

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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AUG 1 2 58 PM '97

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code § 11-6F-5

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

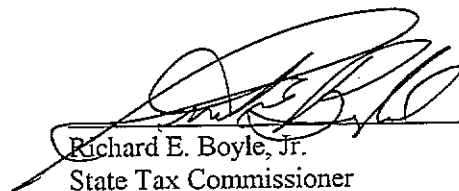
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 6F

TITLE OF RULE BEING PROPOSED: Property Tax Valuation of Certain Manufacturing

Property

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.


Richard E. Boyle, Jr.
State Tax Commissioner

\$14.80

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Property Tax Valuation of Certain Manufacturing Property

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Division
 Address: P.O. Box 1005
Charleston, WV 25324-1005

1. Effect of Proposed Rule

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

2. Explanation of above estimates:

There should be no additional expenses resulting from this rule.

3. Objectives of these rules:

The rule explains and clarifies Chapter 11, Article 6F of the West Virginia Code.

Rule Title: Property Tax Valuation of Certain Manufacturing Property

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The rule provides special property tax valuation procedures.

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

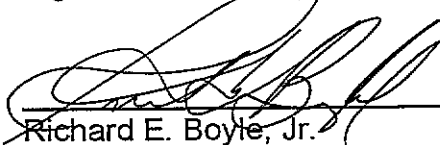
There may be a reduction in the property taxes paid.

C. Economic Impact on Citizens/Public at Large.

There may be an increase in employment.

Date: August 1, 1997

Signature of Agency Head or Authorized Representative



Richard E. Boyle, Jr.
State Tax Commissioner



**STATE OF WEST VIRGINIA
DEPARTMENT OF TAX AND REVENUE**

**CECIL H. UNDERWOOD
GOVERNOR**

**TAX DIVISION
P. O. Box 2389
Charleston, West Virginia 25328-2389**

**ROBIN C. CAPEHART
SECRETARY**

SUMMARY OF RULE

110 C.S.R. 6F

PROPERTY TAX VALUATION OF CERTAIN MANUFACTURING PROPERTY

This rule explains and clarifies the Property Tax Valuation Methodology established in West Virginia Code § 11-6F-1 et seq.



**STATE OF WEST VIRGINIA
DEPARTMENT OF TAX AND REVENUE**

**CECIL H. UNDERWOOD
GOVERNOR**

**TAX DIVISION
P. O. Box 2389
Charleston, West Virginia 25328-2389**

**ROBIN C. CAPEHART
SECRETARY**

STATEMENT OF CIRCUMSTANCES

110 C.S.R. 6F
PROPERTY TAX VALUATION OF CERTAIN MANUFACTURING PROPERTY

S.B. 513, passed on April 12, 1997 and effective from the day of passage, enacted a special method for valuing certain manufacturing property for property tax purposes. This rule clarifies the valuation method.

DATE: August 1, 1997

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

LEGISLATIVE RULE TITLE: Property Tax Valuation of Certain Manufacturing Property

1. Authorizing statute(s) citation: West Virginia Code § 11-6F-5

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

June 30, 1997

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

Available on the Internet

c. Date of public comment period: June 30, 1997 - July 30, 1997

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

Attached No comments received

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

August 1, 1997

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

Mark Morton - 558-8500

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

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

N/A _____

b. Date of hearing: _____

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

d. Attach findings and determinations and reasons:

Attached _____

FILED

TITLE 110
LEGISLATIVE RULE
DEPARTMENT OF TAX AND REVENUE

AUG 1 2 57 PM '97

SERIES 6F
PROPERTY TAX VALUATION OF CERTAIN MANUFACTURING PROPERTY

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 110-6F-1. General.

1.1 **Scope.** -- This legislative rule explains and clarifies the special property tax valuation provisions set forth in Article 6F, Chapter 11 of the West Virginia Code.

1.2 **Authority.** -- This legislative rule is issued under the authority of W. Va. Code § 11-6F-5.

1.3 **Filing Date.** --

1.4 **Effective Date.** --

§ 110-6F-2. Definitions. -- As used in this rule 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 in the plural.

2.1 **"The Act"** means Article 6F, Chapter 11 of the West Virginia Code.

2.2 **"Betterment."** See Section 2.3.1.1.b.2 of this rule.

2.3 **"Certified capital addition property" and "qualified capital addition to a manufacturing facility"** -- The terms "certified capital addition property" and "qualified capital addition to a manufacturing facility" are defined in Section 11-6F-2 of the West Virginia Code. Those definitions incorporate the terms "personal property" and "real property," which are, in turn, in part defined by reference to certain statutory definitions of personal and real property which are broad and expansive in scope. However, Section 11-6F-4 of the Act limits the property to which the Act applies to long term capital asset type property, and makes the Act inapplicable to intangibles, inventories or expense items such as work in process, raw materials, or consumable supplies, etc. which are owned or used by the Taxpayer for a comparatively short time and then sold, consumed, used up or disposed of. The Act repeatedly refers to "capital" additions as the qualifying property.

2.3.1 The Act provides special property tax valuation for capital additions, and not for purchases of inventory and other non-capitalized property. Therefore, the definitions of the terms "qualified capital addition to a manufacturing facility" and "certified capital addition property" do not mean or include certain types of property:

2.3.1.1 **Exclusions.** -- The following property or costs of property (by lease or purchase) for the following are excluded from the definitions of "certified

State Tax Department
Title 110
Series 6F

capital addition property" and "qualified capital addition to a manufacturing facility," without regard to whether such costs or investments in such property are capitalized or otherwise: repairs, facility maintenance or other maintenance, airplanes, motor vehicles licensed by the Division of Motor Vehicles, inventories, non-capitalized property, property that does not create additional manufacturing production capacity and replacement property, except that certain replacement property will qualify as specified in this rule. Notwithstanding the fact that pollution abatement equipment typically does not create additional manufacturing capacity, investment in pollution abatement property will count toward the measure of qualified capital addition property. Investment in pollution abatement property will not mean or include costs of repairs, equipment maintenance or ongoing operating expenses associated with pollution control property.

2.3.1.1.a For purposes of this definition, the term "non-capitalized property" means property, the cost of which is not required to be capitalized for federal income tax purposes under the Internal Revenue Code or the rules, regulations or policies implemented or promulgated by the United States Internal Revenue Service. Property is capitalized for purposes of the Act when the cost of such property is required to be capitalized for federal income tax purposes under the Internal Revenue Code or the rules, regulations or policies implemented or promulgated by the United States Internal Revenue Service.

2.3.1.1.b For purposes of this definition, the term "replacement property" means property acquired by purchase or lease for the purpose of replacing other property in a facility, the investment in which replacement property would not have been made but for the loss of service, destruction, removal or other loss of the property which the replacement property is intended to replace.

2.3.1.1.b.1 Replacement property will not typically constitute qualified capital addition property, notwithstanding that such property may be capitalized for federal income tax purposes or a lease of such property may otherwise qualify under this rule and notwithstanding the fact that its construction or installation may result in an increase in productive capacity.

2.3.1.1.b.2 However, significant betterments will be recognized as qualified capital addition property. Betterments, in combination with other qualified capital addition property which (including such betterment) has an aggregate cost in excess of \$50 million, may be treated as a qualified capital addition to a manufacturing facility. The term "betterment" means and is limited to replacement property which enlarges productive capacity, economic efficiency or the quality, efficiency or extent of pollution abatement capabilities of the facility in which the replacement property is installed or placed. A betterment will be treated as significant if it enlarges productive capacity, economic efficiency or the quality, efficiency or extent of pollution abatement capabilities of the facility by at least twelve percent over such

capacities or capabilities measured at their maximum, of the facility at the time the property which the replacement property is intended to replace was in operation.

2.3.1.1.b.3 Replacement property which is installed or constructed to replace property that was destroyed by fire, explosion, flood, storm or other casualty will constitute qualified capital addition property, but the measure of the cost of such replacement property for purposes of the Act will be reduced by any insurance proceeds or other proceeds received in compensation for the loss.

Example 1:

Company XYZ is a large manufacturing firm. A large boiler used in the manufacturing process is replaced in the facility due to the wear and physical deterioration of the boiler resulting from use in the manufacturing process.

Company XYZ replaces the old boiler with a new boiler which has a higher pressure rating and productivity than the old boiler. XYZ Company capitalizes the purchase for federal income tax purposes.

The new boiler is not qualified for special valuation under the Act. Even though the replacement of the old boiler is a capitalized investment and even though the new boiler will improve productivity at the facility, the acquisition and installation of the new boiler is essentially a maintenance operation intended mainly to maintain ongoing day to day operations of the plant. The increase in productive capacity and efficiency were incidental to the installation, not significant and not the primary reason for the investment.

Had the old boiler not worn out, the investment would not have been made. The investment in the new boiler was not intended to result in a significant expansion of the operation. It was a mere replacement of existing property for the purpose of keeping operations going. Only significant betterments will constitute qualified capital addition property.

Example 2:

The manufacturing facility suffers a casualty where the boiler building catches fire and the old boiler is destroyed. This is an extraordinary and catastrophic fire. The destruction of the boiler is not the result of ordinary wear associated with the fire used to run the boiler in day to day operation.

The old boiler is replaced with a new boiler, and associated construction occurs. The replacement property costs \$2,000,000. The insurance proceeds received by the Taxpayer in compensation for the loss amount to \$1,500,000. The amount of the cost

of the new boiler and structure that will qualify as qualified capital addition property for purposes of the Act is \$500,000.¹

2.3.1.1.c Occasionally, manufacturers in West Virginia have seen fit to lease, purchase or construct residential dwellings or housing in West Virginia for the purpose of providing long term or temporary housing for certain management personnel or other company personnel or for visiting dignitaries, company officers or guests of the company. The terms "qualified capital addition to a manufacturing facility" and "certified capital addition property" do not mean or include any houses, entertainment facilities, guest accommodations, dwellings or similar facilities, without regard to whether such property is purchased or leased, or whether the cost of such property is capitalized for federal income tax purposes, and without regard to whether a lease of such property might otherwise qualify under this rule.

2.3.1.1.d The terms "qualified capital addition property," "qualified capital addition to a manufacturing facility" and "certified capital addition property" do not mean or include any property acquired by purchase or lease from or between related entities. The Tax Commissioner can waive this prohibition against related entity acquisitions if the property was acquired from a related entity for its fair market value and there is no manipulation of the cost of, or amount of investment in, qualified capital addition property for the purpose of gaining entitlement to special property valuation under the Act.

2.3.2 Pollution abatement property or specialized manufacturing production property as certified capital addition property and qualified capital additions to a manufacturing facility. – Qualification of property for special valuation under the pollution control facilities provisions of Article 6A, Chapter 11 of the West Virginia Code or as specialized manufacturing production property under Article 6E, Chapter 11 of the West Virginia Code will not affect application of the provisions of the Act. The cost of property to be counted toward the \$50 million threshold will be so counted notwithstanding the fact that such property may qualify for special property tax valuation under the aforementioned provisions. However, property subject to valuation under Article 6A and Article 6E, Chapter 11 of the West Virginia Code will receive permanent special valuation under those provisions, whereas valuation under the Act applies for a maximum of 10 years.

2.3.3 Leased property as qualified capital addition property, certified capital addition property or qualified capital additions to a manufacturing facility. – The policies that will govern treatment of leased property for purposes of determining

¹It is assumed that other capital additions to the facility are made at the same time so as to aggregate to more than \$50 million, in accordance with the requirements of the Act.

whether it will be counted toward the cost of qualified capital addition property will, to the extent possible, be parallel with the treatment of leased property for purposes of determining whether leased property will be counted toward the original cost of a preexisting facility, as discussed in the definition of the term "original cost."

2.3.3.1 Leased property will not typically constitute qualified capital addition property to the lessee because the lessor, and not the lessee, is ordinarily legally responsible for payment of the property tax on leased property.

2.3.3.2 Leased real or tangible personal property which a lessee is required to treat as purchased property for federal income tax purposes may constitute qualified capital addition property to the extent of the amount capitalized for federal income tax purposes represented by such property if the written lease specifically makes the lessee responsible for payment of property taxes on the leased property.

2.3.3.3 Where the qualified capital addition property in a manufacturing facility incorporates leased tangible personal property under a lease that has a primary term of at least 75% of the useful life of the property, and where the written lease for that property specifically makes the lessee responsible for payment of the property taxes on the leased property, such leased property may constitute qualified capital addition property.

2.3.3.4 Where the qualified capital addition property in a manufacturing facility incorporates leased real property under a lease that has a primary lease term of at least ten years, and where the written lease for that property specifically makes the lessee responsible for payment of the property taxes on the leased property, such leased property may constitute qualified capital addition property.

2.3.3.5 The cost of leased real or tangible personal property for purposes of determining the cost of qualified capital addition property will be the discounted present value of the rent reserved for the primary term of the lease, but not to exceed ten years. The discount rate for this computation will be as prescribed by the Tax Commissioner from time to time.

2.3.3.6 The extent to which the cost of leased property may qualify as qualified capital addition property under the Act may be adjusted by the Tax Commissioner, depending on whether the lease payments are reflective of a fair market value lease rate. Only those costs of leased property imposed pursuant to a written lease agreement may qualify to be counted toward the cost of qualified capital addition property.

2.3.3.7 In the case of real or tangible personal property purchased by a Taxpayer and sold to a leasing company or other entity and then leased back to the Taxpayer which originally purchased the property (a so called sale and lease back): Where the lease otherwise qualifies to be counted toward the measure of qualified capital addition property, the cost of the sale/lease back property to be counted toward the measure of cost of qualified capital addition property will be the original purchase price cost of the property to the Taxpayer prior to the sale of the property to the leasing company or lessor.

2.4 **"Derivative products"** means manufactured products that are made directly from polymers.

2.5 **"Enrolled" or "enrollment"** – "Enrollment" is the act of placing property on the property tax rolls or records of the taxing jurisdiction in the name of the Taxpayer. Property is first "enrolled" and "enrollment" of a given item of property first occurs when the property is first placed on the property books of the taxing jurisdiction in the name of the Taxpayer.

2.6 **"Feedstock"** means raw materials or production inputs which are directly used in the manufacture of polymers.

2.7 **Fifty million dollar threshold.** -- Under Sections 11-6F-2(d) and 3 of the Act, a Taxpayer will become entitled to the special valuation allowed under the Act when at least \$50 million of qualified capital addition property has been enrolled in the name of the Taxpayer. The special valuation will be granted beginning in the tax year when the aggregate total value of enrolled qualified capital addition property enrolled in the name of the Taxpayer has exceeded \$50 million and for allowable succeeding years in accordance with Sections 11-6F-3 and 4 of the Act.

2.8 **"Intangibles."** See Section 6.4.1.3.i.4.1(6) of this rule.

2.9 **"Original cost," as that term is used with reference to a preexisting facility, and not to new investment, or the terms "original cost before a capital addition" or "original cost of a preexisting facility."** --

2.9.1 Under Section 11-6F-2(d) of the West Virginia Code, the preexisting manufacturing facility must have a total original cost before the capital addition of at least one hundred million dollars. Manufacturing facilities may in the aggregate carry with them an original cost that is no longer reflective of the current fair market value of the property. It is typical that the fair market value of manufacturing facilities, because of depreciation, inflation, and various market economic forces will differ in some degree from original cost. It could be that a facility may have an original cost exceeding the \$100 million minimum set forth in Section 11-6F-2(d), but have a fair market value after

physical deterioration and economic obsolescence, that is minimal. It could be that a facility could have a market value well in excess of the original cost due to economic factors that would make the construction of a similar facility far more expensive than original cost.

2.9.2 "Original cost," as that term is used with reference to a preexisting facility, and not to new investment, or the terms "original cost before a capital addition" or "original cost of a preexisting facility" means the total, original, undepreciated cost, unadjusted for inflation or deflation, of capitalized property and certain leased property physically in service at a facility immediately prior to the placement of certified capital addition property in service at the facility, excluding property enumerated as excluded under this rule. As a general rule, original cost is the basis to the Taxpayer of the property for federal income tax purposes (prior to any federal adjustments) at the time of the acquisition by the Taxpayer of the property and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange or abandonment, etc. Depreciation is not taken into account in determining the original cost of the property. Original cost shall include installation costs, transportation, sales and excise taxes, planning costs, and other costs associated with the acquisition of a given asset to the extent that such costs are capitalized for federal income tax purposes.

2.9.2.1 Excluded property

2.9.2.1.a **Airplanes, motor vehicles, non-capitalized property and qualified capital addition property.** -- There shall be excluded from the determination of "original cost" or "original cost before a capital addition" or "original cost of a preexisting facility" the following property whether purchased or leased: Airplanes, motor vehicles licensed by the Division of Motor Vehicles, inventories and non-capitalized property, qualified capital addition property to be included as part of the certified capital addition property (including construction in progress), any property acquired by purchase or lease from a related entity or between related entities. The Tax Commissioner can waive the prohibition against related entity acquisitions if the property was acquired from a related entity for its the fair market value and there is no manipulation of the measure of the cost of, or the amount of investment in, qualified capital addition property for the purpose of gaining entitlement to special property valuation under the Act.

2.9.2.1.b For purposes of this definition, the term "non-capitalized property" means property, the cost of which is not required to be capitalized for federal income tax purposes under the Internal Revenue Code or the rules, regulations or policies implemented or promulgated by the United States Internal Revenue Service.

2.9.2.2 Property no longer in service. -- There shall be excluded from the determination of "original cost" or "original cost before a capital addition" or "original cost of a preexisting facility" the cost of any property, whether purchased or leased, which has been removed from service, scrapped, or permanently shut down or placed in mothball mode, notwithstanding that such property may remain on the premises, or in the facility or on the facility grounds. Any property sold, no longer owned by the Taxpayer, or removed from the premises or otherwise permanently out of service will not count toward the measure of original cost.

2.9.2.3 Residential and entertainment property. -- Occasionally, manufacturers in West Virginia have seen fit to lease, purchase or construct residential dwellings or housing in West Virginia for the purpose of providing long term or temporary housing for certain management personnel or other company personnel or for visiting dignitaries, company officers or guests of the company. There shall be excluded from the determination of "original cost" or "original cost before a capital addition" or "original cost of a preexisting facility" the cost of any houses, entertainment facilities, guest accommodations, dwellings or similar facilities, whether leased or purchased (constructed or otherwise), without regard to whether the cost of such property is capitalized for federal income tax purposes and without regard to whether such property is leased under lease terms which would otherwise qualify under this rule.

2.9.3 Original cost and leased property. -- Leased property will not typically count toward the measure of original cost to the lessee. However, certain types of leased property will be counted.

2.9.3.1 Leases capitalized for federal income tax purposes. -- Real or tangible personal property still under lease immediately prior to the placement of certified capital addition property in service at the facility may be counted toward the measure of original cost if the lessee is required to treat such leased property as purchased property for federal income tax purposes and the written lease specifically makes the lessee responsible for payment of the property tax on the leased property. The amount of original cost of such leased property for purposes of the Act will be the amount capitalized for federal income tax purposes represented by such property.

2.9.3.2 Leases of Tangible personal property. -- Where the preexisting manufacturing facility incorporates leased tangible personal property under a lease that, at the time the lease was entered into had a primary lease term of at least 75% of the useful life of the leased tangible personal property, and where the written lease for that property specifically makes the lessee responsible for payment of the property taxes on the leased property, such leased tangible personal property still under lease at the time qualified capital addition property is enrolled may be counted toward the measure of original cost of the preexisting facility.

2.9.3.3 Leases of realty. -- In the case of leases of real property which at the time the lease was entered into had a primary lease term of at least ten years, and where the written lease for that property specifically makes the lessee responsible for payment of the property taxes on the leased property, the cost of such leased real property still under lease at the time qualified capital addition property is first enrolled in the name of the Taxpayer may be counted toward the measure of original cost of the preexisting facility.

2.9.3.4 The extent to which the cost of leased real or tangible personal property may qualify may be adjusted by the Tax Commissioner, depending on whether the lease payments are reflective of a fair market value lease rate. Only those costs of leased property imposed pursuant to a written lease agreement may qualify to be counted toward original cost.

2.9.3.5 Except for sale and lease back property, the cost of leased property that will qualify to be counted for purposes of determining original cost under the Act shall be the rent paid for such property prior to the date when any item of qualified capital addition property is enrolled in the name of the Taxpayer over the primary term of the lease or the bygone portions thereof, and any subsequent lease renewals that have been exercised.

2.9.3.6 Sale and lease back property. -- In the case of property purchased by a Taxpayer and sold to a leasing company or other entity, and then leased back to the Taxpayer which originally purchased the property (a so called sale and lease back): As with other leases, a sale/lease back lease would count toward the original cost of a preexisting facility if such property meets the criteria set forth in this section for qualification (i.e., the lease is capitalized for federal income tax purposes, or a tangible personal property lease having a primary term of 75% of useful life, or a realty lease having a 10 year or more primary term, and the lessee is required by the written terms of the lease to pay the property tax on the leased property).

2.9.3.7 If the sale/lease back lease otherwise qualifies to be counted toward the measure of original cost of the preexisting facility, the measure of original cost of the sale/lease back property to be counted as part of the cost of the preexisting facility will be the original purchase price cost of the property to the Taxpayer prior to the sale of the property to the leasing company or lessor.

2.10 "Placed in service" -- Qualified capital addition property becomes a qualified capital addition to a manufacturing facility which is qualified for special valuation under the Act when such property is placed in service, without regard to the point in time when such property is purchased, physically installed or physically placed in operation. Qualified capital addition property enrolled in the name of the Taxpayer before the \$50 million threshold has been exceeded will not be treated as having been

placed in service for purposes of the Act until the \$50 million threshold has been exceeded and at least \$50 million of the qualified capital addition property has been enrolled in the name of the Taxpayer. Qualified capital addition property in excess of \$50 million that is enrolled in the name of the Taxpayer on or after the date of enrollment of property representing the \$50 million threshold amount will be treated as having been placed in service when enrolled in the name of the Taxpayer. Property assessed as construction in progress for purposes of this determination will be treated as placed in service in the same manner as other qualified capital addition property in accordance with this subsection.

2.11 **"Preexisting facility" or "preexisting manufacturing facility"** mean a manufacturing facility, as defined in Section 11-6F-2(b) of the West Virginia Code, and the attributes thereof at the manufacturing facility (excluding all qualified capital addition property) immediately prior to the enrollment of qualified capital addition property which will become certified capital addition property when the \$50 million threshold is exceeded.

2.12 **"Property tax year" or "tax year"** means the calendar year following the July first assessment day. The term "tax year" for purposes of the property tax is defined in Section 11-5-3 of the West Virginia Code to mean the calendar year following the July first assessment day, or in the case of a public service business assessed pursuant to article six of Chapter eleven, the calendar year beginning on the January first assessment day.

2.13 **"Qualified capital addition property"** means property not otherwise disqualified or excluded from qualifying as certified capital addition property or as a qualified capital addition to a manufacturing facility under the provisions of the Act or this rule, which may potentially qualify as certified capital addition property and as a qualified capital addition to a manufacturing facility if the \$50 million threshold and the other requirements of the Act are ultimately fulfilled by investment in such property and, after the \$50 million threshold has been exceeded, qualified capital addition property means certified capital addition property and comprises the qualified capital addition to a manufacturing facility.

2.14 **Related entity.** -- The term "related entity" means:

2.14.1 A corporation, partnership association or trust controlled by the Taxpayer:

2.14.2 An individual corporation, partnership, association or trust that is in control of the Taxpayer;

2.14.3 A corporation, partnership, association or trust controlled by an individual, corporation, partnership, association or trust that is in control of the Taxpayer; or

2.14.4 A member of the same controlled group as the Taxpayer.

2.14.5 For purposes of this rule, "control," with respect to a corporation means ownership, directly or indirectly, of stock possessing fifty percent (50%) or more of the total combined voting power of all classes of the stock of such corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent (50%) or more of the beneficial interest in the principal or income of such trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in Section 267(c) of the United States Internal Revenue Code of 1954, as amended, other than paragraph (3) of such section.

2.15 "**Replacement property.**" See Section 2.3.1.1.b of this rule.

2.16 "**Statutory effective date**" means the effective date of Article 6F, Chapter 11 of the West Virginia Code. Section 11-6F-6 of the West Virginia Code states that Article 6F, Chapter 11 of the West Virginia Code is effective for tax years beginning on and after July 1, 1997. The term "tax year" for purposes of the property tax is defined in Section 11-5-3 of the West Virginia Code to mean the calendar year following the July first assessment day, or in the case of a public service business assessed pursuant to article six of Chapter eleven, the calendar year beginning on the January first assessment day.

2.16.1 For Taxpayers other than public service businesses, the provisions of Article 6F, Chapter 11 of the West Virginia Code are effective for property assessed on July 1, 1997 for the January 1 to December 31, 1998 tax year, and thereafter. Property assessed prior to July 1, 1997 would not be subject to the treatment allowed under Article 6F, Chapter 11 of the West Virginia Code. For public service businesses, the provisions of the Act are effective for property assessed on January 1, 1998 for the January 1 to December 31, 1998 tax year and thereafter.

§ 110-6F-3. Application for certification of capital addition property. — Section 11-6F-4 of the Act requires that an application for certification of capital addition property be filed with the Tax Commissioner "on or before the date the property is first required to be reported on an annual return for ad valorem property tax purposes."

3.1 Every corporation owning a manufacturing facility located in West Virginia (except public service businesses) is required by Section 11-1C-10 of the West Virginia

State Tax Department
Title 110
Series 6F.

Code to prepare and file an annual property tax return with the Tax Commissioner between July 1st and October 1st each year listing all of its property subject to taxation including, but not limited to, construction in progress.

3.1.1 Note that the year in which the annual return is required to be filed is the calendar year preceding the tax year. The term "tax year" is defined in Section 11-5-3 of the West Virginia Code to mean the calendar year following the July first assessment day, or in the case of a public service business assessed pursuant to Article 6, of Chapter 11 of the West Virginia Code, the calendar year beginning on the January first assessment day.

3.2 **Due date.** -- Under Section 11-6F-4 of the West Virginia Code, a person seeking to have property designated as certified capital addition property for purposes of the Act, must make a sworn application to the State Tax Commissioner, on forms prescribed for that purpose by the Tax Commissioner, on or before the date the property is first required to be reported on an annual return for property tax purposes. Application for certification will be treated as having been timely filed with the Tax Commissioner for purposes of the Act if the application for certification is filed on or before the first day of October of the year in which the annual return is required to be filed to report the property which the Taxpayer seeks to have certified as certified capital addition property. For public service businesses, application for certification will be treated as having been timely filed with the Tax Commissioner for purposes of the Act if the application for certification is filed on or before the first day of May of the year in which the annual return is required to be filed to report the property which the Taxpayer seeks to have certified as certified capital addition property. Applications will not be accepted for capital additions to a manufacturing facility enrolled in the name of the Taxpayer before the statutory effective date, i.e., for property enrolled in the name of the Taxpayer before July 1, 1997.

3.2.1 **Applications for certification of multiple party projects located in polymer alliance zones.** -- If qualified capital addition property investment is made in a polymer alliance zone, Section 11-6F-2d of the Act allows one or more persons making such qualified capital addition to join in a multiparty project with a person owning or operating a preexisting manufacturing facility: (1) that is located in the polymer alliance zone where the qualified capital addition property is to be located and (2) that has property in place in the polymer alliance zone having a total original cost before the capital addition of at least one hundred million dollars.

3.2.1.1 The multiple party project can be certified by the Tax Commissioner if the capital addition creates additional production capacity of existing or related products or feedstock or derivative products respecting the preexisting manufacturing facility and if the qualified capital addition property investment otherwise meets the requirements of the Act and this rule.

3.2.1.2 Applications for multiple party projects to be located in a polymer alliance zone must make a sworn application to the Tax Commissioner in accordance with Section 11-6F-4 of the Act on forms prescribed for that purpose by the Tax Commissioner, on or before the date the property is first required to be reported to the county assessor on an annual return for property tax purposes. Application for certification will be treated as having been timely filed with the Tax Commissioner for purposes of the Act if the application for certification is filed on or before the first day of October of the year in which the annual return is required to be filed to report the property which the Taxpayers seek to have certified as certified capital addition property.

3.2.1.2.a An application for a multiple party project for qualified capital addition property investment in a polymer alliance zone must be executed by all proposed participants. It must specifically state that the participants seek certification of a multiple party project and certified capital investment to be made in a polymer alliance zone. The application must specifically identify the particular polymer alliance zone in which the investment is to be made. It must affirm that all participants are either:

- (1) Manufacturers of polymers,
- (2) Manufacturers of the production inputs (i.e. feedstock) for the manufacture of polymers or
- (3) Manufacturers that use polymers as production inputs in the manufacture of derivative products.

No other Taxpayers or persons will qualify as participants in a multiple party polymer alliance zone project for purposes of the Act.

3.2.1.2.b The application for a multiple party project must specifically state that one of the proposed participants is a person owning or operating a manufacturing facility that predominantly (1) manufactures polymers or (2) manufactures production inputs (feedstock) for the manufacture of polymers or (3) manufactures a derivative product which is produced from polymers. The facility must predominantly manufacture one or more of the enumerated products, but need not exclusively manufacture such products. The application must specifically state that the preexisting manufacturing facility is (1) located in the polymer alliance zone where the qualified capital addition property is to be located and (2) has a total original cost before the capital addition of at least one hundred million dollars in place in a polymer manufacturing facility in the polymer alliance zone. The application must specifically identify the person owning or operating that manufacturing facility and must be executed

by that person or a legal representative of that person along with all other proposed participants.

3.2.1.2.c The application for certification of a multiple party project must specifically state that the proposed qualified capital addition property will create additional production capacity of existing or related polymer products produced by that manufacturing facility or feedstock or derivative products produced by that manufacturing facility.

3.2.1.2.d The application must describe in detail the investment and business expansion plan, and must show that the investment will be integrated with the preexisting manufacturing facility.

3.2.1.2.e Multiple party investments in a polymer alliance zone that are not integrated with the preexisting facility will not be certified. In order for an investment to be integrated with a preexisting facility, the qualified capital investment property and its operation must typically be physically, economically and functionally integrated with the preexisting manufacturing facility in accordance with the criteria set forth in this rule for integrated investments.

3.2.1.2.f Only persons or entities that directly make substantial investment in qualified capital addition property will qualify as project participants in a multiple party polymer alliance zone project for purposes of the Act.

§ 110-6F-4. Polymer alliance zone investment.

Section 11-6F-2(d) of the Act defines the term "qualified capital addition to a manufacturing facility," and sets forth certain specifications relating to persons making investment in qualified capital addition property in a polymer alliance zone:

if the capital addition is made in a polymer alliance zone as designated from time-to-time by executive order of the governor, then the person making the capital addition may for purposes of satisfying the requirements of this subsection join in a multiparty project with a person owning or operating a manufacturing facility that has a total original cost before the capital addition of at least one hundred million dollars if the capital addition creates additional production capacity of existing or related products or feedstock or derivative products respecting the manufacturing facility.

4.1 The "polymer alliance zone" provision of the Act applies only

to the following entities if they have a facility located in a polymer alliance zone:

- (1) Manufacturers of polymers,
- (2) Manufacturers of the production inputs (i.e. feedstocks) for the manufacture of polymers and
- (3) Manufacturers that use polymers as production inputs for production of derivative products.

4.2 The provisions of the Act relating to polymer alliance zones do not apply to any other manufacturers or persons that may be located in a polymer alliance zone. However, all West Virginia manufacturers that qualify under the Act would be subject to the special property tax valuation provisions of the Act without regard to whether they are located in a polymer alliance zone or elsewhere in West Virginia.

4.3 Applications for certification of multiple party projects must meet specific requirements set forth in this rule under Section 3.2.1.

§ 110-6F-5. The point in time when entitlement to special property tax valuation accrues.

A Taxpayer will become entitled to the special valuation allowed under the Act when at least \$50 million of qualified capital addition property has been enrolled in the name of the Taxpayer. The special valuation will be granted for the tax year when the aggregate total value of enrolled qualified capital addition property enrolled in the name of the Taxpayer has exceeded \$50 million and for succeeding years in accordance with Sections 11-6F-3 and 4 of the Act.

5.1 Qualified capital addition property enrolled in the name of the Taxpayer before the \$50 million threshold has been exceeded will not be treated as having been placed in service for purposes of the Act. When the first \$50 million of the qualified capital addition property has been enrolled in the name of the Taxpayer, that \$50 million threshold investment in such property is deemed to be placed in service on the date of enrollment of the property. Qualified capital addition property in excess of \$50 million that is enrolled in the name of the Taxpayer on or after the date of enrollment of property representing the \$50 million threshold amount will be treated as having been placed in service when enrolled in the name of the Taxpayer.

5.2 The qualified capital addition property as well as the initial \$50 million investment in property will constitute a "qualified capital addition to a manufacturing facility" and "certified capital addition property," and will be valued in accordance with Section 11-6F-3 of the Act beginning in the tax year for which the amount of the original

cost of the investment in new qualified capital addition property in place first exceeds \$50 million on the July 1 assessment day.

5.3 Example:

Construction of a capital addition to an existing eligible manufacturing facility begins on April 1, 1997. The construction will be accomplished over a period of 24 months. It will be completed on April 1, 1999, and the capital addition will be placed in operation on June 1, 1999.

On **July 1, 1997**, three months of construction have been completed. On **July 1, 1998**, 15 months of construction have been completed, and more that \$50 million of qualified capital addition property is in place.

Construction is completed **April 1, 1999**. The plant is placed in operation on **June 1, 1999**, and as of **July 1, 1999** is assessed as a completed qualified capital addition to a manufacturing facility for tax year 2000.

5.3.1 The addition is assessed as follows for the tax years 1998, 1999 and 2000:

5.3.1.1 On **July 1, 1997**, 3 months of construction in progress is enrolled in the name of the Taxpayer with an appraised value equal to the fair market value of the materials in place in the construction. The \$50 million threshold has not yet been reached. Therefore, for purposes of the Act, the property is not treated as having been placed in service, and the construction in progress is valued and taxed for the 1998 tax year without applying the special property tax valuation. The 1998 tax year is the January 1 to December 31 calendar year next succeeding the July 1, 1997 assessment date. W. Va. Code § 11-5-3.

5.3.1.2 The Act does not yet apply because the \$50 million threshold has not been reached. For the 1998 tax year, the assessed value is 60% of the appraised value. Typically the appraised value of construction in progress is set at the value of the materials in place without any cost of labor component.

5.3.1.3 On **July 1, 1998**, fifteen months of construction have been completed, and more than \$50 million of construction materials have been incorporated into the construction in progress and are assessed on July 1. The \$50 million threshold has now been exceeded. The property having a cost of more than \$50 million, even though it has not yet been placed into operation, will be treated as having been placed in service on **July 1, 1998** for purposes of the Act. This is the date when the cost of the property enrolled in the name of the Taxpayer attributable to the project exceeds \$50 million.

5.3.1.4 The physical placement of property into operation and the placement of property into service for purposes of the Act are not related concepts, and these events do not typically occur simultaneously. The term "placed in service" is defined in Section 2 of this rule. Property is placed into service for purposes of the Act when the criteria set forth in that definition have been satisfied. Section 11-6F-4 of the Act states that the certified capital addition property receives special property tax valuation beginning at the point in time when the qualified capital addition property is "placed in service." The Taxpayer's entitlement to special property tax valuation accrues only when qualified capital addition property is "placed in service."

5.3.1.5 For the 1999 tax year (the tax year following **July 1, 1998**), the assessed value is the appraised value X 5% X 60%. Again, for construction in progress, the materials cost is counted in the appraised value, but not the labor cost component.

5.3.1.6 Construction is completed on **April 1, 1999**. The plant goes into operation on **June 1, 1999**. Note that the placement of property in service for purposes of the Act bears no relationship to the date when property is placed into operation as a functioning part of the manufacturing facility.

5.3.1.7 On **July 1, 1999**, the construction has been completed for about 3 months. The qualified capital addition property enrolled for the first time in the name of the Taxpayer on **July 1, 1999** will be treated as having been placed in service immediately upon enrollment because the \$50 million threshold was reached on **July 1, 1998**. New qualified capital addition property enrolled in the name of the Taxpayer after the \$50 million threshold has been exceeded is treated as having been placed in service for purposes of the Act when enrolled in the name of the Taxpayer. The plant's appraised value will now include not only the cost of the materials incorporated into the plant, but also the value of the labor for the construction. Appraised value will increase significantly for the 2000 tax year (the calendar year after **July 1, 1999**).

5.3.2 The assessed value will be original cost X 5% X 60%.

5.3.2.1 The cost layers created by the property enrolled in the name of the Taxpayer on **July 1, 1997** and on **July 1, 1998** will have special property tax valuation treatment for the tax years 1999 through 2008 inclusive (ten years).

5.3.2.2 Note that the value of property enrolled in the name of the Taxpayer on July 1, 1997 was below the \$50 million threshold. Therefore, the qualified capital addition property enrolled in the name of the Taxpayer in that year is not treated as having been placed in service in the 1998 tax year (the next calendar year after July 1, 1997). The \$50 million threshold is exceeded on July 1, 1998. The investment that makes up the \$50 million amount is composed of the investment in the property enrolled

in the name of the Taxpayer on July 1, 1997, as well as the investment in property enrolled in the name of the Taxpayer on July 1, 1998. Thus, the property enrolled in the name of the Taxpayer as of July 1, 1997 is treated as having been placed in service for purposes of the Act on July 1, 1998, along with the remaining investment in property comprising the \$50 million amount that was enrolled in the name of the Taxpayer on July 1, 1998. This is why the property enrolled in the name of the Taxpayer on both assessment days, July 1, 1997 and July 1, 1998, is treated as placed in service on July 1, 1998. The July 1, 1998 assessment day is the assessment day for the tax year beginning on January 1, 1999. This is why the property enrolled in the name of the Taxpayer on July 1, 1997 and the property enrolled in the name of the Taxpayer on July 1, 1998 will receive special property tax valuation under the Act beginning in tax year 1999 and ending in tax year 2008.

5.3.2.3 The cost layer created by the property enrolled in the name of the Taxpayer on **July 1, 1999** will have special property tax valuation treatment for the tax years 2000 through 2009 (ten years). The special property tax valuation treatment for both layers will be concurrent for the years 2000 to 2008.

§ 110-6F-6. Period of time over which property is placed in service.

Section 11-6F-4 of the Act requires that an application for certification of capital addition property be filed with the Tax Commissioner "on or before the date the property is first required to be reported on an annual return for ad valorem property tax purposes."

6.1 A Taxpayer could apply for certification of a project investment that is to be placed in service or phased in over a period of years at a total cost of more than \$50 million, and could comply with Section 11-6F-4 if the application for certification were filed before the first items of investment property (either as a completed facility or as construction in progress) are required to be reported on a property tax return.

6.2 Certified capital addition property must be placed in service as part of a defined plan for an integrated capital addition to a manufacturing facility over a definite and limited period of time based upon the Taxpayer's plan for the expansion. It may be that a Taxpayer will undertake a development where the investment will be made over a number of years for a single expansion. There is no set maximum time limitation period for the placement of such integrated investment property in service.

6.3 In some cases expansion may take place in phases where one portion of the plant expansion (such as a production line or unit) may be placed in operation, and other phases of the expansion will then be later placed into operation as they are built. The Tax Commissioner will certify multi-phase projects if the project phases can be reasonably included as components of an plan for an integrated capital addition to a

manufacturing facility. However, if there is a substantial expanse of time or delay (either planned or unplanned) between the placement of one phase into operation, and the commencement of construction or operation of a succeeding phase, the Tax Commissioner may determine that the expansions resulting from those purported phased investments are not part of a plan for integrated capital additions to a manufacturing facility, but instead are a series of discrete non-integrated investments. A time gap or delay of more than 1 year would be considered substantial.

6.3.1 If investments are determined to be discrete non-integrated investments, the property acquired with such investments will be required to qualify separately for special property valuation under the Act. Each non-integrated investment will be required to independently meet the \$50 million investment threshold requirement.

6.3.2 In the case of integrated multi-phase investments, the total qualified investment combining all integrated phases of the development will typically be included in the measure of investment in qualified capital addition property for determining whether it meets the \$50 million investment threshold requirement and, once the threshold had been exceeded, toward the amount of the certified capital addition.

6.4 Plan for an integrated capital addition -- Qualified capital addition property must be placed in service as part of a discrete, defined plan for an integrated capital addition to a manufacturing facility over a definite and limited period of time based upon the Taxpayer's plan for the expansion. The property may be placed in service over a period of less than one year, or more than one year or in phases. Phased investments or phased in investments are made pursuant to a plan for an integrated capital addition where one or more portions of the plant expansion (such as a production line or unit) may be placed in operation, and other phases of the expansion will then be later placed into operation in due course as they are concurrently or consecutively constructed or installed. Although integrated phased investments that take more than one year to complete are multiple year investments, other multiple year investments may not be phased investments in that the investment in non-phased multiple year integrated investments are enrolled in the name of the Taxpayer year by year as construction in progress, and the qualified capital addition property goes into actual operation at one point in time, rather than in phases. A so called "turn key" project, where the entire operation substantially commences upon the completion of construction of the facility, would constitute a capital addition to a manufacturing facility resulting from a multiple year non-phased integrated investment.

6.4.1 Integration between qualified capital addition property and preexisting facilities. -- Although physical integration between the preexisting facility and the qualified capital addition property (to the extent that the qualified capital addition property must be located within two miles of the preexisting facility) is required

by the Act in Section 11-6F-2(d), the extent to which qualified capital addition property must be economically or functionally integrated with the preexisting facility will vary on a case by case basis.

6.4.1.2 It is possible that qualified capital addition property may consist of an entirely new plant, operation or process which manufactures an entirely new product or product line in such a way that the qualified capital addition property may not be in any way integrated with, or related to, the preexisting facility or its operations, except for the fact that it is owned by the same person that owns the preexisting facility and it is located within two miles of the preexisting facility. In such a case, the property could qualify for special property tax valuation under the Act if the property were otherwise qualified, and if the investment plan itself constituted a discrete, definite plan for an integrated investment in qualified capital addition property.

6.4.1.3 Criteria indicating the existence of a plan for an integrated capital addition to a manufacturing facility. -- The following criteria relating to a proposed capital addition to a manufacturing facility indicate the possible existence of a plan for an integrated capital addition, but no single factor or combination of factors is dispositive of the issue of integration:

6.4.1.3.a Evidence that an investment is to be made for the accomplishment of a single economic expansion or development, and that the purchase of any major property component or any major service component of the development will not and would not be made unless investment in the remaining major components are also made.

6.4.1.3.b The existence, for a substantial time prior to the enrollment of any qualified capital addition property, of a written plan for the capital addition showing: projected amounts of investment to be placed in service, a detailed schedule for construction and commencement of operations (either in phases or otherwise) and a detailed set of technical engineering and construction plans for the expansion.

6.4.1.3.c The existence, for a substantial time prior to the enrollment of any proposed qualified capital addition property, of minutes of the Board of Directors of the Taxpayer showing the presentation of a proposal for the planned capital addition, deliberations of the Board of Directors regarding the proposed capital addition and approval of the plan by the Board.

6.4.1.3.d The presentation of a proposal for or demonstration of the plan for the capital addition to the shareholders or owners of the Taxpayer a substantial time prior to the enrollment of any proposed qualified capital addition property.

6.4.1.3.e Minutes of the Board of Directors showing authorization of expenditures of the Taxpayer for the capital addition.

6.4.1.3.f Evidence of the encumbrance of funds in the accounting records of the Taxpayer for the capital addition.

6.4.1.3.g Submission of filings, applications and documentation relating to the proposed project with Federal and State agencies such as the Federal Energy Regulatory Commission, the Securities Exchange Commission, or with air, water and solid waste permitting agencies and similar governmental agencies a substantial time prior to the enrollment of any proposed qualified capital addition property.

6.4.1.3.h The preparation and submission of applications for financing with public or private sources of financial resources, the issuance of securities for the financing of the proposed capital addition, and the incurring of debt and other obligations for the financing of the project a substantial time prior to the enrollment of any proposed qualified capital addition property.

6.4.1.3.i Phased investments. -- In the case of phased investments, physical, engineering, economic and functional integration of the qualified capital addition property placed in service must typically be shown for all phases of the investment. The investment phases must be integrated with each other and typically must be integrated with the preexisting facility.

6.4.1.3.i.1 **Physical integration** occurs where the qualified capital addition property is located in or on the premises of a preexisting facility or in near proximity to, or incorporated as part of, a preexisting production unit of the preexisting facility.

6.4.1.3.i.2 **Engineering integration** occurs where the qualified capital addition property is deliberately designed to operate in coordination with other parts of the preexisting production machinery and apparatus at the facility so as to improve productivity, quality control or overall capacity of the manufacturing operation at the facility.

6.4.1.3.i.3 **Economic integration** occurs where the capital addition is designed to enhance the overall economic efficiency of the preexisting manufacturing facility by either decreasing costs per unit of production, or increasing net revenues.

6.4.1.3.i.4 **Factors indicating functional integration.** -- The determination of whether or not the operations resulting from

phased investments and preexisting facilities are functionally integrated (both between phases and between the preexisting facility and the property represented by the phased investment) will turn on the facts and circumstances of the case. Several factors may evidence that the operations are functionally integrated. A non-exclusive list of such factors is found below in this subsection. Generally, several functionally integrating factors will exist in a given business, although functional integration may exist as a result of few factors or even one factor, if the factor or factors involved are particularly significant. In determining whether functional integration exists, factors should not be examined in isolation. Instead, it should be determined whether the factors which are present, in combination, result in functional integration between phased investment property and the preexisting facility. In addition, the presence or absence of any one factor or any particular factors is not necessarily determinative as to whether a functional integration exists, although absence of all of the factors described in this subsection will generally result in a finding that functional integration does not exist.

6.4.1.3.i.4.1 Factors. – A non-exclusive listing of factors to be considered in determining whether business segments are functionally integrated appears below.

(1) Functional integration may be indicated where the capital addition, in conjunction with other preexisting assets at the manufacturing facility is operated to send, receive, exchange or transfer products, materials or goods between the qualified capital addition property and production, storage, receiving, or shipping units of the preexisting facility. The greater the quantity of these exchanges as a percentage of overall exchanges, the more significant this factor becomes.

(2) Functional integration is indicated where there is common management of both the qualified capital addition property and the preexisting facility.

(3) Functional integration is indicated where there is a common use or transfer of technical information, know-how or research and development on a significant scale between operations of the preexisting facility and operations engaged in with the qualified capital addition property.

(4) A common distribution system common to operations represented by property acquired in investment phases and to one or more production units of the preexisting facility for either production inputs or production outputs is indicative of functional integration.

(5) Evidence of functional integration can be found in use of a common distribution system under which inventory control and accounting, storage, trafficking and transportation are controlled through a common network for both the capital addition and the preexisting facility.

(6) Evidence of functional integration may be indicated by common purchasing or supply of substantial quantities of products, services, intangibles, or the like from the same source for both the preexisting facility and the qualified capital addition property, where such supply results in a significant economy of scale, or where such products, services, intangibles, or the like are not readily available from other sources and are particularly important to each component of the Taxpayer's business, both the preexisting facility and the qualified capital addition property. For purposes of this provision the term "intangibles" means and includes, but is not limited to, patents, copyrights, formulas, processes, trade secrets, trademarks, and similar property.

(7) Centralized management may indicate functional integration.

(8) Centralization of management exists when directors, officers or management employees jointly participate in management decisions which significantly affect the operations of the property resulting from phased capital investment and the operations of the preexisting facility. Transfer of officers or management employees between business segments may also provide evidence of centralization of management.

(9) The mere presence of centralized management is not sufficient to support a finding that the operations relating to the property acquired through phased investment and of the preexisting facility are functionally integrated. Only those centralized management activities which contribute to the integration of the operations under consideration constitute a functionally integrating factor. Centralized efforts to fulfill investment stewardship responsibilities, such as the implementation of a uniform system of internal controls, or regulatory reporting requirements, such as the establishment of centralized information processing, will not be determinative for this purpose.

(10) When operations resulting from the phased investment in qualified capital addition property and operations of the preexisting facility are carried on in the same general line of business or constitute steps in a vertically integrated enterprise, such centralized management is more significant as a factor indicative of functional integration than in other business contexts because of the opportunity the respective operations have in making use through such central management of readily transferable knowledge and expertise between operations, and developing coordination between the operations.

(11) **Other factors.** – Functional integration of business segments will generally not be evidenced by such factors (alone or in combination with other factors described by this subparagraph) as common financing, advertising, labor relations, warehousing (in the absence of a central distribution system), pension plans, insurance, and personnel recruitment. However, where a factor or factors described by this paragraph do not clearly demonstrate that functional integration exists, the factor or factors

described in this subparagraph may, in combination with the factors described, demonstrate sufficient additional evidence of functional integration to warrant a finding that functional integration exists.

6.4.1.3.i.4.2 Factors accorded little weight.

– Factors such as common legal services, accounting, tax administration, and financial reporting will generally be accorded little weight in the determination of whether operations relating from property acquired through phased investment and preexisting facilities are functionally integrated.

6.4.1.3.i.4.3 The presence of functional integration will be presumptively shown by the presence of the following:

(1) **Same general line of business:** There is a strong presumption that the property acquired through phased investment and the preexisting facility are functionally integrated when the activities engaged in with the qualified capital addition property and the preexisting facility are in the same general line of business.

(2) **Steps in a vertical process:** The operations resulting from use of the property acquired through phased investments and the operations of the preexisting facility are functionally integrated when the qualified capital addition property and preexisting facility are used in different steps in a vertically structured enterprise. For example, a corporation which explores for and mines copper ores; concentrates, smelts and refines the copper ores; fabricates the refined copper into consumer products and distributes such products is engaged in a vertically integrated and functionally integrated business, regardless of the fact that the various steps in the process are operated substantially independently of each other with only general supervision from the corporation's executive offices.

6.4.1.3.i.4.4 Phased investments in which qualified capital addition property placed in operation is used: (1) neither in the same general line of business as the other property attributable to other phases, (2) nor in steps in a vertical process, are presumptively non-integrated investments absent a determination that the respective segments are functionally integrated.

6.4.1.3.i.4.5 In the event that one phase of a capital addition is functionally integrated with a second phase, and the second phase is functionally integrated with a third phase, the first, second and third phases constitute functionally integrated phases notwithstanding the fact that the first and third phases are not functionally integrated with each other. The preceding sentence shall not apply where the second phase's functional integration with one phase is not substantial viewed from the perspective of either of the remaining phases. All three phases, in turn,

shall be treated as functionally integrated with the preexisting facility if any one of the functionally integrated phases is functionally integrated with the preexisting facility.

6.4.1.3.i.4.6 Where the Taxpayer asserts that property acquired through phased investment and the preexisting facility are functionally integrated, the Taxpayer shall have the burden of proof. Failure by the Taxpayer to produce requested evidence which lies within the control of the Taxpayer gives rise to a presumption that the evidence would be unfavorable if provided.

§ 110-6F-7. Period of time over which special property tax valuation applies.

Section 11-6F-4 of the Act states that the certified capital addition property receives special property tax valuation for a period of 10 years subsequent to the placement of the qualified capital addition property in service unless it is sooner removed from service or operations cease.

7.1 Qualified capital addition property enrolled in the name of the Taxpayer before the \$50 million threshold has been exceeded will not be treated as having been placed in service for purposes of the Act until the \$50 million threshold has been exceeded. Property represented by the \$50 million initial investment amount will be treated as having been placed in service for purposes of the Act on the next assessment day (July 1) after the \$50 million threshold is exceeded without regard to the year when such property may have been enrolled in the name of the Taxpayer, and so will receive the special property tax valuation beginning with the tax year commencing on the next January 1 after the July 1 assessment date. Qualified capital addition property enrolled in the name of the Taxpayer after enrollment of the first \$50 million of qualified capital addition property will be treated as having been placed in service when enrolled in the name of the Taxpayer. The tax year is the calendar year following the July first assessment day. See Section 2.12 of this rule.

7.2 The Taxpayer becomes entitled to the special property tax valuation allowed under the Act only when more than \$50 million of qualified capital addition property has been placed on the property tax books of the taxing jurisdiction. The initial \$50 million of qualified capital addition property and all qualified capital addition property placed on the property tax books after the \$50 million threshold has been exceeded will constitute a "qualified capital addition to a manufacturing facility" and "certified capital addition property," and the ten year valuation treatment will then begin for that property in the tax year for which it is assessed on the next assessment day after the \$50 million threshold is exceeded.

7.3 For qualified capital addition property placed in service after the \$50 million threshold has been exceeded which takes more than one tax year to construct, and for qualified capital addition property placed in service after the \$50 million threshold has

been exceeded that is under construction in such a way that it is caught in a so called "straddle" where some of the qualified capital addition property is assessed on July 1 of one year, and the remainder of the qualified capital addition property is assessed on July 1 of the next year, the mandated valuation will be available for each portion of the qualified capital addition property for ten years beginning in the tax year for which each portion was first assessed. This creates a layered, year by year entitlement to the special valuation under the Act for property represented by each year's investment.

7.4 For example:

7.4.1 The \$50 million threshold is exceeded on or before the July 1 assessment day for tax year 1. Part of the remaining qualified capital addition property is placed in service on or before the July 1 assessment day for tax year two, and part on or before the July 1 assessment day for tax year three.

7.4.2 The initial \$50 million of qualified capital addition property and the qualified capital addition property in excess of \$50 million placed in service for tax year 1 will have the special valuation under the Act for tax years 1 through 10, inclusive. The property placed in service for tax year 2 will have the special valuation under the Act for tax years 2 through 11, inclusive. The property placed in service for tax year 3 will have the special valuation under the Act for tax years 3 through 12, inclusive.

§ 110-6F-8. Computation of tax.

Section 11-6F-2(d) of the Act defines the term "qualified capital addition to a manufacturing facility" in relevant part as follows:

"Qualified capital addition to a manufacturing facility" means all real property and personal property, the combined original cost of all of the property which exceeds fifty million dollars to be constructed, located or installed at or within two miles of a manufacturing facility owned or operated by the person making the capital addition that has a total original cost before the capital addition of at least one hundred million dollars

The tax is computed by valuing the qualified capital addition to a manufacturing facility at 5% of its total original cost, and then applying the 60% West Virginia assessment ratio, and then multiplying the result by the tax rate for the local taxing jurisdiction.

8.1 Illustration: If a \$300 million investment were made in 1997 by a qualified entity with \$100 million or more of original cost investment in place in West Virginia, and

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if the investment in new qualified capital addition property otherwise qualified for special valuation under the Act, the tax liability would be calculated as follows:

Property with an original cost of \$300 million would be valued at 5% of original cost for property tax purposes.

$\$300 \text{ million} \times 5\% = \$15 \text{ million salvage value}$

$\$15 \text{ million} \times 60\% \text{ assessment ratio} = \$9 \text{ million assessed value}$

The 1997 property tax rate for class three property in the particular local taxing jurisdiction will be hypothetically assumed to be 2.0732%.

$\$9 \text{ million} \times 2.0732\% \text{ tax rate} = \underline{\$186,588}$ Annual Tax on the
\$300 Million Capital
Addition Property



FILED
AUG 1 2 57 PM '97

STATE OF WEST VIRGINIA
DEPARTMENT OF TAX AND REVENUE

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
ROBIN C. CAPEHART
SECRETARY

CECIL H. UNDERWOOD
GOVERNOR

Charleston, West Virginia
P. O. Box 963
Charleston, WV 25324-0963
Ph. (304) 558-0211 - Fax (304) 558-2324

August 1, 1997

The Honorable Mike Ross
Co-Chair
Legislative Rule-Making Review Committee
Building 1, Room 152
1900 Kanawha Boulevard East
Charleston, West Virginia 25305-0470

The Honorable Mark Hunt
Co-Chair
Legislative Rule-Making Review Committee
Building 1, Room 152
1900 Kanawha Boulevard East
Charleston, West Virginia 25305

Dear Senator Ross and Delegate Hunt:

Enclosed please find a copy of the final agency approved proposed legislative rule of the Tax Division identified as follows:

Title of Rule: Capital Additions to Manufacturing Facilities
Title No.: 110
Series No.: Series 6F

Along with this document are the documents and other information required by W. Va. Code § 29A-3-11.

Please let me know when this rule will be considered by your committee. If you or committee staff have any questions about this proposed rule or need any additional information, please contact me. You may also contact Sharon Bias, Commissioner of Banking, at 558-2294, or Dale Steager at 558-3356.

Very truly yours,

Robin C. Capehart
Secretary of Tax and Revenue



DuPont External Affairs PM 1 29

DuPont External Affairs
Suite 200
7 Greenbrier Street
Charleston, WV 25311
Tel. (304) 345-7907
(304) 345-7908
Fax (304) 345-7911

STATE TAX DEPT July 29, 1997
LEGAL DIVISION

RECEIVED
JUL 30 1997

Hon. Richard E. Boyle, Jr.
State Tax Commissioner
Legal Division
State Tax Division
P. O. Box 1005
Charleston, WV 25324-1005

State Tax Commissioner

Dear Mr. Boyle:

Re: Regulations related to SB 513:
Special method for appraising
qualified capital additions
to manufacturing facilities
(proposed regulations), as
codified by WV Code 11-6F

As you know, DuPont is the state's largest employer. We own a controlling interest in Consolidation Coal and have four DuPont manufacturing facilities and other operations distributed across the state. Capital invested in West Virginia by DuPont is extremely high, as is our payroll (our hourly employees average \$53,000 per year in earnings). The largest DuPont plant in the world is in Parkersburg.

Because of heavy current and continuing investment in the state, we have three concerns regarding the above proposed regulations:

1. As DuPont begins its process of capital renewal in West Virginia, we must replace outdated technology and conduct significant upgrades in our facilities. For that reason, we believe that capitalizing repairs and replacements is appropriate and should qualify. The exclusions found in the proposed regulations relating to "certified capital addition property" are directly contrary to the legislative intent, as well as the definition of said term, as provided in the Act.

Section 2.3.1.1 of the proposed regulations excludes "repairs, facility maintenance or other maintenance," as well as "investment that does not create additional manufacturing production capacity and replacement property, except that certain replacement property will qualify as specified in these regulations."

It is this form of investment that keeps West Virginia's employers in a competitive position. The Legislature expressly recognizes and speaks to this fact as follows:

"The Legislature further finds that the ad valorem property tax valuation set forth in this article for certified capital addition property, as defined in section two of this article, will help preserve the tax base and preserve and create jobs attributable to manufacturing facilities existing in the state."

(West Virginia Code 11-6F-1)

Building upon these findings, the Legislature defines "[c]ertified capital addition to property," as follows:

" '[c]ertified capital addition to property' means all real property and personal property included within or to be included within a qualified capital addition to a manufacturing facility that has been certified by the state tax commissioner in accordance with section four of this article: Provided, That airplanes and motor vehicles licensed by the division of motor vehicles shall in no event constitute certified capital addition property."

(West Virginia Code 11-6F-2(a))

In defining this important term, the Legislature makes clear its intent, relating to both the preservation of West Virginia's tax base and jobs, by providing an aggressive definition that includes specific exclusions. The inclusion of said exclusions, as found in the above cited proviso, evidences the fact that the Legislature evaluated possible exclusions concluding that only "airplanes and motor vehicles" represent the specific property that it wished to be excluded under the Act.

Ignoring the legislative findings, the definition of "[c]ertified capital addition to property," as well as a basic tenet of statutory construction (*Expressio unius est exclusio alterius* - the inclusion of one is the exclusion of all others), the proposed regulations provides further limitations by excluding not only airplanes and motor vehicles, but also: (1) repairs; (2) facility maintenance; (3) investment that does not create additional manufacturing production capacity; and (4) replacement property.

We respectfully submit that it is this form of investment that will keep West Virginia's employers competitive in the world marketplace. And, as recognized by the Legislature, it is only this form of investment that will "preserve the tax base and preserve and create jobs" in the State of West Virginia.

2. The "betterment" provision of the proposed regulations relating to replacement property, presumably included to mitigate the harshness of the definition in number one, above, is not practically applicable. The huge capital investments already extant by DuPont in West Virginia make it virtually impossible for us to meet the bright line established under the regulations for "betterment", which requires 50 percent capacity/efficiency improvements to qualify. This type of bright line definition discriminates against those with huge West Virginia capital investment already in place.

Section 2.3.1.1.b.2 of the proposed regulations provides an override of the limitation relating to replacement property, as follows:

"However, significant betterments will be recognized as qualified capital addition property. The term "betterment" means and is limited to replacement property which enlarges productive capacity, economic efficiency or the quality, efficiency or the extent of pollution abatement capabilities of the facility in which the replacement property is installed or placed. A betterment will be treated as significant if it enlarges productive capacity, economic efficiency or the quality efficiency or extent of pollution abatement capabilities of the facility by at least 50 percent over such capacities or capabilities measured at their maximum, of the facility at the time the property which replacement property is intended to replace was in operations."

Excluding the installation of certain pollution abatement equipment, we cannot conceive of any DuPont replacement equipment that could reach the threshold definition of betterment as provided above. Because of the "betterment" provisions of the proposed regulations will retard retention and expansion efforts, the expressed intent of the Act relating to both the preservation and creation of jobs is neglected.

3. Small molders and other companies we anticipate may wish to locate in the Polymer Alliance Zone will be making relatively small capital investments - in the area of \$10-40 million dollars. These companies must be allowed to aggregate their investments in order to have any hope of qualifying for the incentives provided by the statute. The provisions of the regulations relating to multi-party projects within the West Virginia Polymer Alliance Zone eviscerate the incentive contemplated by the Legislature.

Executive Order 96-01 establishes the West Virginia Polymer Alliance Zone (The "PAZ") facilitating the promotion of a three-county area of this state as the premier site location in the world for polymer producers, their suppliers and end users.

PAZ already boasts the largest concentration of base polymer resin producers in the world, and economic development officials are attempting to capitalize on this economic reality by luring companies which supply these producers, as well as the molders and extruders which use the resins produced within the PAZ.

Recognizing the attractiveness of this economic model, the Legislature provided that such suppliers or end users making capital additions within the zone could partner with the manufacturers of the base resins thereby creating "multiparty projects." See West Virginia Code 11-6F-2(d), proviso. However, the proposed regulations limit the effectiveness of the incentive by not providing for the aggregation of capital additions by all parties involved in such multiparty agreements.

In practice, the suppliers and end users of the resins typically do not require investments of the magnitude contemplated by the Act (although their processes can be labor intensive thereby creating many jobs per-dollar invested). This fact provides the rationale for including multiparty projects whereby incoming manufacturers could

partner with the established manufacturers to meet the threshold requirements of the Act.

In short, these provisions of the proposed regulations neglect the realities of the economic model that was established to promote the creating of jobs for West Virginians, thereby muting the Legislature's attempt to provide an incentive for such job creation..

Sincerely,



L. Craig Skaggs
External Affairs Manager

cc: Mike Basile
Laurence Miller
Chairman Harold Michael
Chairman Oshel Craigo
Robin C. Capehart
Karen Price
Tom Linder
Tom Burns
Norman Merkosky
John Little
John Wasilik
Max Casada
Mark Stookey



West Virginia
Chamber of Commerce

'97 JUL 31 AM 9 00

July 30, 1997

STATE TAX DEPT.
LEGAL DIVISION

RECEIVED
JUL 31 1997

The Honorable Richard E. Boyle, Jr.
State Tax Commissioner
c/o Legal Division
State Tax Division
P.O. Box 1005
Charleston, West Virginia 25324-1005

State Tax Commissioner

RE: Comments of West Virginia Chamber of Commerce
Regarding Proposed Legislative Rule Title 110, Series 6F,
Property Tax Valuation of Certain Manufacturing
Property

Dear Commissioner Boyle:

On July 30, 1997, the West Virginia Department of Tax and Revenue ("Department") filed a proposed legislative rule, Title 110, Series 6F, entitled "Property Tax Valuation of Certain Manufacturing Property" (the "Proposed Rule") to explain and clarify Enrolled Senate Bill No. 513, enacted April 12, 1997 (the "Act"). West Virginia Chamber of Commerce is the largest association of private sector business in our state. Our members employ more than half of the private sector work force. We are very supportive of the Act and offer the following comments concerning the Proposed Rule.

ORIGINAL COST OF EXISTING MANUFACTURING FACILITY

The proposed rule devotes a substantial amount of analysis respecting what constitutes the *original cost* of the manufacturing facility to determine whether the \$100 million pre-existing investment threshold is met. See Proposed Rule Sec. 110-6F-2.9.2. Two potential concerns respecting the proposed rule in this regard are: (1) treatment of non-capitalized property, abandonments and total write-offs and (2) the administrability of the new "in-place" requirement when the new investment is made. The Department inadvertently makes a simple concept complex and may prohibit a manufacturer that should have qualified from qualifying.

The Voice of Business in West Virginia

Post Office Box 2789, Charleston, WV 25330-2789 • (304) 342-1115 • (304) 342-1130 FAX

We respectfully request that the Department reconsider its restrictive view of what constitutes *original cost* and broadly encourage existing manufacturers to make substantial additional investments in West Virginia.

Sincerely Yours,

Anne J. Mc Cuskey
authorized by:

Michael E. Caryl
Chairman
Committee on Taxation of
Business



WEST VIRGINIA MANUFACTURERS ASSOCIATION

2001 Quarrier Street, Charleston, WV 25311

Telephone: (304) 342-2123

FAX: (304) 342-4552

wwma@citynet.net

July 31, 1997

The Honorable Richard E. Boyle, Jr.
State Tax Commissioner
c/o Legal Division
State Tax Division
P. O. Box 1005
Charleston, West Virginia 25324-1005

RE: Proposed Legislative Rule Title 110, Series 6F, Property Tax
Valuation of Certain Manufacturing Property

Dear Commissioner Boyle:

On July 1, 1997, the West Virginia Department of Tax and Revenue ("Department") filed a proposed legislative rule, Title 110, Series 6F, entitled "Property Tax Valuation of Certain Manufacturing Property" (the "Proposed Rule") to explain and clarify Enrolled Senate Bill No. 513, enacted April 12, 1997 (the "Act"). The West Virginia Manufacturers Association represent over 250 manufacturers throughout the state of West Virginia. We are extremely supportive of Senate Bill 513 as we see it as a tool to be used by existing companies to reinvest and modernize their facilities, thereby maintaining and creating new investment and jobs in West Virginia. We offer the following comments in regard to the proposed rule.

Section 2.3.1.1. The Legislature is clear in their mandate in SB 513 to preserve our existing tax base and preserve and create jobs in the manufacturing segment of our economy. Section 2.3.1.1., as currently written, excludes the types of investment manufacturers make in order to modernize their facilities to keep them competitive, not only in product lines, but also in terms of securing that facility's future in West Virginia. It is clearly the position of the West Virginia Manufacturers Association that these types of replacements should be included in the regulations.

Section 2.3.1.1.b.2. The second area of concern to us deals with this section of the regulation. We believe by requiring a company to meet a threshold of at least fifty percent increase in production, economic efficiency or the quality efficiency or extent of pollution abatement capabilities in order to be able to take advantage of this provision, effectively guts the provision and the legislative intent of the bill.

Section 2.9.2 By excluding certain property that was clearly contemplated

Board of Directors

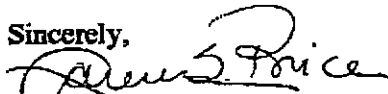
AEP	Downard Hydraulics, Inc.	Georgia-Pacific Corporation	Marble King, Inc.	U.S. Silica Company
Ashland Inc.	DuPont	Halltown Paperboard Company	One Valley Bank	Union Carbide Corporation
BASF Corporation	Eagle Manufacturing Co.	Hester Industries, Inc.	P&WC Aircraft Services, Inc.	W.M. Cramer Lumber Co.
Bayer, Inc.	Elkem Metals Company	Imation	PPG Industries, Inc.	Weirton Steel Corporation
Capitol Cement Corporation	Flaxsys	Inco Alloys International, Inc.	Quebecor Printing	Wheeling-Pittsburgh Steel Corp.
Corning Incorporated	FMC Corporation	Kanawha Manufacturing Co.	Ravenswood Aluminum Corp.	
The Dean Company	GE Plastics	Koppers Industries, Inc.	Rhone-Poulenc Ag Company	

The Honorable Richard E. Boyle, Jr.
July 31, 1997
Page Two

to be included by the Legislature to meet the one hundred million dollar threshold, you severely limit the applicability of the Act to many manufacturers.

The West Virginia Manufacturers Association greatly appreciates the opportunity to comment on the Proposed Rule and on behalf of manufacturers throughout the state, we respectfully request the Department to adopt our recommended changes and include these changes in a revised rule.

Sincerely,



Karen S. Price
President

GEORGE & LORENSEN P.L.L.C.

SHAWN P. GEORGE
CHARLES O. LORENSEN

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ATTORNEYS AT LAW ▲ PROFESSIONAL LIMITED LIABILITY COMPANY
1526 KANAWHA BOULEVARD, EAST
CHARLESTON, WEST VIRGINIA 25311

TELEPHONE (304) 343-5555
FACSIMILE (304) 342-2513

STATE TAX DEPT.
LEGAL DIVISION

July 30, 1997

RECEIVED
JUL 31 1997

State Tax Commissioner

VIA U.S. MAIL AND HAND DELIVERY
The Honorable Richard E. Boyle, Jr.
State Tax Commissioner
% Legal Division
State Tax Division
P.O. Box 1005
Charleston, West Virginia 25324-1005

RE: **Comment of American Electric Power Regarding Proposed Legislative Rule
Title 110, Series 6F, Property Tax Valuation of Certain Manufacturing Property**

Dear Commissioner Boyle:

On June 30, 1997, the West Virginia Department of Tax and Revenue ("Department") filed a proposed legislative rule, Title 110, Series 6F, entitled *Property Tax Valuation of Certain Manufacturing Property* (the "Proposed Rule") to explain and clarify Enrolled Senate Bill No. 513, enacted April 12, 1997 (the "Act"). American Electric Power ("AEP") subsidiaries own and operate several electric power generation facilities in West Virginia. AEP offers the following comment concerning the Proposed Rule.

DEFINITION OF MANUFACTURING FACILITY

The Act defines a *manufacturing facility* as any factory, mill, chemical plant, refinery, warehouse, building or complex of buildings, including land on which it is located, and all machinery, equipment, improvements and other real property and personal property located at or within the facility used in connection with the operation of the facility in a manufacturing business. Neither the Act nor the Proposed Rule further defines or clarifies the meaning of the term *manufacturing business*.

We respectfully request that the Department, in the Proposed Rule, make clear that the generation of electricity for sale to others is considered a *manufacturing business* for purposes of the Act. This characterization is consistent with historic State Business and Occupation Tax classification of electric power generation (before 1978, a generator of electric power was taxed like other manufacturers pursuant to W.Va. Code § 11-3-2b). See, e.g., *VEPCO v. Haden*, 157 W.Va. 298, 200 S.E.2d 848 (1973) (upholding the manufacturing tax on electric power generated and continually referring to electric power generation as *manufacturing*). Additionally, the current Consumers Sales and Service Tax definition of *manufacturing* found in W.Va. Code § 11-15-2(i) would clearly include the activity of electric power generation. Moreover, we anticipate that electric power generation will

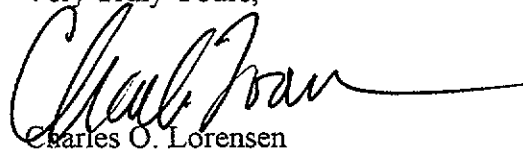
GEORGE & LORENSEN P.L.L.C.

The Honorable Richard E. Boyle, Jr.
July 30, 1997
Page 2

be treated more and more for tax and other regulatory purposes like other manufacturing activities, in light of the evolving deregulation of the electric utility industry and the anticipated de-coupling of electric power generation from transmission and delivery activities.

AEP appreciates this opportunity to comment upon the Proposed Rule and respectfully urges that the Department adopt AEP's recommended change and incorporate it into the revised Rule before submission to the Legislative Rulemaking Review Committee. If you have any questions or need any additional information, please feel free to contact me.

Very Truly Yours,



Charles O. Lorensen

cc: Mark Muchow, Director Research Division
Earl Goldhammer, Esquire, Tax Counsel

Shell Chemical Company



Point Pleasant Polyester Plant
State Route 2
Apple Grove WV 25502
Phone: (304) 576-2041

'97 JUL 31 AM 8 04

STATE TAX DEPT.
LEGAL DIVISION

July 28, 1997

The Honorable Richard E. Boyle, Jr.
State Tax Commissioner
c/o Legal Division
State Tax Division
P. O. Box 1005
Charleston, West Virginia 25324-1005

RE: Comments of Shell Chemical Company Regarding Proposed Legislative Rule Title 110, Series 6F, Property Tax Valuation of Certain Manufacturing Property

Dear Commissioner Boyle:

On July 30, 1997, the West Virginia Department of Tax and Revenue ("Department") filed a proposed legislative rule, Title 110, Series 6F, entitled "Property Tax Valuation of Certain Manufacturing Property" (the "Proposed Rule") to explain and clarify Enrolled Senate Bill No. 513, enacted April 12, 1997 (the "Act"). Shell Chemical Corporation ("Shell"), owns and operates a manufacturing facility in Apple Grove, Mason County, West Virginia. We are very supportive of the Act and offer the following comments concerning the Proposed Rule.

1. FIRST TAX YEAR WHEN SPECIAL PROPERTY TAX VALUATION ACCRUES

The Proposed Rule, at § 110-6F-5, provides that the special valuation benefit allowed under the Act would be granted beginning the tax year when the aggregate value of enrolled qualified capital addition property has exceeded \$50 million as of the preceding July 1st and for succeeding years. Accordingly, pursuant to the Proposed Rule, the special valuation benefit provided under the Act is not available until a new \$50 million "enrollment" threshold is reached. Work in progress is to be assessed at 60% of the appraised value of enrolled property relating to the project until the threshold is attained. We respectfully request that the Department reconsider its policy in this regard.

The act goes a long way towards making West Virginia competitive for major plant expansions in the property tax arena. However, the Proposed Rule's timing requirements for construction work in progress--resulting in a substantial up-front assessment on certain items intended to receive the benefit--does not further the policy objectives of the Act.

The Honorable Richard E. Boyle, Jr.
July 28, 1997
Page 2

Moreover, the Act provides for the tax benefit to apply to certified capital addition property and requires application for certification to be made before the first tax report is due for any property that is part of the project. In reality, certification will often be sought and made long before the \$50 million enrollment threshold is met. The investments at issue--starting at \$50 million--are significant undertakings and construction of expensive, complex manufacturing operations takes time (and can be delayed by climate and other factors beyond a taxpayer's control). We believe that appraising and assessing qualified and certified property under general rules when the project is a work in process is not anticipated under the Act and does not further the purposes of the Act.

We suggest that the Department, in the Proposed Rule, might consider an alternative method of assuring that the \$50 million minimum new investment requirement is met. For instance, the Proposed Rule could require a taxpayer seeking certification to oblige itself to pay forgone property tax if it fails to meet the \$50 million threshold as described in the project certification application, notwithstanding statutory limitations on the State's ability to back tax omitted property.

2. GROUPING RELATED EXPANSIONS

The Proposed Rule, at § 110-6F-6.2, flexibly acknowledges that an integrated capital addition may occur over multiple years. However, with respect to a multi-phased investment, the Department adopts a presumption that, if more than one year passes between placing different phases into service, the phase may not be part of an integrated capital addition.

We respectfully request the Department reconsider the one-year presumption for multi-phased investments. The complexity and cost involved in these substantial projects easily can involve multiple year phases. The projects are certainly considered to be interrelated by manufacturers willing to commit substantial sums, notwithstanding the passage of a single year between phases.

3. REPLACEMENT PROPERTY AS A QUALIFIED CAPITAL ADDITION TO A QUALIFIED MANUFACTURING FACILITY

This Act broadly defines the term *qualified capital addition to a manufacturing facility*. The Proposed Rule generally narrows the definitions of this key term. Of particular concern is the exclusion of most *replacement property*.

In this regard the Proposed Rule, at § 110-6F-2.3.1.1.b.1 provides

The Honorable Richard E. Boyle, Jr.
July 28, 1997
Page 3

Replacement property will not typically constitute qualified capital addition property, notwithstanding that such property may be capitalized for federal income tax purposes or a lease of such property may otherwise qualify under these regulations and notwithstanding the fact that its construction or installation may result in an increase in productive capacity.

The Proposed Rule then discusses exceptions for significant betterments and destroyed property:

We respectfully request the Department reconsider its position to generally exclude replacements. The Act does not limit a qualified capital addition to a manufacturing facility expressly or implicitly with respect to replacement property. The Act allows the State to better compete for a substantial (\$50 million) project, whether it is an expansion or replacement. The reinvestment and replacement decision is vitally important for manufacturers. The Proposed Rule should not cause substantial replacements to fall outside the Act's intended benefits.

Shell appreciates this opportunity to comment on the Proposed Rule and respectfully urges the Department adopt Shell's recommended changes and incorporate them into the revised version of the Proposed Rule before submission to the Legislative Rulemaking Review Committee. If you have any questions or need any additional information, please feel free to contact me at 304-576-4504.

Very Truly Yours,



Michael W. Peterson
Plant Controller

.cc Charles O. Lorensen
George & Lorensen PLLC



Cecil N. Underwood, Governor

WEST VIRGINIA DEVELOPMENT OFFICE

1900 MANAWHA BOULEVARD, EAST
CHARLESTON, WV 25305-0311

July 31, 1997

Honorable Richard E. Boyle, Jr.
State Tax Commissioner
c/o Legal Division
State Tax Division
Post Office Box 1005
Charleston, West Virginia 25324-1005

Dear Commissioner Boyle:

Please accept the following as comments related to the proposed legislative rule implementing Senate Bill 513, Property Tax Valuation of Certain Manufacturing Property. Our review of the proposed rule raises the following three concerns:

1. **The "Betterment" definition contained within the rules is not practical.** Section 2.3.1.b.2 of the proposed rule recognizes "significant betterments" as qualified capital addition property. Betterment is treated as significant, however, only "if it enlarges productive capacity, economic efficiency or the quality efficiency or extent of pollution abatement capabilities of the facility by at least fifty percent over such capacities or capabilities measured at their maximum, of the facility at the time the property which replacement property is intended to replace was in operation."

The intent of Senate Bill 513 was to encourage investment and reinvestment by our existing manufacturers into their operations here. This is critical from the standpoint of modernizing our existing manufacturers so that they remain competitive in a world market. By doing this, we make sure those jobs stay in West Virginia.

Based upon our experience, we are of the opinion that the fifty percent threshold contained in the definition of "betterment" is not one that can be achieved. By requiring a threshold for equipment replacement of fifty percent, you have effectively nullified a company's ability to modernize for the purpose of remaining competitive. We would urge you to consider a lower and more reasonable threshold of no more than 12 percent.

The Honorable Richard E. Boyle, Jr.
July 31, 1997
Page 2

2. **Qualified investment rules for multiparty projects in the Polymer Alliance Zone are unclear.** The proposed rule permits a person making a qualified capital addition in a designated "Polymer Alliance Zone" to join with an already existing manufacturing facility with an original cost of at least \$100 million so as to qualify the new addition for special treatment under Senate Bill 513. We are of the opinion that the Legislature intended to permit more than one new manufacturer to join with an existing company to meet the new investment requirements. As an example, two new companies want to join with an existing polymer manufacturer (otherwise qualified) in a multiparty project. Company A is a manufacturer of the production inputs for the manufacture of polymers and will invest \$20 million; Company B uses polymers as production inputs in the manufacture of derivative products and will invest \$30 million. We believe that a multiparty project packaged in this manner should qualify for the special valuation under Senate Bill 513. In addition, an existing manufacturer should be permitted to combine their qualified new capital investment with the qualified capital investment of a new manufacturer to meet the \$50 million threshold.

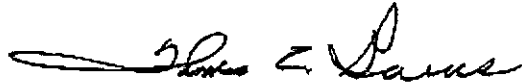
The proposed rule also requires that all participants in a multiparty project located within a polymer alliance zone be a manufacturer of polymers, a manufacturer of the production inputs for the manufacture of polymers, or manufacturers that use polymers as production inputs in the manufacture of derivative products. Although we agree with these parameters, the company (existing or new) should not be required to produce only that product. We should encourage new and existing manufacturers to diversify their product line.

3. **New companies that invest more than \$150 million should qualify for the special valuation.** Often, a new West Virginia company will invest more than \$150 million in their initial startup. When this occurs, we are of the opinion that the special valuation provisions of Senate Bill 513 should apply. Under this scenario, once \$100 million was on the tax books, the company would qualify as having the required existing base. When the company places the next \$50 million on the tax rolls, the threshold would be met entitling them to the special valuation provisions. This clearly meets the Senate Bill 513 standard of an existing \$100 million and a minimum \$50 million capital addition.

The Honorable Richard E. Boyle, Jr.
July 31, 1997
Page 3

We appreciate your consideration of these matters and would be willing to discuss them with you further for clarification purposes. Please feel free to contact us with any questions you may have.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas C. Burns".

Thomas C. Burns
Executive Director

TCB:dd

LAW OFFICES
SPILMAN, THOMAS & BATTLE
SINCE 1864

100 NORTH MAPLE AVENUE, SUITE 200
MARTINSBURG, WEST VIRGINIA 25401

TELEPHONE (304) 263-4100

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300 KANAWHA BOULEVARD, EAST
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CHARLESTON, WEST VIRGINIA 25321-0273

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417 GRAND PARK DRIVE, SUITE 203
PARKERSBURG, WEST VIRGINIA 26101

TELEPHONE (304) 422-6700

WRITER'S DIRECT DIAL NO.

340-3854

July 30, 1997

The Honorable Richard E. Boyle, Jr.
Tax Commissioner
State of West Virginia
c/o Legal Division
State Tax Division
P.O. Box 1005
Charleston, West Virginia 25324-1005

Dear Commissioner Boyle,

On behalf of Weirton Steel Corporation, I provide the following comments relating to the proposed regulations (the "Proposed Regulations") interpreting the **Special Method for Appraising Qualified Capital Additions to Manufacturing Facilities**, as codified by West Virginia Code §§ 11-6F et seq. (the "Act").

As previously discussed, we applaud this legislation as an aggressive attempt to preserve West Virginia's tax base and both preserve and create jobs for our citizens. However, as elaborated below, we are concerned that a number of provisions of the Proposed Regulations will vitiate the realization of the Act's stated goals. As such, we respectfully request that you consider our comments, as follows:

1. The Exclusions Found in the Proposed Regulations Relating to "Certified Capital Addition Property" are Directly Contrary to the Legislative Intent, as well as the Definition of said term, as provided in the Act.

Section 2.3.1.1 of the Proposed Regulations excludes "repairs, facility maintenance or other maintenance," as well as "investment that does not create additional manufacturing production capacity and replacement property, except that certain replacement property will qualify as specified in these regulations."

It is this form of investment that keeps West Virginia's employers in a competitive position. The Legislature expressly recognizes and speaks to this fact, as follows:

The Legislature further finds that the ad valorem property tax valuation set forth in this article for certified capital addition property, as defined in section two of this article, will help

SPILMAN, THOMAS & BATTLE

The Honorable Richard E. Boyle, Jr.
July 30, 1997
Page 2

preserve the tax base and preserve and create jobs attributable to manufacturing facilities existing in the state.

West Virginia Code § 11-6F-1 (emphasis added).

Building upon these findings, the Legislature defines "[c]ertified capital addition to property," as follows:

"[c]ertified capital addition to property" means all real property and personal property included within or to be included within a qualified capital addition to a manufacturing facility that has been certified by the state tax commissioner in accordance with section four of this article: *Provided, That airplanes and motor vehicles licensed by the division of motor vehicles shall in no event constitute certified capital addition property.*

West Virginia Code § 11-6F-2(a) (emphasis added).

In defining this important term, the Legislature makes clear its intent, relating to both the preservation of West Virginia's tax base and jobs, by providing an aggressive definition that includes specific exclusions. The inclusion of said exclusions, as found in the above cited *proviso*, evidences the fact that the Legislature evaluated possible exclusions concluding that only "airplanes and motor vehicles" represent the specific property that it wished to be excluded under the Act.

Ignoring both the legislative findings and the definition of "[c]ertified capital addition to property," as well as a basic tenet of statutory construction (*Expressio unius est exclusio alterius* – the inclusion of one is the exclusion of all others), the Proposed Regulations provide further limitations by excluding not only airplanes and motor vehicles, but also: (1) repairs; (2) facility maintenance; (3) investment that does not create additional manufacturing production capacity; and (4) replacement property.

We respectfully submit that it is only this form of investment that will keep West Virginia's employers competitive in the world marketplace. And, as recognized by the Legislature, it is only this form of investment that will "preserve the tax base and preserve and create jobs" in the State of West Virginia.

2. The "Betterment" Provisions of the Proposed Regulations Relating to Replacement Property, Presumably Included to Mitigate the Harshness of the Above Definition, are not Practically Applicable.

Section 2.3.1.1.b.2 of the Proposed Regulations provides an override of the above limitation relating to replacement property, as follows:

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However, significant betterments will be recognized as qualified capital addition property. The term "betterment" means and is limited to replacement property which enlarges productive capacity, economic efficiency or the quality, efficiency or the extent of pollution abatement capabilities of the facility in which the replacement property is installed or placed. **A betterment will be treated as significant if it enlarges productive capacity, economic efficiency or the quality efficiency or extent of pollution abatement capabilities of the facility by at least fifty percent over such capacities or capabilities measured at their maximum, of the facility at the time the property which replacement property is intended to replace was in operation.**

Id. (emphasis added)

Excluding the installation of certain pollution abatement equipment, we cannot conceive of any replacement equipment that could reach the threshold definition of betterment as provided above.

Example 1, which follows Section 2.3.1.1.b.3, perfectly illustrates the concern. In Example 1, the Division denies the applicability of the Act as it relates to the replacement of a boiler as installed by fictitious Company XYZ. We submit that this is precisely the form of investment that the Act seeks to induce. Better that the new boiler be placed on West Virginia soil rather than elsewhere, for such investment preserves both the tax base and jobs. And, again, it is this form of preservation that is expressly contemplated by the Act.

Because the "betterment" provisions of the Proposed Regulations will retard retention and expansion efforts, the expressed intent of the Act relating to both the preservation and creation of jobs is neglected.

3. The Provisions of the Proposed Regulations Relating to Original Cost are Contrary to the Definitions Pertaining to such, thereby Diminishing the Applicability of the Act to many West Virginia Employers.

Section 2.9.2 of the Proposed Regulations relating to "original cost," and the exclusions found within said section, limit the applicability of the Act by excluding certain property which the Legislature clearly contemplated to be included for purposes of establishing the one hundred million dollar threshold of a given "manufacturing facility."

In order to maximize the preservation and creation of jobs, the Act broadly defines "manufacturing facility," as follows:

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“[m]anufacturing facility” means any factory, mill, chemical plant, refinery, warehouse, building or complex of buildings, including land on which it is located, and all machinery, equipment, improvements and other real property and personal property at or within the facility used in connection with the operation of the facility in a manufacturing business.

West Virginia Code § 11-6F-2(b) (emphasis added).

The integral definition of the term “personal property,” as included in the above definition, is defined, as follows:

“[p]ersonal property” means all property specified in subdivision (q), section ten, article two, chapter two of this code and, includes, but is not limited to, furniture, fixtures, machinery and equipment, pollution control equipment, computers and related data processing equipment, spare parts and supplies.

West Virginia Code § 11-6F-2(c) (emphasis added).

In order to promote the intent of the Act, the definitions broadly define the key terms, as provided above. Conversely, the Proposed Regulations go to great lengths to limit the applicability of the Act to only a few of West Virginia’s largest employers by paring the definitions through the inclusion of a laundry list of exclusions relating to inventory, non-capitalized property and property no longer in service.

It is respectfully submitted that these exclusions, by diminishing the breadth of the above provided definitions relating to the original cost of manufacturing facilities, unnecessarily limit the applicability of the Act thereby offending the legislative intent of job preservation and creation.

4. The Breadth and Complexity of the Proposed Regulations Violate the Authority Granted regarding the Proposition of these Legislative Rules, as well as Basic Tenets of Statutory Construction.

In West Virginia, the executive branch of government is constitutionally charged with ascertaining the intent of the Legislature and implementing its mandates, as conveyed by its Legislative Acts. Specifically speaking to this point, the Legislature provides in the Act the authority to implement legislative rules “as may be necessary to implement the provisions of this article.”

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As elaborated above, the Proposed Regulations go beyond what is "necessary to implement the provisions of this article" by redefining key terms thereby ignoring and manipulating the explicit intent of the Act. See West Virginia Code § 11-6F-5.

Further, the Proposed Regulations ignore long-standing West Virginia precedent relating to this form of legislation. The West Virginia Supreme Court of Appeals has held that socioeconomic legislation designed to encourage industrial development should be liberally construed to effectuate the goals of such legislation. See Andy Bros. Tire Co., Inc. v. West Virginia Tax Commissioner, 160 W.Va. 144, 233 S.E.2d 134 (1977).



In conclusion, we respectfully submit that the Proposed Regulations unnecessarily dilute the Legislature's aggressive attempt to "preserve the tax base and preserve and create jobs" in the State of West Virginia. Thank you for your attention.

Sincerely,



Michael J. Basile

PUBLIC COMMENTS AND RESPONSES

110 C.S.R. 6F

PROPERTY TAX VALUATION OF CERTAIN MANUFACTURING PROPERTY

The following is a summary of the public comments received regarding the aforementioned rule relating to the valuation of certain manufacturing property for ad valorem property tax purposes, during the Public Comment Period of July 1, 1997 to July 31, 1997. The comments summary is stated in general, and the response of the Department of Tax and Revenue is set forth immediately after each summary.

COMMENT:

Senate Bill 513, W. Va. Code § 11-6F-1, (the Act) or (the Bill) requires that, in order for property to qualify for the special tax treatment allowed under the Act, the Taxpayer must have at least \$100 million of "original investment" in place at a preexisting manufacturing facility, and the Taxpayer must then acquire property costing in excess of \$50 million to be incorporated into or near that preexisting facility as new investment property. The new investment property will qualify for the special tax treatment.

Section 2.3.1.1 and other provisions of the rule set forth exclusions of certain types of property from the definitions of "certified capital addition property" and "qualified capital addition property" which are the measure of the cost of property that will qualify for special tax treatment under the Act.

Comments were received stating that the section 2.3.1.1 exclusions of certain types of property from the definitions of "certified capital addition property" and "qualified capital addition property" and other related provisions are too restrictive and do not comport with legislative intent. The comments argue that exclusion of costs of repairs, ongoing maintenance, non-capitalized property, replacement property and property that does not increase productive capacity will not preserve and create jobs in accordance with the legislative mandate of section 11-6F-1 of the Act. Some comments

point out that the statute defines the terms "certified capital addition property" and "qualified capital addition property" broadly.

RESPONSE:

Section 11-6F-2 of the Act defines the term "personal property" as follows:

(c) "Personal property" means all property specified in subdivision (q), section ten, article two, chapter two of this code and, includes, but is not limited to, furniture, fixtures, machinery and equipment, pollution control equipment, computers and related data processing equipment, spare parts and supplies.

Section 2-2-10(q) of the West Virginia Code reads as follows:

2-2-10. Rules for construction of statutes.

The following rules shall be observed in the construction of statutes, unless a different intent on the part of the Legislature be apparent from the context:

(q) The words "personal estate" or "personal property" include goods, chattels, real and personal, money, credits, investments and the evidences thereof;

The definition of "qualified capital addition to a manufacturing facility" set forth in the Act is:

"Qualified capital addition to a manufacturing facility" means all real property and personal property, the combined original cost of all of the property which exceeds fifty million dollars to be constructed, located or installed at or within two miles of a manufacturing facility owned or operated by the person making the capital addition that has a total original cost before the capital addition of at least one hundred million dollars

Emphasis added.

However, section 11-6F-4 states in relevant part that the Tax Commissioner will certify qualified capital additions to a manufacturing facility and requires that:

After the state tax commissioner determines that property is or will be part of a qualified capital addition to a manufacturing facility, the property is and remains certified capital addition property for purposes of this article until the earlier of : (a) The disposition of the property to an unrelated third party other than a transferee who continues to operate the manufacturing facility; (b) the cessation of all business at the manufacturing facility; or (c) the tenth year succeeding the year in which the qualified capital addition to a manufacturing facility to which the property relates is first placed in service.

This language clearly contemplates the continued long term retention and operation of property that constitutes a "qualified capital addition to a manufacturing facility." It clearly contemplates such property as being long term capital asset type property, and not inventories or expense items such as raw materials, or consumable supplies etc. which are owned or used by the Taxpayer for a comparatively short time and then sold, used up or disposed of. The Act repeatedly refers to "capital" additions.

The definition of "qualified capital addition to a manufacturing facility" set forth in the Act "means all real property and personal property . . ." In turn, personal property, defined by reference in the Act to section 2-2-10(q) of the West Virginia Code, includes "goods, chattels, real and personal, money, credits, investments and the evidences thereof."

Certainly, "goods, chattels . . . , money,

credits . . . and evidences [of investment]" include non-capitalized property. Indeed, money, credits and evidences of investment would almost never be considered ordinary capitalized assets. Even though the aforementioned definitions contain broad language that could be interpreted to include these non-capitalized assets, it is the interpretation of the Department of Tax and Revenue that the terms should be construed to have a more limited meaning. The terms "qualified capital addition to a manufacturing facility" and "certified capital addition property," read in pari materia with the above quoted language of section 11-6F-4, will be interpreted to mean and be limited to assets required to be capitalized for federal income tax purposes which represent a true capital expansion of a manufacturing operation.

The Act was intended to address capital additions, and not purchases of inventory and other non-capitalized property. Further, the terms "qualified capital addition to a manufacturing facility" and "certified capital addition property" do not mean or include costs of repairs (whether capitalized or not), replacement property, facility maintenance, or investment that does not create additional manufacturing production capacity.

The first sentence of section 11-6F-1, which sets forth the findings of the Legislature, states that "The Legislature finds that the encouragement of economic growth and development in this state is in the public interest and promotes the general welfare of the people of this state." The intent of the Act was to foster and provide incentives for economic development. Ongoing facility maintenance, repairs, and replacements of property in the day to day operation of a manufacturing facility are certainly necessary to the continuing operation of such facilities. However, they do not represent

"economic growth and development." Although the ongoing operation of manufacturing businesses is most laudable, repair, maintenance and replacement costs in essence represent no increase in the number of jobs in West Virginia, no increase in the production of West Virginia products, no increase in sales of West Virginia products, no increase in the sales of other West Virginia manufacturers, vendors or businesses, and no improvement, growth or expansion of the West Virginia economy.

The Act was not meant to provide special tax treatment for property or purchases related to these types of costs.

Notwithstanding the fact that pollution abatement equipment typically does not create additional manufacturing capacity, new capital investment in pollution abatement property will count toward the measure of the original cost of a preexisting facility under the rules. This provision was adopted because under the current regulatory climate, it is necessary for a manufacturing company to make investment in this type of property in order to pursue expansions representative of true economic growth and development as contemplated by the Legislature. Where new investment is made in pollution abatement property, the cost of such property will count toward the measure of the cost of qualified capital addition property. Investment in pollution abatement property will not include costs of repairs (whether capitalized or not), replacement property, equipment maintenance or ongoing operating expenses associated with pollution control property.

Under the rule, replacement property will not constitute qualified capital addition to a manufacturing facility or certified capital addition property. Replacement property essentially represents property purchased to replace worn

out property that the Taxpayer had to replace as a matter of ongoing ordinary maintenance. Had the old property not worn out, the investment would not have been made. Investment in the replacement property is not intended to result in a significant expansion of the operation. It is a mere replacement of existing property for the purpose of keeping operations going.

The rule allows qualification of replacement property which is installed or constructed to replace property that was destroyed by flood, storm or other casualty, but the measure of the cost of such replacement property under the rule will be reduced by any insurance proceeds received in compensation for the loss.

Replacement property does not typically contribute to an expansion of productive capacity, or economic growth except to the extent that such property includes a "betterment." The term "betterment" is defined in the rule to mean replacement property which, within defined minimums, enlarges productive capacity, economic efficiency or the quality, efficiency or extent of pollution abatement capabilities of the facility in which the replacement property is installed or placed. Qualified betterments (in combination with other new investment property that, with such betterment, has an aggregate cost in excess of \$50 million) will qualify for the special tax treatment under the rule.

RESOLUTION:

As discussed below, The Department of Tax and Revenue has amended the rule to allow betterments to more easily qualify for the special tax treatment allowed under the Act. No other liberalization of the exclusions and restrictions expressed in section 2.3.1.1 and related provisions has been adopted.

COMMENT:

The Act requires that, in order for property to qualify for the special tax treatment allowed under the Act, the Taxpayer must have at least \$100 million of "original investment" in place at a preexisting manufacturing facility, and the Taxpayer must then acquire property costing in excess of \$50 million to be incorporated into or near that preexisting facility as new investment property. The new investment property will qualify for the special tax treatment.

Comments were received to the effect that the rule excludes too much in enumerating types of property and costs that are excluded from qualifying as "original cost" of a preexisting facility.

RESPONSE:

Disallowing adjustments for depreciation, the measure of original cost of preexisting facilities prescribed by the rule is consistent with the United States Internal Revenue Service federal income tax basis calculation requirements for the cost basis of capitalized property. The methodology outlined is a long practiced and well understood procedure in the tax practitioner and business community. The legal validity and consistency of that methodology are well established and present the best method available for calculation of original cost basis and capital adjustments.

It does not appear to have been the intent of the Legislature to allow property which was once purchased by a Taxpayer, but then abandoned (abandonments) to qualify for the credit. Likewise, it seems very unlikely that the Legislature would have intended that purchases of non-capitalized items such as supplies, raw materials, and similar property (which are purchased and owned or used by the Taxpayer for a comparatively short time and then sold, used up or disposed of) to count toward the measure of the original cost of a preexisting

facility. It seems clear that the Legislature did not intend to allow entertainment facilities or residential housing to qualify as part of the original cost of a preexisting manufacturing facility under the Act.

These are the types of property excluded from the measure of original cost by the rule.

The Legislature intended original cost to represent the cost of the land, buildings, and equipment serving as productive hard capital assets of a manufacturing facility at the time the new investment is to be made.

RESOLUTION:

The Department of Tax and Revenue has not changed the rule in response to the comment. The original cost of the preexisting facility, as measured by the criteria set forth in the rule, is consistent with legislative intent and well established tax practice, and should not be altered.

COMMENT:

The Act requires that in excess of \$50 million of "qualified capital addition property" be placed in service by the Taxpayer at a qualified facility in order for the Taxpayer to gain entitlement to the special tax treatment allowed under the Act. The rule specifies that entitlement to the special treatment will occur only when property having a value in excess of \$50 million has been placed in service.

Comments were received to the effect that the special property tax valuation treatment should be allowed from the first moment property is placed in service, without waiting for the \$50 million threshold to be reached. One or more comments state that the requirement causes the Taxpayer to pay the property tax on the property at the standard valuation (rather than the special discounted valuation) during the period of time that new investment property is being constructed, until the amount of property on site

has accumulated to the point where it has an aggregate cost of at least \$50 million. Then the special treatment becomes applicable, and the amount of tax payable suddenly drops as a result of the special treatment.

RESPONSE:

The Act is clear that a Taxpayer only becomes entitled to the special tax treatment if the Taxpayer has placed property in service which has an aggregate cost in excess of \$50 million.

There is no provision in the Act that would allow for the proposed change. If a Taxpayer were to take the special treatment for property from the first moment any portion of the property representing a proposed investment of more than \$50 million were placed in service, and if the proposed investment and expansion project were then modified or abandoned by the Taxpayer before the construction was completed, there is no provision in the Act which would allow the State to recover the tax that should have been paid, but was lost due to special tax treatment.

RESOLUTION:

The rule has not been changed in response to the comments. The rule as proposed is consistent with the requirements of the Act, and represents a workable method for implementing those requirements. There is no provision in the Act which would allow adoption of an alternative method. Adoption of an alternative would require enactment of a statutory recapture provision or some other means of recovering tax underpayments resulting from misapplication of the special tax treatment.

COMMENT:

The Act requires that, in order for property to qualify for the special tax treatment allowed under the Act, the Taxpayer must have at least \$100 million of "original investment" in place at a preexisting manufacturing facility, and the Taxpayer must then acquire property costing in

excess of \$50 million to be incorporated into or near that preexisting facility as new investment property. The new investment property will qualify for the special tax treatment.

Comments were received stating that the rule should be amended to allow investment in a totally new facility costing over \$150 million to qualify for the special tax treatment without regard to whether a preexisting facility was in place before the investment was made. The gist of these comments is that the Taxpayer, in construction of its facility, will reach a point where \$100 million worth of property will be on site. That investment could be considered "preexisting" investment, and the next \$50 million of investment placed on site would then constitute the threshold amount of "new" investment required for qualification under the Act.

Once the threshold investment is exceeded (i.e., \$150 million has been enrolled on the property tax records of the taxing jurisdiction), the new facility would then receive the special tax treatment allowed under the Act for property represented by investment in excess of \$100 million.

RESPONSE:

Section 11-6F-2(d) of the Act defines the term "qualified capital addition to a manufacturing facility" in relevant part as follows:

"Qualified capital addition to a manufacturing facility" means all real property and personal property, the combined original cost of all of the property which exceeds fifty million dollars to be constructed, located or installed at or within two miles of a manufacturing facility owned or operated by the person making the capital addition that has a total original cost before the capital addition of at least one hundred million dollars

This provision clearly requires that the new investment property be installed at or within two miles of a manufacturing facility (a preexisting facility) that has a total original cost before the capital addition of at least \$100 million.

The Act clearly contemplates the physical existence of a preexisting plant, and it clearly requires that the preexisting plant be in existence before the capital addition.

The legislative intent of this language is that entitlement to special tax treatment under the Act be limited to Taxpayers which have a facility in West Virginia before the capital investment in the expansion or new investment program begins. Given this intent, investment in a totally new facility cannot qualify for the special tax treatment because a preexisting facility was not in place before the investment was made.

RESOLUTION:

The rules have not been changed in response to these comments. The adoption of the treatment advocated in the comments is not consistent with the language or intent of the Act.

COMMENT:

The rule (in section 2.3.1.1 and elsewhere) sets forth exclusions of certain property from qualifying as "certified capital addition property" and "qualified capital addition property." Excluded are costs representing repairs, ongoing maintenance, non-capitalized costs of property, replacement property and property that does not increase productive capacity, etc.

Under the rule, replacement property will not constitute a qualified capital addition to a manufacturing facility or certified capital addition property.

Replacement property does not typically contribute to an expansion of productive capacity, or economic growth except to the

extent that such property includes a "betterment." The term "betterment" is defined in the rule to mean replacement property which enlarges productive capacity, economic efficiency or the quality, efficiency or extent of pollution abatement capabilities of the facility by at least fifty percent over such capacities or capabilities (measured at their maximum) of the facility at the time the property which the replacement property is intended to replace was in operation. Qualified betterments (in combination with other new investment property that, with such betterment, has an aggregate cost in excess of \$50 million) will qualify for the special tax treatment under the rule.

The comments state that a betterment should qualify if the extent of enlargement of productive capacity, economic efficiency or the quality, efficiency or extent of pollution abatement capabilities is considerably less than 50%, and that the 50% requirement should be lowered.

RESPONSE: The rule has been changed.

RESOLUTION: Based upon the comments received, the requirement for qualification of a betterment has been lowered from 50% to 12%.

Under the amended rule, a betterment (in combination with other new investment property that, with such betterment, has an aggregate cost in excess of \$50 million) will only qualify for special treatment under the Act if the betterment enlarges productive capacity, economic efficiency or the quality, efficiency or extent of pollution abatement capabilities of the facility by at least twelve percent over such capacities or capabilities (measured at their maximum) of the facility at the time the property which the replacement property is intended to replace was in operation.

COMMENT:

Section 11-6F-2(d) of the Act defines the term "qualified capital addition to a manufacturing facility," and sets forth certain specifications relating to persons making new investments in a polymer alliance zone:

if the capital addition is made in a polymer alliance zone as designated from time-to-time by executive order of the governor, then the person making the capital addition may for purposes of satisfying the requirements of this subsection join in a multiparty project with a person owning or operating a manufacturing facility that has a total original cost before the capital addition of at least one hundred million dollars if the capital addition creates additional production capacity of existing or related products of feedstock or derivative products respecting the manufacturing facility.

The rule interprets this "polymer alliance zone" subsection as applying only to the following entities if they have a facility located in a polymer alliance zone:

- (1) Manufacturers of polymers,
- (2) Manufacturers of the production inputs for the manufacture of polymers and
- (3) Manufacturers that use polymers as production inputs.

The rule does not interpret the special "polymer alliance zone" provisions as being applicable to any other manufacturers or persons that may be located in a polymer alliance zone. However, all West Virginia manufacturers that qualify under the other provisions of Senate Bill 513 would be subject to the property tax valuation provisions of the Act without regard to whether they are located in a polymer alliance zone or elsewhere in West

Virginia.

Comments state that the rule is not clear as to whether the amount of the aggregate new investment can be composed of investment by two or more participants in the proposed project. The comments also state that the rule should expressly state that the person owning or operating a manufacturing facility that has a total original cost before the capital addition of at least one hundred million dollars may be a manufacturer of products other than polymer related products, so long as that manufacturer also produces polymers or related products at the facility.

RESPONSE: The rule has been changed.

RESOLUTION: The rule has been amended to clarify the fact that it allows aggregation of the investment of two or more multiple party project participants in order to reach the \$50 million investment threshold. The rule has been amended to allow the person owning or operating a manufacturing facility that has a total original cost before the capital addition of at least one hundred million dollars to qualify for the multiple party project provisions of the polymer alliance zone provisions of the Act if that manufacturer predominantly (but not exclusively) manufactures polymers, the production inputs for the manufacture of polymers or products that use polymers as production inputs.

COMMENT: In some cases expansion may take place in phases where one portion of the plant expansion (such as a production line or unit) may be placed in operation, and other phases of the expansion will then be later placed into operation as they are built. The proposed rule states that the Tax Commissioner will certify multi-phase projects if the project phases can be reasonably included as components of an discrete capital addition

project for a manufacturing facility. However, if there is a substantial expense of time or delay (either planned or unplanned) between the placement of one phase into operation and the commencement of construction on a succeeding phase, the Tax Commissioner may determine that the expansions resulting from those purported phased investments are not part of a discrete capital addition project for a manufacturing facility, but instead constitute a series of non-integrated investments. The rule states that a time gap or delay of more than 1 year would be considered substantial.

A comment was received to the effect that the one year limit should be deleted.

RESPONSE:

Section 11-6F-2(a) of Enrolled Senate Bill 513 defines the term "certified capital addition property" as follows:

"Certified capital addition property" means all real property and personal property included within or to be included within a qualified capital addition to a manufacturing facility that has been certified by the state tax commissioner in accordance with section four of this article: Provided, That airplanes and motor vehicles licensed by the division of motor vehicles shall in no event constitute certified capital addition property.

The term "qualified capital addition to a manufacturing facility" is in turn defined in section 11-6F-2(d) of the Act as follows:

"Qualified capital addition to a manufacturing facility" means all real property and personal property, the combined original cost of all of the property which exceeds fifty million dollars to be constructed, located or installed at or within two miles of a manufacturing facility owned or operated by the person making the capital

addition that has a total original cost before the capital addition of at least one hundred million dollars: Provided, That if the capital addition is made in a polymer alliance zone as designated from time-to-time by executive order of the governor, then the person making the capital addition may for purposes of satisfying the requirements of this subsection join in a multiparty project with a person owning or operating a manufacturing facility that has a total original cost before the capital addition of at least one hundred million dollars if the capital addition creates additional production capacity of existing or related products of feedstock or derivative products respecting the manufacturing facility.

The rule states that if investments are determined to be discrete non-integrated investments, the property acquired with such investments will be required to qualify separately for special property valuation under the Act. Each non-integrated investment will be required to independently meet the \$50 million investment threshold requirement.

RESOLUTION:

The statute clearly contemplates the making of investment in a defined, discrete, integrated plan for a capital addition to a manufacturing facility. The rule is consistent with this legislative intent. The suggested change is not. The rule has not been changed in response to this comment.

COMMENT:

A comment was received stating that the rule should be amended to clarify the fact that the term "manufacturer" includes manufacturers of electricity.

RESPONSE:

The Department of Tax and Revenue agrees that the term "manufacturer" for purposes of the Act and the rule includes manufacturers of electricity. However, many businesses in addition to manufacturers of electricity qualify as

manufacturers for purposes of the Act and the rule. We feel it would be inappropriate to list every type of manufacturer.

RESOLUTION:

The rule has not been changed. Although the Department of Tax and Revenue confirms that electricity manufacturers constitute "manufacturers" for purposes of the Act and the rule, the Department of Tax and Revenue will not amend the rule to specifically list such manufacturers or other manufacturers as coming within the definition of the term "manufacturer." To do so is impractical and inappropriate.

COMMENT:

A comment was received which was comprised of three main parts. That comment is summarized as follows:

A comment was received that:

(1) "The Breadth and Complexity of the Proposed Regulations Violate the Authority Granted regarding the Proposition of these Legislative Rules, as well as Basic Tenets of Statutory Construction."

The comment states that:

(2) "The Proposed Regulations go beyond what is 'necessary to implement the provisions of this article [W. Va. Code § 11-6F-1 et seq.]' by redefining key terms thereby ignoring and manipulating the explicit intent of the Act."

The comment goes on to state that:

(3) "The Proposed Regulations ignore long-standing West Virginia precedent relating to this form of legislation. The West Virginia Supreme Court of Appeals has held that socioeconomic legislation designed to encourage industrial development should be liberally construed to effectuate the goals of the legislature. See Andy

Bros. tire Co., Inc. v. West Virginia Tax Commissioner, 160 W. Va. 144, 233 S.E.2d 134 (1977)."

RESPONSE:

This comment is not specific as to which particular provisions of the rule are alleged to "go beyond what is necessary," etc. Nor does the comment state which particular provisions of the rule are in contravention of the purported mandate of the Andy Brothers Tire case.

The responses to the three parts of the comment are numbered to correspond to the numbering set forth above.

Response to part (1):

It is the position of the Department of Tax and Revenue that, although the rule does contain some "breadth and complexity," the rule is no more broad or complex than necessary to articulate the positions and interpretations adopted by the Department of Tax and Revenue with reference to the Act. Tax statutes, tax regulations and tax law generally can be very complex and very broad. Such is the nature of the subject.

The Department of Tax and Revenue disagrees with the assertion that the rule in any way violates the authority granted to the Department of Tax and Revenue to propose and promulgate the rule. Under section 11-6F-5 of the Act, the Department of Tax and Revenue is specifically granted authority to propose rules for promulgation in accordance with Article 3, Chapter 29a of the West Virginia Code. The Department of Tax and Revenue specifically rejects the allegation that the rule was issued in any way in violation of this express statutory authority.

Response to part (2):

The Department of Tax and Revenue disagrees with the assertion that the rule goes "beyond what is 'necessary to implement the provisions of . . . [W. Va. Code § 11-6F-1 et seq.]" by redefining key terms thereby ignoring and manipulating the explicit intent of the Act." The comment does not state which specific provisions of the rule redefine key terms and ignore and manipulate the explicit intent of the Act.

We can only surmise that the comment refers to the three other issues commented upon by the author of the comment. They are:

- (1) The "betterments" provisions are too restrictive.
- (2) The restrictions on original cost of preexisting facilities are too restrictive, and
- (3) The exclusions of certain types of property from the definitions of "certified capital addition property" and "qualified capital addition property" are too restrictive.

The Department of Tax and Revenue has set forth its responses to these comments above. They will not be repeated here. The Department of Tax and Revenue has endeavored to comply with legislative intent rather than "ignore" or "manipulate" legislative intent. We note that the "betterments" provision was amended in response to comments. The Department of Tax and Revenue believes this amendment to be consistent with legislative intent.

Response to part (3):

The comment states that the West Virginia Supreme Court of Appeals has held that socioeconomic legislation designed to

encourage industrial development should be liberally construed to effectuate the goals of the legislature. The case of Andy Bros. Tire Co., Inc. v. West Virginia Tax Commissioner, 160 W. Va. 144, 233 S.E.2d 134 (1977), is cited as authority for this position.

In the Andy Brothers Tire case a Taxpayer appealed from a decision of the Tax Commissioner denying its petition for reassessment. The Tax Department had disallowed the Taxpayer's application of the industrial expansion tax credit. The circuit court affirmed. The Taxpayer appealed to the West Virginia Supreme Court, and the circuit court decision was reversed.

The case resulted from ambiguous and conflicting provisions in the industrial expansion tax credit statute which excluded "replacement" property from qualifying for the credit, but allowed "reconstructed" property to qualify.

The issue was whether the total replacement of a burned down facility with a newly built facility would qualify for the industrial expansion credit. The statutory construction question was whether the new facility was "replacement" property (excluded by the statute), or whether the new facility was "reconstructed" property (qualified for the credit).

The court held the new facility to be "reconstructed" property qualified for the credit. The court based its holding on the fact that the statute was prefaced with a paragraph stating legislative intent to encourage new industry and expansion of existing industry. The court found that the Legislature intended that when an existing industrial facility was completely destroyed, its rebuilding and the reemployment of its labor force was to be encouraged. Resumption of employment was seen by the

court as consistent with the economic development purpose of the statute.

The court stated its rule for construction of the industrial expansion tax credit statute as follows:

This court has always attempted to liberally construe socioeconomic legislation to effectuate recited legislative intent. See, State ex rel. County Court of Marion County v. Demus, 148 W.Va. 398, 135 S.E.2d 352 (1964); State ex rel. The County Court of Brooke County v. Kemp, 151 W.Va. 349, 151 S.E.2d 680 (1966); Chapman v. Huntington, West Virginia Housing Authority, 121 W.Va. 319, 3 S.E.2d 502 (1939); and State ex rel. The West Virginia Housing Development Fund v. Copenhagen, 153 W.Va. 636, 171 S.E.2d 545 (1969).

The preface of the industrial expansion tax credit statute states the economic development purpose underlying the legislation. The court stated that this preface caused the court to use this liberal rule of construction.

The comment indicates that Senate Bill 513 should be construed liberally presumably because the Act contains legislative findings in section 11-6F-1 stating that encouragement of economic growth and development in West Virginia is in the public interest and that the ad valorem property tax valuation set forth in the Act will "help preserve the tax base and preserve and create jobs attributable to manufacturing facilities existing in this state."

Senate Bill 513 is a property tax valuation statute. It essentially addresses administrative procedures for assessment of property taxes. Over ten years after the Andy Brothers Tire case was decided, the court, in the case of Calhoun County Assessor v. Consolidated Gas Supply

Corp. specifically stated the rules of construction to be applied to statutes "establishing administrative procedures for collection and assessment of taxes." The court stated the rule as follows:

Statutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer. However, statutes establishing administrative procedures for collection and assessment of taxes will be construed in favor of the government. Calhoun County Assessor v. Consolidated Gas Supply Corp., 178 W.Va. 230, 358 S.E.2d 791 (1987), commented on in 90 W.Va. L. Rev. 720 (1988).

If there were an ambiguity in the Act, the Act would arguably be interpreted according to the rule announced by the court in the Consolidated Gas Supply Corp. case, and not according to the Andy Brothers Tire rule.

The Department of Tax and Revenue has applied a reasoned, informed and consistent interpretation of Senate Bill 513 in seeking to implement legislative intent through the rule.

RESOLUTION:

The rule has not been changed in response to the comment. The Department of Tax and Revenue has interpreted the Act consistently with legislative intent. The Department of Tax and Revenue has written the rule with the breadth and complexity necessary to address issues presented, and the Department of Tax and Revenue has issued the proposed rule in compliance with the authority granted to the Department of Tax and Revenue to issue rules.