

**WEST VIRGINIA  
SECRETARY OF STATE  
JOE MANCHIN, III  
ADMINISTRATIVE LAW DIVISION**  
Form #7

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2004 APR -8 A 11:47

OFFICE WEST VIRGINIA  
SECRETARY OF STATE  
Effective Date

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Department of Environmental Protection TITLE NUMBER: 33

CITE AUTHORITY: W. Va. Code 22-17-6

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 31

TITLE OF RULE BEING AMENDED: Underground Storage Tank Fee Assessments

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

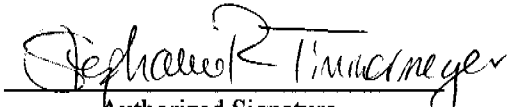
TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

HB4521 was passed by the 2004 Legislature and requires that an emergency rule be filed so that the amendments may be implemented in state fiscal year 2004.

Use additional sheets if necessary

  
Authorized Signature



**EMERGENCY RULE QUESTIONNAIRE**

DATE: April 8, 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection  
Division of Waste Management  
1356 Hansford Street  
Charleston, WV 25301-1401  
558-5929

EMERGENCY RULE TITLE: Title 33 Series 31 "Underground Storage Tank Fee Assessments"

1. Date of filing April 8, 2004

2. Statutory authority for promulgating emergency rule:  
W. Va. Code 22-17-6

3. Date of filing of proposed legislative rule: May 2004

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? It amends current language.

5. Has the same or similar emergency rule previously been filed and expired?  
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.  
House bill 4521 which was passed by the 2004 Legislature and approved by the Governor on April 2, 2004, requires the filing of an emergency rule so that the approved fee increase will be implemented in state fiscal year 2004. These fees are used to fund the Underground Storage Tank Program which regulates tanks that contain petroleum and hazardous substances.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

House Bill 4521; state fiscal year 2004

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The Underground Storage Tank Program is operating at a deficit and without an immediate increase in funding as provided by HB4521 inspection staff will have to be reassigned to other programs. Loss of funding and staff will lead to the loss of Federal grant funds.

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**ENROLLED****H. B. 4521**

(By Delegates Mahan, Craig,  
Michael and Amores)

[Passed March 13, 2004; in effect from passage.]

AN ACT to amend and reenact §22-17-20 of the code of West Virginia, 1931, as amended, relating to the underground storage tank act; increasing the annual registration fee; requiring emergency rule; increasing cap amount for underground storage tank fund; and requiring annual report to the joint committee on government and finance.

*Be it enacted by the Legislature of West Virginia:*

That §22-17-20 of the code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

**ARTICLE 17. UNDERGROUND STORAGE TANK ACT.****§22-17-20. Appropriation of funds; underground storage tank administrative fund.**

(a) The secretary shall collect annual registration fees from owners of underground storage tanks. The registration fee collected under this section shall not exceed sixty-five dollars per tank per year. All such registration fees and the net proceeds of all fines, penalties and forfeitures collected under this article including accrued interest shall be paid into the state treasury into a special revenue fund designated "the underground storage tank administrative fund" to be used to defray the cost of administering this article in accordance with rules promulgated pursuant to section six of this article. The secretary shall promulgate an emergency rule in accordance with article three, chapter twenty-nine-a of this code, implementing the increase in registration fees. This fee of up to sixty-five dollars is effective for the fiscal year ending the thirtieth day of June, two thousand four.

(b) The total fee assessed shall be sufficient to assure a balance in the fund not to exceed five hundred thousand dollars at the beginning of each year.

(c) Any amount received pursuant to subsection (a) of this section which exceeds the annual balance required in subsection (b) of this section shall be deposited into the leaking underground storage tank response fund established pursuant to this article to be used for the purposes set forth for expenditure of moneys in the fund.

(d) The net proceeds of all fines, penalties and forfeitures collected under this article shall be

appropriated as directed by article XII, section 5 of the constitution of West Virginia. For the purposes of this section, the net proceeds of such fines, penalties and forfeitures are the proceeds remaining after deducting from the proceeds those sums appropriated by the Legislature for defraying the cost of administering this article. In making the appropriation for defraying the cost of administering this article, the Legislature shall first take into account the sums included in the special fund prior to deducting additional sums as may be needed from the civil fines, civil penalties and forfeitures collected pursuant to this article. At the end of each fiscal year any unexpended balance of the collected civil fines, civil penalties, forfeitures and registration fees shall not be transferred to the general revenue fund but shall remain in the fund.

(e) The secretary shall submit an annual report to the joint committee on government and finance on or before the first day of January each year providing information as to the status of the underground storage tank fund, the registration fees or forfeitures collected and any fines and penalties assessed pursuant to this article, the amount of net proceeds of fines, penalties and forfeitures paid into the fund and information as to the progress of the underground storage tank program in the protection of human health and the environment.

|             |   |                                    |                 |
|-------------|---|------------------------------------|-----------------|
| <p>4521</p> | <p>Increasing the current annual registration fee for underground storage tanks and requiring the DEP to annually report on the status of the fund and the underground storage tank program</p> | <p>Approved by Governor 4/2/04</p> | <p>04/02/04</p> |
|-------------|---|------------------------------------|-----------------|

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**BRIEFING DOCUMENT**

**Rule Title:** Title 33, Series 31- "Underground Storage Tank Fee Assessments"

**A. AUTHORITY:** W.Va. Code §22-17-6

**B. SUMMARY OF RULE:**

This amendment to the rule will allow the increase in the annual registration fees as required by House Bill 4521.

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

This emergency rule will allow the Department of Environmental Protection to assess the annual registration fees in compliance with HB4521. HB4521 requires that the emergency rule be filed and the fee be assessed for state fiscal year 2004.

**D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:**

No federal counterpart to this proposed rule exists.

**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:**

The Environmental Protection Advisory Council will review and discuss the proposed rule at its next scheduled meeting on April 29, 2004.

□  
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 33 Series 31 "Underground Storage Tank Fee Assessments"

Type of Rule:  Legislative     Interpretive     Procedural

Agency: Department of Environmental Protection

Address: Division of Water and Waste Management

1356 Hansford Street

Charleston, WV 25301-1401

1. Effect of Proposed rule:

|                                  | ANNUAL FISCAL YEAR |          |         |      |            |
|----------------------------------|--------------------|----------|---------|------|------------|
|                                  | INCREASE           | DECREASE | CURRENT | NEXT | THEREAFTER |
| <b>ESTIMATED TOTAL COST</b>      | \$0                | \$0      | \$0     | \$0  | \$0        |
| <b>PERSONAL SERVICES</b>         | \$0                | \$0      | \$0     | \$0  | \$0        |
| <b>CURRENT EXPENSE</b>           | \$0                | \$0      | \$0     | \$0  | \$0        |
| <b>REPAIRS &amp; ALTERATIONS</b> | \$0                | \$0      | \$0     | \$0  | \$0        |
| <b>EQUIPMENT</b>                 | \$0                | \$0      | \$0     | \$0  | \$0        |
| <b>OTHER</b>                     | \$0                | \$0      | \$0     | \$0  | \$0        |

2. Explanation of Above Estimates:  
To implement this rule change only a field in a database will be changed.

3. Objectives of These Rules:  
To increase revenue to the Underground Storage Tank Program which has been underfunded for several years.

Rule Title: Title 33 Series 31 "Underground Storage Tank Fee Assessments"

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

The increase in the fee will increase revenue to the Underground Storage Tank Program and allow it to be self supporting.

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

The increase will effect underground storage tank owners who are major oil companies, petroleum marketers, individual service station owners, other state agencies, some cities and counties, the federal government, and others.

C. Economic Impact on Citizens/Public at Large.

None will be directly affected by the fee increase. The revenue increase will however allow the regulatory program to continue to operate and regulate the underground storage tanks which will in turn protect human health, safety, and the environment.

Date: April 8, 2004

Signature of Agency Head or Authorized Representative:

Stephanie Timmermeyer

FILED

TITLE 33  
LEGISLATIVE RULES  
~~DIVISION~~ DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF WASTE MANAGEMENT

2004 APR -8 A 11:47

SERIES 31  
UNDERGROUND STORAGE TANK FEE ASSESSMENTS

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

§33-31-1. General.

1.1. Scope. -- This legislative rule establishes procedures for the assessment and collection of fees for the Underground Storage Tank Administrative Fund and the Leaking Underground Storage Tank Response Fund pursuant to W. Va. Code §§22-17-20 and 22-17-21.

1.2. Authority. -- W. Va. Code §22-17-6.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Incorporation by Reference. -- Whenever federal statutes or regulations are incorporated by reference into this rule, the reference is to the statute or rule in effect on the date on which this rule was proposed ~~July 1, 1992~~ April 8, 2004.

1.6. Tanks Excluded From Fee Assessments. -- The following categories of underground storage tanks are excluded from the fee assessment provisions of section 3 of this rule.

1.6.a. Any underground storage tank holding hazardous wastes listed or identified under Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended, or a mixture of such hazardous waste and other regulated substances;

1.6.b. Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the federal Clean Water Act;

1.6.c. Equipment or machinery that contains regulated substances for operational purposes

such as hydraulic lift tanks and electrical equipment tanks;

1.6.d. Any underground storage tank system whose capacity is one hundred and ten (110) gallons or less;

1.6.e. Any underground storage tank system that contains a de minimis concentration of regulated substances; and

1.6.f. Any emergency spill or overflow containment underground storage tank system that is expeditiously emptied after use.

§33-31-2. Definitions.

2.1. "Act" means the West Virginia Underground Storage Tank Act (W. Va. Code §22-17-1 et seq.).

2.2. "Change-In-Service" means when an underground storage tank system has undergone a "change-in-service" pursuant to 40 C.F.R. §§280.71 and 280.72.

2.3. "Division" "Department" means the ~~division~~ department of environmental protection.

2.4. "Owner" means:

2.4.a. In the case of an underground storage tank system in use on November 8, 1984, or brought into use after that date, a person who owns an underground storage tank used for the storage, use, or dispensing of a regulated substance.

2.4.b. In the case of an underground storage tank system, in use before November 8, 1984, but no longer in use on that date, a person

who owned such a tank immediately before the discontinuation of its use.

2.5. "Person" means any individual, trust, firm, joint stock company, federal agency, corporation (including government corporations), partnership, association, state, municipality, commission, political subdivision of a state, interstate body, consortium, joint venture, commercial entity, or the United States government.

2.6. "Permanent Closure" means the closure of an underground storage tank in the manner specified under 40 C.F.R. §§ 280.71 and 280.72.

2.7. "Regulated Substance" means:

2.7.a. Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended; or

2.7.b. Petroleum, including crude oil or ~~an~~ any fraction thereof which is liquid at a temperature of sixty (60) degrees fahrenheit and a pressure of fourteen and seven-tenths pounds per square inch absolute (14.7 psia).

2.8. "Underground Storage Tank" or "UST" means any one or combination of tanks, and the underground pipes connected thereto, that is used to contain an accumulation of regulated substances and the volume of which, including the volume of underground pipes connected thereto, is ten percent (10%) or more beneath the surface of the ground. The term underground storage tank does not include:

2.8.a. Farm or residential tanks with a capacity of eleven hundred ~~gallons~~ (1,100) gallons or less and used for storing motor fuel for noncommercial purposes;

2.8.b. Tanks used for storing heating oil for consumptive use on the premises where stored;

2.8.c. Septic tanks;

2.8.d. A pipeline facility, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979, or an intrastate pipeline facility regulated under state laws comparable to the provisions of either of those acts;

2.8.e. Surface impoundments, pits, ponds, or lagoons;

2.8.f. Storm water or wastewater collection systems;

2.8.g. Flow-through process tanks;

2.8.h. Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

2.8.i. Storage tanks situated in an underground area such as basement, cellar, mine working, drift, shaft, or tunnel if such storage tank is situated upon or above the surface of the floor; and

2.8.j. Any pipes connected to any tank which is described in sub-division 2.8.a. through 2.8.i. of this rule.

### §33-31-3. Fee Assessment.

#### 3.1. Registration Fees.

3.1.a. The ~~division~~ department will collect an annual registration fee from each owner of an underground storage tank which has not undergone permanent closure or change-in-service in this state. The registration fee will not exceed ~~twenty-five dollars (\$25)~~ sixty-five dollars (\$65) per tank per year.

#### 3.2. Response Fees.

3.2.a. The ~~division~~ department will collect an annual response fee from each owner of an underground petroleum storage tank which has not undergone permanent closure or change-in-service in this state. The response fee will not exceed twenty-five dollars (\$25) per tank per year.

#### 3.3. Fee Calculation.

3.3.a. The division department will calculate the fees assessed pursuant to this rule based upon the maximum assessment allowable under the Act.

3.3.b. Owners of USTs, the use of which commenced on or after January 1 of the current calendar year must pay the full annual fees assessed under sub-sections 3.1. and 3.2. of this rule (i.e., fees assessed will not be prorated).

3.3.c. Owners of USTs that have completed permanent closure or a change-in-service during the calendar year must pay the full annual fees assessed under sub-sections 3.1. and 3.2. of this rule.

#### 3.4. Fee Consolidation.

3.4.a. The fees assessed pursuant to this rule will be consolidated.

#### §33-31-4. Fee Collection.

4.1. An invoice for the fees assessed pursuant to this rule will be provided by the division department to each tank owner upon whom a fee is assessed. Such invoice will include an itemized list of fees assessed and the date upon which such fees are due and payable. The invoice will be provided in the form and manner prescribed by the division department.

4.2. Fees assessed pursuant to this rule must be paid by check, money order, or bank draft payable to the West Virginia division department of environmental protection. Payment of the entire amount of the fees assessed, as calculated on the assessment invoice, must be made in a single payment.

4.3. Fee payments must be sent to the address on the assessment invoice provided by the division department 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.

#### 4.4. Correcting Fee Assessment Errors.

4.4.a. Under charges that appear on the assessment invoices issued by the division

department will be corrected by the issuance of a corrected invoice.

4.4.b. Overcharges that appear on the assessment invoices issued by the division department will be corrected on the assessment invoices issued for the next calendar year unless the tank owner submits a written request for a refund to the division department. Said request, along with documentation supporting the claim of erroneous assessment, must accompany the payment of the assessed fee. The division department shall investigate the tank owner's claim and issue a refund for the amount in excess of the proper assessment if the tank owner's claim proves to be valid.

4.4.c. Any errors made in the calculation of assessment fees, whether by the division department or as a result of inaccurate information submitted by the owner or operator pursuant to the notification requirements under section 4 of the Underground Storage Tank Rule ((33 C.S.R. 30 §4) and section 8 of The Underground Storage Tank Act (W. Va. Code §22-17-8), must be corrected within one (1) year of the due date posted on the invoice, except for the following:

~~4.4.c.1. Within one (1) year after the effective date of June 14, 1993, the division or the owner or operator may correct assessment fee errors for all invoices with due dates specified within the previous two (2) years of the effective date under Section 1.4 of these regulations.~~

4.4.d. All fee assessments shall be as originally assessed if no errors are identified within the one (1) year period.

4.5. A tank owner who does not make a full, timely payment of the fees pursuant to this rule, or who otherwise fails to comply with the provisions of this rule, is subject to the penalties provided under W. Va. Code §§22-17-15 and 22-17-16.

4.6. Penalties shall be assessed on fee payments not received by the specified due date on the invoice. Late fees shall be a cumulative sum based on the following penalty assessment:

4.6.a. Fifty percent (50%) of the balance assessed for delinquent fees in excess of thirty (30) days after the due date specified on the invoice.

**§33-31-5. Fee Deposit.**

5.1. Fees collected by the ~~division~~ department pursuant to this rule will be deposited into the state treasury in accordance with W. Va. Code §§22-17-20 and 22-17-21.

5.1.a. The deposit of a fee payment into the state treasury is not an admission by the ~~division~~ department of an assessment for the correct number of tanks. Each tank owner is obligated to notify the ~~division~~ department if the number of tanks assessed is incorrect. Corrections will be made in accordance with sub-section 4.4 of this rule.

5.1.b. Deposits into the Underground Storage Tank Administrative Fund will include:

5.1.b.1. All registration fees collected pursuant to sub-section 3.1 of this rule;

5.1.b.2. The net proceeds of all fines, penalties, and forfeitures collected under the Act; and

5.1.b.3. All interest accruing on investments and deposits of this fund.

5.1.c. Deposits into the Leaking Underground Storage Tank Response Fund will include;

5.1.c.1. All response fees collected pursuant to sub-section 3.2 of this rule;

5.1.c.2. Any registration fee monies received by the ~~division~~ department that exceed the maximum annual balance for the Underground Storage Tank Administrative Fund as prescribed under W. Va. Code §22-17-20(a).

5.1.c.3. All interest accruing on investments and deposits of this fund.