

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

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2010 JUL 30 AM 11:59

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: DEP - Division of Water and Waste Management TITLE NUMBER: 33

CITE AUTHORITY: §22-18-6

AMENDMENT TO AN EXISTING RULE: YES  NO


IF YES, SERIES NUMBER OF RULE BEING AMENDED: 20

TITLE OF RULE BEING AMENDED: Hazardous Waste Management Rule

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

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

  
Authorized Signature

**QUESTIONNAIRE**

*(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)*

DATE: July 30, 2010

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection, DWWM  
601 57th Street SE  
Charleston, WV 25304  
304-926-0449

LEGISLATIVE RULE TITLE: 33 CSR 20 Hazardous Waste Management Rule

1. Authorizing statute(s) citation WV Code § 22-18-6

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
June 14, 2010

b. What other notice, including advertising, did you give of the hearing?  
Class I legal ad in the Charleston Gazette and the Charleston Daily Mail  
Agency mailing list  
Agency website

c. Date of Public Hearing(s) *or* Public Comment Period ended:  
July 15, 2010 7:00 pm

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

Attached     X                          No comments received

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

July 30, 2010

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- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Scott G. Mandirola, Director  
Division of Water and Waste Management  
601 57th Street SE  
Charleston, WV 25304

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Telephone: 304-956-0499 Extension 1058  
Fax: 304-926-0497

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- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Ken Holliday, Environmental Resources Specialist  
Permitting Section  
Division of Water and Waste Management

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601 57th Street SE  
Charleston, WV 25304  
Telephone: 304-926-0499 Extension 1615  
Fax: 304-926-0456

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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

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b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**DEPARTMENT OF ENVIRONMENTAL PROTECTION  
BRIEFING DOCUMENT**

**Rule Title: "Hazardous Waste Management System" 33CSR20**

**A. AUTHORITY: WV Code §22-18-6**

**B. SUMMARY OF RULE:** This rule regulates the generation, treatment, storage and disposal of hazardous waste. The rule proposed for 2011 adopts and incorporates by reference the federal regulations set forth in 40 CFR Parts 260 through 279 that are in effect as of June 1, 2010 with the exception of two federal amendments. One federal amendment currently undergoing reconsideration is the "Revisions to the Definition of Solid Waste" (October 30, 2008, Federal Register Vol. 73, No. 211). The other federal amendment, the "Expansion to RCRA Comparable Fuel Exclusion" (December 19, 2008, Federal Register Vol. 73, No. 245), has been withdrawn. Two federal rule amendments are adopted by this rule: "Revisions to the Requirements for Transboundary Shipments of Hazardous Waste Between OECD Member Countries", (January 8, 2010, Federal Register Vol. 75 No. 5) and "Hazardous Waste Technical Corrections and Clarifications Rule", (March 18, 2010, Federal Register Vol. 75, No. 52).

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:** This rule is proposed to adopt and incorporate by reference two changes to federal regulations 40 CFR Parts 260 through 279, enabling the State hazardous waste program to maintain consistency with the federal program. The first federal rule revises the requirements for transboundary shipments of hazardous wastes between OECD Member Countries. The second rule makes technical correction and clarifications to existing hazardous waste regulations.

**D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE / DETERMINATION OF STRINGENCY:** A federal counterpart to the proposed rule exists. Because proposed revisions are consistent with the federal counterpart regulation, no determination of stringency is required.

**E. CONSTITUTIONAL TAKINGS DETERMINATION**

In accordance with W. Va. Code §§ 22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

**F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:**

At its meeting on [June 3, 2010], the Environmental Protection Advisory Council discussed the proposed rule. See attached minutes for Council's discussion.

## ENVIRONMENTAL PROTECTION ADVISORY COUNCIL

### MEETING MINUTES

June 3, 2010

#### I. CALL TO ORDER

**Kristin A. Boggs, Ex Officio Chair designated by Secretary Randy Huffman,** called to order a special meeting of the DEP Advisory Council at 1:40 p.m. on June 3 2010 at the headquarters of the West Virginia Department of Environmental Protection, 601 57th Street Southeast, Charleston, West Virginia. Agendas were distributed.

#### II. ROLL CALL

Members present: Lisa Dooley, Jackie Hallinan, Larry Harris, Karen Price, Bill Raney, and Rick Roberts.

The meeting was also attended by the following DEP personnel: Randy C. Huffman, DEP Cabinet Secretary; Lisa McClung, DEP Deputy Cabinet Secretary; Kathy Cosco, DEP Chief Communication Officer; Daniel T. Arnold, Division of Water and Waste Management; Bill Timmermeyer, Division of Water and Waste Management; Charles Sturey, Division of Mining and Reclamation; Dave Vandelinde, Division of Mining and Reclamation, Office of Explosives and Blasting; Yvonne Anderson, Division of Mining and Reclamation; Ken Holliday, Division of Water and Waste Management; Yogesh Patel, Division of Water and Waste Management; Fred Durham, Division of Air Quality; Jim Mason, Division of Air Quality; Lewis Halstead, Division of Mining and Reclamation.

Also in attendance were: Don Garvin of the Ohio Valley Environmental Coalition; Katherine Crockett and Emily Moy of Spilman Thomas & Battle; and Lewis Baker of the West Virginia Rural Water Association.

#### III. OLD BUSINESS

**Minutes of the May 27, 2010 Meeting.** The minutes were emailed and provided to Council in hard copy. Ms. Dooley moved for approval of the minutes, Mr. Raney seconded the motion, and it was carried by acclamation of Council.

#### IV. PROPOSED 2011 LEGISLATIVE RULES

Because the Advisory Council had received summaries of the rule two weeks prior to the meeting, he suggested that Ms. Boggs simply read the title of the rule and allow Council members to ask questions, rather than read the summaries to Council. The suggestion was well taken. Summaries of the proposed rules are set forth herein for completeness of the record, and so the minutes will reflect the complete information provided to Council.

## Division of Air Quality

- ❖ 45 C.S.R. 8 – *Ambient Air Quality Standards*. Promulgated last in the 2010 Session. Revisions to the rule include a change in format to incorporation by reference, rather than reiterating the NAAQS in the rule. The rule now incorporates by reference the NAAQS promulgated by EPA under 40 C.F.R. § 50 and the ambient air monitoring reference methods and equivalent methods under 40 C.F.R. § 53, which become effective June 1, 2010. EPA has established a new primary one-hour NO<sub>2</sub> standard at a level of 100 parts per billion, based on the three-year average of the 98th percentile of the yearly distribution of one-hour daily maximum concentrations, to supplement the existing primary annual standard of 53 parts per million. This new NO<sub>2</sub> primary standard is incorporated by reference in this rule.

Section 2, titled *Anti-Degradation Policy*, has been stricken for two reasons. First, the new incorporation by reference format incorporates the federal significant deterioration of air quality provisions under 40 C.F.R. § 50.2(c). Second, because West Virginia adopted the federal Prevention of Significant Deterioration program under 45 C.S.R. 14 in the early 1980s, the State has more than satisfied the intent of the relic language in Section 2 to protect the air quality in areas that were in attainment of the NAAQS. Section 2 was authored in the early 1970s as a placeholder in anticipation of the future PSD program and its provisions for best available control technology.

- ❖ 45 C.S.R. 14 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration*. Promulgated last in the 2010 Session. Revisions to the rule include deletion of federally stayed provisions for fugitive emissions and clarification of affected facilities at large coal prep plants. EPA is now reconsidering inclusion of fugitive emissions and will issue a final rule in the future. Fugitive emissions from stockpiles (now an affected source under 40 C.F.R. § 60, Subpart Y) are now counted for large coal prep plants (but haul roads are still excluded). Other minor revisions ensure consistency with federal counterpart language.
- ❖ 45 C.S.R. 16 – *Standards of Performance for New Stationary Sources*. Promulgated last in the 2010 Session. Revisions to this rule are the annual incorporate-by-reference amendments to the NSPS, including Standards of Performance for Coal Preparation and Processing Plants. These final amendments include revisions to the emission limits for particulate matter and opacity standards for thermal dryers, pneumatic coal cleaning equipment, and coal handling equipment located at coal preparation and processing plants.
- ❖ 45 C.S.R. 18 – *Combustion of Solid Waste*. Promulgated last in the 2008 Session. Revisions to the rule include new federal emission guidelines for existing hospital/medical/infectious waste incinerators (HMIWI). The revised rule has been restructured to better comport to respective federal counterpart language. The stricken provisions in Section 12, *Compliance Dates*, have been moved to respective sections for existing HMIWI and commercial and industrial solid waste incinerators. The revisions

strike obsolete language regarding repealed provisions, as well as add new definitions to the rule. Other miscellaneous revisions are included that improve the clarity and accuracy of existing rule language.

- ❖ 45 C.S.R. 19 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution Which Cause or Contribute to Nonattainment*. Promulgated last in the 2010 Session. Revisions to the rule include a new subsection 1.5, which provides that references to the federal counterpart will be construed as the version that was in effect as of June 1, 2010. Also, the term “affected facilities” has been clarified. Fugitive emissions from stockpiles (now an affected facility under 40 C.F.R. § 60, Subpart Y) are now counted for large coal prep plants (but haul roads are still excluded). Other minor revisions ensure consistency with federal counterpart language to date.
- ❖ 45 C.S.R. 25 – *Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities*. Promulgated last in the 2010 Session. Revisions to the rule include annual incorporation-by-reference updates. Definitions that are not used in the rule have been stricken and requirements pertaining to ignitable, reactive or incompatible wastes have been updated to reference a federal counterpart. The fee schedule for hazardous waste management facilities has been simplified.
- ❖ 45 C.S.R. 34 – *Emission Standards for Hazardous Air Pollutants*. Promulgated last in the 2010 Session. Revisions to this rule include the annual incorporation-by-reference revisions to the Hazardous Air Pollutant rule that include the following source categories of new or revised NESHAP standards promulgated as of June 1, 2010 for non-major area sources: Chemical Manufacturing Area Sources. The revised rule also incorporates by reference the following source categories of new or revised NESHAP standards promulgated as of June 1, 2010 for major sources: Petroleum Refineries and Reciprocating Internal Combustion Engines.
- ❖ The following source categories of newly promulgated NESHAPS affecting non-major area sources of hazardous air pollutants are being excluded from incorporation by reference: Prepared Feeds Manufacturing; Aluminum, Copper, and Other Non-Ferrous Foundries; Asphalt Processing and Asphalt Roofing Manufacturing, Paints and Allied Products Manufacturing; and Chemical Preparations Industry. EPA has not provided any additional funding to implement these new federal area source air toxics rules. Further, DAQ considers these standards to be resource-intensive and costly to implement as a practical matter, without achieving commensurate air quality benefits. For these reasons, West Virginia is one of Several States in Region III that are adopting some, but not all, of these standards. EPA Regional Offices will be implementing those standards not adopted by the States, thereby providing a measure of regulatory certainty and consistency.

#### **Division of Water & Waste Management**

- ❖ 33 C.S.R. 20 – *Hazardous Waste Management System*. Promulgated last in the 2010 Session. Revisions to this rule include striking “Expansion to RCRA Comparable Fuel Exclusion” from exclusion from incorporation by reference of the federal rule.

- ❖ 47 C.S.R. 12 – *Requirements Governing Groundwater Standards*. Promulgated last in the 2010 Session. The proposed revision to this rule is technical cleanup from last year’s revision. Last year’s amendment incorrectly set a numeric standard for radon, which the EPA proposed in draft language in 2009 but has not yet finalized. Therefore, West Virginia’s adoption of a radon standard for groundwater was premature.
- ❖ 47 C.S.R. 60 – *Monitoring Well Design Standards*. Promulgated last in the 2010 Session. Revisions to this rule are needed to correct requirements for documentation submittals to DEP. The current version requires reporting of all borehole abandonment, which is unenforceable and unnecessary. Revisions to this rule will require abandonment documentation for “high risk” boreholes and permanent monitoring wells, as was the original intention of the 2010 amendments recommended by the Monitoring Well Advisory Council.

#### **Secretary’s Office**

- ❖ 60 C.S.R. 2 – *Rules on Freedom of Information Act Requests*. Promulgated last in 1997. Revisions to this rule include changing the fee structure for searching for and reproducing requested records to bring it in line with other State agencies by setting a flat search fee of \$20.00 per hour (or a quarter fraction thereof) for a Division’s time spent in locating, duplicating or compiling the requested records providing and a cost of \$10.00 if the information is produced on diskette, tape or other storage media.

#### **Division of Mining & Reclamation**

- ❖ 38 C.S.R. 2 – *West Virginia Surface Mining Reclamation Rule*. Promulgated last in the 2009 Session. In addition to the amendments discussed at the December 9, 2009 meeting, which are currently in effect as an Emergency Rule, the proposed revisions include the following: (1) Clarification of the format and information necessary for complete application submittal and clarification on the renewal process to take into account DEP’s electronic filing processes; (2) Provision for advertisement of the application when it is technically complete, as opposed to administratively complete; (3) Provision for reopening of the public comment period; (4) Provision that pre-subsidence surveys shall be confidential and only used for evaluating damage relating to subsidence; (5) Clarification of when an operator is considered to be in compliance with applicable environmental performance standards; (6) Provision that the Secretary has the authority to initiate bond release in lieu of the permittee; (7) Clarification that bonding for a permit in inactive status shall remain in effect for the life of the operation; and (8) Provision that the Secretary shall provide email notice of the issuance of a show cause order to members of the public who have subscribed to the Secretary’s email notification service and otherwise provide notice to any person whose Citizen Complaint has resulted in the issuance of any violation that led to the issuance of a show cause order.

- ❖ 199 C.S.R. 1 – *Surface Mining Blasting Rule*. Promulgated last in the 2008 Session Revisions to this rule include modifying the definitions of “other structure” and “structure” to provide for dams as defined in 38 C.S.R. 4 § 2.7 and to provide that those dams will be exempt from the maximum air blast and ground vibration standards of the rule.

## V. COMMENTS FROM COUNCIL

Ms. Dooley moved that Council recommend to the Secretary that the Air Quality rules contain language in their sections entitled “Inconsistency Between Rules” to read as follows: “In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method, or rule using sound scientific information.” See, 45 C.S.R. 8 proposed § 4.1. Ms. Dooley pointed out that DEP uses this language in some of its other Divisions’ rules and some states surrounding West Virginia also use this language or similar language. Mr. Raney seconded the motion and discussion ensued. Ms. Hallinan pointed out that the proposed language is vague and may cause *Daubert*-related problems for attorneys arguing before boards and the courts using these rules. A vote was taken, and Ms. Dooley’s motion passed by a majority vote of Council; Ms. Hallinan voted no and Dr. Harris abstained.

Regarding 45 C.S.R. 8, Dr. Harris asked about removing the anti-degradation section. He expressed concern about how many areas of the State are in attainment and asked if West Virginia does not still need the policy in order to stay in attainment. He was also concerned that removing the specific reference to “anti-degradation” might lead the public to believe that DEP does not enforce any such policy anymore. Mr. Mason explained that the anti-degradation was meant as a placeholder back when the rule was originally promulgated in the 1970s until the states could get their own programs up and running. Because West Virginia adopted the federal Prevention of Significant Deterioration program under 45 C.S.R. 14 in the early 1980s, the State has more than satisfied the intent of the relic “anti-degradation” language in Section 2 to protect the air quality in areas that were in attainment of the NAAQS. “Prevention of significant deterioration” in Rule 14 means the same thing as “anti-degradation.”

Regarding 45 C.S.R. 14, Dr. Harris inquired about the justification for the proposed changes to the rule. Mr. Mason explained why the rule is being amended and a discussion ensued about fugitive emissions.

In relation to 45 C.S.R. 25, Mr. Roberts asked how many hazardous waste treatment, storage, and disposal facilities are in West Virginia, and Mr. Mason advised Council that he would have to research those numbers and report back.

Finally, regarding 45 C.S.R. 34, Dr. Harris asked for a definition of "area sources" and whether the federal EPA would enforce those provisions. Mr. Mason explained what area sources are and that EPA will enforce those standards.

In relation to 33 C.S.R. 20, Ms. Dooley inquired whether hazardous waste fees were being changed, and Ms. Boggs explained that, while fees are regurgitated in this rule, the statutory authority to change the fees was set forth in the statute; there are no changes to the fee structure proposed in this rule.

Dr. Harris asked the record to reflect that the Groundwater Standards rule was not submitted by the deadline, so Council had not yet had an opportunity to review the text or a summary of the rule prior to the Council meeting. Mr. Timmermeyer was on hand and did answer questions regarding why the rule had to be promulgated this year.

Regarding 60 C.S.R. 2, Ms. Dooley inquired about the language "shall furnish copies," and Ms. Boggs explained that the language for § 7.2 is in the disjunctive: the agency shall furnish copies or advise the requester when he or she can come in and review documents or deny the request. Ms. Dooley then inquired about the new exemptions, and Ms. Boggs explained that the exemptions mirror the West Virginia Freedom of Information Act, which is set forth at W. Va. Code 29B-1-1 et seq., and the federal Freedom of Information Act. Finally, Ms. Dooley asked whether the proposed fee changes would be sufficient to cover the agency's costs in responding to FOIA requests, and Ms. Cosco affirmed that they would.

Finally, regarding 38 C.S.R. 2, Dr. Harris inquired about the provisions relating to the addition of a trust account as an approved form of bond. Specifically, he asked whether the proposed trust account would cover perpetual treatment. Mr. Clarke explained that the proposed trust account is intended to be another form of bonding, not be a replacement for the Special Reclamation Fund. Dr. Harris then inquired as to how the cost of perpetual treatment is calculated. Mr. Clarke explained that the federal Office of Surface Mining Reclamation & Enforcement (OSM) has developed a computer model that estimates cost by developing a formula based on a mechanism that allows treatment for 40 or more years.

## **VI. COMMENTS FROM THE PUBLIC**

Mr. Garvin asked for clarification on the trust account proposed by the Division of Mining and Reclamation. Mr. Clarke answered his questions.

Mr. Garvin then had several questions for Mr. Mason and Mr. Durham regarding the proposed Air Quality rules, which were duly answered.

VII. ADJOURNMENT

Mr. Raney moved that the meeting be adjourned, Ms. Dooley seconded the motion, and it carried by acclamation of Council. The meeting was adjourned at 3:05 p.m.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: 33CSR20 - "Hazardous Waste Management System"

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Department of Environmental Protection DWWM

Address: 601 57th Street SE  
Charleston, WV 25304

Phone Number: (304) 926-0499 Ext. 1615 Email: Kenneth.C.Holliday@wv.gov

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The proposed revisions to this rule should cause no additional impact on cost and revenues of state government.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

<b>FISCAL YEAR</b>			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
<b>2. Estimated Total Revenues</b>	0.00	0.00	0.00

33CSR20 - "Hazardous Waste Management System"

Rule Title: \_\_\_\_\_

Rule Title:

33CSR20 - "Hazardous Waste Management System"

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

The proposed revisions to this rule will have minimal effect on the costs to the Division of Water and Waste Management because they impose no additional requirements beyond current federal requirements. Costs are covered under previous cost estimates.

**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: June 14, 2010

Signature of Agency Head or Authorized Representative



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FILED  
2010 JUL 30 AM 11:59  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

TITLE 33  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
WASTE MANAGEMENT

SERIES 20  
HAZARDOUS WASTE MANAGEMENT SYSTEM

§33-20-1. General.

1.1. Scope. -- This rule establishes and adopts a program of regulation for the generation, treatment, storage, and disposal of hazardous waste to the extent necessary for the protection of the public health and safety and the environment.

1.2. Authority. -- This rule is promulgated pursuant to the West Virginia Hazardous Waste Management Act, W. Va. Code, §22-18-6.

1.3. Filing Date. -- ~~April 9, 2010~~

1.4. Effective Date. -- ~~May 1, 2010~~

1.5. Incorporation by Reference. -- Whenever either federal statutes or regulations or state statutes or rules are incorporated by reference into this rule, the reference is to that statute or regulation in effect on ~~June 1, 2009~~ June 16, 2010 unless otherwise noted in the text of this rule. This incorporation by reference is not intended to replace or abrogate federal authorities granted the Resource Conservation and Recovery Act of 1976.

1.5.a. In applying the federal requirements incorporated by reference throughout this rule, the following exceptions or substitutions apply, unless the context clearly requires otherwise or the referenced rule cannot be delegated to the state:

1.5.a.1. "West Virginia Department of Environmental Protection" will be substituted for "Environmental Protection Agency."

1.5.a.2. "Secretary of the West Virginia Department of Environmental Protection" will be substituted for "Administrator," "Regional Administrator," and "Director." In those sections that are not adopted by reference or that are not delegable to the state, "Administrator", "Regional Administrator", and "Director" will have the meaning defined in 40 C.F.R. §260.10.

1.5.a.3. Whenever the regulations require publication in the "Federal Register" compliance will be accomplished by publication in the "West Virginia Register," a part of the "State Register" created pursuant to the provisions of W. Va. Code, §29A-2-2 for those areas applicable and delegable to the state.

1.5.a.4. Whenever in the federal regulation reference is made to the Resource Conservation and Recovery Act of 1976 §3010, as amended (42 U.S.C. §6930), the reference is to section 4. The notification requirements of the Resource Conservation and Recovery Act of 1976 §§3010 remain in effect and will be satisfied by compliance with section 4.

1.6. Cross Reference. -- Whenever a reference is cited in a provision incorporated by reference which cross reference was not incorporated by reference, the provisions of the applicable state law and rules, if any, control to the extent of any conflict or inconsistency. Where state rules are present and there is a question, the state rules govern. Where there are no state rules present, federal regulations govern. For example, cross

reference to 40 C.F.R. part 264 subpart O -- Incinerators, which was not incorporated by reference, would need to be referenced to the applicable West Virginia Department of Environmental Protection, ~~Office~~ Division of Air Quality rule, 45CSR25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities."

1.7. Inconsistencies with the West Virginia Code. -- In the event a provision of the Code of Federal Regulations incorporated by reference herein includes a section that is inconsistent with the West Virginia Code, the West Virginia Code controls to the extent federal law does not preempt the state law. In the event a provision of the Code of Federal Regulations incorporated by reference herein is beyond the scope of authority granted to the Department of Environmental Protection pursuant to statute or is in excess of the statutory authority, the provision will be and remain effective only to the extent authorized by the West Virginia Code.

1.8. Provisions Applied Prospectively. -- The provisions of this rule are to be applied prospectively. All orders, determinations, demonstrations, rules, permits, certificates, licenses, waivers, bonds, authorizations and privileges that have been issued, made, granted, approved or allowed to become effective by the Secretary, and that are in effect on the date this rule becomes effective, will continue in effect according to their terms unless modified, suspended or revoked in accordance with the law.

1.9. This rule references the provisions of the West Virginia Department of Environmental Protection, Division of Air Quality rule, 45CSR25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities" that is in effect on the date that this rule becomes effective.

1.10. This rule excludes the following federal rules from incorporation by reference: "Revisions to the Definition of Solid Waste" in Federal Register Vol. 73, No. 211, dated

October 30, 2008., and "Expansion to RCRA Comparable Fuel Exclusion" in Federal Register Vol. 73, No. 245, dated December 19, 2008.

### **§33-20-2. Hazardous Waste Management System: General.**

2.1. 40 C.F.R. Part 260. -- The provisions of 40 C.F.R. §260 are hereby adopted and incorporated by reference with the modifications, exceptions, and additions set forth in this section.

2.1.a. The definitions of terms used in this rule will have the meaning ascribed to them in 40 C.F.R. §§260, 261, 262, 263, 264, 265, 266, 267, 268, 270, 273 and 279 with the exceptions, modifications and additions set forth in this section.

2.1.a.1. "Full regulation" means those rules applicable to generators of greater than one thousand (1,000) kilograms of non-acutely hazardous waste in a calendar month and/or who treat, store or dispose of hazardous waste at their facility.

2.1.a.2. "Stage" or "staging" means the temporary placement of off-site generated recyclable materials within a recycling facility for a period of time no longer than three (3) days. Placement of recyclable materials for longer than three (3) days is considered "storage."

2.1.b. This rule excludes any and all changes to 40 C.F.R. §260 resulting from Federal Rule "Revisions to the Definition of Solid Waste," in Federal Register Vol. 73, No. 211, dated October 30, 2008.

2.2. 40 C.F.R. §260.2. B -- The provisions of 40 C.F.R. §260.2 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provisions of W. Va. Code § 22-18-12.

2.3. 40 C.F.R. §260.21(d). B -- The provisions of 40 C.F.R. §260.21(d) are excepted from incorporation by reference.

#### 2.4. Petitions for Waste Exclusions.

2.4.a. Any person seeking to exclude a waste at a particular generating facility from 40 C.F.R. §261.3 or 40 C.F.R. part 261, subpart D, as incorporated by this rule, may petition the Secretary for an exclusion following the procedures established in 40 C.F.R. §260.20 and 40 C.F.R. §260.22. The Department of Environmental Protection will utilize EPA guidance in evaluating delisting petitions.

2.4.b. An initial non-refundable fee of one thousand dollars (\$1,000.00) shall accompany all petitions submitted under this rule. The petitioner shall execute an agreement with the Secretary providing for the recovery of all reasonable costs incurred by the Department of Environmental Protection attributable to the review and investigation of the petition in excess of the initial fee submitted with the petition.

2.4.b.1. Recoverable costs will be determined by the number of hours worked under the agreement by the primary Department of Environmental Protection employee multiplied by two and one-half (2.5) times the hourly rate of that employee and then adding direct expenses incurred by that employee. Costs related to independent contractors retained by the Department of Environmental Protection to assist in the review and investigation of petitions will be included as direct expenses.

2.4.b.2. Within thirty (30) calendar days of receiving a petition under this section, the Department of Environmental Protection shall send the petitioner an itemized list of estimated costs it expects to incur as a result of reviewing and investigating the petition. The list will include anticipated outside contractor costs.

2.4.b.3. If, upon review of the

itemized list of estimated costs submitted by the Department of Environmental Protection, the petitioner determines not to continue the petition process, the petitioner, if he wishes to withdraw the petition, shall submit a certified letter to the Secretary withdrawing the petition. If the letter is submitted within ten (10) days of the date of receipt of the Department of Environmental Protection's list of estimated costs, the petitioner will not be liable for any costs incurred in excess of the initial application fee.

2.4.c. Where the Administrator of the EPA has granted a petition to exclude hazardous waste from 40 C.F.R. §261.3 or 40 C.F.R. part 261, subpart D, pursuant to 40 C.F.R. §260.22, the Secretary shall accept the determination and amend this rule accordingly, provided:

2.4.c.1. Petitioner submits a copy of the petition submitted to the Administrator, including all demonstrative information, and a copy of the Administrator's approval granting the exclusion pursuant to 40 C.F.R. §260.20(e); and

2.4.c.2. No scientifically supportable reasons for denying the petition are advanced that had not been presented to the Administrator.

2.5. Petitions to amend the regulations to include additional wastes as universal wastes.

2.5.a. Persons desiring to include a waste as a universal waste shall petition the Secretary for an inclusion after having received approval from the Administrator of the Environmental Protection Agency. The petition will include:

2.5.a.1. A copy of the petition submitted to the Administrator of the Environmental Protection Agency pursuant to 40 C.F.R. §260.23, including all demonstration information;

2.5.a.2. A copy of the Administrator's approval granting the petition

under 40 C.F.R. §260.23 and 40 C.F.R. §260.20 and 40 C.F.R. part 273; and

2.5.a.3. Any additional information that may be required for the Secretary to evaluate the petition.

2.5.b. Within one hundred twenty (120) days of the filing of the petition the Secretary shall decide whether to approve or to deny the petition and so advise the petitioner. Where a decision to deny a petition is made, the Secretary shall notify the petitioner of the action in writing, setting forth the reasons therefor.

2.5.c. The Secretary shall not deny a petition to include a waste as a universal waste that has been approved by the Administrator, unless scientifically supportable reasons for the denial are advanced that had not been presented to the Administrator.

2.5.d. Any person may petition the Secretary to include a waste as a universal waste as follows:

2.5.d.1. Submit a petition to the Secretary demonstrating that regulation under the universal waste regulations of 40 C.F.R. part 273 is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the Hazardous Waste Program. The petition shall also include information required by 40 C.F.R. §260.20(b) and include as many of the factors listed in 40 C.F.R. §273.81 as are appropriate for the waste or category of waste addressed in the petition.

2.5.d.2. The Secretary shall grant or deny a petition using the factors listed in 40 C.F.R. §273.81. The decision will be based on the weight of evidence showing that regulation under 40 C.F.R. part 273 is appropriate for the waste or category of waste, will improve management practices for the waste or category of waste, and will improve implementation of the Hazardous Waste Program.

2.5.d.3. The decision of the Secretary will be in writing and state the reasons to either grant or deny the petition. Any petitioner aggrieved by the decision of the Secretary may appeal the decision to the Environmental Quality Board in accordance with the provisions of W. Va. Code §22-18-20.

### **§33-20-3. Identification and Listing of Hazardous Waste.**

3.1. 40 C.F.R. Part 261. -- The provisions of 40 C.F.R. part 261 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

3.1.a. In order for a mixture of a waste and one or more hazardous wastes identified in 40 C.F.R. §261.3(a)(2)(iv) to be exempt from the definition of hazardous waste, the owner or operator shall comply with the following:

3.1.a.1. Provide a certification in writing to the Secretary that groundwater monitoring that either complies with 40 C.F.R. part 265, subpart F or that is agency approved is or will be in place at the wastewater treatment facility identified in 40 C.F.R. §261.3(a)(2)(iv). A time schedule for the installation of groundwater monitoring shall be included. This requirement does not apply to wastewater treatment units or containers.

3.1.a.2. Before claiming an exemption, the owner or operator of each wastewater treatment facility receiving mixtures of wastes under 40 C.F.R. §261.3(a)(2)(iv) shall notify the Secretary of the receipt of the wastes on a form prescribed by the Secretary.

3.1.a.3. Annually submit to the Secretary a list of hazardous wastes that are expected to be present in the mixture to be exempted.

3.2. The provisions of 40 C.F.R. §261.5

(f)(3)(iv) and (v) and 40 C.F.R. §261.5(g)(3)(iv) and (v) are excepted from incorporation by reference. Conditionally exempt small quantity generators shall notify the Secretary of their hazardous waste activity in accordance with section 4 of this rule.

3.3. This rule excludes any and all changes to 40 C.F.R. part 261 resulting from Federal Rules: "Revisions to the Definition of Solid Waste" and ~~"Expansion of RCRA Comparable Fuel Exclusion."~~

#### **§33-20-4. Notification of Hazardous Waste Activity Regulations.**

4.1. Applicability. Any person who engages in a hazardous waste activity in the State of West Virginia shall notify the Secretary of these activities when that activity begins, unless those activities are exempted from the requirements of this rule.

4.1.a. Any person as described in subsection 4.1 who has notified the EPA or is subject to the requirements to notify EPA as specified in volume 45, number 39 of the Federal Register, dated February 26, 1980, pages 12746 through 12754, is subject to the provision of section 4 of this rule.

4.1.b. The purpose of section 4 is to provide a means for the State of West Virginia to utilize the information provided by all who complied with the notification requirements of EPA as described in subdivision 4.1.a above or all who initiated hazardous waste activities subsequent to the requirements of EPA as referenced above in subdivision 4.1.a to notify the Secretary of their hazardous waste activities.

4.2. Notification. Any person who notified EPA of hazardous waste activities as referenced above in subsection 4.1 shall provide a copy of that notification to the Secretary.

4.2.a. Any person involved in hazardous waste activities who did not comply

with the notification requirements of EPA, as referenced above in subsection 4.1, but is subject to those requirements shall notify the Secretary in writing of his or her hazardous waste activities within thirty (30) days of the effective date of this rule. Notification may be accomplished by the use of EPA Form 8700-12, RCRA Subtitle C Site Identification Form, or the provision of the same information in any other manner selected by the notifier.

4.2.b. Any person exempted from the federal notification requirements as specified in 40 C.F.R. §§261.6(b) and 261.5, but subject to West Virginia notification requirements, shall notify the Secretary in writing of his or her hazardous waste activities on the date of initiation of these activities. Notification may be accomplished by use of EPA Form 8700-12 or the provision of the same information in any other manner selected by the notifier.

4.2.c. One notification form is required for each generator.

4.2.d. A notification form is required for each storage, treatment, disposal, or other facility. However, if one facility site includes more than one storage, treatment, or disposal activity, only one notification form for the entire facility site is required.

4.2.e. Generators that store, treat, or dispose of hazardous waste on-site shall file a notification form for generation activities, as well as storage, treatment, and disposal activities, unless those activities are exempted from the requirements of this rule.

4.2.f. New generators and those initiating activities subsequent to the EPA notification period referenced in subsection 4.1.a shall comply with the EPA identification number requirements and shall provide a copy of their application for an EPA identification number to the Administrator.

#### **§33-20-5. Standards Applicable to Generators of Hazardous Waste.**

5.1. 40 C.F.R. Part 262. -- The

provisions of 40 C.F.R. part 262 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

5.2. 40 C.F.R. §262.10(g). -- The provisions of 40 C.F.R. §262.10(g) will be excepted from incorporation.

5.2.a. A person who generates a hazardous waste as defined by 40 C.F.R. part 261 is subject to the compliance requirements and penalties prescribed in W. Va. Code §22-18-1 et seq. if he or she does not comply with the requirements of this rule. This rule in no way abrogates the enforcement authority of the Resource Conservation and Recovery Act of 1976 §3008.

5.2.b. All references to 40 C.F.R. §262.10(g) will be deemed references to subsection 5.2 of this rule and its subdivisions, as appropriate.

5.3. 40 C.F.R. §262.10(j). -- The provisions of 40 C.F.R. §262.10(j) (1) and (2) including Table 1 will be excepted from incorporation.

5.4. 40 C.F.R. Part 262, Subpart E. -- The provisions of 40 C.F.R. part 262, subpart E -- Exports of Hazardous Waste are hereby adopted and incorporated by reference. The substitution of terms in subdivision 1.5.a above does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of subpart E shall file with the Secretary copies of all documentation, manifests, exception reports, annual reports or records submitted to EPA, the Administrator or the Regional Administrator as required by and within the time frames set forth in subpart E.

5.5. 40 C.F.R. Part 262, Subpart H. -- The provisions of 40 C.F.R. part 262, subpart H -- ~~Transfrontier Shipments~~ Transboundary Shipments of Hazardous Waste for Recovery within the OECD are hereby adopted and incorporated by reference. The substitution of

terms in subdivision ~~1.6.a~~ 1.5.a above does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of subpart H shall file with the Secretary copies of all documentation, manifests, exception reports, annual reports or records submitted to EPA, the Administrator or the Regional Administrator as required by and within the time frames set forth in subpart H.

5.6. 40 C.F.R. Part 262, Subpart I. -- The provisions of 40 C.F.R. part 262, subpart I -- New York State Public Utilities will be excepted from incorporation.

5.7. 40 C.F.R. Part 262, Subpart J. -- The provisions of 40 C.F.R. part 262, subpart J -- University Laboratories XL Project -- Laboratory Environmental Management Standard will be excepted from incorporation.

#### **§33-20-6. Standards Applicable to Transporters of Hazardous Waste.**

6.1. 40 C.F.R. Part 263. -- The provisions of 40 C.F.R. part 263 are hereby adopted and incorporated by reference, insofar as those regulations relate to the transportation of hazardous waste by air and water.

6.2. The use of railroads for the transportation of hazardous waste is regulated by the West Virginia Public Service Commission rules, "Rules and Regulations Governing the Transportation of Hazardous Waste by Rail," 150CSR11. The use of the state highways for the transportation of hazardous waste is regulated by the West Virginia Division of Highways at 157CSR7, "Transportation of Hazardous Wastes upon the Roads and Highways."

#### **§33-20-7. Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.**

7.1. 45CSR25, Division of Air Quality, -- The standards in this section apply to owners and operators of all facilities that treat, store or dispose of hazardous waste, except as

otherwise provided by law. In addition to the standards in section 7 of this rule, 45CSR25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities," applies to management facilities that may emit hazardous waste or the constituents thereof into the atmosphere, including incineration facilities, except as otherwise provided by law. For purposes of this section, the following persons are considered to be incinerating hazardous waste:

7.1.a. Owners or operators of hazardous waste incinerators; and

7.1.b. Owners or operators of boilers or industrial furnaces used to destroy wastes.

7.2. 40 C.F.R. Part 264. -- The provisions of 40 C.F.R. part 264 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

7.3. Required Receipt of Identical Notification. -- The provisions of 40 C.F.R. §§264.12(a)(1) and (2) are retained by the Environmental Protection Agency; however, the Secretary shall receive identical notification.

7.4. Releases from Solid Waste Management Unit. -- The provisions of 40 C.F.R. part 264, subpart F -- Releases from solid waste management units are incorporated by reference with the following modifications, exceptions and additions.

7.4.a. For purposes of 40 C.F.R. §264.92, reference to the "Regional Administrator" will be to the Secretary of the Department of Environmental Protection. The Secretary establishes groundwater protection standards pursuant to the authority granted to the Secretary in W. Va. Code § 22-12-4.

7.4.b. For purposes of 40 C.F.R. §264.94 and subparagraphs thereof, the agency rule on groundwater protection standards, 47CSR12, will apply as required pursuant to the authority granted the Secretary

in W. Va. Code, § 22-12-4.

7.4.c. The provisions of 40 C.F.R. §264.99(g) are incorporated by reference with the following modifications:

7.4.c.1. The Secretary shall specify in the facility permit the frequencies for collecting samples required under 40 C.F.R. §264.99(g). This frequency shall not be less than once annually.

7.5. Financial Requirement. -- The provisions of 40 C.F.R. part 264, subpart H -- Financial Requirements are adopted and incorporated by reference with the following modifications:

7.5.a. The provisions of 40 C.F.R. §§264.149 and 264.150 are excepted from incorporation by reference.

7.6. Provisions Relating to Incinerators. -  
- The provisions of 40 C.F.R. §§264.341, 264.342, 264.343, 264.344, 264.345 and 264.347(a) relating to incinerators are excepted from incorporation by reference. Consult the rules of the Division of Air Quality regarding emissions from incinerators. The Division of Air Quality retains its authority to enforce the air monitoring items listed in 40 C.F.R. §264.347(a) related to incinerating hazardous waste. The Secretary retains authority to enforce 40 C.F.R. §§264.347(b)(c)(d).

7.6.a. Consult the Division of Air Quality, 45CSR25, "Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities?"

7.7. 40 C.F.R. Part 264, Subparts AA, BB, CC and 40 C.F.R. §264.1080(f); and 40 C.F.R. §264.1080(g). -- The provisions of 40 C.F.R. §264.1080(f); and 40 C.F.R. §264.1080(g) are hereby adopted and incorporated by reference and the remaining provisions of 40 C.F.R. part 264, subparts AA, BB, and CC are excepted from incorporation by reference. Consult the rules of the Division of Air Quality regarding air emissions from

process vents, equipment leaks, tanks, surface impoundments and containers.

**§33-20-8. Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.**

8.1. 40 C.F.R. Part 265. -- The provisions of 40 C.F.R. part 265 are adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

8.2. 40 C.F.R. §§265.12(a), 265.149 and 265.150. -- The provisions of 40 C.F.R. §§265.12(a)(1) and (2), 265.149, and 265.150 are excepted from incorporation by reference. The Secretary shall receive identical notification.

8.3. 40 C.F.R. §§265.341, 265.345, 265.347 (a), 265.352. -- The provisions of 40 C.F.R. §§265.341, 265.345, 265.347(a) and 265.352 relating to incinerators are excepted from incorporation by reference. Consult the rules of the Division of Air Quality regarding emissions from incinerators. The Division of Air Quality retains its authority to enforce the air monitoring items listed in 40 C.F.R. §265.347(a) related to incinerating hazardous waste. The Secretary retains authority to enforce 40 C.F.R. §§265.347(b)(c)(d).

8.4. Thermal Treatment. -- The provisions of 40 C.F.R. Part 265, Subpart P -- Thermal Treatment are incorporated by reference except for the provisions of 40 C.F.R. §265.375 and 40 C.F.R. §265.383 that are excepted from incorporation by reference. Consult the rules of the Division of Air Quality regarding emissions from thermal treatment units.

8.5. 40 C.F.R. Part 265 Subparts AA, BB, CC and 40 C.F.R. §265.1080(f); and 40 C.F.R. §265.1080(g). -- The provisions of 40 C.F.R. §265.1080(f); and 40 C.F.R. §265.1080(g) are hereby adopted and incorporated by reference and the remaining provisions of 40 C.F.R. part 265, subparts AA, BB, and CC are excepted from incorporation by reference. Consult the

rules of the Division of Air Quality regarding air emission standards for process vents, air emission standards for equipment leaks, and air emission standards for tanks, surface impoundments and containers.

**§33-20-9. Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities.**

9.1 40 C.F.R. Part 266. -- The provisions of 40 C.F.R. part 266 are hereby adopted and incorporated by reference. Consult the rules of the Division of Air Quality regarding Subpart H of this part.

**§33-20-10. Land Disposal Restrictions.**

10.1. 40 C.F.R. Part 268. -- The provisions of 40 C.F.R. part 268 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

10.2. 40 C.F.R. §§268.5, 268.6, 268.10 - 13, 268.42(b) and 268.44. -- The provisions of 40 C.F.R. §§268.5, 268.6, 268.10, 268.11, 268.12, 268.13, 268.42(b) and 268.44 are excepted from incorporation by reference.

10.3. Definition of Administrator in 40 C.F.R. §268.40(b). The term "Administrator" in 40 C.F.R. §268.40(b) will retain its meaning as defined in 40 C.F.R. §260.10.

**§33-20-11. The Hazardous Waste Permit Program and Standardized Permit.**

11.1. 40 C.F.R. Part 270. -- The provisions of 40 C.F.R. part 270 and 40 C.F.R. part 267 are hereby adopted and incorporated by reference with the modifications, exceptions and additions set forth in this section.

11.2. 40 C.F.R. §270.2 Definitions.

11.2.a. Definition of "RCRA permit" -- For purposes of this section, the term "RCRA permit" means "West Virginia

Hazardous Waste Management Permit.” The following additional requirements will apply to obtain a Hazardous Waste Management Permit in West Virginia. All references in 40 C.F.R. part 270 and 40 C.F.R. part 267 to 40 C.F.R. part 124 will be deemed to be references to the applicable provisions of subsections 11.4 through 11.17 of this rule. To the extent of any inconsistency with 40 C.F.R. part 270 and 40 C.F.R. part 267, the specific provisions contained herein will control.

11.2.b. This rule excludes any and all changes to 40 C.F.R. part 270 resulting from Federal Rule “Revisions to the Definition of Solid Waste.”

### 11.3. Application Fees.

11.3.a. Any person who applies for a permit for the construction or operation of a hazardous waste management facility, or both, shall submit as part of the application a money order or cashier’s check payable to “The Hazardous Waste Management Fund” of the state treasury. Persons required to obtain a permit-by-rule pursuant to this rule are not required to pay a permit application fee.

11.3.b. The fee will be determined by the schedule set forth in Table 1. If the cumulative total of application fees imposed under this section equals or exceeds fifty thousand dollars (\$50,000) then the person required to pay the fees may, at the person’s option, elect to submit the fee payments in installments over a three (3) year period. The installments submitted to the Department of Environmental Protection may not be less frequent than annually and the amount submitted annually may not be less than one-third (1/3) of the total amount due.

11.3.c. The fee for permit renewal is the same as for an initial permit.

### 11.4. Pre-application Public Meeting and Notice

11.4.a. **Applicability.** The requirements of this subsection will apply to West Virginia Hazardous Waste Management Part B permit applicants seeking initial permits for hazardous waste management units. The requirements of this section will also apply to West Virginia Hazardous Waste Management Part B permit applicants seeking renewal of permits for those units, when the renewal application is proposing a significant change in facility operations. For the purposes of this section, a “significant change” is any change that would qualify as a Class 3 permit modification (*See* 40 C.F.R. §270.42 for a description of permit modifications). The requirements of this section do not apply to permit modifications under 40 C.F.R. §270.42 or to applications that are submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

11.4.b. Prior to the submission of a West Virginia Hazardous Waste Management Part B permit application for a facility, the applicant shall hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

11.4.c. The applicant shall submit a summary of the meeting, along with the list of attendees and their addresses developed under subsection 11.4.b, and copies of any written comments or materials submitted at the meeting, to the permitting agency as a part of the Part B application, in accordance with 40 C.F.R. §270.14(b).

11.4.d. The applicant shall provide public notice of the pre-application meeting at least thirty (30) days prior to the meeting. The applicant shall maintain, and provide to the permitting agency upon request, documentation of the notice.

11.4.d.1. The applicant shall

provide public notice in all of the following forms:

11.4.d.1.A. A newspaper advertisement. The applicant shall publish a notice, fulfilling the requirements in paragraph 11.4.d.2, in a newspaper of general circulation in the county or equivalent jurisdiction that hosts the proposed location of the facility. In addition, the Secretary shall instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, where the Secretary determines that publication is necessary to inform the affected public. The notice shall be published as a display advertisement.

11.4.d.1.B. A visible and accessible sign. The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in paragraph 11.4.d.2. If the applicant places the sign on the facility property, then the sign shall be large enough to be readable from the nearest point where the public would pass by the site.

11.4.d.1.C. A broadcast media announcement. The applicant shall broadcast a notice, fulfilling the requirements in paragraph 11.4.d.2, at least once on at least one local radio station or television station. The applicant may employ another medium with prior approval of the Secretary.

11.4.d.1.D. A notice to the permitting agency. The applicant shall send a copy of the newspaper notice to the permitting agency, and the Secretary shall forward copies to the appropriate units of State and local government having jurisdiction over the area where the facility is or is proposed to be located; and to each State agency having any authority under State law with respect to the construction or operation of the facility.

11.4.d.2. The notices required by paragraph 11.4.d.1 shall include:

11.4.d.2.A. The date, time, and location of the meeting;

11.4.d.2.B. A brief description of the purpose of the meeting;

11.4.d.2.C. A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location;

11.4.d.2.D. A statement encouraging people to contact the facility at least seventy-two (72) hours before the meeting if they need special access to participate in the meeting; and

11.4.d.2.E. The name, address, and telephone number of a contact person for the applicant.

11.5. Public Notice Requirements at the Application Stage.

11.5.a. Applicability. The requirements of this subsection apply to all West Virginia Hazardous Waste Management Part B permit applicants seeking initial permits for hazardous waste management units. The requirements of this section also apply to Hazardous Waste Management Part B permit applicants seeking renewal of permits for these units upon the expiration of the existing permit. The requirements of this section do not apply to permit modifications under 40 C.F.R. §270.42 or permit applications submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

11.5.b. Notification. The Secretary shall provide public notice as required in subsection 11.5 when a Part B permit application has been submitted. The Secretary shall provide public notice to:

11.5.b.1. The applicant;

11.5.b.2. All persons on a mailing list developed pursuant to subparagraph 11.11.d.1.D; and

11.5.b.3. The appropriate units of State and local government having jurisdiction over the area where the facility is proposed to be located; and to each State agency having any authority under State law with respect to the construction or operation of the facility, that a Part B permit application has been submitted to the Secretary and is available for review.

11.5.b.4. Any person otherwise entitled to receive notice under subdivision 11.5.b may waive the right to receive notice for any classes and categories of permits.

11.5.c. The notice will be published within a reasonable period of time after the application is received by the Secretary. The notice shall include:

11.5.c.1. The name and telephone number of the applicant's contact person;

11.5.c.2. The name and telephone number of the permitting agency's contact office and a mailing address to which information, opinions, and inquiries shall be directed throughout the permit review process;

11.5.c.3. An address to which people can write in order to be put on the facility mailing list;

11.5.c.4. The location where copies of the permit application and any supporting documents can be viewed and copied;

11.5.c.5. A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location on the front page of the notice; and

11.5.c.6. The date that the application was submitted.

11.5.d. Concurrent with the notice required under subdivision 11.5.b, the Secretary shall place the permit application

and any supporting documents in a location accessible to the public in the vicinity of the facility or at the permitting agency's office.

#### 11.6. Information Repository.

11.6.a. Applicability. The requirements of this section apply to all applicants seeking West Virginia Hazardous Waste Management Permits for hazardous waste management units.

11.6.b. The Secretary shall assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the Secretary shall consider a variety of factors, including: the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. If the Secretary determines, at any time after submittal of a permit application, that there is a need for a repository, then the Secretary shall notify the facility that it must establish and maintain an information repository.

11.6.c. The information repository shall contain all documents, reports, data, and information deemed necessary by the Secretary to fulfill the purposes for which the repository is established. The Secretary shall have the discretion to limit the contents of the repository.

11.6.d. The information repository shall be located and maintained at a site chosen by the facility. If the Secretary finds the site unsuitable for the purposes and persons for which it was established due to problems with the location, hours of availability, access, or other relevant considerations, then the Secretary shall specify a more appropriate site.

11.6.e. The Secretary shall specify requirements for informing the public about the information repository. At a minimum, the Secretary shall require the facility to provide a written notice about the information repository to all individuals on the facility mailing list.

11.6.f. The facility's owner/operator shall be responsible for maintaining and updating the repository with appropriate information throughout a time period specified by the Secretary. The Secretary shall close the repository at his or her discretion, based on the factors listed in subdivision 11.6.b.

#### 11.7. Application for a Permit.

11.7.a. Any person who requires a permit under this rule shall complete, sign, and submit to the Secretary an application for each permit required under this rule. Applications are not required for hazardous waste permits by rule pursuant to 40 C.F.R. §270.60. The Secretary shall not begin processing permit until the applicant has fully complied with the application requirements for that permit. Permit applications shall comply with the signature and certification requirements of 40 C.F.R. §270.11.

11.7.b. The Secretary shall review for completeness every application. Each application submitted by a new hazardous waste management facility shall be reviewed for completeness by the Secretary within thirty (30) days of its receipt. Each application submitted by an existing hazardous waste management facility (both Part A and Part B of the application), shall be reviewed for completeness within sixty (60) days of receipt. Upon completing the review, the Secretary shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Secretary shall list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the Secretary shall specify in the notice of deficiency a date for submitting the necessary information. The Secretary shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Secretary shall request additional information from the applicant, but only when necessary to clarify, modify or supplement previously submitted material. Request for additional information

shall not render an application incomplete.

11.7.c. If the applicant fails or refuses to correct deficiencies in the application, the permit shall be denied and appropriate enforcement actions will be taken pursuant to W. Va. Code §§ 22-18-15, 22-18-16, and 22-18-17.

11.7.d. If the Secretary decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date will be scheduled.

11.7.e. The effective date of an application is the date on which the Secretary notifies the applicant that the application is complete as provided for in subdivision 11.7.b above.

11.7.f. For each application, the Secretary shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule shall specify target dates by which the Secretary intends to:

11.7.f.1. Prepare a draft permit;

11.7.f.2. Give public notice;

11.7.f.3. Complete the public comment period, including any public hearing;

11.7.f.4. Issue a final permit.

11.8. Modification, Revocation and Reissuance, or Termination of Permits.

11.8.a. Permits shall be modified, revoked and reissued, or terminated either at the request of an interested person (including the permittee) or upon the Secretary's initiative. However, permits shall only be modified, revoked and reissued, or terminated for the reasons specified in 40 C.F.R. §§270.41 or 270.43. All requests shall be in writing and shall contain facts or reasons supporting the request.

11.8.b. If the Secretary decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment or hearings. Denials by the Secretary may be appealed to the Environmental Quality Board in accordance with section 16 of this rule.

11.8.b.1. If the Secretary initially decides to modify or revoke and reissue a permit under 40 C.F.R. §§270.41 or 270.42 (c), he or she shall prepare a draft permit pursuant to subsection 11.9 below, incorporating the proposed changes. The Secretary may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of a revoked and reissued permit, the Secretary shall require the submission of a new application.

11.8.b.2. In a permit modification under this section, only those conditions to be modified will be reopened when a new draft permit is prepared. When a permit is revoked and reissued under this section, the entire permit is reopened. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

11.8.b.3. "Classes 1 and 2 Modifications" as defined in 40 C.F.R. §§270.42 (a) and (b) are not subject to the requirements of this section.

11.8.c. If the Secretary decides to terminate a permit under 40 C.F.R. §270.43, he or she shall issue a Notice of Intent to Terminate. A Notice of Intent to Terminate is a type of draft permit that follows the same procedures as any draft permit prepared under subsection 11.9 below.

#### 11.9. Draft Permits.

11.9.a. Once an application is complete, the Secretary shall decide whether

to prepare a draft permit or to deny the application.

11.9.b. If the Secretary decides to deny the permit application, he or she shall issue a Notice of Intent to Deny. A Notice of Intent to Deny the permit application is a type of draft permit that follows the same procedures as any draft permit prepared under this section. If the Secretary's final decision is that the initial decision to deny the permit application was incorrect, he or she shall withdraw the Notice of Intent to Deny and proceed to prepare a draft permit.

11.9.c. If the Secretary decides to issue a draft permit, he or she shall prepare a draft permit that contains the following information:

11.9.c.1. All conditions under 40 C.F.R. §§270.30 and 270.32;

11.9.c.2. All compliance schedules under 40 C.F.R. §270.33;

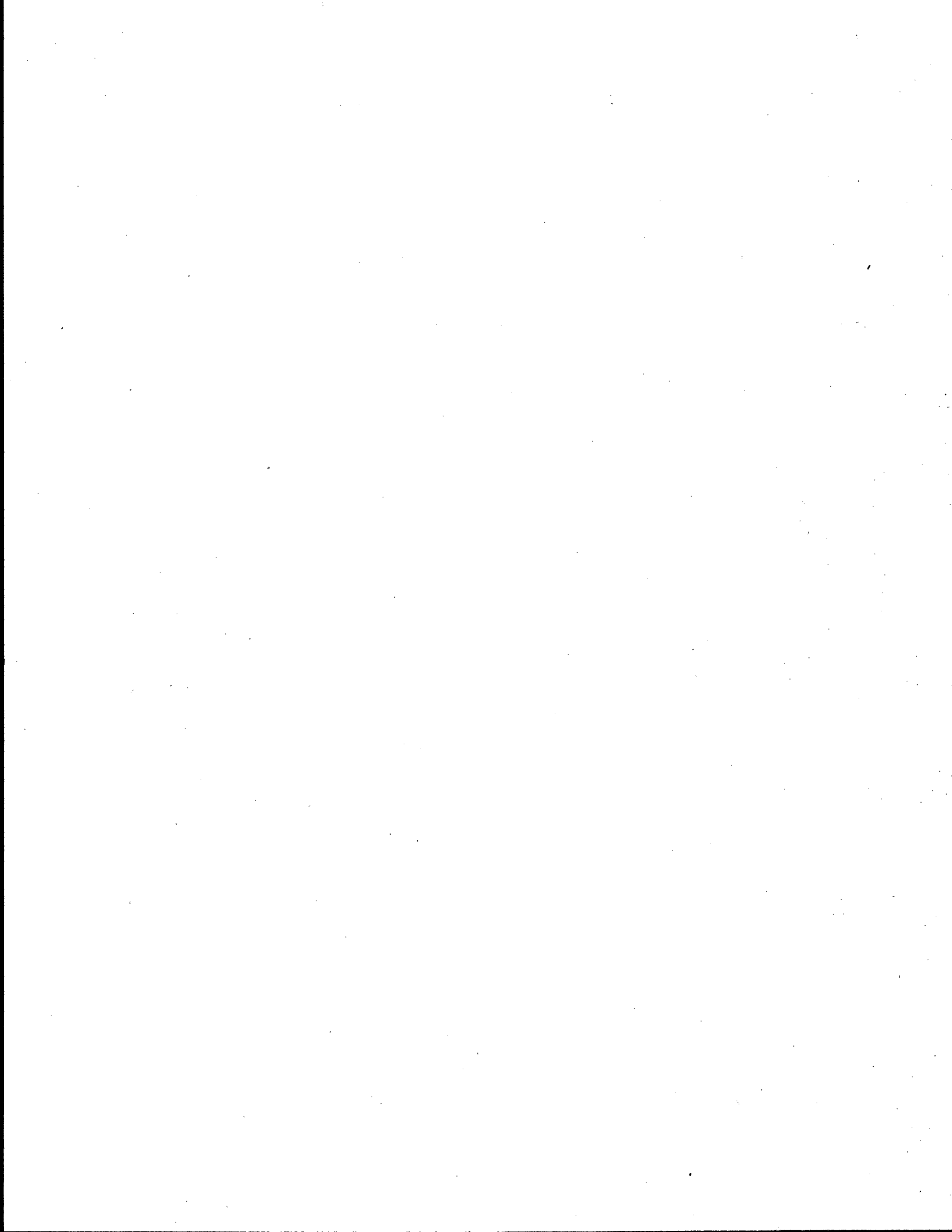
11.9.c.3. All monitoring requirements under 40 C.F.R. §270.31; and,

11.9.c.4. Standards for treatment, storage, and/or disposal and other permit conditions under 40 C.F.R. §270.30.

11.9.d. All draft permits prepared by the Secretary under this section shall be accompanied by a fact sheet and shall be based on the administrative record, publicly noticed, and made available for public comment.

#### 11.10. Fact Sheet

11.10.a. A fact sheet shall be prepared for every draft permit for a hazardous waste management facility that the Secretary finds is the subject of wide-spread public interest or raises major issues. The fact sheet will briefly set forth the principal facts and the significant factual, legal, and methodological and policy questions considered in preparing the draft permit. The Secretary shall send the



fact sheet to the applicant and to anyone who requests it.

11.10.b. The fact sheet shall include when applicable:

11.10.b.1. A brief description of the type of facility or activity that is the subject of the draft permit;

11.10.b.2. The type and quantity of waste, fluids, or pollutants that are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged;

11.10.b.3. A brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record;

11.10.b.4. Reasons why any requested variances or alternatives to required standards do or do not appear justified;

11.10.b.5. A description of the process for reaching a final decision on a draft permit including:

11.10.b.5.A. The beginning and the ending dates of the comment period and the address where comments will be received;

11.10.b.5.B. Procedures for requesting a hearing and the nature of that hearing; and

11.10.b.5.C. Any other procedures by which the public participates in the final decision.

11.10.b.6. Name and telephone number of a person to contact for additional information.

11.11. Public Notice of Permit Actions and Public Comment Period.

11.11.a. Scope. The Secretary shall give public notice if the following actions

have occurred:

11.11.a.1. A draft permit has been prepared; and

11.11.a.2. A hearing has been scheduled.

11.11.b. No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under subsection 11.8 above. Written notice of that denial shall be given to the requester and to the permittee.

11.11.c. Timing. Public notice of the preparation of a draft permit (including a Notice of Intent to Deny a Permit Application) required under subdivision 11.11.a will allow at least forty-five (45) days for public comment. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit, and the two notices may be combined.)

11.11.d. Public notice of activities described in subdivision 11.11.a shall be given by the following methods:

11.11.d.1. By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

11.11.d.1.A. The applicant;

11.11.d.1.B. Any other agency that the Secretary knows has issued or is required to issue a RCRA, UIC, PSD or other permit under the Clean Air Act or West Virginia Code § 22-5-1 et. seq.; NPDES, 33 U.S.C. §1344; or sludge management permit for the same facility or activity;

11.11.d.1.C. Federal and State agencies with jurisdiction over fish, shell fish and wildlife resources and over coastal

zones management plans, the advisory council on historic preservation, and the state historic preservation office, as applicable;

11.11.d.1.D. Persons on a mailing list developed by:

11.11.d.1.D.1. Including those who request in writing to be on the list;

11.11.d.1.D.2. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

11.11.d.1.D.3. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and state funded newsletters, environmental bulletins, or state law journals. The Secretary shall update the mailing lists from time to time by requesting written indications of continued interest from those listed. The Secretary shall delete from the lists the name of any person who fails to respond to the request.

11.11.d.1.E. To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and

11.11.d.1.F. To each State agency having any authority under State law with respect to the construction or operation of the facility.

11.11.d.2. Publication of a notice in a daily or weekly major local newspaper of general circulation and broadcast over local radio stations;

11.11.d.3. In a manner constituting legal notice to the public under State laws; and

11.11.d.4. Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to

elicit public participation.

11.11.e. All public notices issued under this section will contain the following minimum information:

11.11.e.1. Name and address of the office processing the permit action for which notice is being given;

11.11.e.2. Name and address of the permittee or the permit applicant and, if different, of the facility or activity regulated by the permit;

11.11.e.3. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit;

11.11.e.4. Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit, fact sheet, and the application; and

11.11.e.5. A brief description of the comment procedures required by subsections 11.12 and 11.13 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final decision.

11.11.e.6. The location of the administrative record, the times that the record will be open for public inspection; and

11.11.e.7. Any additional information considered necessary or proper.

11.11.f. Public notices for hearings. In addition to the general public notice described in subdivision 11.11.e, the public notice of a hearing will contain the following information:

11.11.f.1. Reference to the date of previous public notices relating to the permit;

11.11.f.2. Date, time, and place of the hearing; and

11.11.f.3. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

11.11.g. In addition to the general public notice described in subdivision 11.11.e, all persons identified in subparagraphs 11.11.d.1.A, 11.11.d.1.B, and 11.11.d.1.C shall be mailed a copy of the fact sheet, the permit application, and the draft permit, as applicable.

#### 11.12. Public Comments and Requests for Public Hearings.

11.12.a. During the public comment period provided under subsection 11.11, any interested person may submit written comments on the draft permit and may request a public hearing, if a hearing has not already been scheduled.

11.12.b. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in subsection 11.16 below.

#### 11.13. Public Hearings.

11.13.a. The Secretary shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit.

11.13.b. The Secretary shall also hold a public hearing at his or her discretion, whenever, for instance, a hearing might clarify one or more issues involved in the permit decision.

11.13.c. The Secretary shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within forty-five (45) days of public notice under subdivision

11.11.c. Whenever possible, the Secretary shall schedule a hearing under this section at a location convenient to the nearest population center to the proposed facility.

11.13.d. Public notice of the hearing will be given as specified in subsection 11.11.

11.13.e. Whenever a public hearing will be held, the Secretary shall designate a presiding officer for the hearing who will be responsible for its scheduling and orderly conduct.

11.13.f. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits shall be set upon the time allowed for oral statements, and the submission of statements in writing will be required. The public comment period under subsection 11.11 shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

11.13.g. A tape recording or written transcript of the hearing shall be made available to the public.

#### 11.14. Reopening of the Public Comment Period.

11.14.a. If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the Secretary shall take one or more of the following actions:

11.14.a.1. Prepare a new draft permit, appropriately modified, under subsection 11.9.

11.14.a.2. Prepare a revised fact sheet under subsection 11.10 and reopen the comment period.

11.14.a.3. Reopen or extend the comment period under subsection 11.11 to give interested persons an opportunity to

comment on the information or arguments submitted.

11.14.b. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under subsection 11.11 shall define the scope of the reopening.

11.14.c. Public notice of any of the above actions will be issued subsection 11.11 above.

11.15. Issuance and Effective Date of Permit.

11.15.a. After the close of the public comment period on a draft permit, the Secretary shall issue a final permit decision. The Secretary shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice shall include reference to the procedures for appealing a decision on the permit. For purposes of this section the final permit decision means a final decision to issue, deny, modify, or revoke and reissue, or terminate a permit.

11.15.b. A final permit decision will become effective thirty (30) days after the service of Notice of Decision unless:

11.15.b.1. A later effective date is specified in the decision; or

11.15.b.2. Review is requested or evidentiary hearing is requested; or

11.15.b.3. No comments requested change in the draft permit, in which case the permit will become effective immediately upon issuance.

11.16. Response to Comments.

11.16.a. At the time that any final permit decision is issued, the Secretary shall issue a response to comments. This response will:

11.16.a.1. Specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change; and

11.16.a.2. Briefly describe and respond to all comments on the draft permit or the permit application raised during the public comment period or during any hearing.

11.16.b. The response to comments shall be available to the public.

11.17. Administrative Record.

11.17.a. The provisions of a draft permit prepared under subsection 11.9 shall be based on the administrative records consisting of:

11.17.a.1. The application and any supporting data furnished by the applicant;

11.17.a.2. The draft permit or notice of intent to deny the application or to terminate the permit;

11.17.a.3. The fact sheet;

11.17.a.4. All documents cited in the fact sheet; and

11.17.a.5. Other documents contained in the supporting file for the draft permit.

11.17.b. The Secretary shall base final permit decisions on the administrative record consisting of:

11.17.b.1. Administrative record for the draft permit;

11.17.b.2. All comments received during the public comment period provided under subsection 11.11 (including any extension or reopening under subsection 11.14);

11.17.b.3. The tape or transcript

of any hearing(s) held under subsection 11.13;

11.17.b.4. Any written material submitted at the hearing;

11.17.b.5. The response to comments required by subsection 11.16 that identify and support any change made in the draft permit and any new material placed in the record under that subsection;

11.17.b.6. Other documents contained in the supporting file for the permit;

11.17.b.7. An addendum to the fact sheet if needed; and

11.17.b.8. The final permit.

11.17.c. The administrative record shall be complete on the date the final permit is issued.

11.17.d. Material readily available at the issuing agency office or published material that is generally available and that is included in the administrative record under subdivisions 11.17.a and 11.17.b need not be physically included with the rest of the record, as long as it is specifically referred to in the fact sheet or in the addendum to the fact sheet.

#### 11.18. Public Access to Information.

11.18.a. Any records, reports, or information and any permit, permit applications, and related documentation within the Secretary's possession shall be available to the public for inspection and copying; provided, however, that upon a satisfactory showing to the Secretary that those records, reports, permit documentation, or information, or any part thereof would, if made public, divulge methods or processes or activities entitled to protection as trade secrets, the Secretary shall consider, treat, and protect those records as confidential.

11.18.b. It shall be the responsibility of the person claiming any information as confidential under the provisions of this

subsection to clearly mark each page containing that information with the word "CONFIDENTIAL" and to submit an affidavit setting forth the reasons that the person believes that the information is entitled to protection.

11.18.c. Any document submitted to the Secretary that contains information for which claim of confidentiality is made must be submitted in a sealed envelope marked "CONFIDENTIAL" and addressed to the Secretary. The document shall be submitted in two (2) separate parts. The first part shall contain all information that is not deemed by the person preparing the report as confidential and shall include appropriate cross-references to the second part, which contains data, words, phrases, paragraphs or pages and appropriate affidavits containing or relating to information that is claimed to be confidential.

11.18.d. No information shall be protected as confidential information by the Secretary unless it is submitted in accordance with the provisions of subdivision 11.18.c above, and no information that is submitted in accordance with the provision of subdivision 11.18.c shall be afforded protection as confidential information unless the Secretary finds that the protection is necessary to protect trade secrets. The person who submits information claimed to be confidential shall receive written notice from the Secretary as to whether the information has been accepted as confidential or not.

11.18.e. All information that meets the tests of subdivision 11.18.d shall be marked with the term "ACCEPTED" and shall be protected as confidential information. If the person fails to satisfactorily demonstrate to the Secretary that information in the form presented meets the criteria of subdivision 11.18.d, the Secretary shall mark the information "REJECTED" and promptly return it to the person who submitted the information. The Secretary shall retain a copy of the information for reference.

11.18.f. Nothing contained herein

shall be construed to restrict the release of relevant confidential information during situations declared to be emergencies by the Secretary.

11.18.g. Nothing in subsection 11.18 shall be construed as limiting the disclosure of information by the Department to any officer, employee or authorized representative of State or Federal government concerned with effecting the purposes of this subsection.

11.18.h. Persons interested in obtaining information pursuant to this subsection shall submit a request in accordance with the Freedom of Information Act, W. Va. Code § 29B-1-1, et seq.

11.19. 40 C.F.R. §270.12. The provisions of 40 C.F.R. §270.12 are excepted from incorporation by reference. Availability of information provided under this rule is controlled by the provision of W. Va. Code, § 22-18-12 and subsection 11.18 of this rule.

11.20. 40 C.F.R. §270.24. The provisions of 40 C.F.R. §270.24 are excepted from incorporation by reference. Consult the rules of the Division of Air Quality regarding emissions from process vents.

11.21. 40 C.F.R. §§270.60(b) and 270.64. The provisions of 40 C.F.R. §§270.60(b) and 270.64 are hereby adopted and incorporated by reference. Consult the rules of the Division of Water and Waste Management regarding additional requirements for underground injection wells.

11.22. 40 C.F.R. §270.155. The provisions of 40 C.F.R. §270.155 relating to the administrative appeal of a decision to approve or deny a Remedial Action Plan (RAP) application are hereby modified for the purposes of this rule as follows: Any commenter on the draft RAP or notice of intent to deny, or any participant in any public hearing(s) on the draft RAP, may appeal the Secretary's decision to approve or deny the RAP application to the Environmental Quality Board pursuant to W. Va. Code § 22-18-20.

Any person who did not file comments or did not participate in any public hearing(s) on the draft RAP may petition for administrative review only to the extent of the changes from the draft to the final RAP decision. Appeals of a RAP may be made to the same extent as for final permit decisions under section 11 of this rule. The Secretary shall give public notice of any grant of review of a RAP by the Environmental Quality Board through the same means used to provide notice under subsections 11.4 through 11.17 above.

### **§33-20-12. Deed and Lease Disclosure; Notice in Deed to Property.**

12.1. Recording Requirement. -- The owner of the property on which a hazardous waste management facility is located shall record, in accordance with State law, a notation on the deed or lease to the facility property -- or on some other instrument that is normally examined during title search -- that will in perpetuity notify any potential purchaser of the property that:

12.1.a. The land has been used to manage hazardous wastes; and

12.1.b. Its use is restricted under 40 C.F.R. §264.117(c).

12.2. Upon actual transfer of property that contains hazardous wastes that have been stored, treated, or disposed of, the previous owner shall notify the Secretary in writing of the transfer.

12.3. Other Requirements. -- Nothing contained in this section will relieve any person from complying with the requirements on deed and lease disclosures set forth in W. Va. Code § 22-18-21.

### **§33-20-13. Universal Waste Rule.**

13.1. 40 C.F.R. Part 273. -- The provisions of 40 C.F.R. part 273 are hereby adopted and incorporated by reference with the modifications, exceptions and additions contained in this section.

13.2. 40 C.F.R. §§273.20, 273.40, 273.56 -- The provisions of 40 C.F.R. §§273.20, 273.40, and 273.56 relating to exports are hereby adopted and incorporated by reference. The substitution of terms in subdivision 1.6.a does not apply to the provisions of this subsection. In addition to the requirements contained therein, any person subject to the provisions of 40 C.F.R. part 273 shall file with the Secretary copies of all documentation, manifests, exception reports, annual reports or records submitted to EPA, the Administrator or the Regional Administrator as required by 40 C.F.R. part 273.

13.3. 40 C.F.R. §273.70 -- The provisions of 40 C.F.R. §273.70 "Imports" are hereby adopted and incorporated by reference. Persons managing universal waste that is imported to West Virginia are subject to the requirements of this rule.

13.4. 40 C.F.R. §§273.80 and 273.81 -- The provisions of 40 C.F.R. §§273.80 and 273.81 are excepted from incorporation by reference. Consult the provisions of subdivision 2.5.d above to petition to include a waste as a universal waste.

#### **§33-20-14. Standards for the Management of Used Oil.**

14.1. 40 C.F.R. Part 279. -- The provisions of 40 C.F.R. part 279 are hereby adopted and incorporated by reference, with the exception contained in this section. Consult the rules of the Division of Air Quality regarding the burning of used oil.

14.2. 40 C.F.R. §279.82(b). -- The term "EPA" at 40 C.F.R. §279.82(b) will mean United States Environmental Protection Agency.

#### **§33-20-15. Standards for Hazardous Waste Recycling.**

15.1 The provisions of 40 C.F.R. §261.6 are hereby adopted and incorporated by reference, with the modifications contained in this

section.

#### **15.2 Standards Applicable To All Hazardous Waste Recycling Activities.**

15.2.a Any residual material resulting from a recycling process shall be evaluated in accordance with section 3 of this rule to determine whether it is subject to regulation as a hazardous waste.

15.2.b Any facility that treats hazardous waste without recycling it, or that treats hazardous waste prior to recycling it, is subject to regulation under section 11 above. Generators that treat hazardous waste in containers or tanks in compliance with 40 C.F.R. §262.34 are exempt from regulation under section 11 for that treatment activity.

15.2.c Owners or operators of facilities with hazardous waste management units that recycle hazardous wastes are subject to section 7 of this rule.

#### **15.3 Hazardous Waste Recycling At Off-Site Facilities.**

15.3.a. Owners or operators of facilities that receive recyclable materials, stage recyclable materials, and recycle them without storing them before they are recycled are subject to:

15.3.a.1. The requirements of subsection 15.2 of this rule;

15.3.a.2. The generator requirements of section 5 of this rule; and

15.3.a.3. Financial Requirements -- Prior to staging any material, owners or operators shall demonstrate financial assurance for closure of the facility by:

15.3.a.3.A. Maintaining a closure cost estimate that meets the requirements of 40 C.F.R. § 265.142 and that has been approved by the Secretary; and

15.3.a.3.B. Establishing financial assurance in accordance with 40 C.F.R. §265.143.

15.3.b. Owners or operators of facilities that store recyclable materials before they are recycled are subject to section 11 of this rule and to all applicable provisions of sections 1, 3, and 5.

**§33-20-16. Appeal Rights.**

Any person aggrieved or adversely affected by the failure or refusal of the Secretary to act within a reasonable time on an application for a permit or by the issuance or denial of or by the terms and conditions of a permit granted by the Secretary under the provisions of this rule, may appeal to the Environmental Quality Board in accordance with the provisions of W. Va. Code §§ 22-18-22 and 22B-1-1 et seq.

**TABLE 1**  
**TABLE 1**  
**PERMIT APPLICATION FEE SCHEDULE**

**STORAGE**

<b>EPA CODE ACTIVITY</b>	<b>FEE</b>	<b>FEE</b>
S01 Container	<100 tons capacity \$2,500.00	>100 tons capacity \$3,750.00
S02 Tank	<100 tons capacity \$2,500.00	>100 tons capacity \$3,750.00
S04 Surface Impoundment	<1,000 tons capacity \$10,000.00	>1,000 tons capacity \$12,500.00
S05 Drip Pad	\$2,500.00	
S03 Waste Pile	<100 tons capacity \$5,000.00	>100 tons capacity \$7,500.00
S06 Waste Pile (Containment Bldg.)	<100 tons capacity \$5,000.00	>100 tons capacity \$7,500.00

**DISPOSAL**

<b>EPA CODE ACTIVITY</b>	<b>FEE</b>	<b>FEE</b>
D80 Landfill	<1,000 tons/year \$15,000.00	>1,000 tons/year \$25,000.00
D81 Land Application	<1,000 tons/year \$15,000.00	>1,000 tons/year \$25,000.00
D83 Surface Impoundment	<1,000 tons/year \$15,000.00	>1,000 tons/year \$25,000.00

**TABLE 1  
PERMIT APPLICATION FEE SCHEDULE  
(CONTINUED)**

**TREATMENT**

<b>EPA CODE ACTIVITY</b>	<b>FEE</b>	<b>FEE</b>
T01 Tank	<100 tons capacity \$2,500.00	>100 tons capacity \$3,750.00
T02 Surface Impoundment	<1,000 tons/year \$10,000.00	>1,000 tons/year \$12,500.00
T03 Incinerator	<1,000 tons/year \$5,000.00	>1,000 tons/year \$7,500.00
T80 thru T93 Boiler/Industrial Furnace	<1,000 tons/year \$5,000.00	>1,000 tons/year \$7,500.00
T04 Other	\$5,000.00	\$7,500.00
T-94 Containment Bldg. Treatment	\$5,000.00	\$7,500.00

**EMERGENCY PERMITS**

<b>EPA CODE ACTIVITY</b>	<b>FEE</b>
State and Federal	Nil
Others	\$500.00

**TABLE 1**  
**PERMIT APPLICATION FEE SCHEDULE**  
**(CONTINUED)**

**MISCELLANEOUS**

<b>EPA CODE ACTIVITY</b>	<b>FEE</b>
Permit Modification under 40 C.F.R., 270.42 (Class I)	\$ 500.00
Permit Modification under 40 C.F.R., 270.42 (Class II and III) HWIR Staging Pile	\$ 1,250.00
Modification under 40 C.F.R., 270.41	\$ 2,500.00
Post-Closure Care Permit	\$15,000.00
Closure Plans	\$ 1,500.00

BEFORE THE WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION  
DIVISION OF WATER AND WASTE MANAGEMENT

IN THE MATTER OF:

PROPOSED 2010 RULES  
33CSR20 - Related to the  
Hazardous Waste Management  
System

**TRANSCRIPT OF PROCEEDINGS** had or testimony  
adduced in the above-entitled matter, on the 15<sup>th</sup> day of  
July, 2009, commencing at 6:03 p.m. and concluding at 6:04  
p.m., at the Coopers Rock Training Room, 601 57<sup>th</sup> Street,  
S.E., Charleston, Kanawha County, West Virginia, pursuant  
to notice to all interested parties.

BEFORE: KATHY COSCO, Public Information Office

**ORIGINAL**

**NANCY MCNEALY**  
CERTIFIED COURT REPORTER  
Post Office Box 13415  
Charleston, West Virginia 25360-0415  
(304) 988-2873 FAX (304) 988-1419

**I N D E X**

Reporter's Certificate.....Page 5

1 MS. COSCO: Good evening. My name is Kathy  
2 Cosco and I am with the Public Information Office. Welcome  
3 to the DEP and the public hearing on four of the agency's  
4 proposed rule changes. This evening, we will be taking  
5 comments on changes to 33CSR 20 - *Hazardous Waste*  
6 *Management System*; 47CSR12 - *Requirements Governing*  
7 *Groundwater Standards*; 47CSR60 - *Monitoring Well Design*  
8 *Standards*; and 60CSR2 - *Rules on Freedom of Information Act*  
9 *Requests*.

10 To make the most efficient use of our time,  
11 we will open the hearing for comments on the first rule,  
12 and once everyone who wishes to speak about that rule has a  
13 chance to do so, we will close the hearing on that rule and  
14 immediately open the next hearing for the next rule.

15 We have four sign-in sheets at the back of  
16 the room. If you wish to speak about all four rules,  
17 please make sure your name is on each sign-in sheet.  
18 However, if you only want to comment on one rule, your name  
19 only needs to be on the sign-in sheet for that rule.

20 If no one has any questions, I will begin by  
21 opening the hearing for 33CSR20. Okay.

22 The first rule we will accept comments on  
23 this evening is 33CSR20, *Hazardous Waste Management System*.  
24 This rule was promulgated last in the 2010 session.

1 Revisions to this rule include striking "Expansion to RCRA  
2 Comparable Fuel Exclusion" from exclusion from  
3 incorporation by reference of the federal rule.

4 Please make sure you have signed in and have  
5 indicated whether you are going to make a comment. If you  
6 have written comments, please provide them to me when you  
7 speak or at the close of this hearing.

8 If everyone is ready, the floor is now open.  
9 There being no one wishing to speak, this concludes the  
10 public hearing for the proposed rule 33CSR20, regarding  
11 *Hazardous Waste Management System*.

12 The agency will review all comments and  
13 prepare a written response which will be filed when the  
14 final rule is filed with the Secretary of State and that  
15 closes this hearing on 33CSR20.

16 (WHEREUPON, the hearing was concluded.)

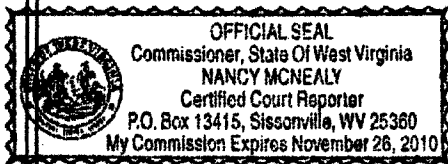
BEFORE THE WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

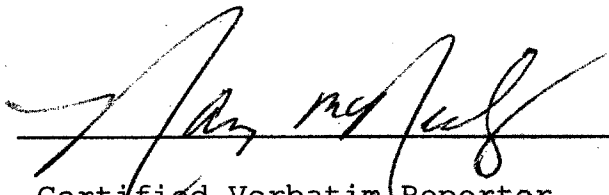
STATE OF WEST VIRGINIA,  
COUNTY OF KANAWHA, to wit:

I, **NANCY MCNEALY**, Certified Verbatim Court Reporter and Commissioner of West Virginia, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof.

Given under my hand this 16<sup>th</sup> day of July, 2010.

My commission expires November 26, 2010.



  
\_\_\_\_\_  
Certified Verbatim Reporter  
Commissioner of West Virginia



**To: Division of Water and Waste Management**  
West Virginia Department of Environmental Protection

**From: Indian Creek Watershed Association, Board of Directors**  
Monroe County, West Virginia

**Date: July 19, 2010**

**RE: Comments on Proposed Title 47 Legislative Rules Regarding Water Resources** (*Public Comment period ending July 19, 2010*)

We are writing as representatives of the Monroe County Indian Creek Watershed Association (ICWA). An active watershed organization since 1996, ICWA's focus and mission is: "The preservation and protection of Monroe County's abundant, pure water." Our website can be found at: <http://IndianCreekWatershedAssociation.org/>

**We commend the West Virginia DEP for taking steps to protect West Virginia's water and water quality.** This is an especially important time for new, stronger regulations to be enacted and enforced. In particular, increased Marcellus Shale gas drilling presents unique demands and dangers for our state's water levels and water quality.

**We feel strongly, however, that the proposed regulations do not go far enough to create the safeguards needed to protect West Virginia's current and future water resources.** Some regulations, in fact, appear to weaken existing quality standards. We make some specific comments on proposed rules below, but our overarching call is that the WVDEP needs strong regulations, as well as the funding and staff required to monitor and enforce those regulations. While Marcellus gas drilling may offer valid economic opportunities for the state and state residents, we do not believe that any West Virginia residents would knowingly agree to put at risk the waters that are used by themselves and their families, as well as their neighbors, communities, livestock and wildlife.

- **West Virginia's waters should not be sacrificed to the current "gas rush" mentality.** The potential for negative environmental impacts of deep gas drilling and its attendant activities are being exposed on a near daily basis. Clearly, the industry has not been directed to put adequate safeguards in place, and we believe that there has not been sufficient environmental impact review.
- **Regulations should protect West Virginia waters at all stages of industrial operations.** Marcellus Shale drilling requires enormous amounts of water, and presents clear dangers to water quality in the transportation and use of toxic chemicals for hydraulic fracturing as well as the "containment" or recycling of contaminated fluids. In particular, Clean Water Act standards that protect streams and watersheds should not be excluded from applying at drilling sites. What is the point of safety regulations if they are waived where they are most needed?
- **Regulations should be adequate to address the full range of West Virginia watersheds and waterways.** West Virginia enjoys a wild, wonderful and diverse set of natural resources and landscapes. Procedures and regulations that might

have served safely in other areas of the country do not necessarily apply in our mountains and valleys.

- **In Monroe County, we have a special concern: the highly vulnerable karst formations that underlie much of our county.** Karst formations – characterized by the presence of sinkholes, caves, and “lost rivers” – have been identified by the EPA as particularly sensitive high-risk aquifers, where water contamination can happen quickly, spread unpredictably, and be extremely difficult to remedy. Ginsburg and Palmer, in their 2002 EPA document, also note that karst varies significantly from region to region, so that guidelines applicable to making source-water assessments in one karst region do not necessarily apply to other karst formations. We believe that the risk of contamination *at any stage* of Marcellus Shale gas drilling operations could present immediate and potentially long-lasting dangers to the region’s water quality. This danger is magnified by the fact it could be difficult for public or private parties to respond effectively to any incident, either to contain the damage or even to alert those whose drinking and agricultural water supplies might be in jeopardy.

We feel strongly that before any gas drilling is pursued in Monroe County, there should be a thorough environmental impact study that looks at the specific issues of water supply and watershed contamination in our karst territory. In particular, the gas companies should be required to assess and report current water quality and quantity in the region where the drilling will occur as part of the permitting process before any permit is issued. This type of study would help protect not only the interests of Monroe County residents, but those of the state and gas companies as well, by avoiding what could be a disastrous, expensive, long-term liability.

**With little or no local authority to provide protections, our counties must depend on the WVDEP to fulfill its mission as guardian of West Virginia’s environmental resources.** We urge that the strongest possible measures be put in place. At a minimum, WV regulations should meet all federal EPA and Clean Water Act standards – and they should exceed federal standards and regulations where the special needs and interests of West Virginia are at stake.

Following are comments related to specific Proposed Rules:

#### **47CSR2 – Requirements Governing Water Quality Standards Proposed Rule [links to WVDEP]**

§47-2-3. Conditions Not Allowable In State Waters – The addition of “certain water withdrawal activities” not allowable in state waters is important, but should be further strengthened. To be protective of both human health and aquatic life, DEP should draft legislation for immediate consideration by the West Virginia Legislature that establishes guidelines and a permit process for water withdrawals.

§47-2-7. West Virginia Waters: 7.2 Applicability of Water Quality Standards – It is not clear that waters in karst formation areas would be adequately protected by existing or proposed standards. We recommend that specific language be added, in this section and/or wherever most appropriate, to address site-specific conditions in karst regions, recognizing that additional testing and permit procedures might be required due to the unusual vulnerability of water resources in karst topography.

§47-2-8. Specific Water Quality Criteria:

8.3.a.3. Criteria for Nutrients in Lakes. We oppose the proposed language that states the “a lake shall not be considered impaired based upon an average total phosphorous concentration in excess of the criterion established ... unless the chlorophyll-a criterion established therein is also exceeded.” WVDEP regulations should follow the EPA guidance and recognize that lakes might be impaired for *either* phosphorous or chlorophyll-a.

8.3.b. Criteria for Nutrients in Streams. We applaud adding specific phosphorous standards for the Greenbrier River. We also agree with the West Virginia Environmental Council (WVEC) that, in addition, the DEP should reconvene its Stakeholders Nutrient Committee and move ahead on the criteria-setting process for rivers and streams overall.

Other areas in which we advocate stronger standards:

- The water quality standard for Iron in Trout Streams should not be changed, and especially not weakened, until more thorough studies are conducted.
- With regard to a statewide quality standard for Total Dissolved Solids,
  - WVDEP should adopt the federal standard for human health of 250mg/l.
  - WVDEP should adopt an aquatic life criterion for conductivity as proposed by EPA. And any criteria for TDS/conductivity should be protective of streams threatened by golden algae.

## **47CSR12 – Requirements Governing Groundwater Standards Proposed Rule**

§47-12-3. Groundwater Standards

We object to regulation 3.4, which *excludes* the WVDEP groundwater quality standards from applying to geologic formations in sites specific to production or storage of crude oil or natural gas, underground injection zones, and coal extraction and earth disturbing activities. These are sites where environmental protection is most needed.

This exclusion appears especially dangerous for karst formations, since contamination at any site would likely pass quickly beyond the borders of the site in unknown directions and to considerable distances. If exploration, production and storage activities are to be permitted in areas of karst formation, adherence to groundwater quality standards should be closely monitored and controlled, not excluded.

## **47CSR60 – Monitoring Well Design Standards**

### **Proposed Rule**

It is not clear whether the guidelines in this regulation are applicable to the engineering requirements of deep-gas drilling and hydraulic fracking. We urge that the strongest reasonable safeguards be put in place for all drilling and groundwater monitoring, and that the unique vulnerabilities of karst formations be given special consideration.

Deep gas drilling and industrial uses of water are discretionary activities, unlike maintaining the quality of water for human and animal use. Too many times, the terms “reasonable” or “best practices” have been used as a cover for “acceptable pollution.” In West Virginia, there are no barriers between the water which would be contaminated by the drilling and fracking process and the water which would be used by people and animals, and in fact, they are one and the same. Consequently, it is of paramount importance that the water quality be preserved to drinking water quality standards.

## **33CSR20 – Hazardous Waste Management System**

### **Proposed Rule**

We urge that WVDEP regulations meet or exceed federal guidelines for hazardous waste management. In particular, we ask WVDEP to ensure that regulations are in place to protect our citizens and waterways from the toxic chemicals and by-products that will be transported, used, stored, recycled, and otherwise introduced into the West Virginia environment in the process of Marcellus Shale drilling for natural gas.

**Respectfully,**

Judy Azulay, Steve Ellison, Nancy Bouldin, Jill Grace Young, Keveney Bair

**Board of Directors and Staff Members, Indian Creek Watershed Association**

*Contact for questions or follow-up:*

Nancy Bouldin, [nancy\\_bouldin@hotmail.com](mailto:nancy_bouldin@hotmail.com)



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(304) 340-1200

July 15, 2010

**Via Hand Delivery and e-mail @ [kathy.cosco@wv.gov](mailto:kathy.cosco@wv.gov)**

Public Information Office  
ATTN: Kathy Costo  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

Re: Proposed Revisions to "Hazardous Waste Management Rule," 33 CSR 20  
Filed June 14, 2010

Dear Ms. Cosco:

These comments are filed on behalf of the West Virginia Chamber of Commerce (the "Chamber"). The Chamber is West Virginia's largest, most influential general business organization, representing all business sectors in every region of the State. Members range from small business enterprises to mid-sizes manufacturers to tourism destinations to energy companies to Fortune 500 corporations; however, small businesses are the core of the Chamber's membership - making up 85 percent of the Chamber's companies and firms.

The Chamber appreciates the opportunity to provide comments on the proposed revisions to the regulations titled "Hazardous Waste Management Rule" to be codified at 33 CSR 20. The proposed revisions would adopt and incorporate by reference the federal regulations set forth in 40 CFR Parts 260 through 270 that are in effect as of June 1, 2010. The Chamber is concerned that the proposed revisions attempt to incorporate in the West Virginia "Hazardous Waste Management Rule" a federal rule that that did not take effect until after June 1, 2010, and that was partially withdrawn. The proposed revisions would also strike a reference to a federal rule that was not withdrawn until after June 1, 2010. The two federal rules of concern are: (1) the "Hazardous Waste Technical Corrections and Clarifications Rule" that was published March 18, 2010 (75 Fed. Reg. 12,989); and (2) the Withdrawal of Expansion of RCRA Comparable Fuel Exclusion that was published June 15, 2010 (75 Fed. Reg. 33,712). Because the West Virginia rule incorporates the federal regulations that were in effect as of June 1, 2010, and because these two federal amendments did not take effect until after June 1, 2010, the Chamber

believes that the proposed revisions insofar as they concern these two federal amendments are premature at this time.

The proposed revisions would adopt the federal amendment entitled "Hazardous Waste Technical Corrections and Clarifications Rule" that was published as a Direct Final Rule on March 18, 2010 (75 Fed. Reg. 12,989). The federal amendment expressly provided that "This Direct Final Rule is effective on June 16, 2010 without further notice unless EPA receives adverse comments by May 3, 2010." *Id.* at 12,989, column 3. The Chamber and other commenters filed timely comments on the March 18, 2010 "Hazardous Waste Technical Corrections and Clarifications Rule," objecting to a new requirement in the Direct Final Rule that the accumulation start date be marked on 90-day hazardous waste tanks. A copy of the Chamber's comments is attached. On June 4, 2010, the U.S. Environmental Protection Agency (EPA) published a partial withdrawal of its March 18, 2010 "Hazardous Waste Technical Corrections and Clarifications Rule". The partial withdrawal included the amendment seeking to add the new requirement that the accumulation start date be marked on 90-day hazardous waste tanks. The federal amendments that EPA did not withdraw took effect June 16, 2010, or after the date used in the West Virginia rule to determine the federal regulations incorporated by reference.

The proposed revisions would also remove from the provision excluding from incorporation by reference at § 33-20-1.10 the "Expansion to [*sic*] RCRA Comparable Fuel Exclusion" that was published in the *Federal Register* Vol. 73, No. 245, dated December 19, 2008. While the Chamber recognizes that the U.S. Environmental Protection Agency has withdrawn the "Expansion to [*sic*] RCRA Comparable Fuel Exclusion," the withdrawal did not take effect until June 15, 2010 (75 Fed. Reg. 33,712), or after the date used in the West Virginia rule to determine the federal regulations incorporated by reference.

The Chamber requests that the West Virginia Department of Environmental Protection (DEP) clarify that the proposed revisions to the "Hazardous Waste Management Rule" do not incorporate by reference the federal amendments that were withdrawn on June 4, 2010, including the requirement that the accumulation start date be marked on 90-day hazardous waste tanks. The Chamber further requests that the DEP explain how it reconciles the proposed revisions to incorporate by reference a federal rule that took effect after June 1, 2010, and to strike the reference to a federal rule that was withdrawn after June 1, 2010, with the language in the West Virginia "Hazardous Waste Management Rule" at § 33-20-1.5 that: "Whenever...federal...regulations...are incorporated by reference into this rule, the reference is to that...regulation in effect on June 1, 2010 unless otherwise noted in the text of this rule".

The Chamber appreciates the opportunity to comment on the proposed revisions to the West Virginia "Hazardous Waste Management Rule," 33 CSR 20. If you have any questions, please feel free to contact me.

Comments on Proposed Revisions to "Hazardous Waste Management Rule," 33 CSR 20  
Public Information Office  
July 15, 2010  
Page 3 of 3

Sincerely,

A handwritten signature in cursive script that reads "Gale Lea Rubrecht". The signature is written in black ink and is positioned above the printed name.

Gale Lea Rubrecht  
Co-Chair, Waste Subcommittee  
West Virginia Chamber of Commerce



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May 3, 2010

(Via Online @ <http://www.regulations.gov>)  
RCRA Docket (2822T)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460  
Attn: Docket ID No. EPA-HQ-RCRA-2008-0678

Re: Docket ID No. EPA-HQ-RCRA-2008-0678  
"Hazardous Waste Technical Corrections and Clarifications Rule;  
Proposed Rule," 75 Fed. Reg. 13066 (March 18, 2010)

Dear Sir:

The West Virginia Chamber of Commerce (the Chamber)<sup>1</sup> is pleased to submit the following comments on U.S. Environmental Protection Agency's (EPA or Agency) proposed rule titled "Hazardous Waste Technical Corrections and Clarifications Rule" that was published in the *Federal Register* at 75 Fed. Reg. 13066 on March 18, 2010. In particular, the Chamber submits these comments on EPA's proposed rule insofar as it relates to revising 40 CFR § 262.34(a)(2) to add a new requirement that hazardous waste tanks be marked with the accumulation start date. *Id.* at 12994 & 13004.

The Chamber opposes EPA's proposal to require that hazardous waste tanks be marked with the accumulation start date. If EPA intends to revise 40 CFR §262.34(a), then the Chamber urges EPA to revise the accumulation time provision to state that marking each tank with the date each accumulation period begins is not the sole way to demonstrate compliance with the 90-day accumulation time limit and allow for alternative methods for identifying the start date of accumulation. If EPA intends to require that hazardous waste tanks as well as hazardous waste containers be marked with the accumulation start date, the Chamber urges EPA to seek public comment on the issue and not bury the requirement as a "technical correction" or "clarification" in a direct final rule.

<sup>1</sup> The Chamber is the largest business organization in West Virginia, representing all business sectors in every region of the state. Members range from small business enterprises to mid-size manufacturers to tourism destinations to energy companies to Fortune 500 companies. However, small businesses are the core of the Chamber's membership – making up 95% of the Chamber's companies and firms.

**1. EPA's proposal to add a requirement that hazardous waste tanks be marked with the accumulation start date will reduce flexibility in how a generator demonstrates that a hazardous waste tank has been emptied within the 90-day accumulation period without adding environmental benefit.**

Marking a tank with the accumulation start date is not the only way that a generator may show that a hazardous waste tank has been emptied within a 90-day period. Other ways to demonstrate compliance with the 90-day accumulation period of Section 262.34, could include documenting the accumulation start date on a daily inspection log, documenting a tank level, using process computer control, or some other means.

An example of a log sheet used by one company for one of its RCRA tanks is enclosed.<sup>2</sup> As indicated on the log sheet, the tank is inspected daily, and the start fill date (carrying it through each day) is recorded. The log sheets are kept on file at the plant. The start date is also included in the plant's computer system. This facility has had numerous inspections by the West Virginia Department of Environmental Protection, and the state inspectors have not raised an issue with the facility's demonstration of compliance with the 90-day accumulation limit.

EPA's proposal to require marking the accumulation start date on tanks as the sole method to show compliance would reduce a generator's flexibility in demonstrating compliance with the 90-day accumulation period of Section 262.34. Such a result would be contrary to EPA's rationale for including Section 262.34 in the requirements for hazardous waste generators in the first instance. As EPA itself has said, its rationale for including the 90-day accumulation provisions of Section 262.34 was to obtain a reasonable balance between congressional intent not to interfere with the generator's manufacturing or production processes with the need to provide adequate protection of human health and the environment. 45 Fed. Reg. 12730, 12730 (Feb. 26, 1980); see also 65 Fed. Reg. 12378, 12380 (March 8, 2000); 59 Fed. Reg. 62896, 62909 (Dec. 6, 1994); & 57 Fed. Reg. 37194, 37212 (Aug. 18, 1992). Generators are documenting the start date of accumulation for a tank. Thus, EPA's proposed change would not result in necessary protection of the environment but would interfere with the generator's manufacturing or production processes by reducing the ways generators may demonstrate compliance.

EPA's proposal also ignores the fact that tanks are not labeled in the same manner as containers. Containers are identified with adhesive labels, which generally include the accumulation start date. Because tanks are more permanent pieces of equipment than containers, tanks are typically spray painted with the words "Hazardous Waste". However, tanks are not spray painted with a date because the date would have to be repainted at least every 90 days. Adhesive labels are typically not used on tanks because the label would have to be a type that could be replaced every 90 days, creating a risk that the label may not stay attached. Moreover, the historical record of emptying the tank every 90 days would be lost each time a generator removed a label or repainted a tank date. The generator creates a separate historical record for emptying a tank, and the Chamber submits that EPA should accept the historical record of

<sup>2</sup> For purposes of these comments, information identifying the tank being inspected has been redacted from the sample log sheet. In practice, the log sheet would identify the tank being inspected, especially if there is more than one RCRA tank present on the site.

emptying a tank as demonstration of a generator's compliance with the 90-day accumulation limit.

**2. EPA's proposal to add a requirement that hazardous waste tanks be marked with the accumulation start date is inconsistent with recent EPA guidance.**

In a 2007 guidance memo, "Turnover of Hazardous Wastes Stored in Generator Accumulation Tanks," RCRA Online 14764, discusses various methods that large quantity generators may use to demonstrate compliance with the 90-day accumulation limit. For tanks utilizing a batch process, EPA explains that:

the use of inventory records in conjunction with tank markings may provide confirmation that the tank has been emptied within an appropriate time period. Specifically, the inventory records typically show the dates and associated quantity of hazardous waste entering the tank, as well as the dates the tank was emptied. Shipping or hazardous waste manifest records also may be used to verify when the tank was emptied. Likewise, tanks accumulating hazardous wastes may have information indicating the time and date hazardous waste first entered the tank. There may be other methods to demonstrate that a tank has been emptied, but any method used to confirm compliance with 40 CFR 262.34(a)(1)(ii) must be reasonable and easily discernible to EPA or an authorized state.

*Id.* at p. 2.

For tanks utilizing a continuous flow process, EPA allows in the 2007 guidance memo a "turnover" or "mass balance" approach to determine whether a tank is emptied within 90 days:

EPA is interpreting 40 CFR 262.34(a)(1)(ii) to allow for the turnover approach.... In the case of hazardous wastes flowing through tanks continuously, there is a means of demonstrating when a tank is "emptied" within 90 days under 40 CFR 262.34(a)(1)(ii) that would not require completely emptying the tank, and may be more suitable for tanks with continuous flow. More specifically, a mass balance approach (i.e., - the "turnover" approach...) can be used for continuous flow tanks rather than the approach...for batch process tanks. The key parameters in this mass balance approach are the volume of the tank (e.g., 6,000 gallons), the daily throughput of hazardous waste (e.g., 300 gallons per day) and the time period the hazardous waste "resides" in the tank. In this example, the hazardous waste entering the tank would have a residence time of 20 days ((6,000 gallons/300 gallons per day) = 20 days) and meet the requirements of 40 CFR 262.34(a)(1)(ii) since the hazardous waste has been in the tank for less than 90 days.

*Id.* at pp. 1 & 3.

In the 2007 guidance memo, EPA also identifies alternative approaches that large quantity generators accumulating hazardous wastes through a continuous flow process may use to demonstrate that the hazardous waste has not been stored for more than 90 days:

This may be achieved by the use of inventory, or some form of accounting or monitoring data. For example, a generator could confirm that the volume of a tank has been emptied every 90 days by recording the results of monitoring equipment both entering and leaving a tank. This recordkeeping, in conjunction with the tank volume, would enable inspectors, as well as facility personnel to demonstrate compliance with 40 CFR 262.34(a)(1)(ii). Likewise, in marking the tank, a generator could mark both the tank volume and estimated daily throughput to allow inspectors to determine the number of days that hazardous waste resides in a tank to determine compliance with 40 CFR 262.34(a)(1)(ii). As noted above, there may be other methods to demonstrate that a tank has been emptied, but any method or demonstration to confirm compliance must be reasonable and easily discernible to EPA or an authorized State.

*Id.* at p. 3.

The Chamber recognizes that the Agency noted in the June 2003 RCRA Monthly Call Center Report, RCRA Online 14683, its "intent" that the accumulation start date be marked on tanks even though "this requirement is not cited in Section 262.34(a)(2)." However, if EPA wants accumulation start date markings to appear right on the tank, the Chamber submits that EPA needs to make this a regulatory requirement by amending 40 CFR § 262.34 (a)(2) to add "and tanks" through notice-and-comment rulemaking instead of relying upon the Agency's asserted intent in a 2003 guidance document. Moreover, the 2007 guidance memo post-dates the June 2003 RCRA Monthly Call Center Report, RCRA Online 14683, and is certainly more thoroughly reasoned than the summary statement in the June 2003 RCRA Monthly Call Center Report, RCRA Online 14683.

**3. It is unclear whether the lack of any regulatory marking requirement for hazardous waste tanks was inadvertent or intentional.**

The Chamber recognizes that the preamble to the March 24, 1986 final rule titled "Hazardous Waste Management System: General; Identification and Listing of Hazardous Waste; Standards for Generators of Hazardous Waste; Standards for Transporters of Hazardous Waste; EPA Administered Permit Programs; Authorization of State Hazardous Waste Programs" (51 Fed. Reg. 10146) reads, at page 10160, that "the date upon which the period of accumulation begins [must be] clearly marked on the tank or container." The language does not appear in the regulatory text, however. Indeed, the regulatory text concerning marking the accumulation start date has remained unchanged now for more than 24 years, suggesting that the omission may have been intentional.

In the March 24, 1986, final rule EPA continues first by discussing the standards for accumulation in containers under Part 265, Subpart I, and second by discussing the standards for accumulation in tanks under Part 265, Subpart J. The preamble discussion of the Subpart I requirements for containers repeats the requirement found in 40 CFR § 262.34(a)(2) that the accumulation start date be marked on the container. *Id.* at 10166. Significantly, the preamble discussion of the Subpart J requirements is notably silent on a similar requirement for tanks based upon 40 CFR 262.34(a)(2). *See id.*

Additionally, a review of the *Federal Register* notices revising Section 262.34 after 1980 when EPA first promulgated the regulations establishing a system to manage hazardous wastes tends to support the conclusion that EPA never intended to require that the accumulation start date had to be marked on tanks as well as containers. Since 1980, EPA has revised Section 262.34 at least 21 times, and has failed to correct what it now calls an "inadvertent omission".

In the 1982 final rule (47 Fed. Reg. 1248; Jan. 11, 1982), which was the first revision to the original Section 262.34, EPA expanded the 90-day accumulation provision to apply not only to hazardous waste which generators send off-site, but also to hazardous waste which they treat, store or dispose on-site. In the preamble, EPA stated: "Section 262.34(a), as promulgated on May 19, 1980, also requires generators to mark containers with the date upon which each period of accumulation begins. This requirement is not changed by today's action." *Id.* at 1249. EPA did not mention a similar requirement in the preamble discussion on tanks. The following year, EPA "reorganize[d] the presentation of permit program requirements governing the Hazardous Waste Management program" but made "no substantive changes to any of the affected sections," 48 Fed. Reg. 14146 (April 1, 1983), and in 1984, EPA added satellite accumulation provisions, 49 Fed. Reg. 49568 (Dec. 20, 1984).

EPA made no mention of any requirement that hazardous waste accumulation tanks needed to be marked with the accumulation start date until March 24, 1986, when EPA added the small quantity generator provisions, 51 Fed. Reg. 10146, 10160. However, when EPA amended the hazardous waste tank regulations less than four months later, EPA neither mentioned a marking requirement for tanks in the preamble nor revised the regulatory text to include such a requirement. 51 Fed. Reg. 25422 (July 14, 1986).

In 1990, EPA extended the 90-day exemption to drip pads and allowed owners and operators of drip pads to use documented procedures to demonstrate compliance with the 90-day limit. 55 Fed. Reg. 50450, 50456 & 50483-84. (Dec. 6, 1990). EPA stated in the preamble that:

[O]wners and operators of drip pads operating under the 90-day accumulator exemption will be required to maintain records documenting that their drip pads and associated collection systems are emptied of all wastes at least once every 90 days. The recordkeeping requirements specify that owners and operators maintain, as part of the facility operating record, a description of all procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least every 90 days. Owners and operators must also document each waste removal in the operating record by recording, at a minimum, the quantity of waste removed, and the date and time of removal.

*Id.* at 50456.

Indeed, in the technical corrections to the 1990 regulations, EPA corrects the reference in Section 262.34(d)(4) to refer to "the correct paragraphs for compliance with container marking and container/tank labeling requirements". 56 Fed. Reg. 30195, 30193 (July 1, 1991). Notably, EPA did not refer to container/tank marking requirements and did not "correct" Section 262.34(a)(2) to require that the period of accumulation be marked on tanks. *Id.* at 30195.

In 1992, EPA promulgated standards allowing management of certain hazardous wastes in units called "containment buildings" and extended the 90-day accumulation provisions to containment buildings. 57 Fed. Reg. 37194 (Aug. 18, 1992). While EPA rejected a "mass balance" approach for containment buildings, EPA agreed that "documented procedures" could be used to demonstrate that each volume of waste resides in the unit for no more than 90 days. As EPA explained in the preamble:

This requirement could be met in two ways: (1) By documenting that the unit is emptied at least once every 90 days, or (2) by having and documenting (in writing) the procedures in place to ensure that wastes in the unit are segregated by age and that no portion of the stored wastes is allowed to remain beyond the time limit. As part of that latter demonstration, owner/operators must document that the nature of their hazardous waste management operation is consistent with respecting that 90-day limit....EPA believes this degree of assurance of actual waste turnover is justified.

EPA does not seek to require documentation of each individual addition or removal of waste from the unit; rather, the required written documentation must show that procedures are in place to ensure that individual additions and removals of wastes are consistent with the 90-day time limit for each portion of the wastes managed in the unit....

*Id.* at 37212.

Since August 18, 1992, EPA has revised the accumulation time provisions of 40 CFR § 262.34 and corrected "inadvertent omissions," "typographical errors," etc. In none of the preambles to those final rules, however, does EPA suggest that it intended for tanks to be marked with the accumulation start date. Indeed, in considering revisions to the accumulation time limit for the National Environmental Performance Track Program, EPA refers to containers as the only subject to the marking requirement. See, e.g., 69 Fed. Reg. 21737, 21746 (April 22, 2004) ("The generator must comply with certain unit-specific standards (e.g., tank, container, containment building, and drip pad standards) for accumulation units, and certain general facility requirements such as those for marking and labeling of containers, preparedness and prevention, and emergency response procedures.").

Further, the language of 40 CFR 268.50 concerning prohibitions on storage of restricted wastes sets forth separate and distinct marking requirements for storage of hazardous wastes restricted from land disposal in containers and tanks and tends to support the conclusion that EPA may have intended to make the same or similar distinction in 40 CFR 262.34(a)(2) and (3). Section 268.50(a) provides in pertinent part that:

(a) Except as provided in this section, the storage of hazardous wastes restricted from land disposal under Subpart C of this part of RCRA section 3004 is prohibited, unless the following conditions are met:

(1) A generator stores such wastes in tanks, containers, or containment buildings on-site solely for the purpose of the accumulation of such quantities of

hazardous waste as necessary to facilitate proper recovery, treatment, or disposal and the generator complies with the requirements in § 262.34 and parts 264 and 265 of this chapter.

(2) An owner/operator of a hazardous waste treatment, storage, or disposal facility stores such wastes in tanks, containers, or containment buildings solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal and:

(i) Each container is clearly marked to identify its contents and the date each period of accumulation begins;

(ii) Each tank is clearly marked with a description of its contents, the quantity of each hazardous waste received, and the date each period of accumulation begins, or such information for each tank is recorded and maintained in the operating record at that facility. Regardless of whether the tank itself is marked, an owner/operator must comply with the operating record requirements specified in § 264.73 or § 265.73.

(3) A transporter stores manifested shipments of such wastes at a transfer facility for 10 days or less.

Emphasis added.

The preamble in the June 4, 1987 final correction rule titled "Hazardous Waste Management System; Land Disposal Restrictions; Correction," (52 Fed. Reg. 21010) states that:

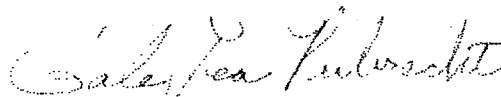
Today's notice corrects this ambiguity by revising § 268.50(a)(2) to reflect that each period of accumulation must be recorded on the containers themselves, as is currently required under § 262.34. However, where storage of prohibited wastes occurs in tanks, the Agency has not expressed any intent to deviate from existing regulations in § 264.73 and § 265.73 which allow the recording of each period of accumulation in the facility's operating record. Today's notice corrects § 268.50(a)(2) to conform with these existing requirements.

*Id.* at 21013.

It makes no sense for EPA to allow tanks used to accumulate *restricted wastes* to use information in the facility's operating record to demonstrate compliance with the 90-day accumulation limit but to mandate that tanks used to accumulate *unrestricted wastes* may demonstrate compliance only by marking the accumulation start date on the tank.

The Chamber appreciates the opportunity to comment on EPA's March 18, 2010 proposed rule entitled "Hazardous Waste Technical Corrections and Clarifications Rule".

Very truly yours,



Gale Lea Rubrecht  
Co-Chair, Waste Subcommittee  
West Virginia Chamber of Commerce

**RCRA Tank Daily Inspection**

Use the following steps to inspect the RCRA tank and document the results of the inspection.

Liquid level: \_\_\_\_\_ % \_\_\_\_\_ pounds

Initial start of filling date: \_\_\_\_\_

Inspection Item	Initials	Yes	No
Review the previous day's inspection checklist for deficiencies. If any were documented, review repair status and document the deficiency below if the repair has not yet been completed.			
1. High level switch operational			
2. Liquid level operational			
3. Area free of signs of hazardous waste release			
4. Both secondary containment areas (dike/pad) free of cracks and gaps			
5. Dike valve is in closed position			
6. Tank free of obstruction			
7. Tank and all piping free of damage, corrosion, leaks			
8. Cap on line at RCRA TT loading spot			
9. Verify handvalve is closed.			
10. All vents have plugs			
11. Tank pressure controller set, with make-up at <5 psig (normally 2 psig) and vent at >15 psig (normally 20 psig)			
If any deficiencies are noted above, document the problem in the electronic logbook and submit a request for repair.			
If any deficiencies are noted above, contact EH&S			
Additional LDAR monitoring may be required.			
Place this checksheet in the RCRA inspection manual.			

**Holliday, Kenneth C**

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**From:** Ellerbe.Lillie@epamail.epa.gov  
**Sent:** Thursday, July 15, 2010 2:32 PM  
**To:** Holliday, Kenneth C  
**Cc:** Pontiveros, Lucia S; Burgos.Hilda@epamail.epa.gov  
**Subject:** EPA Review of West Virginia's Proposed 2011 Hazardous Waste Rule

**Categories:** Red Category

Per our conversation and discussion, EPA has reviewed the West Virginia Department of Environmental Protection 's proposed 2011 hazardous waste regulations and we submit the following comment:

At 33-20-1.5 - The Division of Water and Waste Management (DWM) should modify its incorporation by reference (IBR) effective date from June 1, 2010 to at least June 16, 2010 in order to correspond with the effective date of Revision Checklist 223, "Hazardous Waste Technical Corrections and Clarifications Rule." Specific amendments to the Direct Final rule promulgated on March 18, 2010 (75 FR 12989) were withdrawn in the Federal Register (FR) notice dated June 4, 2010 (75 FR 31716) because of adverse comment received. In this same FR notice, the amendments for which EPA did not receive adverse comment were not withdrawn and became effective on June 16, 2010. In order to include the final rule addressed by Checklist 223 in your IBR DWM must change the effective date in 1.5.

The Division of Air Quality has made this change in its 2011 proposed regulations.

Please consider the above comment in your final rulemaking decision. If you should have any questions, please let me know.

Thank You

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## 33 CSR 20

### HAZARDOUS WASTE MANAGEMENT RULE

#### RESPONSE TO COMMENTS

On June 14, 2010, the Division of Water and Waste Management (DWWM) commenced a thirty-day public comment period and subsequently held a public hearing on July 15, 2010 to accept oral comments on proposed revisions to legislative rule 33CSR20. Written comments were also accepted through 7:00 p.m. on Thursday, July 15, 2010. Three commenters submitted written comments regarding proposed revisions to 33CSR20, and no commenters provided verbal comments. DWWM addresses the comments below.

**Commenters: Gale Lea Rubrecht on behalf of the West Virginia Chamber of Commerce**

**Comment A.** The commenter requested that the effective date of West Virginia's Hazardous Waste Management Rule be no earlier than June 16, 2010.

One rule being incorporated by reference entitled "Hazardous Waste Technical Corrections and Clarifications Rule" was not finalized by EPA until this date. Additionally, the commenter noted that the "Expansion of RCRA Comparable Fuel Exclusion" rule, which had previously not been incorporated into the state rule because it was being reconsidered by EPA, had been withdrawn entirely. The effective date of this withdrawal was June 15, 2010.

**Response A.** If the commenter is referring to §1.5 of the Rule, which is entitled "Incorporation by Reference," DWWM finds the comment to be well taken and has revised the rule accordingly.

**Commenter: Lillie Ellerbe on behalf of the US Environmental Protection Agency**

**Comment B.** The commenter stated the West Virginia DEP should make the effective date of the Hazardous Waste Management Rule no earlier than June 16, 2010 for the reasons given above.

**Response B.** Please refer to **Response A.**

**Commenters: Judy Azulay, Steve Ellison, Nancy Bouldin, Jill Grace Young, Keveney Bair on behalf of the Indian Creek Watershed Association**

**Comment C.** The commenters urged that WVDEP regulations meet or exceed the federal guidelines for hazardous waste management, with particular regard to Natural Gas development in the Marcellus Shale.

**Response C.** DWWM appreciates the comment; however, the comment involves language that is beyond the scope of the proposed revisions and, therefore, no response is required. However, it is important to note that DEP is in the midst of a comprehensive review of its oil and gas regulatory program, in light of the new techniques and practices related to Marcellus Shale development. All departments within DEP have been and will continue to be included in this review.

**Amendment of Rule:** In response to the EPA's withdrawal of "Expansion of RCRA Comparable Fuel Exclusion" rule, effective June 15, 2010 (75 Fed. Reg. at 33,712), DWWM has revised § 1.10 to leave the exclusion in effect. In other words, the sentence that was stricken in the June 14, 2010 filing is being left in the rule.