization, processing or disposal of solid waste can be financed with tax exempt bonds. See Treas. Reg. Section 1.103-8(f)2 and Treas. Temp. Reg. Section 17.1(a), CCH Standard Federal Tax Reports, paragraph 7745. Further, the portion of the entire facility which can be funded with the tax exempt bonds is determined by allocating the costs of the property between

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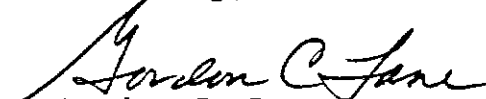
The Honorable James H. Paige, III
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the solid waste disposal function and any other functions by referring to all the facts and circumstances with respect to such property, which reasonably reflects a separation of costs for each function of the property. See Temp. Treas. Section 17.1(b).

In the instant situation, the facility was funded with tax-exempt bond financing, and an analysis was undertaken under federal income tax laws which determined the portion of the entire facility which was apportioned to solid waste disposal and the portion to generating electrical power. Thus, in the case of NB Partners Facility, a determination has already been made under the tax exempt bond financing, as to the cost of the entire facility which relates to solid waste disposal, and the cost of the project which relates to producing electric power. This process is used under the federal income tax laws, and the Tax Commissioner should be able to look at the entire facility of NB Partners, Ltd. and make an apportionment as to the cost of the facility relating to pollution control and the portion relating to power generation.

Again, the West Virginia Legislature in Article 6A has generally given the authority for a special method of assessment for pollution control facilities. In many cases, particularly when Article 6A was enacted, pollution control facilities were often special equipment which would be added on to existing manufacturing and production plants. The items and equipment that were pollution control equipment would have been easy to ascertain. The above proposed recommendations provide flexibility to the Tax Department to address new and unique facilities which have state-of-the-art technology and which combine pollution control and profitable by-products.

Sincerely,


Gordon C. Lane

GCL/pdh
170750

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August 10, 1993

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AUG 11 1993 40-1383

SECRETARY OF
TAX AND REVENUE

Honorable James H. Paige, III, Secretary
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RECEIVED
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STATE TAX DEPARTMENT
LEGAL DIVISION

Re: Comments of Morgantown Energy Associates concerning
Proposed Pollution Control Facility Regulations

Dear Mr. Paige:

On July 14, 1993, the West Virginia Department of Tax and Revenue ("Tax Department") filed proposed regulations concerning the valuation of pollution control facilities for property taxation purposes (the "Proposed Regulations"). The Proposed Regulations would modify the existing regulations, Legis. Reg. § 110-6-1 et seq. (the "Regulations"), promulgated in 1981 to implement W.Va. Code § 11-6A-1 et seq. ("Article 6A").

This letter sets forth the comments of Morgantown Energy Associates ("MEA") concerning the Proposed Regulations. As you know, MEA owns a coal waste-fired electric cogeneration facility located in Morgantown (the "Plant") which was appraised by the Tax Department for tax year 1993. That appraisal, consistent with the Tax Department's advice in 1988 to the developers of a similar facility in Grant County and in 1989 to the developers of the then-proposed MEA Plant, recognized significant portions of the Plant as eligible for valuation as pollution control facilities. MEA recommends that the Proposed Regulations be modified to further clarify valuation of the personal property associated with such state-of-the-art, environmentally progressive facilities.

SUMMARY OF COMMENTS

Although the proposed regulations represent a significant improvement over the existing Regulations, further modifications

Honorable James H. Paige, III, Secretary
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are recommended to insure consistency and to more clearly and effectively implement Article 6A. The definition of pollution control facilities should not be narrowly limited to "equipment" and "devices". As contemplated by Article 6A, qualifying pollution control facilities include facilities made up of multiple components which may have profitable by-products but which, by design, abate or reduce pollution or contamination. Both the overall pollution abatement purposes and integrated pollution control functions of a multi-function, multi-component facility should be considered by the environmental agencies in evaluating approval of the facility as a pollution control facility. In this regard, the personal property associated with a coal waste-fired electric generating facility should be recognized under the final Proposed Regulations as eligible for pollution control valuation, subject to allocation of value for portions of the facility necessary for the productive purposes but not the pollution abatement and control functions of the facility.

Attached as Appendix A to these comments is a copy of the Proposed Regulations reflecting MEA's recommended modifications.

GENERAL COMMENTS

1. The West Virginia Legislature passed Article 6A for a particular purpose: to provide special valuation treatment for and thereby to encourage the installation and use of pollution control facilities.

2. Under Article 6A, the Tax Department is authorized to promulgate regulations for the administration of Article 6A. Such regulations must be consistent with Article 6A, and should effectuate the underlying purpose of the statute.

3. The existing Regulations need to be modified. They are inconsistent with Article 6A and are subject to interpretation in a manner which would frustrate rather than facilitate the purpose of Article 6A. The Regulations fail to take into account advances in technology which have occurred since Article 6A was passed into law in 1973.

4. The Proposed Regulations represent a significant improvement over the existing Regulations. However, further modifications are warranted.

5. Section 4 of Article 6A specifically authorizes the Tax Department to promulgate regulations for, allocation of the value for a pollution control facility which produces a profitable by-product. Thus, Article 6A irrefutably contemplates the

existence of pollution control facilities which produce profitable by-products.

6. Section 4 also provides for the allocation of value where part of a pollution control facility is required for operation of the business. Thus, Article 6A also contemplates the existence of pollution control facilities which are constituted of multiple components operating together to perform, on a collective basis, one or more functions which are primarily but not exclusively for the purpose of pollution abatement and/or pollution control.

7. Thus, production of profitable by-products clearly does not preclude a multi-component facility from pollution control valuation, provided the facility meets the requirements of Section 2 of Article 6A.

8. Both the Proposed Regulations and the existing Regulations are far more restrictive than the statute. The language of both appears to be limited to "devices" and "equipment", and could (inappropriately and incorrectly) be construed as not applying to new facilities, such as solid waste disposal facilities disposing of acidic gob, built from the ground up to perform a pollution abatement/contamination reduction function in strict compliance with the applicable pollution control requirements.

9. The allocation or separation of values occurs only after a facility has been approved by the air and/or water pollution control agencies as a pollution control facility. Consequently, if applied too narrowly by the environmental agencies, the definition of a qualifying pollution control facility could create a highly inappropriate result and thereby frustrate the intent of Article 6A. Narrowly evaluating each component of a new facility which is made up of multiple components functioning together to perform a pollution abatement function and/or an integrated pollution control function could conceivably and inappropriately result in few of the components, when viewed individually and not as a part of the functioning unit, being recognized as pollution control facilities. Environmentally progressive facilities would be discouraged rather than encouraged, contrary to the intent of Article 6A.

10. The Proposed Regulations should be consistent with the Tax Department's current valuation of facilities such as the MEA Plant, and should be modified to make clear that a modern facility specifically designed and installed for the purpose of fulfilling a pollution abatement function encouraged by state law

(e.g., the disposal of coal waste in electric generating facilities) and which uses integrated, state-of-the-art technology and equipment (rather than scrubbers and precipitators) for pollution control purposes are to be approved as pollution control facilities, subject to allocation. Such facilities are precisely the type for which allocation of value is appropriate, and the language of the Proposed Regulations should be clarified to reflect this.

In short, recognition must be given under the Proposed Regulations to the overall pollution abatement function of such multi-component, multi-function facilities and to the integrated pollution control technology and equipment of such facilities.

COMMENTS ON THE PROPOSED REGULATIONS

1. The Proposed Regulations, by the addition of a new Section 110-6-4, provide for the allocation of values, as contemplated by Section 4 of Article 6A. The modification is a very appropriate addition to the existing Regulations.

2. The Proposed Regulations eliminate the last sentence of Section 110-6-2.2, which defines "pollution control facility". This modification properly eliminates language of the existing Regulations which is inconsistent with both the language and intent of Article 6A.

3. However, MEA suggests that the second sentence of Section 110-6-2.2 should also be deleted. This sentence is inconsistent with and can be read as being more restrictive than the language of Section 2 of Article 6A. Section 2 of Article 6A does not contain any language suggesting the limitations of the second sentence of Section 110-6-2.2.

4. First, Article 6A clearly contemplates that pollution control facilities may be constituted of multiple components working together to perform one or more integrated functions which are primarily but not exclusively pollution abatement or control functions. However, both the Proposed Regulations and the existing Regulations incorrectly suggest that the definition of pollution control facilities should be limited to "equipment" and "devices". Such a microscopic and myopic component-by-component analysis would ignore the overall functional aspects of multiple components which work together in a modern, integrated facility to perform a pollution abatement function. Moreover, the statute contains no language calling for strict construction of the definition of pollution control facilities.

The first sentence of Section 110-6-2.2 appropriately tracks the language of Section 2 of Article 6A. The second sentence of Section 110-6-2.2 is therefore entirely unnecessary. Even if the "strictly construed" language is to be retained, the language subject to construction must conform to the statutory standards. Thus, the second sentence of Section 110-6-2.2, if retained at all, should provide for the definition of facility "to include only such facilities [rather than 'equipment and devices'] as are installed primarily for the purpose of abating or reducing water or air pollution or contamination [rather than 'and immediately to abate air or water pollution']".

5. The Proposed Regulations modify the administrative remedy provision, providing that disputes regarding the eligibility of property for pollution control treatment are to be deemed matters of "classification and taxability" appealable under W.Va. Code § 11-3-24(a). This would provide much needed clarification.

However, MEA suggests that the matter be characterized simply as one of "classification." In addition, MEA suggests that the sentence added by the Proposed Regulations to the administrative remedies section be preceded with the phrase "For purposes of seeking administrative relief only, . . .". Moreover, MEA notes that matters of classification and taxability are not appealable to circuit court by third parties under W.Va. Code § 11-6-25. Thus, any administrative remedy provided for under the Proposed Regulations should not afford third parties any greater appeal rights than third parties challenging determinations regarding classification for levying purposes.

6. Finally, Section 110-6-3.1 of the Proposed Regulations, entitled "Approval as a pollution control facility," requires that a taxpayer requesting salvage valuation of personal property as a pollution control facility must receive approval from the appropriate state agency governing the control of air or water pollution. In the past, the Tax Department has not required written approval from the air or water pollution control agencies as a precondition to pollution control valuation eligibility. It is still not clear whether in the future each facility requesting salvage valuation must have separate written approval, or whether the environmental agencies can provide "generic" approval for certain types of facilities. In any event, any such requirement of written approval would presumably apply only to facilities not previously listed as eligible by the Tax Department pursuant to Regulation Section 110-6-4 (i.e., Proposed Regulation Section 110-6-6). Perhaps this point should be made explicit in the Proposed Regulations.

Honorable James H. Paige, III, Secretary
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7. The pollution control agencies need to be made specifically aware of the ability of the Tax Department to allocate values and of the fact that being productive does not disqualify a facility from recognition as a pollution control facility.

Accordingly, MEA suggests that the Proposed Regulations should specifically provide that a facility which produces a profitable by-product or which is made up of multiple parts or components, one or more of which may be required for operation of the business without regard to federal or state air or water quality standards, may be approved as a pollution control facility, subject to the allocation or separation of values by the Tax Department to reflect valuation of those components which are necessary for the productive purposes of the facility and are not necessary to the primary pollution control functions of the facility.

COMMENTS REGARDING THE APPLICATION OF THE
PROPOSED REGULATIONS TO GOB-FIRED ELECTRIC GENERATING FACILITIES

Obviously, neither the existing Regulations nor the Proposed Regulations would preclude facilities such as the MEA Plant from recognition as pollution control facilities. Nevertheless, clarification on this matter is recommended.

1. As noted above, neither the existing Regulations nor the Proposed Regulations specifically address state-of-the-art, new facilities constructed from the ground up to perform, as an inherent and defining purpose, a pollution abatement or contamination reduction function. Both are more specifically applicable to single purpose "devices" retrofitted to facilities which would otherwise not comply with environmental standards.

2. Similarly, neither the existing Regulations nor the Proposed Regulations specifically state that solid waste disposal facilities meeting requirements of IRC § 103 which burn predominantly acidic coal waste are entitled to pollution control treatment. As you know, the West Virginia Legislature has specifically encouraged such facilities, stating that gob piles are unsightly and have the potential to pollute and that it is in the best interest of the citizens of the State to facilitate the construction of gob-fired electric generation facilities. W.Va. Code § 13-2C-21(a). As a matter of sound public policy, the matter should be clarified.

3. Solid waste disposal facilities that burn acidic coal wastes should specifically be recognized as pollution control facilities by the State water pollution control authority. If the

environmental agencies examine such facilities on a myopic, component-by-component basis, they may fail to give appropriate recognition to either the fundamental pollution abatement function or the integrated pollution control aspects of such facilities. On the other hand, if the agencies examine and approve the entire facility, provided it meets certain defined criteria (discussed below), the task would then fall to the Tax Department to allocate value, as contemplated by Section 4 of Article 6A.

4. The initial, principal and defining function of such facilities is the disposal of acidic gob, a pollution abatement and contamination reduction function. In order to perform that function in compliance with applicable air quality requirements, such facilities are required to use circulating fluidized bed boilers (CFB) technology. Thus, such facilities have both a pollution abatement function as their defining concept and, in addition, utilize integrated, state-of-the-art technology and equipment (rather than retrofitted scrubbers and precipitators) to perform the pollution control function of insuring operation in compliance with air quality standards.

5. Therefore, MEA recommends that the Tax Department's final Proposed Regulations provide that if the State water pollution control authority determines that a facility (i) qualifies as a solid waste disposal facility meeting the requisites of Section 103 of the Internal Revenue Code of 1986, (ii) burns predominantly acidic coal waste, and (iii) performs that function in compliance with applicable air and water pollution control requirements, then the facility is to be approved as a pollution control facility, subject to allocation of value by the Tax Department, notwithstanding the production of steam and/or electricity as profitable by-products.

6. The allocation of value by the Tax Department would not have to be performed on a component-by-component basis, but could be based, for example, on the proportion of total capital costs eligible for tax exempt financing as a solid waste disposal facility under federal law, or on the proportion of coal waste burned as a percentage of total fuel consumed. The proportion of value recognized as subject to salvage valuation could be limited to some reasonable maximum level, e.g., not greater than 65% of the appraised value of the facility prior to recognition of pollution control valuation treatment.

7. It should be noted that such facilities are inherently capital intensive. None would have been built in the State and no more will be built in the State unless the pollution abatement function which causes such facilities to be configured in

Honorable James H. Paige, III, Secretary
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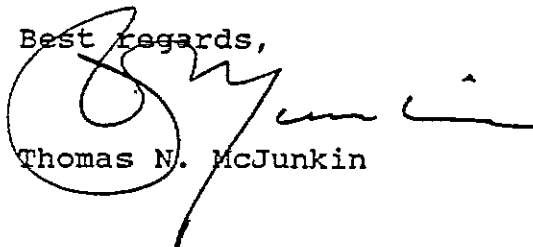
the way they are is recognized as warranting valuation treatment under Article 6A.

8. Finally, it should be recognized that generating electricity is itself generally regarded as a "public service." Almost all electric generating facilities in the State are owned by public utilities which are able to pass along their operating cost to their customers, and are valued for property taxation purposes by the Board of Public Works. Comparing valuation based on electric generating capacity, i.e., the "productive," non-environmental function of such facilities, gas burning electric burning facilities are valued far higher than the State's public utility power plants.

CONCLUSION

The Proposed Regulations are a significant improvement over the existing Regulations, but should be further modified in the manner indicated on Appendix A hereto.

Best regards,



Thomas N. McJunkin

TNM/sla/03D25

APPENDIX A
TO COMMENTS OF MORGANTOWN ENERGY ASSOCIATES

110 CSR 6

PROPOSED REGULATIONS
RECOMMENDED MODIFICATIONS

TITLE 110
LEGISLATIVE RULES
TAX DEPARTMENT

SERIES 6
POLLUTION CONTROL FACILITIES

§110-6-1. General.

1.1. Scope. -- These regulations established general operating procedures for the tax treatment of pollution control facilities.

1.2. Authority. -- W.Va. Code §11-6A-4

1.3. Filing Date. -- 1993

1.4. Effective Date. -- 1993

§110-6-2. Definitions.

2.1. "Commissioner" means the State Tax Commissioner, or his delegate.

2.2 "Facility" or "Pollution Control Facility" means any personal property designed, constructed, or installed primarily for the purpose of abating or reducing water or air pollution or contamination by removing, altering, disposing, treating, storing, or dispersing the concentration of pollutants, contaminants, wastes or heat in compliance with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, the design, construction, and installation of which personal property was approved as a pollution control facility by the Water Resources Division of the Department of Natural Resources or the Air Pollution Control Commission, as the case may be. ~~The definition of facilities eligible for salvage tax treatment shall be strictly construed so as to include only such equipment and devices as are installed primarily and immediately to abate air or water pollution.~~

2.3. "Personal Property" means things of value, moveable and tangible, which are the subjects of ownership. This definition is found as a part of West Virginia Code §11-5-3 and applied to all of Chapter 11.

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2.4. "Moveable", as used in section 2.3, relates to a device or piece of equipment capable of being moved from one location to another.

2.5. "Salvage Value" means the price for which such facility would sell in place if voluntarily offered for sale by the owner thereof; that is to say, the scrap value of the material of an eligible facility less the cost of removal of said facility. Administratively, salvage value will be five percent of original cost.

§110-6-3. Approval as Pollution Control Facility.

3.1. Any owner or taxpayer requesting salvage valuation for a facility under the authority of W.Va. Code §11-6A-3 must receive approval from the appropriate state agency governing the control of air or water pollution. The approval must state that the facility subject to salvage value consideration is designed, constructed or installed primarily for the purpose of abating or reducing air or water pollution or contamination by removing, altering, disposing, treating, storing or dispersing the concentration of pollutants, contaminants, wastes or heat, and does perform such function or functions, and does abate or reduce water or air pollution in compliance with air or water quality standards prescribed under the laws of this state or the United States. In evaluating approval of a facility for which salvage valuation has been requested, the appropriate state agencies shall give consideration to any pollution abatement or contamination reduction purposes for which the facility was designed, constructed or installed. Personal property associated with a facility which meets the definition of a pollution control facility and which produces a profitable by-product or contains parts or components necessary for operation of the business without regard to the requirements of state or federal air or water quality standards shall be approved as pollution control facilities, subject to an allocation or separation of values as provided below. Accordingly, the personal property associated with a facility which (i) meets the requirements of a solid waste disposal facility under section 103 of the Internal Revenue Code of 1986, (ii) burns predominantly coal waste as contemplated by section 13-2C-21a of the West Virginia Code, and (iii) performs that function in compliance with state and federal air and water quality standards shall be approved as a pollution control facility, subject to an allocation or separation of values.

§110-6-4. Allocation or Separation of Values.

4.1: Where the pollution control facility produces a profitable by-product or where a part of such facility is required for the operation of the business without regard to the requirements of state or federal air or water quality standards, the tax commissioner ~~may shall~~ allocate or separate ~~that portion of value attributable to the pollution control activity values so that~~ personal property not attributable or necessary to the abatement or reduction of water or air pollution or contamination does not receive salvage valuation.

§110-6-5. Recommendation of Values to County Assessor.

5.1 Each county assessor will be notified before December first of any eligible facility in his county on the preceding July first assessment day together with the salvage value of each such facility. Said notice will recommend that the assessor use the salvage value provided as the appraised value of such facility.

§110-6-6. Annual List of Eligible Facility Items.

6.1. The tax commissioner, annually before July tenth, will prepare a list of apparatus, equipment and components which are eligible for salvage treatment under provisions of Article 6A, Chapter 11 of the Code of these regulations. Such list shall be revised annually to include items made eligible by administrative or judicial decision.

§110-6-7. Administrative Remedy.

7.1. Any taxpayer or government official claiming to be aggrieved or damaged by the tax commissioner by the inclusion or exclusion of a facility or any component thereof, may appeal such action to the commissioner. Disputes concerning whether an item of personal property qualifies as a "facility" or "pollution control facility" as defined in section 2.2 above shall be deemed to be matters of classification or taxability and as such are appealable under the provisions of W.Va. Code §11-3-24a.

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**WEST VIRGINIA
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STATE TAX DEPARTMENT
LEGAL DIVISION

August 12, 1993

WV Department of Tax and Revenue
Legal Division
PO Box 1005
Charleston, WV 25324-1005

RE: Comments on Proposed Changes in Pollution
Control Facilities Rules (Title 110, Series 6)

Dear Ladies and Gentlemen:

This is to respectfully submit this Association's comments on the changes in the above-referenced rules which you have proposed.

Generally, the proposal to allow the apportionment of integrated facilities which have both a pollution control or abatement function and a productive function is a significant improvement in the existing rules. However, to fully and effectively implement this improved approach, the second sentence of section 2.2 should either be deleted, as the third sentence in that section is, or it should be significantly revised. Specifically, the existing language of that sentence focusing on specific items of "equipment and devices" runs counter to the new theme of apportioning integrated pollution control/production facilities.

Moreover, the term "strictly construed" remains a most inappropriate concept in the context of this rule, which has to do with the Legislature's establishment of a particular valuation exemption from property tax which is not within the power of the Legislature to provide. That is to say, while exemptions from taxation are to be strictly construed, application of a legislatively-established valuation methodology should be made without any particular presumptions for or against it.

Given the existing language of section 2 of the statute, as well as of section 2.2 of the regulations, the proposed new section 3, requiring separate and additional approval by a pollution regulatory agency, passing on the primary purpose of a pollution control facility, adds unnecessary and inappropriate bureaucratic oversight.

While the reference to the exercise of regulatory judgments, in the normal course of the discharge of an enforcement agency's responsibilities, may be useful in various circumstances to add objectivity to the administration of related tax laws, the separate and unnecessary approval by such a regulatory agency solely to determine the tax status of certain property, and not in the normal course of that agency's regulatory function, adds an unwieldy, unrealistic and unnecessary layer of bureaucratic action to the administration of the pollution control facilities valuation methodology.



WEST VIRGINIA
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WV Department of Tax and Revenue
August 12, 1993
Page 2

Finally, the revised language in the proposed new section 7, clarifying that disputes concerning eligibility for the pollution control facility valuation discount are to be decided by the tax commissioner, is too restrictive. Specifically, the availability and the extent of a pollution control discount, particularly under the new apportionment approach, is inherently a mixed question of law and facts so that an opportunity for an evidentiary hearing before the Board of Equalization and Review should, in addition to the opportunity to pursue a taxability ruling, be available at a taxpayer's option.

Thank you for this opportunity to submit comments on these proposed rules. This Association looks forward to working with your Department in refining and improving these rules which affect many of its members.

Sincerely,

A handwritten signature in cursive script that reads "Karen S. Price".

Karen S. Price
President

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