

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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1988 SEP -2 AM 8 35
OFFICE OF THE SECRETARY OF STATE

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

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W.Va. Code §§ 11-10-5, 20-5F-5a, and 29A-3-15

AMENDMENT TO AN EXISTING RULE: YES NO

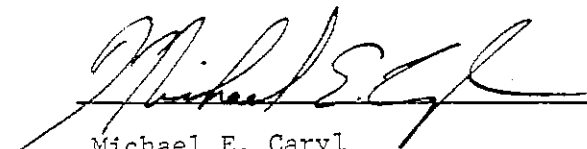
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 110-6A

TITLE OF RULE BEING PROPOSED: Solid Waste Assessment Fee

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.


Michael E. Caryl
State Tax Commissioner

FILED

FISCAL NOTE FOR PROPOSED RULES

1988 SEP -2 AM 8:35

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Rule Title: Solid Waste Assessment Fee

Type of Rule: Legislative Interpretive Procedural

Agency: Tax Department Address: State Capital; Charleston, WV 25305

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

2. Explanation of above estimates:

The fiscal impact of the rule should not differ from that envisioned by the Legislature when it passed H.B. 3146 on March 12, 1988.

3. Objectives of these rules:

This rule governs the administration of the solid waste assessment fee imposed by H.B. 3146.

DATE: SEPTEMBER 2, 1988
TO: LEGISLATIVE RULE-MAKING COMMITTEE
FROM: STATE TAX DEPARTMENT
EMERGENCY RULE TITLE: SOLID WASTE ASSESSMENT FEE

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SECRETARY OF STATE

1. Date of filing: September 2, 1988
2. Statutory authority for promulgating the emergency rule: W. Va. Code §§ 11-10-5, 20-5F-5a and 29A-3-15
3. Date of filing of proposed legislative rule: September 2, 1988
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?
The emergency rule is a new rule.
5. Has the same or similar emergency rule previously been filed and expired?
No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.
N/A
7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.
N/A
8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.
The solid waste assessment fee imposed by W. Va. Code § 20-5F-5a is effective July 1, 1988. Because the fee is imposed on all who disposes of solid waste at authorized facilities unless otherwise exempted by law, regardless of whether such parties are West Virginia residents or from out-of-state, this rule is necessary to protect the public interest.

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1988 SEP -2 AM 8:35

AGENCY APPROVED

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

AMENDED EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 6A
(1988)

Filed: September 2, 1988

§ 110-6A-1. General.

1.1 Type of Regulation.-These regulations are emergency legislative regulations as defined in W. Va. Code §§ 29A-1-2(d) and 29A-3-15.

1.2 Scope.-These emergency legislative regulations explain and clarify West Virginia law as it relates to the administration of the solid waste assessment fee imposed by W. Va. Code § 20-5F-5a.

1.3 Authority.-These emergency legislative regulations are issued under the authority of W. Va. Code §§ 29A-3-15, 11-10-5 and 20-5F-5a(f).

1.4 Filing Date.-These emergency legislative regulations were promulgated and filed in the State Register on June 30, 1988. A public comment period commenced on June 30, 1988, and continued until 5:00 p.m. and July 31, 1988. These emergency legislative regulations were refiled in the State Register and with the Legislative Rule-Making Review Committee on September 2, 1988.

1.5 Effective Date.-These emergency legislative regulations become effective immediately upon filing in the State Register.

1.6 Citation.-These emergency legislative regulations may be cited as 110 C.S.R. 6A, § _____ (1988).

§ 110-6A-2. Definitions.-As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular or plural.

2.1 "Approved solid waste facility" means a solid waste facility or practice which holds a valid permit issued under the provisions of W. Va. Code § 20-5F-1 et seq.

2.2 "Board" shall mean the State Water Resources Board.

2.3 "Code" shall mean the Code of West Virginia, one thousand nine hundred thirty-one, as amended.

2.4 "Commercial solid waste facility" means any solid waste facility which accepts solid waste generated by sources other than the owner or operator of the facility and shall not include an approved solid waste facility owned and operated by a person for the sole purpose of disposing of solid wastes created by that person or such person and other persons on a cost-sharing or non-profit basis.

2.5 "Delegate" as used in the phrase "or his delegate" and when used in reference to the Tax Commissioner, means any officer or employee of the Tax Department duly authorized by the Tax Commissioner, directly or indirectly, by one or more redelegations of authority, to perform the function mentioned or described in W. Va. Code § 20-5F-5a or these regulations.

2.6 "Department" shall mean the Department of Natural Resources.

2.7 "Director" shall mean the director of the Department of Natural Resources, or his authorized designee.

2.8 "Exclusive or cost-share solid waste disposal facility" means only those facilities certified by the Department. Such facilities will not be certified as such if waste is accepted from sources other than the owner, operator or lessee of the facility or those contributing to the operations of such facilities pursuant to a cost-sharing agreement.

2.9 "Open dump" means any solid waste disposal which does not have a valid permit under W. Va. Code § 20-5F-1 et seq. or which is in violation of state law, or where solid waste is disposed in a manner that does not protect the environment.

2.10 "Person", "persons" or "applicant" shall mean any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; State of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; industry; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any legal entity whatever.

2.11 "Point source" shall mean any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

2.12 "Related parties" means two or more persons, organizations or businesses owned or controlled directly or indirectly by the same interests. Control exists if a contract or lease, either written or oral, is entered into whereby one party undertakes activities for another in any but an arm's length transaction. In the case of related parties, the Tax Commissioner may apportion or allocate responsibilities between or among such persons, organizations or

businesses if he determines that such apportionment or allocation is necessary to more clearly reflect transactions.

2.13 "Residential solid waste" when used in describing disposal activities exempt from the solid waste assessment fee pursuant to W. Va. Code § 20-5F-5a(e) shall mean only that waste disposed of by those not in the business of hauling or disposing of solid waste. This waste must be disposed of in a manner consistent with Department rules regulating exempt disposal days and shall not include any solid waste of a type inconsistent with that typically generated at a residence.

2.14 "Reuse or recycling operation" means an operation at which reusable or recyclable waste is processed into a commercially salable form or where such waste is collected for shipment and sale to a commercial, municipal or industrial enterprise processing such waste.

2.15 "Reused or recyclable waste" means only that waste which meets the definition and standards of the Department for fee exempt disposal of such waste.

2.16 "Sewage" shall mean water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such ground water infiltration and surface waters as may be present.

2.17 "Sludge" means solid or semisolid residue or precipitate, separated from or created by a municipal, commercial or industrial waste treatment plant, water supply treatment plant or air pollution control facility or any other such waste having similar origin.

2.18 "Solid waste" means any garbage, paper, litter, refuse, cans, bottles, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, other discarded material, including carcasses of any dead animal or any other offensive or unsightly matter, solid, liquid, semisolid or contained liquid or gaseous material resulting from industrial, commercial, mining activity or from community activities but does not include solid or dissolved material in sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources and have permits under W. Va. Code § 20-5A-1 et seq. or source, special nuclear or by product material as defined by the Atomic Energy Act of 1954, as amended, or a hazardous waste either identified or listed under W. Va. Code § 20-5E-1 et seq. or refuse, slurry and overburden regulated under W. Va. Code § 22A-1-1 et seq.

2.19 "Solid waste assessment fee" means that fee imposed upon the disposal of solid waste pursuant to W. Va. Code § 20-5F-5a.

2.20 "Solid waste disposal" means the practice of disposing of solid waste including placing, depositing, dumping or throwing or causing to be placed, deposited, dumped or thrown any solid waste.

2.21 "Solid waste disposal shed" means the geographical area which the West Virginia Resource Recovery-Solid Waste Disposal Authority so designates on

either a temporary or permanent basis and files as such in the State Register pursuant to W. Va. Code § 16-26-8.

2.22 "Solid waste disposal facility" means any system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of solid waste, including landfills, transfer stations, resource recovery facilities and other such facilities not herein specified.

2.23 "Tax Commissioner" means the Tax Commissioner of the State of West Virginia, or his delegate.

2.24 "Transfer Station" means any location where solid waste is accumulated on a temporary basis for subsequent removal to a landfill or other solid waste disposal facility.

2.25 "Water resources", "water" or "waters" shall mean any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this State, or bordering this State and within its jurisdiction, and shall include, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds (except farm ponds, industrial settling basins and ponds and water treatment facilities), impounding reservoirs, springs, wells, watercourses and wetlands.

§ 110-6A-3. Imposition of tax. -Beginning July 1, 1988, and continuing until such time as it is repealed by the legislature, the solid waste assessment fee is levied and imposed upon the disposal of solid waste at any solid waste disposal facility in West Virginia.

3.1 The solid waste assessment fee shall be collected from the person disposing of solid waste at a solid waste disposal facility in West Virginia, at the time such solid waste is disposed of, by the operator of the solid waste disposal facility. The fee collected shall be remitted to the State Tax Commissioner.

3.2 Any person creating, contributing to or operating an open dump shall be subject to the solid waste assessment fee, upon any solid waste disposed at such open dump. Any landowner who fails to cooperate with the Department in stopping unauthorized dumping upon his land may, in the discretion of the Tax Commissioner and upon notice from the Department that said landowner has failed to cooperate with the Department, be issued an assessment for unpaid solid waste assessment fees which shall be imposed upon the solid waste disposed of on that landowner's property.

3.3 Any person or persons owning, operating or leasing a solid waste disposal facility shall be personally and jointly and severally liable for any solid waste assessment fees which are not collected from the person disposing of solid waste unless the facility is certified by the Department as an exclusive or cost-share solid waste disposal facility and is operated in a manner consistent with the provided exemption, or unless the solid waste is separated

at the time of disposal into a stock of reusable or recyclable solid waste, but only for that portion which is reusable or recyclable, and the solid waste disposal facility has a Department certified reuse and recycling project or the solid waste is disposed of pursuant to and subject to the Department's regulations authorizing residential exempt disposal as provided in W. Va. Code § 20-5F-5a(e)(3).

3.4 The solid waste assessment fee shall be collected both from persons disposing of solid waste at a transfer station and again upon the subsequent disposal of solid waste from the transfer station at another solid waste disposal facility. This pyramiding provision shall not apply, however, where the transfer station is operated by the same person operating the solid waste disposal facility to which the solid waste is subsequently removed.

§ 110-6A-4. Rate.—The solid waste assessment fee shall be imposed at a rate of one dollar and twenty-five cents per ton or part thereof on solid waste disposed of at a solid waste disposal facility located within the same solid waste disposal shed as the point of origin of the solid waste.

The solid waste assessment fee shall be imposed at a rate of two dollars and twenty-five cents per ton or part thereof on solid waste disposed of at a solid waste disposal facility when the point of origin of the solid waste is outside of the solid waste disposal shed in which the solid waste disposal facility is located.

4.1 Solid waste disposal sheds shall be those areas as finally designated in the State Register by the West Virginia Resource Recovery-Solid Waste Disposal Authority. In the absence of a final designation, the most recent designation published by the West Virginia Resource Recovery-Solid Waste Disposal Authority in the State Register shall constitute the solid waste disposal sheds.

4.2 No solid waste disposal facility authorized by the Department to handle an aggregate of ten thousand tons or more of solid waste per month may accept solid waste after July 1, 1988, unless the commercial solid waste disposal facility has Department of Labor approved scale facilities sufficient to weigh all solid waste as it arrives at the facility after June 30, 1988.

4.3 Every solid waste disposal facility other than those subject to the provisions of Subsection 4.2 of these regulations shall install by May 1, 1989, Department of Labor-approved scale facilities which will be sufficient to weigh all solid waste arriving at such facility on and after that date.

4.4 Those solid waste disposal facilities which are not authorized by the Department to accept an aggregate of ten thousand tons or more of solid waste per month may use the following conversion factors until May 1, 1989, in order to estimate the tonnage of solid waste disposed of at the facility for purposes of calculating the solid waste assessment fee due;

4.4.1 COMPACTED 2.5 cubic yards/ton

4.4.2	UNCOMPACTED	5.0 cubic yards/ton
4.4.3	BALED	1.25 cubic yards/ton
4.4.4	SOIL	0.6 cubic yards/ton
4.4.5	SLUDGE	1.0 cubic yards/ton

§ 110-6A-5. Return and Due Date.-The solid waste assessment fees collected by the operator of a solid waste disposal facility shall be due and payable on or before the fifteenth day of the month next succeeding the month in which the fee accrued, together with a return in such form or forms as prescribed by the State Tax Commissioner. A return shall be due regardless of the fact that no fees are due from the facility for the reportable month.

§ 110-6A-6. Exemptions From Fee.-The following transactions shall be exempt from the solid waste assessment fee:

6.1 Disposal of solid waste at a solid waste disposal facility by the person who owns, operates or leases the solid waste disposal facility if such facility is used exclusively to dispose of waste originally produced by such person in such person's regular business or personal activities or by persons utilizing the facility on a cost-sharing or nonprofit basis.

6.1.1 This exemption applies only to those facilities which obtain and maintain certification from the Department that the facility qualifies as an exclusive or cost-share solid waste disposal facility.

6.1.2 The exclusive or cost-share solid waste disposal facility will forfeit its certification for this exemption if it accepts any solid waste other than that originally produced by the exclusive user of such facility or by persons using the facility pursuant to a written non-profit or cost-sharing agreement.

6.2 Reuse or recycling of any solid waste.

6.2.1 This exemption applies only to those persons who obtain certification from the Department that the transaction qualifies as reuse or recycling.

6.2.2 This exemption may not be taken for disposal of solid waste except at a solid waste disposal facility with a certified reuse or recycling project or trans-shipment location.

6.2.3 Solid waste must be separated by the person disposing of the reusable or recyclable waste prior to disposing of such waste to qualify for exemption under these provisions.

6.2.4 This exemption does not apply where the operator of a solid waste disposal facility merely asserts an intention to reuse or recycle at a future date, but applies only to those operations where the reuse or recycling

activity is actually undertaken or where solid waste is accumulated for trans-shipment to a facility where actual reuse or recycling activities are occurring, as certified by the Department.

If the operator asserts an intention to reuse or recycle solid waste but fails to reuse or recycle the solid waste or to ship it to a facility which will do so, the operator shall be personally liable for the fee due on such tonnage and not the person who in good faith disposed of it with the operator.

6.3 Disposal of residential solid waste by an individual not in the business of hauling or disposing of solid waste shall be exempt only when done pursuant to regulations and requirements of the Department implementing this exemption.

§ 110-6A-7. Records.-Each solid waste disposal facility shall keep complete and accurate records of the following:

7.1 Amount of solid waste received from each person disposing of solid waste at a solid waste disposal facility.

7.2 The amount of solid waste disposal assessment fee collected from each person disposing of solid waste at the facility.

7.3 The identity of each person disposing of solid waste at the facility including the name and address of the individual.

7.4 The license plate number of the vehicle carrying the solid waste.

7.5 A copy of the manifest or an affidavit from the generator or collector of the solid waste identifying the type of waste and its origin, unless the solid waste is residential solid waste disposed of by an individual not in the business of hauling or disposing of solid waste.

7.6 Any other records the Tax Commissioner or Director deem necessary.

§ 110-6A-8. Records keeping.-All records and other documents shall be preserved for a period of time not less than three years from the due date of the monthly return to which they relate, unless:

8.1 The Tax Commissioner or Director in writing requires the operator to keep records for a longer period;

8.2 An agreement extending the time for issuance of a deficiency assessment is executed, which shall automatically extend the time for retention of records.

§ 110-6A-9. Confidentiality.-Pursuant to the authority granted under W. Va. Code § 11-10-5d(f), and upon passage of these regulations by the Legislature as legislative regulations, the State Tax Commissioner may enter into an agreement with the Director of the Department to exchange any information with the

Director, that the Tax Commissioner may in his discretion deem to facilitate the enforcement of W. Va. Code § 20-5F-1 et seq.

§ 110-6A-10. Procedure and Administration.-Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in W. Va. Code § 11-10-1 et seq. shall apply to the solid waste assessment fee.

§ 110-6A-11. Criminal penalties.-Notwithstanding W. Va. Code §§ 11-10-2 through 17, the provisions of W. Va. Code § 11-9-1 et seq. shall apply to the solid waste assessment fee.

§ 110-6A-12. Deposit of funds.-Net proceeds collected under W. Va. Code § 20-5F-5a by the Tax Commissioner shall be transferred to an account designated by the director, who then shall deposit the funds in other accounts as provided in W. Va. Code § 20-5F-5a(h). It shall be the duty of the director to make all calculations to assure the proper allocation and deposit of funds into the accounts as provided in subsection (h).

§ 110-6A-13. Person disposing of solid waste to pay, accounting by solid waste disposal facility.-The person disposing of solid waste shall pay the operator of the solid waste disposal facility the amount of the solid waste assessment fee, which shall be added to and constitute a part of the sales price, and shall be collectible as such by the solid waste disposal facility, which shall account to the State for all solid waste assessment fees paid by the disposer of solid waste. The solid waste disposal facility shall keep the amount of solid waste assessment fees paid separate from the proceeds of sale exclusive of the solid waste assessment fee unless authorized in writing by the Tax Commissioner to keep such fees in a different manner. Where such authorization is given, the State's claim shall be enforceable against and shall take precedence over all other claims against the moneys commingled.

The solid waste disposal facility shall report as it's "total solid waste disposed of during the month," it's tonnage total for purposes of determining the solid waste disposal assessment fees, not the actual weight totals of solid waste disposed of at the facility. Each load, or the total aggregate weight of all loads received from a particular person making more than one trip during the day, is to be rounded to the next highest whole number of tons, and the totals of these daily figures are to be totaled for the month and reported on the return as the "total solid waste disposed of during the month." For those haulers regulated by the West Virginia Public Service Commission, the total aggregate weight of all loads received for the month is to be rounded to the next highest whole number of tons, and this figure is to be used to compute the solid waste assessment fee due and the "total solid waste disposed of during the month."

§ 110-6A-14. No profit shall accrue to any person as a result of the collection of the solid waste assessment fee notwithstanding the fact that the total amount of such fees collected may be in excess of the amount for which such person would be liable pursuant to W. Va. Code § 20-5F-5a, and the total of all such fees collected by such person shall be returned and remitted to the Tax Commissioner as otherwise provided.

§ 110-6A-15. Receivership, bankruptcy; priority of tax.-In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all solid waste assessment fees due and unpaid, shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts due the United States which under federal law are given priority or except other taxes and debts owed the State of West Virginia.

§ 110-6A-16. Exempt Facilities.-Once a facility is certified exempt from the solid waste assessment fee by the Department of Natural Resources, no provisions of these regulations purporting to require the filing of returns, the keeping of records or the installation of scales shall apply.

§ 110-6A-17. Remittance Of Fee From Customers Billed Monthly.-For those customers billed on a monthly basis, the solid waste assessment fee accrued in a month may be reported as accrued in the following month in which payment is received by the landfill operator. For example, fees accrued in August, 1988 may be deemed to have accrued in September, 1988; such fees must be then remitted in October, 1988.

§ 110-6A-18. Limitation Of Liability Of Solid Waste Facility Operator Where Customer Fails To Pay Fee.-The solid waste facility operator will not be held liable for solid waste assessment fees invoiced to the hauler which the hauler refuses to pay if the operator, within thirty (30) days after the hauler refuses to pay the fees assessed, supplies the Tax Commissioner with copies of the invoices showing the amount of solid waste dumped by the hauler, the amount of solid waste assessment fee due from the hauler, and the name and address of the hauler.

§ 110-6A-19. Solid Waste From Both Inside And Outside The Waste Shed.-Haulers of solid waste with routes which cross a solid waste disposal shed line, shall provide the operator of a solid waste disposal facility with the percentage of accounts inside the waste shed and the percentage of accounts outside the solid waste shed so that the operator will be able to account for the totals to be included in the respective category of out-of-shed and in-shed tons reported on their monthly returns. Once the percentage of tons in each category is calculated, tonnage shall be accounted for in the manner required by Section 110-6A-13.

PUBLIC COMMENTS TO THE SOLID WASTE ASSESSMENT FEE REGULATIONS

The following are the public comments received on the Solid Waste Assessment Fee Regulations. Generally, the comments listed are not a word-for-word of those which were received; rather, what is provided here is a synthesis of that received. The Comments are followed by a brief statement of the Tax Department's response to the issue raised.

Comment: Exemptions are statutorily provided and should be self executing without prior certification by the Department of Natural Resources.

Response: The solid waste disposal assessment fee is directly deposited in special accounts administered by the Department of Natural Resources. The State Tax Department was given the task of collecting such fees without the provision of extra monies to administer such collection. Without increased resources it is unrealistic to expect the State Tax Department to adequately monitor compliance with the terms of W. Va. Code § 20-5F-5a. It was therefore decided that the best means of preventing circumvention of the law or abuse of the exemptions is to require certification of eligibility through the Department of Natural Resources. These certifications are not required to be provided to the Tax Department as such, but should be available should a question arise as to the applicability in any particular instance.

Comment: Returns, records and scales should not be mandatory for those facilities determined to be exempt by the Department of Natural Resources.

Response: A new section has been inserted in the regulations, as a result of the public comment period, relieving such facilities from the requirements of filing, recordkeeping and the installation of scales.

Comment: The lateness with which the regulations were filed and the subsequent tardiness in learning of the need for certification of all exemptions by the Department of Natural Resources will make it impossible to obtain such certifications prior to the due date of the first solid waste assessment return.

Response: The Department of Natural Resources has developed a standard temporary exemption form which can be mailed upon the receipt of any application for fee exempt certification. Those who do not write in within the one and a half months before the return is due, are required by emergency regulation to file and remit the solid waste assessment fees due until they do obtain the Department of Natural Resource's certification. Any

refunding procedure must be run by the Department of Natural Resources because it is the only agency authorized by statute to make transmittals of money from the special accounts created by H.B. 3146.

Comment: It is unfair to charge the entire \$1.25 per ton on a part ton. The fee should be prorated based upon the exact weight.

Response: The statutory language employed by the Legislature provides a rate of \$1.25 per ton "or part thereof". Such language as a matter of statutory construction must mean that any part of a ton is subject to the entire \$1.25 fee. Where the Legislature intends for a proration to occur it uses such phrases as "or in like ratio on any part thereof". See, W. Va. Code § 11-17-3.

The regulations have been amended to allow the aggregation of weights for all loads brought in by a person during a day before the fee is calculated for that person. This means the maximum cost above amounts actually dumped in any one day would be \$1.24 for any person disposing of waste. For those haulers whose rates are regulated by the Public Service Commission weights will be aggregated for the entire month before calculating the fee.

Comment: The definition of solid waste disposal facility should not include recycling or resource recovery facilities or transfer stations.

Response: Solid Waste disposal facility is defined in W. Va. Code § 20-5F-5a(d) as "any solid waste facility or open dump in this State." Solid waste facility is defined in W. Va. Code § 20-5F-2(g) as "any system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of solid waste, including landfills, transfer stations, resource recovery facilities and other such facilities not herein specified."

Comment: No fee can attach to transfer stations which handle materials on a temporary basis only.

Response: Transfer stations are included in the definition of solid waste disposal facilities and solid waste is disposed of there on a temporary basis, therefore the fee must be collected. The fact that the fee will be imposed upon the same solid waste once it is disposed of at another facility is in no way unfair given the fact that the fee is a user fee and the transfer station is a facility which must be monitored by the Department of Natural Resources. The intent of H.B. 3146 is not to minimize the initial cost of disposing of solid waste but rather to insure that waste is disposed of properly so that larger costs are not imposed upon the public at a later date to correct problems which can be prevented by proper facility monitoring.

Comment: Solid waste disposal facilities should not be required to have scales.

Response: The Legislature has imposed the solid waste assessment fee at a per ton rate. There is no uniform specific density for any conceivable category of solid waste. Therefore no method of estimating weight from volume measurement is feasible. The temporary conversion factors provided in the emergency regulations are only a stop-gap measure until scales can be acquired by all facilities. These conversion factors are generally extremely inaccurate and leave no tangible record such as weigh slips for use on the audit trail.

Comment: Solid Waste Facilities should not be required to record vehicle license numbers.

Response: These records are needed to match license numbers to weigh tickets and determine whether the vehicles came from inside or outside of the solid waste shed. This shows whether the proper rate was collected by the operator.

Comment: There should be no provision of personal, joint and several liability upon persons owning, operating or leasing a facility for fees not collected.

Response: H.B. 3146 sets up what is essentially a trust fund fee collection procedure, very similar to the sales tax where vendors collect the tax from the taxpayer and must remit tax collected to the State Tax Department. The emergency regulations place certain responsibilities upon the solid waste disposal facility operator to insure the fee is collected. These responsibilities are analogous to those placed upon the vendor by W. Va. Code § 11-15-1 et seq.

Comment: The provisions dealing with open dumps should attach only to those caught dumping at an open dump. No fee should attach upon amounts already in the dump.

Response: The regulations currently provide that fees are immediately due and assessable for all solid waste contained in an open dump. This provides a potent deterrent to unlawfully contributing to an open dump. The emergency regulations also allow the State Tax Commissioner to assess a landowner for all solid waste disposed on his land upon notice from the Department of Natural Resources that the landowner has failed to assist the Department in stopping illegal dumping at open dumps. This tool is viewed as a means to shut down landfill operations which attempt to operate in noncompliance with State law, and provides a potential revenue source for the Department to assist in the immense cost associated with cleaning up these sites. In no way would a landowner be liable in any manner without committing affirmative acts by which intent to break the law can be demonstrated.

Comment: The definition of exclusive cost share solid waste disposal facility should apply to those with an exclusive lease to use such a facility. The definition of residential solid waste should not be limited to the person generating the solid waste.

Response: These provisions have been modified in the agency approved amended emergency regulations to remedy these concerns.

Comment: The regulations should not apply to direct reuse of industrial by-products such as fly ash.

Response: There may be situations where such operations are determined by the Department of Natural Resources to be disposal of solid waste. Only in those circumstances would the regulations apply. Generally such operations would already be excepted from the regulations and fee as exclusive solid waste disposal facilities.

Comment: These regulations have no application to fossil fuel production businesses.

Response: Generally such businesses are regulated pursuant to other Chapters and Articles under the Code of West Virginia. If a business, however, were to engage in disposal activities as defined subject to the solid waste assessment fee in H.B. 3146, these activities will be subject to Department of Natural Resource rules, regulations and policies as they apply to solid waste disposal.

Comment: Criminal sanctions of the Tax Code should not be used to enforce H.B. 3146.

Response: H.B. 3146 provides that failure to comply with the terms of W. Va. Code § 20-5F-5a subjects a person to both the West Virginia Tax Procedure and Administration Act and the West Virginia Tax Crimes and Penalties Act.

Appalachian Power Company
PO Box 1986
Charleston WV 25327-1986
304 348 4700

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AUG 09 1988



APPALACHIAN
POWER

STATE TAX
COMMISSIONER

Mr. Ronald Potesta, Director
Department of Natural Resources
State Capitol
Charleston, WV 25305

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AUG 09 1988

August 10, 1988

STATE TAX
COMMISSIONER

Director Potesta:

Attached are comments by Appalachian Power Company, Ohio Power Company and American Electric Power Service Corporation on the West Virginia Department of Natural Resources emergency legislative rules regarding solid waste fee assessment exemptions and proof of proper solid waste disposal.

We are urging that portions of the rules be revised to more accurately reflect the Legislature's intent to not impose the exemption certificate requirements upon facilities which are statutorily exempt by definition, by the fact that the waste generator exclusively owns and uses the facility, or by the fact that the wastes are reused or recycled. We also urge that the rules be revised to provide more realistic requirements regarding proof of proper solid waste disposal.

Finally, we urge you to give special attention to the unique nature of coal combustion by-products--particularly ash--and the many economic benefits which derive from their utilization. Again, we submit that it is outside of legislative intent to create unnecessary regulatory burdens upon the current and potential use of such materials.

Thank you for your consideration.

Sincerely,

R. E. Northup
Vice President

cc: Michael Caryl, State Tax Commissioner

COMMENTS OF
APPALACHIAN POWER COMPANY
OHIO POWER COMPANY
AMERICAN ELECTRIC POWER SERVICE CORPORATION

REGARDING:

WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES
PROPOSED AND EMERGENCY RULES ON SOLID WASTE ASSESSMENT
FEE EXEMPTIONS AND PROOF OF PROPER DISPOSAL

Title 47, Series 38A and 38B

August 10, 1988

COMMENTS ON DNR RULES REGARDING
SOLID WASTE ASSESSMENT FEE EXEMPTIONS
AND PROOF OF PROPER DISPOSAL

These comments are offered by Appalachian Power Company, Ohio Power Company and American Electric Power Service Corporation, (the Companies) regarding the Department of Natural Resources' proposed and emergency rules regarding the solid waste assessment fee exemptions and proof of proper solid waste disposal. Those rules are intended to implement certain provisions of Enrolled Committee Substitute for H.B. 3146 enacted in the 1988 Regular Session. The Companies have previously submitted comments to the State Tax Commissioner regarding related rules on the solid waste assessment fees. As detailed in those comments, it is the position the Companies that the exemption set forth in W.Va. Code §20-5F-5a(e)(1) for exclusive, captive disposal sites is straightforward. The Companies believe that there can be no confusion about whether a particular disposal facility is owned, operated or leased by a solid waste generator, and whether the facility handles solid waste exclusively generated by the owner, operator or lessee in the course of its regular business. Such information is readily available to the DNR through its waste treatment and waste disposal permitting programs and need not be duplicated or supplemented through regulations requiring applications for certificates of exemption. Accordingly, the Companies urge both the Tax Commissioner and the DNR to delete any requirements for obtaining certificates of exemption for facilities which, by definition, are entitled to be excluded from payment of the fees.

Reuse and Recycling of Solid Waste

Of particular concern to the Companies is the treatment of material which is being reused or recycled. The Companies firmly believe that material which is being so used does not constitute "solid waste" as defined in the Solid Waste Management Act. Such material is not being discarded at all. Most especially, the Companies are concerned with the treatment by the Department of Natural Resources of the reuse and recycling of coal ash, a byproduct of coal combustion for electric generation.

The rules of the DNR regarding exemptions and those of the Tax Department regarding reuse and recycling do not seem at all to contemplate the kind of direct reuse or recycling of material which is a common feature in our operations. In most cases, our coal ash is directly reused as a fill material in structural landfills, as a filler in plastics, as an admixture in concrete and cement, blasting grit, roofing granules, road and ice control, mine

stabilization and reclamation, and many other applications. In fact, our Companies are constantly searching for other ways in which to beneficially utilize ash. The success of coal ash marketability turns primarily on the advantage of being a lower cost substitute for commercially available construction and manufacturing materials. Accordingly, any complications and regulatory burdens imposed on its utilization will negatively impact upon these efforts. We do not believe that this is consistent with the legislative history or intent of the original Solid Waste Management Act or the 1988 amendments.

As presently constituted the DNR's proposed rules on obtaining certificates of exemption might be construed to require facilities and activities beneficially utilizing ash to obtain certificates of exemption. We urge the DNR to modify the rule to eliminate any such implication.

Proof of Proper Solid Waste Disposal

Consistent with the foregoing comments, the Companies are concerned that the DNR proposed rules for proof of proper solid waste disposal can be construed to require information to be kept on each load of material disposed in a privately held solid waste disposal facility. We do not believe that this was intended by the Legislature in its authorization to the Director for the promulgation of rules regarding proper solid waste disposal. Rather, we believe that such information is intended under the statute to be compiled as to origin, type, and amount only with regard to disposal in commercial solid waste facilities. Such burdensome recordkeeping requirements on captive facilities cannot be justified. Accordingly, the Companies urge the DNR to eliminate any implication or requirement of such a nature with regard to captive facilities.

If you have any questions with regard to these comments, please contact Robert J. Robinson, Environmental Affairs Director, Appalachian Power Company, (703) 985-2300.

OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 8/11, 19 88 LOG NO. _____

TO: Robert Wilson - Legal

SUBJECT: _____

PLEASE:

Prepare a response for _____ signature with copy(s) to _____

Note

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AND

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REMARKS:



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STATE TAX DEPARTMENT

Weston Transfer, Inc. JUL 28 1988 2 11 D

CLERK NO. 26 (304) 269-2776

P.O. BOX 386
467 MAIN AVENUE
WESTON, WEST VIRGINIA 26452

July 25, 1988

State Tax Department
Division of Excise & License Tax
Tax Return Section (CSD)
Post Office Drawer 2991
Charleston, West Virginia 25330

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1988 AUG 12 PM 1:00
STATE TAX DEPARTMENT
LEGAL DIVISION

To Whom It May Concern:

In regard to the imposition of tipping fees on solid waste disposal, and the method of conversion from cubic yards to tons.

Enclosed is one Example:

Weight slip from one 1984 Ford with a 20 cubic yard Sani Cruiser Rear Loader Packer made by Leach.

Full Load	36,540 lbs.
Empty	24,010 lbs.

Weight difference 12,530 lbs.

Converted into tons App. 6.3 Tons or about 3.17 cubic yards per ton.

These were weighed at the Foster Feed Co., Depot Street, Weston, WV, on certified scales.

We also use a 1980 Ford with a 23 cubic yard Truxmore side loader packer, which will compact approximately 5 cubic yards to the ton.

The average compaction ratio is app. 3:1 or 4:1 from loose to compacted yardage, or 10 - 20 loose yards to the ton.

Also enclosed is information received from the National Solid Waste Management Association relating to the conversion method.

Please call me if I can be of more help.

Sincerely,
Larry D. Brown
Larry D. Brown

Enclosures



NSWMA

National Solid Wastes Management Association

Mr. Ronald Potesta
Department of Natural Resources
1800 Washington Street East
Charleston, WV 25305

Dear Mr. Potesta:

At the request of Larry Brown, Chairman of the West Virginia Chapter of the National Solid Wastes Management Association, enclosed is information compiled by our association that will enable you to determine the national average number of cubic yards of solid waste, compacted and loose, equivalent to a ton.

In the Technical Bulletin "Basic Data: Solid Waste Amounts, Composition and Management Systems," please refer to Table 6 on page 5. The table provides a range of the average number of pounds of compacted and loose refuse that equal a cubic yard. Reversing the conversions, you will find that an average of 2-4 cubic yards of refuse, compacted, is the equivalent of a ton (3 is the figure most commonly used), and 10-20 cubic yards of loose refuse amounts to a ton.

I hope this information is useful. Please contact our office should you need further assistance.

Sincerely,



Shari M. Jackson
State Affairs Analyst

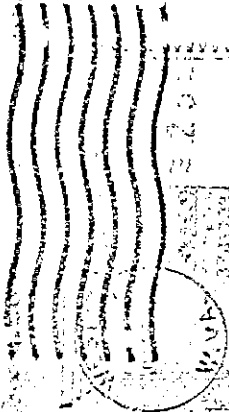
Enclosures

cc: Larry Brown
Chairman, West Virginia Chapter

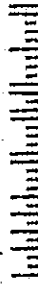
UNIT #7 9-9-85	133909
From Fall To	To
36.540	UNIT #7 9-6-85
Gross Load of	Empty
Tare Driver (on/off)	133914
Fees	From To
Net	24.010
Form 5 Dup. - Form 7 Trip	Gross Load of
	Tare Driver (on/off)
	Fees Date 19
	Net
	Form 5 Dup. - Form 7 Trip
	Weighter

Weston Transfer, Inc.

P.O. BOX 386
467 MAIN AVENUE
WESTON, WEST VIRGINIA 26452



State Tax Department
Division of Excise & License Tax
Tax Return Section (CSD)
Post Office Drawer 2991
Charleston, West Virginia 25330



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STATE TAX DEPARTMENT
LEGAL DIVISION



July 26, 1988

Mr. Michael E. Caryl
State Tax Commissioner
Rm. W.W.-300
State Capitol
Charleston, West Virginia 25305

Dear Mr. Caryl:

Re: **SOLID WASTE ASSESSMENT FEE**
W. VA. CODE §§ 11-10-5, 20-5F-5a(f) AND 29A-3-15

Virginia Power appreciates the opportunity to comment on the above captioned regulations. As the owner and operator of the Mt. Storm Power Station, located in Grant County, West Virginia, we find that these regulations directly effect our ash operations at that facility. Specifically, coal is burned at the Station to generate electricity and fly ash, bottom ash, and pyrites are produced as by-products of this combustion process. The ash and pyrites are collected and hauled by truck to a disposal facility which is located entirely on plant property and is used exclusively by Virginia Power for this disposal. Therefore we feel that it is appropriate to offer the following comments:

1. We are concerned that these emergency rules apparently were not distributed prior to their effective date. Lack of availability of the rules, and the immediate effective date make compliance extremely difficult, if not impossible. More importantly, the absence of a comment period prior to the effective date of the regulations can, and we believe already has, resulted in ill-advised administrative requirements that are costly and of little benefit.
2. We feel that those facilities that are exempt from the fee should not be required to file monthly solid waste assessment fee returns as required by paragraph 6.1.2. We fail to see the benefit, or even the purpose, that is served by filing the return for an exempt facility.
3. Paragraph 6.1.1 states that the exemption applies to those facilities which obtain and maintain the certification from the Department of Natural Resources (DNR). This implies that, even though a facility may qualify for an exemption, it will not be exempt until it has received the certification from the DNR. We can envision the DNR being inundated with applications for certificates of exemption, particularly with such short notice. Must monies be

Mr. Michael E. Caryl
Page 2
July 26, 1988.

remitted to the Tax Commissioner prior to obtaining a certificate of exemption, and if so, will these fees be refunded after the facility obtains such a certificate?

4. We feel that the requirements of paragraph 4.2 to have scales of sufficient capacity, and to weigh all solid waste prior to disposal places an unreasonable burden on those facilities qualifying for an exemption from fee under paragraph 6.1. Our facility will incur a considerable, and, we believe, unnecessary expense in order to comply with this provision. At most, the fee-exempt facilities should be allowed to use some other method of quantifying the amount of waste, perhaps similar to the conversion factors provided in paragraph 4.4.
5. Finally, it is unclear from the definition of Solid Waste Disposal contained in paragraph 2.20 if the regulations are meant to apply to ash which is used as a structural fill material. The Environmental Protection Agency's recent Report to Congress on Wastes from the Combustion of Coal by Electric Utility Power Plants clearly encourages the beneficial reuse of combustion by-products in, among other uses, such applications as road construction and structural fill material. To tax the placement of this material would seriously harm programs to reuse this material and would result in the substitution of other valuable resources in these applications.

Once again we wish to express our appreciation for the opportunity to comment on these regulations and hope that our concerns will be seriously addressed in the positive manner in which they are offered. If we can provide any further information, please contact either Mr. W. A. Sprouse at (804) 273-3552 or Mr. M. F. Kadlubowski at (804) 273-2991.

Sincerely,



B. M. Marshall, P.E.
Manager
Water Quality

MFK:ro:1218

cc: Mr. Ronald R. Potesta, Director
West Virginia Department of Natural Resources
Building 3, Room 669
Capitol Complex
Charleston, West Virginia 25305

5000 Dominion Boulevard
Chen Allen, Virginia 23060



Mr. Michael E. Caryl
State Tax Commissioner
Rm. W.W.-300
State Capitol
Charleston, West Virginia 25305



OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 7/29, 19 88 LOG NO. 88-TL-618

TO: John Montgomery

SUBJECT: _____

PLEASE:

Prepare a response for _____ signature with copy(s) to _____

Note

Approve

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Take Appropriate Action

AND Return to _____

Forward to _____

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REMARKS:

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LEGAL DIVISION



Nicholas Sanitation, Inc.

P. O. Drawer 9
Craigsville, W. Va. 26205
Phone 872-3686

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JUL 29 1988

STATE TAX
COMMISSIONER

STATE TAX DEPARTMENT
LEGAL DIVISION

1988 AUG - 0 PM 2:20

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July 27, 1988

Michael E. Caryl
State Tax Commissioner
Room WW-300
State Capitol
Charleston, WV 25305

Dear Sir:

We wish to protest the way the State Tax Department interprets section five-A article five F, Chapter twenty, lines one through five of HB 3146.

We fill it is unfair to Solid Waste Haulers to pay the full amount of the assessment fee of \$1.25 on a portion of a ton of each truck load of garbage dumped at a landfill.

Our landfill bills us monthly. They convert pounds into tons and bill us for the exact amount of solid waste dumped. This is the correct method of billing.

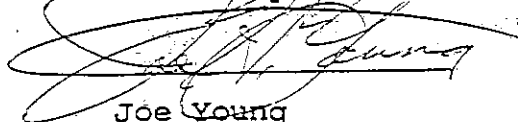
With the Tax Department interpretation, we will be paying assessments fee's on tons and tons of solid waste we never dumped at the landfill because you are charging the full assessment fee on a portion of a ton on each truck load of solid waste dumped at the landfill.

EXAMPLE: One truck load of solid waste weighing 6 tons 200 pounds will cost us another \$1.25 on the 200 pounds when in essence the true amount should be 12½ cents.

It is evident using the tax department method of interpretation will add much more to the cost of dumping fee's.

We strongly urge you to be fair and change the method of paying the assessment fee to the exact amount of solid waste dumped in the landfill.

Sincerely,



Joe Young
President

cc: Senator Tonkouch
Senator Tucker
Delegate Chambers

Nicholas Sanitation, Inc.
P.O. Drawer 130
Craigsville, WV 26205

Michael E. Caryl
State Tax Commissioner
Room WW-300
State Capitol
Charleston, WV 25305



Postage
95157



OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 7/29, 1988 LOG NO. 88-TL-620
TO: John Montgomery
SUBJECT: _____

PLEASE:

_____ Prepare a response for _____ signature with
copy(s) to _____

Note

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_____ Return

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STATE TAX DEPARTMENT
LEGAL DIVISION



The State Chamber

Serving a united business community since 1936

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1988
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JUL 29 1988

July 29, 1988

Mr. Michael E. Caryl
State Tax Commissioner
Room WW-300
State Capitol
Charleston, West Virginia 25305

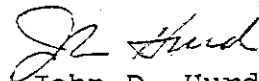
STATE TAX
COMMISSIONER

Re: Comments on Solid Waste
Assessment Fee Legislative
Proposed and Emergency Rules,
Title 110, Series 6A.

Dear Commissioner Caryl:

I am submitting to you on behalf of the members of the West Virginia Chamber of Commerce our comments with regard to the emergency and proposed legislative rules regarding solid waste assessment fees which were filed by your office with the Secretary of State of June 30, 1988. The Chamber would greatly appreciate your consideration of these detailed comments and your cooperation in making amendments to the existing emergency rules prior to August 15, 1988, to avoid imposing any unnecessary burden on businesses and individuals to file tax returns by that date where such persons are entitled to be exempt from the payment of the fee. Our concerns with this rule and our specific suggestions for change are set forth in these comments. If you have any questions, please feel free to contact me.

Very truly yours,


John D. Hurd
President

JDH:dls

BEFORE THE WEST VIRGINIA
TAX DEPARTMENT

COMMENTS OF THE WEST VIRGINIA CHAMBER OF COMMERCE
REGARDING SOLID WASTE ASSESSMENT FEE
EMERGENCY LEGISLATIVE REGULATIONS
(Title 110, Series 6A, 1988)

Submitted July 29, 1988

COMMENTS OF THE WEST VIRGINIA
CHAMBER OF COMMERCE REGARDING
SOLID WASTE ASSESSMENT FEE RULES

Introduction

These comments are submitted by the West Virginia Chamber of Commerce on behalf of its members. The assessment fee rules, as presently written and in effect, adversely impact a very large number of the Chamber's members. Accordingly, the Chamber wishes to bring its serious concerns about these rules to the Tax Department's attention along with a request that immediate revisions be made to them prior to the first due date for returns on August 15, 1988.

Lack of Notice

The emergency rules were filed on June 30, 1988 and made effective the next day, July 1. It is our sincere conviction that there are still many persons in the state directly liable under these rules who have not even seen a copy of them, much less implemented the detailed requirements. Many would be fortunate to even know that the law has changed. This is particularly true because many who have presumed themselves exempt due to clear statutory language will also assume that any rules do not affect them. That, as it turns out, would be an erroneous presumption which could result in the imposition of fines, penalties and even a loss of exemption.

The Chamber fully appreciates that the law, enacted on March 12, 1988, signed by the Governor on March 31, did not become effective until June 10, 1988. The revenue provisions for collecting tipping fees, W.Va. Code §20-5F-5a, became effective on July 1, 1988. We understand that need which the Commissioner obviously felt to get rules into effect as quickly as possible to begin collecting those fees. However, we believe these rules go beyond the authority of the Commissioner to prescribe forms for the return of these fees to the State. W.Va. Code §20-5F-5a(b). They also go beyond what is reasonable and necessary to assure proper collection.

Therefore, the Chamber believes that much of the emergency rule cannot be supported as necessitated by an "emergency" as contemplated under W.Va. Code §29A-3-15(g).

Because of the importance of these rules to the general public and to affected businesses, the Chamber believes that a public hearing to receive comments is necessary, not just a written comment period.

Rule Framework

The Chamber's basic objection to these rules comes down to the fact that they are drawn in such a fashion that even those facilities which are exempt from the payment of the tax fee are nonetheless subject to all of the rulemaking and reporting burdens of this rule. The only requirement from which they escape is the actual payment of the fee. There can be no possible justification

for this kind of regulatory burden. The recordkeeping provisions alone which are associated with this rule will be enormous and will apply to every solid waste facility, whether privately owned or publicly owned and operated, in the State. This recordkeeping burden is particularly inappropriate as it relates to a tax regulation. The keeping of such records and the making of tax returns whether or not fees are due cannot be justified as a means of policing those who are subject to payment of the tipping fee. Furthermore, W.Va. Code §20-5F-5a(e) provides that certain transactions shall be exempt from the fee imposed. The statute then goes on to list specifically three kinds of transactions which are exempt from the fees by statute. In the face of this clear statutory exemption, we cannot support any method which would force such individuals to seek certificates of exemption from the Tax Commissioner or the DNR in order to prove their entitlement to an exemption already granted by statute. Furthermore, once an exemption is applicable, the exempt party should be completely free of any regulatory burden in these rules. The exemption should be complete.

Accordingly, the Chamber requests that the Tax Commissioner revise these rules to provide directly for the statutory exemptions without need for any persons to obtain certificates of entitlement to an exemption and that the rules be further revised to eliminate any recordkeeping or other substantive requirements on facilities and persons exempt from the fee payment.

This request, of course, will require considerable revision of the emergency regulations. The following passages set forth our more detailed criticisms of the rules.

"Exclusive or Cost-share Solid Waste Disposal Facility"

The Department has chosen to define this phrase, which is related to entitlement to an exemption, by reference to a certification from the Department of Natural Resources. However, the definition goes on to limit this phrase to mean persons operating under a cost-sharing agreement. The statutory exemption in W.Va. Code §20-5F-5a(e)(1) extends not only to exclusive use facilities but also facilities utilized on a cost-sharing or nonprofit basis. Furthermore, the definition seems to suggest that the exemption is limited to a lessor of a facility. In fact, the discussions surrounding the development of this concept in the legislation contemplated disposal at a facility for which the generator was actually the lessee. We believe that this proposed definition is therefore incorrect with respect to the exemption stated and furthermore is a concept which should be left to definition and implementation by the Department of Natural Resources.

"Open Dump"

While this definition tracks the statutory definition closely, the tax rules have inserted the word "valid" before the

word "permit." A conforming amendment should be made to this definition.

"Residential Solid Waste"

This definition is also tied to a statutory exemption from tipping fees. The statutory reference deals with disposal of residential solid waste "by an individual not in the business of hauling or disposing of solid waste." This does not suggest that the waste from the residence must be disposed of by the actual individual generating the waste. Rather, the exemption goes to the disposal of residential type waste on a tax-free basis on such days and times as are designated by the Director of the DNR. Again, we believe that the definition of "residential solid waste" should be left to the Director of the DNR to identify those circumstances which would be considered to be by individuals not in the business of solid waste disposal. For example, the DNR might choose to exempt from the tipping tax fee disposal of remodeling wastes by contractors doing residential work if that waste is disposed of at facilities during designated days and hours.

"Reuse or Recycling Operation"/"Reused or Recyclable Waste"

In connection with these two definitions, the Chamber calls the attention of the Department to the DNR's Solid Waste Management regulations, Title 47, Series 38, filed on April 1, 1988. In those rules, in Sections 2.24 and 2.25, the terms "recycling facility" and "resource recovery facility" are defined. The term "reuse" is not defined in either the DNR regulations or

the tax regulations. However, it is important to understand that reuse may be direct without any involvement with a recycling facility or operation. The rules of the Tax Department do not seem to recognize or take into account the possibility of direct reuse. The statutory exemption from payment of the fee applies to both reuse and recycling. Accordingly, it is important to include both concepts. At a minimum, we would request that the Tax Department defer to the DNR definitions now existing for "recycling facility" and "resource recovery facility." Furthermore, we would urge that the regulations make it clear that direct reuse of a material is also exempt from the fee. In fact, it is the position of the Chamber the definition of the term "solid waste" in the statute itself refers solely to "discarded material" and therefore cannot legally extend to any material which is reused or recycled since such material is not waste. For example, the use of fly ash in structural fills associated with construction operations, or as an additive in the production of concrete, is a direct use of a combustion by-product which does not constitute disposal of a waste.

"Solid Waste"

While we certainly do not quarrel with this definition since it is identical to the statutory definition for solid waste, the Chamber would point out that by virtue of this definition itself, as previously mentioned, certain activities although they deal with solid waste disposal will not be included within the

ambit of these regulations whatsoever. For example, material which is not being discarded but is being reused or recycled does not constitute solid waste. In addition, materials in irrigation return flows and industrial discharges which are point sources and have permits under the state Water Pollution Control Act are likewise excluded. So is the disposal of any hazardous waste which is regulated under Chapter 20, Article 5E and all refuse, slurry and overburden regulated under Chapter 22A, the state Surface Mining Laws.

"Solid Waste Disposal Facility"

The Chamber strongly disagrees with the definition for this term which is included in Section 2.22 of the Emergency Rules. The solid waste assessment fee is imposed only upon the disposal of solid waste at any solid waste disposal facility not exempt. W.Va. Code §20-5F-a(a). Clearly then, a disposal facility cannot include recycling facilities, resource recovery facilities or transfer stations. The Department has taken unfortunate liberty in transferring the definition of a "solid waste facility" and superimposing it on the definition for disposal facility. This is not authorized and clearly not intended by the statute. The Department of Natural Resources properly makes this distinction in its regulations in Section 2.30 which defines "solid waste disposal facility" to mean:

Any solid waste facility installed, established, constructed, modified or operated for the purpose of solid waste disposal. (emphasis added.)

The whole section around which this regulation is built has to do with disposal alone. Accordingly, we urge the Commissioner to substantially modify this definition to conform to the DNR regulations.

"Transfer Station"

The Chamber submits that there is no need for a definition such as this in these rules since no fee can attach to transfer stations which handle material only on a temporary basis and do not dispose of solid waste. In addition, we also point out that the Tax Commissioner's definition is at variance with that of the DNR found in Section 2.34 of the DNR rules. At the very least, these definitions should be identical.

Fees on Open Dumps

In applying Section 3.2 of the regulations, it must be remembered that an "open dump" can be any facility which for whatever reason does not have a permit pursuant to Chapter 20, Article 5F. That fact alone would not subject disposal in the open dump to the solid waste assessment fees if the material so disposed is otherwise exempt from payment of assessment fees. Furthermore, we would be concerned that this section not be construed to impose the solid waste assessment fee on "all solid waste disposed of at such open dump." This language seems to imply that the Tax

Commissioner could go back and assess a fee against all solid waste existing at the open dump, rather than only that material disposed of there after July 1, 1988. Furthermore, while the Chamber does not condone the existence of any open dump, we believe that the statute imposing the solid waste assessment fee applies only to the disposal of waste and attaches only to the person who is disposing of it. Accordingly, the landowner who has not personally contributed to an open dump on his land cannot be legally assessed for unpaid solid waste assessment fees. There is no authority in W.Va. Code §20-5F-5a for imposition of the fee on anyone other than the disposer.

Liabilities of Owners, Operators and Leasing Parties

Section 3.3 of the rules similarly attempts to impose personal, joint and several liability upon a person owning, operating or leasing a solid waste disposal facility for fees not collected from persons disposing of solid waste in that facility unless the facility is certified as exempt. As stated previously, we do not believe that there is any statutory authority for the imposition of fees on anyone other than persons disposing of solid waste. Furthermore, if the facility is a disposal facility or activity which is statutorily exempt from the payment of fee, we do not believe that a certificate of exemption can be required as a precondition of entitlement to that statutory exemption. Accordingly, we urge the Department to delete this subsection.

Transfer Station Assessments

The Chamber also strongly objects to Section 3.4 which attempts to impose the solid waste assessment fee against "disposal" of solid waste at a transfer station. Transfer stations by definition do not dispose of solid waste. The waste assessment fee may only be imposed upon disposal. Accordingly, this provision is unauthorized by law and should be deleted.

Rates

Limited experience with the application of the assessment fees has revealed that operators are having a difficult time determining how to fairly assess the disposal fees. Section 4 of the rules requires the fee to be imposed on each ton or part thereof. Accordingly, if a load is one pound over a ton, an additional \$1.25 must be charged and collected. Operators have pointed out that over a month's time this can amount to considerable poundage which has not been disposed of but on which an assessment fee has been imposed. Accordingly, this section should be clarified to allow operators to impose the rates on something other than a per load basis if it is the intention of the Department to permit such calculation. Certainly, the Chamber would endorse a flexible position on the part of the Department which will allow imposition of the fee to be calculated on as fair a basis as possible relative to the actual amount of waste disposed in a given month by a given disposer. A graduated scale or other clear guidance allowing aggregation should be included in these rules.

Scale Facilities

Sections 4.2 through 4.4 contain requirements that facilities utilize Department of Labor approved scale facilities to weigh all solid waste as it arrives at disposal facilities for purposes, presumably, of verifying tonnages subject to the assessment fee. For facilities over 10,000 tons or more of solid waste per month, that scale requirement went into effect immediately on July 1, 1988. In so doing, the Department has made a very large assumption that all such facilities already have commercial scales in place. Furthermore, it has assumed that all solid waste disposal facilities use scales. While this may be true for commercial solid waste disposal facilities of that size, there are many privately owned solid waste disposal facilities which are not going to be subject to these fees at all which do not use scales. In fact, many of them dispose of solid waste in facilities by pipeline or other means of transport, not trucks. In other cases, facilities may be using transport vehicles which cannot be weighed on conventional commercial scales or to do so may create serious disruption of normal business operations.

Scale facilities of the type envisioned by these rules are very expensive to install and maintain. Costs of \$20,000 to \$100,000 per scale facility will be involved, apart from ongoing operation and maintenance expenses. The imposition of this requirement on all solid waste disposal facilities, whether or not

they are subject to the payment of any fee, is unjustified and should be withdrawn.

Even for those facilities which will be paying the fee, these rules must be written flexibly to allow the use of scales or the use of conversion factors. We know of no reason why an absolute requirement for scales is necessary. Accordingly, we urge the Department to delete any requirement for the use of scales and instead adopt only a conversion factor method for calculation along with a provision for approval of other conversion factors on a case-by-case basis for material which does not fall within any of the categories presently appearing in the emergency rule.

Return and Due Date

The Chamber objects to the requirement in this section that a return be filed regardless of the fact that no fees are due from a facility. If no fees are due, no return should be required. To do so simply imposes an unjustified paperwork burden. At the very least, exempt facilities and transactions should not be required to file returns.

Exemptions From Fee

As indicated earlier in these comments, the Chamber opposes the approach of the Tax Department in these rules to impose extensive requirements on facilities which are entitled to a statutory exemption from the fee. Such facilities and transactions should also be exempt from any of the burdens of this regulation. Accordingly, exclusive use, cost-share and nonprofit disposal

facilities should not be required to keep any records for the Tax Department, nor should they be required to file any monthly solid waste returns. No certificate of exemption should be necessary to be obtained from the Department of Natural Resources to entitle a qualifying facility to take advantage of its statutory exemption. Furthermore, Subsection 6.1.4 seems to suggest that the qualification for a certificate of exemption for cost-share or nonprofit facilities must be based on a written agreement. The statute does not require a written agreement and the Commissioner cannot, therefore, require one.

Similarly, we object to the provisions in 6.2 regarding the reuse or recycling of solid waste. Reuse and recycling per se do not constitute disposal of solid waste. That is why they are subject to a statutory exemption for the fee for disposal. No certificate of exemption should be required and no records should be required to be kept for their own sake. Whether or not an activity actually constitutes legitimate reuse or recycling should be left to the Department of Natural Resources in association with its permitting program. As indicated in earlier passages of these comments, the Chamber is also concerned that the Department has taken a much too narrow view of what activities are exempt as reuse or recycling.

Records

Consistent with our position with regard to other parts of these rules, the Chamber believes that the recordkeeping

requirements under Section 7 should not apply to all solid waste disposal facilities, but rather, only to those facilities subject to payment of the assessment fees. Furthermore, the Chamber believes that even as to those persons required to pay the fee and keep records that some of the provisions are unreasonable. For purposes of the tax rules, only Subsections 7.1, 7.2 and 7.3 can be justified. We know of no reason why the license plate number of a vehicle carrying the solid waste should be recorded, nor why the Tax Department has need to require the keeping of manifests or affidavits identifying waste type and origin. Subsection 7.6 is an open-ended requirement which should be deleted.

The Tax Commissioner should be mindful that under the provisions of W.Va. Code §20-5F-4(j), the DNR Director is now empowered and will be requiring persons disposing of solid waste at commercial solid waste facilities within the state to file with the operator of that commercial facility records concerning the type, amount and origin of solid waste disposed of by them. Furthermore, operators of commercial solid waste facilities must maintain records and file them with the Director concerning the type, amount and origin of solid waste accepted by them. Accordingly, there is no reason for the Tax Commissioner to require the keeping of duplicative records. Certainly, those records kept by commercial solid waste facilities will provide sufficient information to the Tax Commissioner.

Criminal Penalties

Section 11 of the Emergency Regulations have misapplied the statutory provisions of W.Va. Code §20-5F-5a(g). This section should read:

Notwithstanding §11-9-2 of the W.Va. Code, the provisions of W.Va. Code §11-9-3 through 17 shall apply to the solid waste assessment fee imposed pursuant to W.Va. Code §20-5F-5a(a).

Care should be taken in setting forth this section since the special provisions in the Solid Waste Management Act on criminal penalties contained in Section 11 of these rules applies only to the fee and not to other provisions of the rules. These tax rules were promulgated pursuant to the West Virginia Solid Waste Management Act. Accordingly, violations of any of the rules with the exception of the payment of the fee are only enforceable through the provisions of the Solid Waste Management Act, not the punitive provisions of the tax code.

Accounting by Solid Waste Disposal Facility

Consistent with our previous comments, we urge the Commissioner to modify the provisions of Section 13 which require each load to be rounded to the next highest whole number of tons. We believe that this requirement will result in over collection of tax revenues and should be more equitably applied by means of a graduated scale or by aggregation.

Conclusion

On behalf of the members of the West Virginia Chamber of Commerce, we strongly urge the Commissioner to review and revise the present Emergency Regulations consistent with the suggestions in these comments. It is extremely important that these revisions be completed and placed into effect prior to August 15, 1988, when the first tax returns will be due from facilities all over the state. To fail to do so will impose a serious and unjustified burden on facilities not contemplated by the Legislature when it enacted Committee Substitute for H.B. 3146. Furthermore, we would expect that the Department of Natural Resources will be inundated by requests for certificates of exemption which it cannot possibly process by August 15. There is at least some implication that a facility would be liable for the payment of these fees unless the certificate is issued prior to that date. As previously stated, we seriously doubt whether most of the effected persons around the state are even aware of the new provisions of this law much less the detailed requirements of these new regulations. Accordingly, the Department can anticipate widespread noncompliance in these early weeks. Under such circumstances, it is imperative that immediate steps be taken to address the onerous provisions of these regulations and eliminate them.

OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 7/29 19 88 LOG NO. 88-TL-621

TO: John Montgomery

SUBJECT: _____

PLEASE: _____

Prepare a response for _____ signature with copy(s) to _____

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STATE TAX DEPARTMENT
LEGAL DIVISION



Appalachian Power Company
PO Box 1986
Charleston, WV 25327-1986
304 348 4700



1988 AUG - 0 PM 2: 20
STATE TAX DEPARTMENT
LEGAL DIVISION

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Mr. Michael Caryl
State Tax Commissioner
Room WW-300
State Capitol Building
Charleston, WV 25305

July 29, 1988

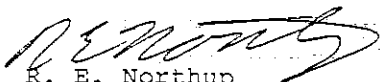
Dear Commissioner Caryl:

Attached are comments by Appalachian Power Company, Ohio Power Company and American Electric Power Service Corporation on the West Virginia Tax Department Solid Waste Assessment Emergency Rule, issued June 30, 1988.

We are urging that portions of the rule be revised to more accurately reflect the West Virginia Legislature's intention to limit applicability of the solid waste assessment fee to solid waste disposal in commercial landfills.

If you have any questions or would like to further discuss the issues we have raised in these comments, please contact P. Scott Icard at 348-4712 or Kevin D. Mack at (614)223-1642.

Sincerely,


R. E. Northup
Vice President

cc: Mr. Ronald Potesta, Director, DNR

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JUL 29 1988

STATE TAX
COMMISSIONER

COMMENTS ON STATE TAX DEPARTMENT
EMERGENCY RULES REGARDING
SOLID WASTE ASSESSMENT FEES

SUBMITTED BY:

APPALACHIAN POWER COMPANY
OHIO POWER COMPANY
AMERICAN ELECTRIC POWER SERVICE CORPORATION

July 29, 1988

COMMENTS ON STATE TAX
DEPARTMENT EMERGENCY RULES REGARDING
SOLID WASTE ASSESSMENT FEES

These comments are offered by Appalachian Power Company, Ohio Power Company and American Electric Power Service Corporation (the Companies) on the West Virginia State Tax Department's June 30, 1988 emergency final rule. That rule implements the Solid Waste Assessment Fee established by West Virginia Code § 20-5F-5a (enacted in Enrolled Committee Substitute for H.B. 3146, 1988 regular session). The Tax Commissioner's responsibilities should be limited strictly to codifying the tax payment, collection and necessary record-keeping requirements for solid waste disposal activities which are covered by the law. The Commissioner's June 30, 1988 emergency rule goes beyond the simple statutory scheme created by the West Virginia legislature and imposes requirements which are inconsistent with the statutory language and the legislative findings and statement of purpose. In doing so, the Commissioner has entered into areas of environmental policy-making which are more properly the responsibility of the Department of Natural Resources (DNR).

Consistent with the stated legislative goals of conserving diminishing public landfill disposal capacity, the legislature chose to exclude from the solid waste assessment fee any disposal of solid waste by a person who owns, operates or leases an approved disposal facility if that facility exclusively disposes of waste produced in the person's business activities. Similarly, the legislature chose to exclude "reuse or recycling"

of solid waste so as not to discourage the beneficial use of materials which would otherwise be disposed of as solid waste.

Exemption from the Solid Waste Assessment Fee at Captive Disposal Sites

The exemption from the solid waste assessment fee for captive disposal sites -- those owned, operated or leased by the generator and disposing exclusively of the generator's solid wastes -- is a recognition that such sites do not contribute to the problems which the assessment fee is designed to address. Because disposal of industrial waste at captive site is an alternative to disposal in commercial landfills, these sites do not aggravate the problem of scarce public landfill disposal capacity.

In enacting H.B. 3146, the legislature acknowledged that there are hidden and indirect costs to the operation of public, commercial landfills, such as county landfills. The solid waste assessment fee is designed to ensure that disposal at commercial facilities more fully reflects the real administrative, enforcement, maintenance, and potential clean-up costs. With captive industrial solid waste landfills directly controlled by the generator, the administrative and operational costs are internalized.

As set forth in W.VA Code § 20-5F-5a(e)(1), the exemption for exclusive, captive disposal sites is straightforward. Section 5a imposes no waste assessment fee obligations for exclusive disposal of solid wastes at facilities meeting the unambiguous criteria of Subsection 5a(e)(1). In contrast, the

Commissioner's emergency rule imposes three unnecessary hurdles for qualification and continued compliance with the solid waste assessment exemption. To begin with, even those facilities clearly meeting the statutory definition are, in effect, presumed to be subject to the assessment fee until a demonstration of qualification is provided to the DNR. The applicability of the assessment fee to the facility continues until the DNR certifies that the facility qualifies for the exemption as an exclusive disposal site, see Section 110-6A-6.1.1.

While there may be some justification to this demonstration and certification approach for "cost-share" disposal facilities, where reasonable disagreements may exist as to eligibility for an exemption, there can be no confusion about whether a particular disposal facility (1) is owned, operated or leased by the solid waste generator; and (2) exclusively disposes of solid waste generated by the owner, operator or lessee in the course of regular business. Such information is readily available to the DNR through its waste treatment and waste disposal permitting programs and need not be duplicated or supplemented through regulations issued by the Tax Department. At the very least, any qualification or notification requirements beyond the provisions of Subsection 5a(e)(1) for exclusive, captive disposal sites should be established by the DNR and not by the Commissioner.

An even more pointless requirement of the Commissioner's emergency rule is that exclusive, captive solid waste disposal facilities certified by the DNR under the

procedures described above must "file monthly solid waste assessment fee returns whether or not any such fees are due." Section 6.1.2. If the facilities are exempt from the solid waste assessment fee, there is no logical justification for imposing Tax Department record-keeping and requiring submission of monthly returns to the Commissioner.

We urge the Tax Commissioner to delete this record-keeping and filing requirement for exclusive solid waste disposal facilities which are exempt under Subsection 5a(e)(1) and repromulgate regulations which restate the statutory exemption language without additional, unnecessary hurdles to qualification.

Exemption from the Solid Waste Assessment Fee for Reuse or Recycling of Solid Waste

An exemption from the solid waste assessment fee is provided in Subsection 5a(e)(2) of Article 5F for "reuse or recycling of any solid waste." The rationales previously described for exempting disposal of solid waste at exclusive, captive disposal sites apply to reused or recycled material, because utilized material does not compete with solid waste for scarce public landfill disposal space. The general statement of purpose and legislative findings for Article 5F stress that "resource recovery and recycling reduces the need for landfills and extends their life" and that present disposal practices can result in "the squandering of valuable non-renewable and non-replenishable resources contained in solid waste" and ought to be changed. Therefore, the socially beneficial advantages of recycling and

reuse should not be discouraged through the imposition of disposal taxes.

As companies which generate large volumes of coal ash as a by-product of burning West Virginia coal for electrical generation, we are directly and substantially affected by the way in which the reuse or recycling exemption will be implemented. The companies have in place a very active marketing and research and development program which fosters utilization of coal ash as a valuable resource in such applications as a filler in plastics, an admixture in concrete and cement, blasting grit, roofing granules, road and ice control, mine stabilization and reclamation, and structural filling. Although coal ash is often technically superior to the materials for which it is substituted, the success of coal ash marketability turns primarily on the advantage of being a lower cost substitute for commercially available construction and manufacturing materials. For this reason, applicability of a solid waste assessment fee, involved paperwork requirements, and delays from certification could have serious negative impacts on coal ash utilization activities. We offer these comments in a constructive effort to ensure that the reuse of coal combustion by-products in West Virginia will continue and even expand, thereby reducing the amount of coal ash which needs to be disposed of and benefitting our customers through reduced utility operating expenses.

In establishing the exemption for reuse or recycling of solid wastes, the legislature did not define the terms, presumably preferring that they be understood in their common sense

meanings. Section 6.2 of the Tax Department's regulations has added confusion to a relatively straightforward exemption by specifying that "this exemption applies only where the solid waste has been separated by the person disposing of the reusable or recyclable waste prior to disposing of such waste." Furthermore, this exemption can only be taken for recycling or reuse "at a solid waste disposal facility with a certified reuse or recycling project."

The Commissioner's description of "reuse or recycling" suggests a narrow conception of materials reuse which is limited to separation of bottles, cans, newspapers, and similar reusable materials from garbage and trash. It appears that the Commissioner may have focused on the definitions of "resource recovery facility" and "recycling facility" under Section 2 of the DNR's solid waste regulations, Title 47, Series 38. Under the DNR's solid waste facility management program, these specifically defined recycling facilities and resource recovery facilities are considered "solid waste processing or recycling facilities" and must be permitted. See C.S.R. 47-38-3.3, and 4.

However, there are various industrial by-product and materials utilization activities (such as coal ash utilization for the purposes described on page 5) which are not directly analogous to the narrow reuse/recycling activities identified by the Commissioner in Section 6.2 of the emergency rules. Therefore, absent the Tax Commissioner's restrictive -- or, perhaps irrelevant -- definition of "reuse or recycling," the companies would examine the clear statutory exclusion language and make a

sound determination of whether any of our ash utilization activities would be covered by the solid waste assessment fee.

The companies urge the Commissioner to revise Section 6.2 of the emergency regulations to simply codify the wording of Subsection 5a(3)(2). If, after consultation with the DNR, the Tax Commissioner determines that the Tax Regulations should elaborate on the statutory exemption for reuse and recycling, we urge that the Commissioner do so in a manner that does not discourage coal ash utilization. If it is truly the intention of the Commissioner and the DNR to make the solid waste assessment fee presumptively applicable only to those "solid waste processing or recycling facilities" subject to the DNR solid waste permitting program (thereby requiring these facilities to notify the DNR and obtain certification of exemption from the solid waste assessment fee), then this should be clarified. In addition, however, any such rule should also avoid ambiguity and specifically state that the exemption from the solid waste assessment fee and record-keeping requirement extends to "beneficial uses or reuses or coal combustion by-products." As a suggestion, this term could be defined as follows:

"The use of coal combustion by-products as products or raw materials, including use for construction, manufacturing materials, or incorporation into a manufacturing process based on technical and/or economic merit."

Conclusion

The Commissioner's rules are flawed because they impose unnecessary certification, record-keeping and filing requirements

on activities which the legislature clearly excluded from coverage of the solid waste assessment fee. The Commissioner's treatment of the reuse and recycling exemption is sufficiently ambiguous that it is likely to interfere with a key legislative purpose of encouraging reuse and recycling of materials that would otherwise have to be disposed of as solid waste. Several provisions in the rule intrude on the DNR Director's responsibilities of developing and implementing statewide environmental protection policies.

The Commissioner should revise the rule in a manner which conforms with the statute by simply codifying the tax payment, collection and necessary record-keeping requirements.

Respectfully submitted this 29th day of July, 1988.

APPALACHIAN POWER COMPANY
OHIO POWER COMPANY
AMERICAN ELECTRIC POWER
SERVICE CORPORATION

OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 7/29, 1988 LOG NO. 88-TL-623

TO: John Montgomerie

SUBJECT: _____

PLEASE:

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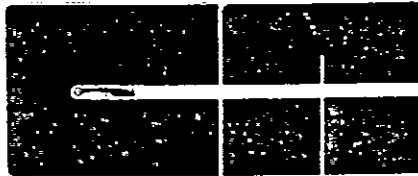
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WEST VIRGINIA COAL ASSOCIATION

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STATE TAX DEPARTMENT
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July 29, 1988

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JUL 29 1988

The Honorable Michael E. Caryl, Commissioner
State Tax Department
State Capitol Building
Charleston, WV 25305

STATE TAX
COMMISSIONER

Re: State Tax Department Emergency Regulations
Title 110, Series 6A filed June 30, 1988

Dear Commissioner Caryl:

The West Virginia Coal Association respectfully offers the following comments to the Title 110, Series 6A Emergency Regulations filed by the Department on June 30, 1988.

GENERAL COMMENTS

Our literal reading of HB 3146, adopted during the 1988 Regular Session and signed into law on March 30, 1988, as well as our knowledge of the underlying intent of the Legislature with respect to the enactment of HB 3146, leads us to conclude that the coal industry is not subject to the provisions of either the legislation or the Title 110, Series 6A Emergency Regulations of the Department.

Within HB 3146, "Solid waste," as defined in 20-5F-2(e), specifically excludes "...industrial discharges which are point sources and have permits under article five-a, chapter twenty of the code, ...or refuse, slurry and overburden regulated under article six, chapter twenty of the code;" Further, HB 3146 defines "Commercial solid waste facility" in 20-5F(h) as specifically excluding "...an approved solid waste facility owned and operated by a person for the sole purpose of disposing of solid wastes created by that person or such persons and other persons on a cost-sharing or non-profit basis; and". These definitions specifically exclude the actual waste products of the coal industry, as well as the method of disposal from the provisions of HB 3146.

In addition, at no time during the extensive public hearings held during the consideration of HB 3146 or the equally extensive consideration given the legislation in various committees and on the floors of the respective houses was the focus of legislative intent on anything other

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WEST VIRGINIA COAL ASSOCIATION

The Honorable Michael E. Caryl
July 29, 1988
Page 2

than issues associated with the operation of public and commercial landfills which handle the solid wastes of outside customers and households. The Tax Department Title 110, Series 6A Emergency Regulations adopt the definition of "Solid Waste" used in HB 3146. Thus, we conclude that coal mining activities are outside the scope of the Emergency Regulations.

Such coal mining activities as are referenced above as being outside the realm of the "Solid waste" and "Commercial solid waste facility" definitions do not go unregulated. These coal mining activities, in whole or in part, are regulated by the West Virginia Department of Energy, the West Virginia Department of Natural Resources, the United States Environmental Protection Agency, the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior and the United States Army Corps of Engineers. It is clear the the Legislature realized this fact when it crafted the definitions of "Solid waste" and "Commercial solid waste facility" contained in HB 3146.

SOLID WASTE ASSESSMENT FEE EXEMPTIONS/RECORDS

As to certain provisions of the Emergency Regulations found at 110-6A-6 titled "Exemptions from Fee," the Department has, in several instances, exceeded the authority granted by HB 3146 and roundly misinterpreted the intent of the Legislature. First, we do not believe that the Tax Department has the statutory authority to require certificates of exemption from the solid waste assessment fee as set forth in Section 6.1.1. Moreover, the concept is cumbersome, unreasonable and will be wrought with delays and appeals. We also do not believe that the Tax Department has the authority to declare the circumstances under which certificates of exemption shall be forfeited, as it purports to do in Section 6.1.4. Second, the Tax Department has undertaken to define other circumstances under which the exemptions will be granted, as in Section 2.8, "Exclusive or cost sharing solid waste disposal facility," and Section 6.2.3, which attempts to limit the exemption from the fee granted to the process of reuse and recycling of solid waste.

Third, we believe that the requirements to maintain scales and records, even in those circumstances where the activity or facility is exempt from tipping fees, is outside the scope of legislative intent and beyond the authority granted the Tax Department in HB 3146. The record keeping requirements outlined in sections 110-6A-7 and 8 have no application to the coal industry, as wastes that are generated directly by the producer or through cost sharing or non-profit arrangements are the only types handled at coal mining facilities. An acceptance of additional types of unapproved "waste" at a coal mining facility would be in clear violation of its permit conditions, as well as a violation of state and federal law.


WEST VIRGINIA COAL ASSOCIATION

The Honorable Michael E. Caryl
July 29, 1988
Page 3

CONCLUSION

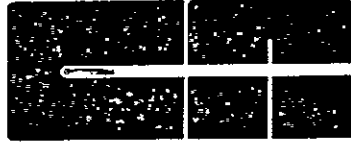
In summary, it is the position of the West Virginia Coal Association that the coal industry is not subject to the provisions of HB 3146, as a result of the definitional exclusions provided for in 20-5F-2(e) and (h) and, as such, is similarly removed from the jurisdiction of the Title 110, Series 6A Emergency Regulations of the Tax Department. The specific language of HB 3146, as well as the complete absence of any legislative intent to include coal mining activities within the context of the bill, makes both the Act and the Emergency Regulations inapplicable to the coal industry.

Respectfully submitted,



Gary G. White
President

GGW/cw



1301 Laidley Tower
Charleston, West Virginia 25301

WEST VIRGINIA COAL ASSOCIATION

The Honorable Michael E. Caryl, Commissioner
State Tax Department
State Capitol Building
Charleston, WV 25305

HAND DELIVER



OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 7/29, 1988 LOG NO. 88-TL-622

TO: John Montgomery

SUBJECT: _____

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MANUFACTURERS ASSOCIATION

SUITE 414
405 CAPITOL STREET
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TELEPHONE (304) 342-2123

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July 29, 1988

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STATE TAX
COMMISSIONER

Mr. Michael E. Caryl
State Tax Commissioner
Room WW-300
State Capitol
Charleston, West Virginia 25301

Re: Comments on the Proposed
and Emergency Legislative
Solid Waste Assessment Fee
Rules, Title 110, Series 6A.

Dear Commissioner Caryl:

The West Virginia Manufacturers Association is composed of over 200 businesses and industries in the manufacturing sector. All of these facilities generate solid waste which must be managed. The Manufacturers have, on behalf of its members, a serious concern about any regulations regarding solid waste. While many of our members have on-site facilities for waste disposal, many are dependent on commercial and public facilities for waste disposal. The Manufacturers are, therefore, vitally concerned that Department of Natural Resources and Tax Department rules reflect reasonable regulatory standards, efficiency and effectiveness.

These comments are submitted on behalf of the members of the Manufacturers Association with regard to the proposed and emergency legislative rules filed by the Tax Department on June 30, 1988, effective July 1, 1988, regarding the imposition and collection of the solid waste assessment fee pursuant to the amendments to the West Virginia Solid Waste Management Act, by virtue of Committee Substitute for H.B. 3146.

It is the position of the Manufacturers that the exemptions set forth in W.Va. Code §20-5F-5a(e) from payment of the fee imposed in Section 5a are self-executing. Accordingly, we do not believe that the statute can be reasonably interpreted to authorize the requirement that such exempt transactions and facilities obtain a certificate of exemption as a prerequisite to entitlement to an exemption. Accordingly, we would urge the Commissioner to eliminate this certification provision in the regulations.

Furthermore, the Manufacturers object to the basic scheme of the tax rules which essentially imposes all of the burdens of the rules except for payment of the fee on facilities which are entitled to an exemption. We believe that an exemption should be complete not only from payment of the fee, but from all other related burdens. Accordingly, we do not believe that exempt facilities and transactions should be subject to any recordkeeping,



WEST VIRGINIA

MANUFACTURERS ASSOCIATION

Mr. Michael E. Caryl

Page 2

July 29, 1988

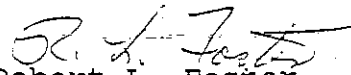
return filing, or weights and measures requirements. We urge the Commissioner to delete all such requirements. Such a regulatory burden cannot be justified and was not contemplated by the Legislature.

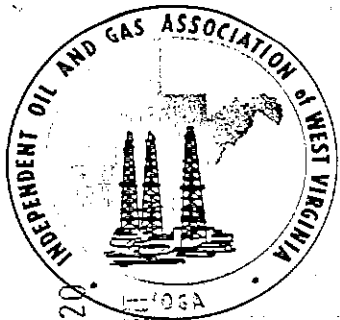
The Manufacturers are also concerned that because the first tax return is due to be filed by August 15, 1988, that it will be virtually impossible for all facilities qualifying for an exemption to both seek and obtain a certificate of exemption from the Department of Natural Resources prior to that date. This could result in facilities which are clearly exempt from the fee having to file a tax return and pay fees on wastes disposed during this first reporting period. We believe that this would be inequitable and unfair and would result in administrative chaos should refunds later be appropriate. Accordingly, we request the Commissioner to delete the requirement for a certificate of exemption and will likewise urge the Department of Natural Resources to delete that requirement or make some accommodation to assure that those entitled to exemptions are not required to pay taxes which the Legislature did not intend to be imposed.

Finally, the Manufacturers urge that these regulations and any related Department of Natural Resources regulation be written so as to encourage and foster the reuse and recycling of solid waste. To do so, restrictive definitions such as those which appear in the tax regulations in connection with such activities must be reviewed and revised. One of the essential keys to sound waste management in this state must be encouragement of reuse and recycling. Imposition of a tax on such activities due to restrictive definitions will simply discourage beneficial activity.

The West Virginia Manufacturers Association also supports and endorses the detailed comments with regard to these rules which have been submitted by the West Virginia Chamber of Commerce. We respectfully request that these comments be seriously considered by you and that appropriate steps be taken to modify the emergency regulations immediately, and definitely prior to August 15, 1988, to avoid the inequitable burden which will otherwise be thrust upon facilities and activities which the Legislature never intended to be subject to this tax program. We appreciate your time and attention to these concerns.

Sincerely,


Robert L. Foster
Chairman, Environmental
Control Committee



Independent Oil & Gas Association of West Virginia

22 Capitol Street, Charleston, West Virginia 25301-2893 Telephone (304) 344-9867

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STATE TAX DEPARTMENT
LEGAL DIVISION

August 1, 1988

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STATE TAX
COMMISSIONER

The Honorable Michael E. Caryl
State Tax Commissioner
Room WW-300
State Capitol
Charleston, West Virginia 25305

Comments of the Independent Oil
Oil & Gas Association of West
Virginia Regarding Solid Waste
Assessment Fee Rules of the
State Tax Department.

Dear Commissioner Caryl:

Background

The emergency rules of the Tax Department regarding the new solid waste assessment fee were filed on June 30, 1988, effective the next day, July 1, 1988. These rules, also filed as proposed rules, impose the new "tipping fee" on disposal of solid waste in any solid waste disposal facility in West Virginia. The first tax return is due on August 15, 1988 unless a certificate of exemption is obtained from the Director of the Department of Natural Resources (DNR).

The Independent Oil & Gas Association of West Virginia (IOGA) is comprised of many companies operating thousands of wells throughout the state. These operations are governed by statutes and rules administered by the Department of Energy (DOE). Virtually all of these operations are covered by permits required pursuant to Chapter 20, Articles 5A (water pollution) and 5F (solid waste) and serve to manage wastes generated only by those same operations. Many operate under a general permit or permit by rule which applies to multiple facilities.

The Honorable Michael E. Caryl
Page 2
August 1, 1988

Jurisdictional Issue

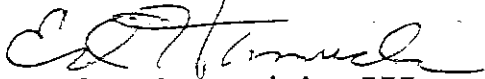
IOGA is aware that several other parties have filed comments with the Commissioner expressing concern about the details of these rules which IOGA shares. In addition, however, it is imperative to point out that it is entirely inappropriate to require facilities regulated by the DOE to obtain certificates of exemption from the DNR.

By virtue of the passage of the Energy Act in 1985, jurisdiction to issue all permits required under Chapter 20, Article 5F was transferred from the DNR to the DOE with regard to all oil and gas, coal mining and other mineral recovery operations. W.Va. Code §22-1-16. With regard to oil and gas operations, this authority is administered by the Director of the Division of Oil and Gas.

IOGA does not concede that W.Va. Code §20-5F-5a forms a basis upon which a requirement to obtain a certificate of exemption can be based. Rather, we believe that the statutory exemptions are absolute and self-executing. At the least, the rules should be revised immediately to recognize the jurisdiction of the DOE over mineral resources activities.

Recordkeeping and Reporting

IOGA also specifically objects to the present framework of the tax rules which would impose significant recordkeeping, weights and measures, and tax reporting burdens on our members eventhough they are exempt from payment of the fee. We believe this to be contrary to the legislative history and intent and urge the Commissioner to immediately revise the rules to eliminate these unwarranted burdens on exempt facilities and activities.


J. Edward Hamrick, III
Executive Director
Independent Oil & Gas Association
of West Virginia

OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 8/2, 1988 LOG NO. 88-TL-624

TO: Legal

SUBJECT: Solid Waste Assmt.

PLEASE:

Prepare a response for _____ signature with copy(s) to _____

Note _____

Approve _____

Return _____

Take Appropriate Action _____

AND

Return to _____

Forward to _____

Retain _____

Discard _____

See me _____

REMARKS:

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STATE TAX DEPARTMENT
LEGAL DIVISION



Independent
Oil & Gas Association of West Virginia
22 Capitol Street
Charleston, West Virginia 25301-2893

Commissioner Michael E. Caryl
WV State Tax Dept.

Hand Delivered
8/1/88

West Virginia Oil and Natural Gas Association

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August 1, 1988

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The Honorable Michael E. Caryl
State Tax Commissioner
Room WW-300
State Capitol
Charleston, West Virginia 25305

STATE TAX
COMMISSIONER

Re: Solid Waste Assessment
Fee Regulations.

Dear Commissioner Caryl:

The West Virginia Oil and Natural Gas Association wishes to take this opportunity to point out to you our concerns with regard to the emergency and proposed rules of the Tax Department regarding solid waste assessment fees which were filed with the Secretary of State on June 30, 1988. Although these rules were effective immediately on July 1, 1988, we urge you to make certain revisions to these rules as soon as possible to correct technical and practical problems with them.

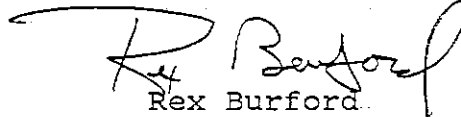
Of special concern to the membership of WVONGA is the fact that your regulations require a certificate of exemption to be obtained from the Director of the Department of Natural Resources in order to avoid payment of the new tipping tax resulting from Committee Substitute for H.B. 3146. This part of your rules apparently ignores the fact that the Department of Energy has exclusive jurisdiction over permits for solid waste facilities for the oil and gas industry as well as other mineral industries. Accordingly, your rules should be promptly amended to recognize the jurisdiction of the Department of Energy to make any necessary determinations for entitlement to certificates of exemption for oil and gas facilities. Please note that our Association does not believe that W.Va. Code §20-5F-5a indicates or implies that a certificate of exemption must be obtained before a facility or activity is entitled to exemption. This statute speaks for itself. However, if you determine to stay with the approach presently taken in your emergency rules, it will, at a minimum be necessary to revise them to recognize the proper statutory role of the Department of Energy.

The Honorable Michael E. Caryl
Page 2
August 1, 1988

We also believe that any exemption should also be interpreted and reflected in these rules to relieve any exempt facility or activity from all of the other requirements for recordkeeping, tax returns or other substantive requirements.

Thank you for your consideration and assistance in addressing these issues.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rex Burford". The signature is written in dark ink and is positioned above the typed name and title.

Rex Burford
Secretary, Treasurer and
General Counsel

OFFICE OF THE TAX COMMISSIONER

MICHAEL E. CARYL

DATE: 8/2, 19 88 LOG NO. 88-TL-625

TO: Legal

SUBJECT: Solid Waste Assmt

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