

**WEST VIRGINIA  
SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #5

FILED  
DEC 18 4 16 PM '99

OFFICE OF THE SECRETARY OF STATE  
STATE OF WEST VIRGINIA

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Division of Environmental Protection TITLE NUMBER: 33  
Office of Waste Management  
CITE AUTHORITY: 22-19-5(d) and 29A-3

RULE TYPE: PROCEDURAL X INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE \_\_\_\_\_  
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW  
\_\_\_\_\_

AMENDMENT TO AN EXISTING RULE: YES X, NO \_\_\_\_\_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 26

TITLE OF RULE BEING AMENDED: Hazardous Waste Emergency Response  
Fund

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: \_\_\_\_\_

TITLE OF RULE BEING ADOPTED: \_\_\_\_\_  
\_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS January 19, 2000

*Cassie J. Chant*  
Authorized Signature



Executive Office  
#10 McJunkin Road  
Nitro, WV 25143-2506  
Telephone No: (304)759-0575  
Fax No: (304)759-0526



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## West Virginia Bureau of Environment

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Cecil H. Underwood  
Governor

Michael C. Castle  
Commissioner

December 16, 1999

Ms. Judy Cooper  
Director, Administrative Law  
Division  
Secretary of State's Office  
Capitol Complex  
Charleston, WV 25305

RE: 33CSR26 - "Hazardous Waste Emergency Response Fund"

Dear Ms. Cooper:

This letter will serve as my approval to file the above-referenced rule with your office as an agency-approved Procedural rule.

Your cooperation in the above request is very much appreciated. If you should have any questions or require additional information, please call Carrie Chambers in my office at 759-0515.

Sincerely,

Michael C. Castle  
Commissioner

MCC:cc

cc: Mike Dorsey, OWM  
Carrie Chambers

TITLE 33  
PROCEDURAL RULE  
DIVISION OF ENVIRONMENTAL PROTECTION  
OFFICE OF WASTE MANAGEMENT

FILED  
DEC 16 4 13 PM '99  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 26  
HAZARDOUS WASTE EMERGENCY RESPONSE FUND PROCEDURAL RULE  
CONCERNING FEE ASSESSMENT

§33-26-1. General.

1.1. Scope. -- The purpose of this rule is to establish procedures for the assessment and collection of hazardous waste generator fees pursuant to WV Code §22-19.

1.2. Authority. -- WV Code §§22-19-5(d) and 29A-3.

1.3. Filing Date. -- December 16, 1999

1.4. Effective Date. -- January 19, 2000

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 the statute in effect on the date on which this rule was originally proposed (October 30, 1987).

1.6. Repeal of Former Rule. -- This rule repeals and replaces 47CSR40A, filed December 2, 1987, and effective January 1, 1988.

§33-26-2. Definitions. -- Definitions of all terms used, but not defined in this subsection, shall have the meaning prescribed in the HWMR and Article 19.

2.1. "Article 19" means WV Code §22-19.

2.2. "Chief" means the chief of the Office of Waste Management of the West Virginia Division of Environmental Protection.

2.3. "Generator" means any person, corporation, partnership, association, or other legal entity, by site location, whose act

or process produces hazardous waste as defined or listed by the director in rules promulgated pursuant to WV Code §22-18-6 in an amount greater than twelve thousand kilograms (12,000 kg) per year.

2.4. "HWMR" or "The Hazardous Waste Management Rule" means Title 33, Series 20, Division of Environmental Protection's Hazardous Waste Management Rule (33CSR20).

2.5. "Hazardous Components" shall be equivalent to the term "Hazardous Constituent" as used in Article 19, and shall mean that portion of a mixture of hazardous waste and other waste which is identified or listed in HWMR.

2.6. "Nonhazardous Constituents" means that portion of a mixture of hazardous waste and other waste which is neither identified nor listed pursuant to HWMR. (Note: Water which is mixed with a hazardous waste is considered a nonhazardous constituent for the purposes of this rule.)

#### §33-26-3. Fee Assessment Deposits.

##### 3.1. Deposits to the Fund.

3.1.a. All monies collected from generators under Article 19 will be deposited in the State Treasury in a special fund designated "The Hazardous Waste Emergency Response Fund."

3.1.b. Deposits will include all generator fee assessments, all interest or surcharges assessed and collected by the director, and all interest accruing on investments and deposits of the Fund.

#### §33-26-4. Information and Reporting Requirements.

##### 4.1. Annual Reporting.

4.1.a. All generators shall provide the following information to the division for the applicable calendar year on the form identified as Appendix I and attached to this rule:

4.1.a.1. Total amounts (in tons) of hazardous waste generated, excluding nonhazardous constituents;

4.1.a.2. The amounts (in tons) of the quantity of

hazardous waste reported for paragraph 4.1.a.1 of this rule which was treated or disposed of off-site;

4.1.a.3. The amounts (in tons) of that quantity of hazardous waste reported for paragraph 4.1.a.1 of this rule which was treated or disposed of on-site;

4.1.a.4. The amount (in tons) of that quantity of hazardous waste reported for paragraph 4.1.a.1 of this rule which was treated off-site so that such waste was rendered nonhazardous; and

4.1.a.5. The amount (in tons) of that quantity of hazardous waste reported for paragraph 4.1.a.1 of this rule which was treated on-site so that such waste was rendered nonhazardous.

4.1.b. If the total amount of hazardous waste reported under paragraph 4.1.a.1 of this rule is not equal to the sum of hazardous waste reported under paragraphs 4.1.a.2 through 4.1.a.5 of this rule, the reasons for the difference must be stated on the form identified as Appendix attached to this rule.

4.1.c. Once he or she completes the form identified as Appendix I to this rule, a generator shall submit that form to the division.

#### 4.2. Review of Information.

4.2.a. All information submitted pursuant to this rule is subject to review by the chief to ensure that accurate and verifiable information is obtained. The chief may request clarifications, corrections, or additional information to supplement the information received to enable the division to properly calculate or recalculate fee assessments.

4.2.b. The result of any sample analyzes performed for reporting the quantity of hazardous waste generated shall be made available to the chief upon request.

#### 4.3. Separation of Hazardous Waste and Nonhazardous Constituents.

4.3.a. The determination of the amount of hazardous waste generated must account for the mixture of hazardous components and nonhazardous constituents in the generated

hazardous waste in accordance with the following:

4.3.a.1. If the hazardous waste is listed in subsection 3.1 of the HWMR, or exhibits any of the characteristics described in subsection 3.1 of the HWMR, the amount of hazardous waste generated must represent the total amount of hazardous waste generated prior to mixing;

4.3.a.2. If the hazardous waste exhibits the characteristic described in subsection 3.1 of the HWMR, then the amount of hazardous component in the waste generated shall be determined by chemical analysis or computed from knowledge of the amount of the waste mixture and chemical composition of the waste stream;

4.3.a.3. If the hazardous waste exhibits any of the characteristic described in subsection 3.1 of the HWMR and physical separation or visual inspection can be employed to measure the proportions of hazardous components and nonhazardous constituents, then the amount of hazardous component in the waste generated may be measured by visual inspection or physical separation techniques and determined directly; and

4.3.a.4. If the hazardous waste is a mixture of nonhazardous constituents and a hazardous component listed in subsection 3.1 of the HWMR, then the amount of hazardous component in the waste generated must be determined and reported based on knowledge of the generation processes, physical separation, or chemical analysis.

4.3.b. If the generator finds, when making determinations as described under paragraphs 4.3.a.2 through 4.3.a.4 of this rule, that nonhazardous constituents have chemically bonded, physically bonded, or chemically and physically bonded to an extent that prevents physical or chemical separation of nonhazardous constituents and hazardous components, then the total amount of the hazardous waste mixture must be reported.

4.3.c. For all determinations performed pursuant to section 4 of this rule which require chemical analysis, reported weight determinations must be completed by employing total analytical concentration values.

4.4 No fee shall be assessed on any wastes that have been

excluded from classification as a hazardous waste by state or federal law, rule or regulation.

#### §33-26-5. Fee Assessment.

##### 5.1. Dissemination of Fee Schedule.

5.1.a. Fee assessments will be computed by the division for all generators in accordance with the provisions of Article 19. Generators for whom fee assessments are computed by the division to be less than five dollars (\$5.00) will not be sent a fee assessment invoice, nor are they required to pay such fees.

5.1.b. The director shall provide a copy of the fee schedule to each generator, by certified mail, within fifteen (15) days of publishing the fee schedule in the state register.

5.1.c. An invoice for the fee required pursuant to this rule shall be provided by the director to each generator upon whom a fee is assessed within fifteen (15) days of publication of the fee schedule in the state register. Such invoice shall include an itemized list of fees to be assessed and the date upon which such fees are due and payable. The invoice shall be provided in the form and manner prescribed by the director.

##### 5.2. Payment of Fees.

5.2.a. Generator fee assessments are due and payable to the division on the fifteenth day of January (January 15) of 1985 and each succeeding year thereafter, except as provided in subdivision 5.2.b of this rule.

5.2.b. If a fee schedule is not published by the first day of August (August 1) of each year, generators upon whom fees are assessed pursuant to Article 19 must pay such fees within one hundred and sixty-eight (168) days after the publication of the fee schedule in the state register.

5.2.c. A fee payment made pursuant to this rule shall be made by submitting a money order or check made payable to the "Hazardous Waste Emergency Response Fund." Such fee payment must be transmitted to the director by the date specified on the invoice. If such fee payment is mailed, then the payment must be

postmarked by the date specified on the invoice.

### 5.3. Reconsideration.

5.3.a. Any generator assessed a fee pursuant to this rule may request the director to reconsider the amount of fee assessed. Such request must be submitted to the director, in writing, within forty-five (45) days of the date sent as noted on the fee assessment invoice required under subdivision 5.1.c of this rule, and must specify the reasons for requesting such reconsideration.

5.3.b. Upon reviewing a request submitted pursuant to subdivision 5.3.a of this rule, the director will reconsider the applicable calculations and will notify the generator by letter of the results. If the director revises the fee assessment, the generator shall be sent a revised fee assessment invoice, payable on the normal fee payment date.

5.3.c. If a revision of fee assessment made pursuant to subdivision 5.3.d of this rule determines that a generator has made an overpayment greater than two hundred dollars (\$200.00), the generator may choose to either receive a fund of the excess amount or use that excess as a credit against the subsequent fee assessment. If the overpayment is two hundred dollars (\$200.00) or less, the excess amount will be credited against the subsequent fee assessment.

### 5.4. Reassessment.

5.4.a. If the director finds that the aggregate amount of fees assessed, after adjustments pursuant to subdivision 5.3.b of this rule, is more than twenty-five thousand dollars (\$25,000.00) below the maximum amount authorized to be collected in any one year by Article 19, the director shall cause all fee assessments to be recalculated and new fee assessment invoices to be transmitted to each generator. The payment due date shall, in such situations, be extended by the same number of days as the revised assessment date is beyond the original date of assessment.

5.4.b. In reassessing the new fee for any generator who requests a reconsideration, the assessment rate per unit weight of the hazardous waste computed for the original fee assessment may not be recalculated unless it is necessary to

recalculate the fee assessment of every generator as required under subdivision 5.4.a of this rule.

APPENDIX I

HAZARDOUS WASTE EMERGENCY RESPONSE FUND  
FEE ASSESSMENT REPORT

Company Name: \_\_\_\_\_

EPA I.D.#: \_\_\_\_\_

Generator Location: \_\_\_\_\_

1. The amount of hazardous wastes generated during the 19\_\_\_\_ calendar year, EXCLUDING NONHAZARDOUS CONSTITUENTS.

\_\_\_\_ Tons

2. The amount of hazardous wastes generated (from the amount determined in #1) that were treated or disposed of off-site, but remained hazardous.

\_\_\_\_ Tons

3. The amount of hazardous wastes generated (from the amount determined in #1) that were treated or disposed of on-site, but remained hazardous.

\_\_\_\_ Tons

4. The amount of hazardous wastes generated (from the amount determined in #1) that were treated off-site, so that such wastes were rendered nonhazardous.

\_\_\_\_ Tons

5. The amount of hazardous wastes generated (from the amount determined in #1) that were treated on-site, so that such wastes were rendered nonhazardous.

\_\_\_\_ Tons

6. Provide a brief narrative of the method(s) used to determine the amount given in

#1, including method(s) used to determine the nonhazardous constituents.

7. If the total of items #2 through #5 is not equal to item #1, provide reasons for the difference.

CERTIFICATION:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based upon my inquiry of the person or persons who managed the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

\_\_\_\_\_  
Print or Type Name of  
Representative

\_\_\_\_\_  
Title

**COMMENTS  
OF THE  
WEST VIRGINIA MANUFACTURERS ASSOCIATION  
ON  
THE HAZARDOUS WASTE EMERGENCY RESPONSE FUND  
PROCEDURAL RULES (33 CSR 26).**

• **INTRODUCTION**

On September 21, 1999, the Office of Waste Management provided public notice of revisions to the HWERF. These comments are filed pursuant to that public notice and before the October 21, 1999 expiration of the written comment period. The West Virginia Manufacturers Association (“WVMA”) supports the DEP’s effort at promulgating this procedural rule and updating statutory and regulatory references. However, the WVMA has noted one change which could have far-reaching substantive effects, and therefore offers the following substantive statement for DEP’s consideration:

**II. COMMENT**

The provision clarifying that excluded hazardous waste need not be reported and will not be included in the fee assessment should be retained, with amendments. Although most changes to superceded rule 47 CSR 40A do not affect the substance of the rule, the deletion of Section 4.1.3 could have unintended effects on the interpretation of which wastes must be reported. Former section 4.1.3 clarified that those hazardous wastes which were listed in former rule 40B need not be reported (i.e., will not be included in the determination of the fee assessment). Section 40B was repealed in its entirety, because it was merely a restatement of Section 22-19-4(a) of the West Virginia Code. An update to the references would have replaced “rule 40B” with “W.V. Code § 22-19-4(a).” Instead, the DEP removed the provision entirely. As a result, proposed rule 33 CSR 26

contains no express exclusion of these Section 22-19-4(a) wastes from reporting and assessment requirements. These excluded wastes are implicitly excluded since they are not within the realm of those wastes which are required to be reported under the rule. However, removing the express provision gives DEP latitude to argue that its “reasonable” interpretation of the code allows them to require reporting and assessment of such excluded wastes.

Therefore, a provision should be added in a newly-created Section 4.4 to exclude wastes listed in W.Va. Code § 22-19-4(a) as those to which a generator fee assessment does not apply, and to exclude, for further clarification, certain wastes not specifically listed in section 3.1 of the Hazardous Waste Management Rule, including:

- fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels;
- solid waste from the extraction, beneficiation, and processing of ores and minerals, including coal, phosphate, rock and overburden from the mining of uranium ore;
- cement kiln dust waste; drilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal energy;
- and any other material that is exempted or excluded from hazardous waste regulation pursuant to the federal Resource Conservation and Recovery Act and the rules promulgated thereunder, including, but not limited to, the exemptions and exclusions set forth in 40 CFR 261.4 and 261.6, or the state Hazardous Waste Management Act, W.Va. Code § 22-18-1 et seq. and the rules promulgated thereunder.

These proposed changes will make West Virginia’s rule consistent with the federal hazardous waste regulations which govern whether certain solid wastes should be considered hazardous. These changes will also clarify the statutory provisions of the HWERF, thereby giving manufacturers and other regulated entities better guidance.

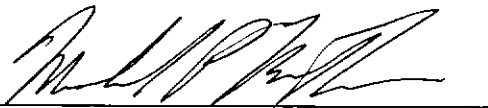
**III. CONCLUSION**

The West Virginia Manufacturers Association appreciates the opportunity to comment and respectfully requests the aforementioned changes be made to proposed rule 33 CSR 26.

**Respectfully Submitted,**

**The West Virginia Manufacturers Association**

**By Counsel**



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**Michael P. McThomas**  
**SBN # 5533**  
**Elizabeth K. Appel**  
**SBN #7685**  
**Robinson & McElwee LLP**  
**P.O. Box 1791**  
**Charleston, WV 25326**  
**304/344-5800**

## 2000 Rule

### 33 CSR 26

Response to comments on Rule 33 CSR 26 from the West Virginia Manufacturers Association (WVMA).

#### I. COMMENT

The provision clarifying that excluded hazardous waste need not be reported and will not be included in the fee assessment should be retained, with amendments. Although most changes to superceded rule 47 CSR 40A do not affect the substance of the rule, the deletion of Section 4.1.3 could have unintended effects on the interpretation of which wastes must be reported. Former section 4.1.3 clarified that those hazardous wastes which were listed in former rule 40B need not be reported (i.e., will not be included in the determination of the fee assessment). Section 40B was repealed in its entirety, because it was merely a restatement of Section 22-19-4(a) of the West Virginia Code. An update to the references would have replaced “rule 40B” with “W.V. Code § 22-19-4(a).” Instead, the DEP removed the provision entirely. As a result, proposed rule 33 CSR 26 contains no express exclusion of these Section 22-19-4(a) wastes from reporting and assessment requirements. These excluded wastes are implicitly excluded since they are not within the realm of those wastes which are required to be reported under the rule. However, removing the express provision gives DEP latitude to argue that its ‘reasonable’ interpretation of the code allows them to require reporting and assessment of such excluded wastes.

Therefore, a provision should be added in a newly-created Section 4.4 to exclude wastes listed in W.Va. Code §22-19-4(a) as those to which a generator fee assessment does not apply, and to exclude, for further clarification, certain wastes not specifically listed in section 3.1 of the Hazardous Waste Management Rule, including.

- fly ash wastes, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels;
- solid waste from the extraction, beneficiation, and processing of ores and minerals, including coal, phosphate, rock and overburden from the mining of uranium ore;
- cement kiln dust waste; drilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal energy;

- and any other material that is exempted or excluded from hazardous waste regulation pursuant to the federal Resource Conservation and Recovery Act and the rules promulgated thereunder, including, but not limited to, the exemptions and exclusions set forth in 40 CFR 261.4 and 261.6, or the state Hazardous Waste Management Act, W.Va. Code §22-18-1 et seq. and the rules promulgated thereunder.

These proposed changes will make West Virginia's rule consistent with the federal hazardous waste regulations which govern whether certain solid wastes should be considered hazardous. These changes will also clarify the statutory provisions of the HWERF, thereby giving manufacturers and other regulated entities better guidance.

#### I. RESPONSE

The WV DEP thanks the WVMA for their comment regarding 33 CSR 26, and has inserted a Section 4.4 in the rule to address the WVMA's concern. Section 4.4 will read "No fee shall be assessed on any wastes that have been excluded from classification as a hazardous waste by state or federal law, rule or regulation"

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October 11, 1999

Mr. Michael Dorsey, Assistant Chief  
Office of Waste Management  
W. Va. Div. of Environmental Protection  
1356 Hansford Street  
Charleston, West Virginia 25301

Re: Comments on Proposed Amendments to 33 CSR 26

Dear Mike:

Please find enclosed Comments of the West Virginia Manufacturers Association in response to the Office of Waste Management's proposed amendments to 33 CSR 26, Hazardous Waste Emergency Response Fund Procedural Rules.

The West Virginia Manufacturers Association appreciates the opportunity to comment on these proposed rules, as many of its members will be directly affected by them.

Sincerely,



Michael P. McThomas  
Counsel, West Virginia  
Manufacturers Association

MPM/EKA/cab

Enclosure

cc: Ahmad Talebi  
Brenda Nichols Harper

**COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS ASSOCIATION  
ON  
HAZARDOUS WASTE EMERGENCY RESPONSE FUND  
PROCEDURAL RULES  
33 C.S.R. 26**

**DIVISION OF ENVIRONMENTAL PROTECTION  
OFFICE OF WASTE MANAGEMENT**

**Prepared by:  
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**Counsel for West Virginia Manufacturers Association**

**October 21, 1999.**