

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #3

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36 AUG 28 PM 3:52

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: Division Environmental Protection  
Water Resources/Waste Management TITLE NUMBER: 33\*\*

CITE AUTHORITY WV Code 22-17-6

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 32 \*\*

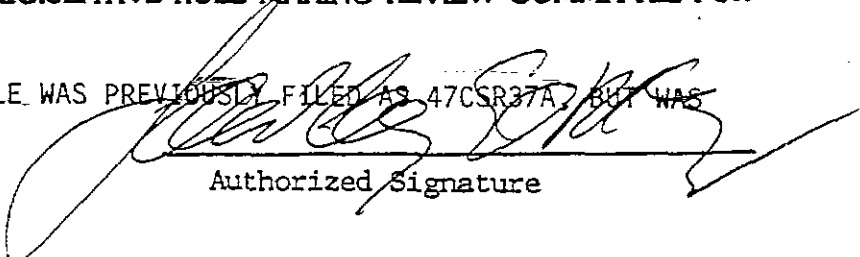
TITLE OF RULE BEING AMENDED: Underground Storage Tank Insurance  
Trust Fund

IF NO, SERIES NUMBER OF NEW 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.

\*\*PLEASE NOTE THIS RULE WAS PREVIOUSLY FILED AS 47CSR37A2 BUT WAS CHANGED AS PART OF RULE CLEANUP.

  
Authorized Signature

7.80



**BUREAU OF ENVIRONMENT**  
10 McJunkin Road  
Nitro, WV 25143-2506

GASTON CAPERTON  
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.  
COMMISSIONER

August 28, 1996

Ms. Judy Cooper  
Director, Administrative Law Division  
Office of the Secretary of State  
Capitol Complex  
Charleston, West Virginia 25305

RE: 33CSR32 - "Underground Storage Tank Insurance  
Fund"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office the above-referenced rule as an Agency-Approved Rule and submission to the Legislative Rule-Making Review Committee.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Mark Scott at 759-0515.

Sincerely yours,



Laidley Eli McCoy, Ph.D.  
Commissioner

LEM:cc

Attachment

**DATE:** August 26, 1996

**TO:** LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

**FROM:** WV Division of Environmental Protection  
Office of Waste Management

LEGISLATIVE RULE TITLE: Underground Storage Tank Insurance Trust Fund

1. Authorizing statute (s) citation WV Code 22-17-6

2. a. Date filed in State Register with Notice of Hearing

July 10, 1996

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

News release-through multi-media with over 100 outlets throughout the state and the DEP monthly newsletter

c. Date of Hearing(s) August 13, 1996 6:30 pm

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

Attached  No comments received

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

August 28, 1996

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

Gil Sattler 558-6371

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

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

N/A  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. Date of hearing: 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 finding and determinations and reasons:

Attached N/A\_\_\_\_\_

**BUREAU OF ENVIRONMENT  
DIVISION OF ENVIRONMENTAL PROTECTION**

**BRIEFING DOCUMENT**

**Rule Title:** Title 33 Series 32\* "Underground Storage Tank Insurance Trust Fund"

- A. AUTHORITY:** WV Code 22-17-6
- B. SUMMARY OF RULE:** *This amendment will update this rule to reflect changes that have been made in the administration of the Underground Storage Tank Insurance Trust Fund. After filing for public comment, amendments were made for technical corrections in accordance with established criteria.*
- C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**  
*The administration of the Underground Storage Tank Insurance Trust Fund has been transferred to the Division of Environmental Protection and a third party administrator.*
- D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:**
- *There is no counterpart regulation.*
- E. CONSTITUTIONAL TAKING DETERMINATION:** *In accordance with WV Code 22-1A, the Director 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 their July 17 meeting, the Environmental Protection Advisory Council had no comments on this rule (see attached minute of July 17 Council Meeting).*

**APPENDIX B**

**FISCAL NOTE FOR PROPOSED RULES**

**Rule Title:** Title 33\* Series 32\* "Underground Storage Tank Insurance Trust Fund"

**Type of Rule:** X **Legislative**        **Interpretive**        **Procedural**

**Agency** Bureau of Environment

**Address** Division of Environmental Protection/  
Office of Waste Management

1356 Hansford Street

Charleston, WV 25301-1401

**1. Effect of Proposed Rule**

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

**2. Explanation of above estimates:** This rule is being amended to reflect a change in the administration of the program. No new administrative expenditures are anticipated.

**3. Objectives of these rules:** To reflect a change in the administration of the program.

**Rule Title:** Title33 Series 32\* "Underground Storage Tank Insurance Trust Fund"

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

No impact.

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

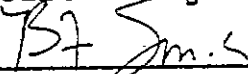
The rule will not economically affect those already regulated.

**C. Economic Impact on Citizens/Public at Large.**

No impact.

**Date:** July 9, 1996

**Signature of Agency Head or Authorized Representative**



B. F. Smith, P.E., Chief

\*\*PLEASE NOTE THIS RULE WAS PREVIOUSLY FILED AS 47CSR37A, BUT WAS CHANGED AS PART OF RULE CLEANUP.

~~TITLE 47~~  
~~TITLE 33~~  
LEGISLATIVE RULES  
DIVISION OF ENVIRONMENTAL PROTECTION  
~~WATER RESOURCES - WASTE MANAGEMENT~~  
OFFICE OF WASTE MANAGEMENT

RECEIVED  
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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

~~SERIES 37A~~  
~~SERIES 32~~  
UNDERGROUND STORAGE TANK INSURANCE TRUST FUND

~~§47-37A-1.~~ §33-32-1. General.

1.1. Scope and Purpose.

These regulations establish an Underground Storage Tank Insurance Trust Fund pursuant to W. Va. Code ~~§20-5H-22~~ §22-17-22 and as set forth under the financial responsibility requirements of W. Va. Code ~~§20-5H-10~~ §22-17-10.

1.2. Authority. -- W. Va. Code ~~§20-5H-6~~ §22-17-6.

1.3. Filing Date. --

1.4. Effective Date. --

~~§47-37A-2.~~ §33-32-2. Applicability.

2.1. Financial Assurance.

Owners or operators of petroleum underground storage tanks are required by statute and rule to establish a means of financial assurance necessary for taking reasonable corrective action and for compensating third parties for bodily injury and property damage caused by sudden or nonsudden accidental releasing arising from the operation of USTs. These regulations apply to petroleum UST owners and operators who do not show evidence of meeting the financial assurance requirements set forth in W. Va. Code ~~§20-5H-10~~ §22-17-10 and to any petroleum UST owner or operator with an established means of financial assurance who desires to participate in the state program.

~~§47-37A-3.~~ §33-32-3. Definitions.

3.1. "Accidental Release".

"Accidental Release" means a release arising from extrinsic causes or occurring unexpectedly, by chance, without intent, or through carelessness any sudden or nonsudden release of petroleum from an underground storage tank that results in a need for corrective action and/or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.

3.2. "Administrator".



"Administrator" means private or state individuals, organizations, other state agencies, companies, corporations, or other persons designated by the director through agreements, including reimbursement for services rendered, contracts, and cooperative arrangements under such terms and conditions as he or she deems appropriate to administer the Underground Storage Tank Insurance Trust Fund in accordance with W. Va. Code §22-17-5(c).

~~3.2.~~ 3.3. "Advisory Committee".

"Advisory Committee" means a committee composed of seven (7) members, which shall include the underground storage tank advisory committee as prescribed in W. Va. Code §22-17-7.

~~3.2.1. One member of the West Virginia Petroleum Council;~~

~~3.2.2. One member of the West Virginia Service Station Dealers Association;~~

~~3.2.3. One member of the West Virginia Petroleum Marketers Association;~~

~~3.2.4. The director of the division of Natural Resources of the West Virginia Department of Commerce, Labor and Environmental Resources;~~

~~3.2.5. One member of the West Virginia Manufacturers Association;~~

~~3.2.6. The West Virginia Insurance Commissioner; and~~

~~3.2.7. A representative from the citizenry-at-large who shall be appointed by the Governor.~~

~~3.3. "Board".~~

~~"Board" means the West Virginia board of risk and insurance management.~~

3.4. "Damages".

"Damages" means bodily injury or property damage caused by a release or accidental release as defined in these regulations this rule.

3.5. "Director".

"Director" means the director of the division of Natural Resources of the West Virginia Department of Commerce, Labor and Environmental Resources environmental protection of the bureau of environment or other such person to whom the director has delegated authority and duties pursuant to sections six or eight [§22-1-6 or §22-1-8] article one of chapter twenty-two.

3.6. "Deductible".

"Deductible" means an amount of money paid by the insured that relieves the insurer of responsibility for an initial specified loss.

3.7. "Division".

"Division" means the division of ~~Natural Resources of the West Virginia Department of Commerce, Labor and Environmental Resources~~ environmental protection of the bureau of environment.

3.8. "Premium".

"Premium" means the payment made for a contract of insurance.

3.9. "Release".

"Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an underground storage tank into groundwater, surface water, or subsurface soils.

3.10. "Regulated Substance".

"Regulated Substance" means:

~~3.10.1.~~ 3.10.a. Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 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~~ and

~~3.10.2.~~ 3.10.b. Petroleum, including crude oil or 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). The term "petroleum" "regulated substance" includes, but is not limited to, petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and finishing such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

3.11. "Underground Storage Tank" or "UST".

"Underground Storage Tank" or "UST" means one tank or a 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 the underground pipes connected thereto, is ten percent (10%) or more beneath the surface of the ground. The term "underground storage tank" does not include:

~~3.11.1.~~ 3.11.a. Farm or residential tanks with a capacity of eleven hundred (1,100) gallons or less and used for storing motor fuel for noncommercial purposes;

~~3.11.2.~~ 3.11.b. Tanks used for storing heating oil for consumptive use on the premises where stored;

~~3.11.3.~~ 3.11.c. Septic tanks;

~~3.11.4.~~ 3.11.d. A pipeline facility, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968, as amended, or the Hazardous Liquid Pipeline Safety Act of 1979, as amended, or an intrastate pipeline facility regulated under state laws comparable to the provisions of either of those acts;

~~3.11.5.~~ 3.11.e. Surface impoundments, pits, ponds, or lagoons;

~~3.11.6.~~ 3.11.f. Storm water or wastewater collection systems;

~~3.11.7.~~ 3.11.g. Flow-through process tanks;

~~3.11.8.~~ 3.11.h. Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

~~3.11.9.~~ 3.11.i. Storage tanks situated in an underground area such as a basement, cellar, mine working, drift, shaft, or tunnel if such storage tank is situated upon or above the surface of the floor; and

~~3.11.10.~~ 3.11.j. Any pipes connected to any tank which is described in ~~Sections 3.11.i~~ sub-divisions 3.11.a. through 3.11.9 ~~3.11.i. of these regulations~~ this rule.

~~§47-37A-4.~~ §33-32-4. Applying for Coverage.

4.1. Application for Coverage.

The owner or operator of an underground storage tank shall submit an application for coverage to the ~~board~~ director or the administrator on forms supplied by the ~~board~~ director or the administrator.

4.2. Sworn Statement.

The application shall include a sworn statement that all information and records are accurate and in compliance with all applicable federal, state, and local requirements.

~~§47-37A-5.~~ §33-32-5. Capitalization Fees.

5.1. Capitalization Fee.

A capitalization fee shall be assessed against all owners or operators of underground storage tanks to be used to establish the Underground Storage Tank Insurance Trust Fund. The fee shall be:

~~5.1.1.~~ 5.1.a. One hundred dollars per tank per year (\$100/tank/year) for a period of not less than one (1) year and not more than three (3) years. Second and third year ~~capital~~ capital

assessments may be levied if there is an inadequate surplus of funds, as determined by the ~~state board of risk and insurance management administrator~~, the director division of Natural Resources, and the underground storage tank advisory committee pursuant to section seven, article ~~five-H~~ seventeen, chapter ~~twenty~~ twenty-two of the West Virginia Code [W. Va. Code ~~§20-5H-7~~ §22-17-7].

#### 5.2. Capitalization Fee Payment.

The capitalization fee shall be paid to the ~~board director or the administrator~~ and shall be deposited into the state treasury into a special fund designated the "Underground Storage Tank Insurance Trust Fund Capitalization Fees".

#### 5.3. Interest Accrued.

Interest accrued on monies in the Underground Storage Tank Insurance Trust Fund Capitalization Fees or the Underground Storage Tank Trust Fund Premium Fund shall be credited to that fund.

### ~~§47-37A-6.~~ §33-32-6. Powers and Duties of the Board Director.

#### 6.1. Premium Rate.

The ~~board director~~ shall have the power, duty, and responsibility to establish and maintain the premium rate for the UST insurance program.

#### 6.2. Premium Rate Payment.

The annual premium rate, as determined by the ~~board director~~, shall be paid by the owners or operators requesting coverage and may include reasonable administrative expenses.

#### 6.3. Premium Payment and Deposit.

The premium shall be paid to the ~~board director or the administrator~~ and deposited into the Underground Storage Tank Insurance Trust Fund Premium Fund.

#### 6.4. UST Insurance Program Shall Be Assessable.

The UST insurance program shall be assessable. The ~~board director~~ may implement assessments once the insurance premium pool fund reaches a level of not more than two million dollars (\$2,000,000) ~~or less~~. The assessment shall be subject to approval of the director and the advisory committee. For purposes of assessment calculations, the insurance premium pool shall not include funds collected from the capitalization fee assessment.

### ~~§47-37A-7.~~ §33-32-7. Cancellation of Coverage.

#### 7.1. Cancellation of Coverage.

~~The division may request a cancellation of coverage for Coverage will be cancelled for an insured who:~~

~~7.1.1. 7.1.a. An owner or operator who is~~ Is not in compliance with the provisions of 40 C.F.R. Part 280 or 47 C.S.R. 36 33 C.S.R. 30;

~~7.1.2. 7.1.b. An owner or operator who fails~~ Fails to install overflow/spill prevention if two (2) incidents are reported within a twelve (12) month period in excess of the insured's deductible;  
~~or~~

~~7.1.3. 7.1.c. An owner or operator who fails~~ Fails to pay the premium when due;

~~7.1.d. Fails to reimburse the UST Insurance Trust Fund for deductible expenses promptly; or~~

~~7.1.e. Fails to reimburse the UST Insurance Trust Fund for any payment made by the fund on account of any claim involving a breach of the terms of the policy or violation of federal or state rules or regulations.~~

#### ~~§47-37A-8. §33-32-8. Emergency Claims.~~

##### 8.1. Notification of Claim.

~~The division insured shall~~ must ~~notify the board director and the administrator of a potential claim, an accidental release, real or alleged, within twenty-four (24) hours of discovery of the release. The insured must notify, or verify that notice has been provided to, the director and the administrator of any occurrence which may result in a claim.~~

##### 8.2. Initial Response Requirements.

~~The owner or operator insured shall~~ must ~~comply with the applicable initial response requirements set forth in 40 C.F.R. §280.61.~~

##### 8.3. Written Itemization.

~~The owner or operator insured shall~~ must ~~immediately submit written itemization of projected contract costs to the board director or the administrator prior to the acceptance of written bids in accordance with subsection 8.4 and 8.5 of this rule.~~

##### 8.4. Bids Secured.

~~Upon compliance with the provisions of 40 C.F.R. §280.61, the owner or operator~~ The insured shall must ~~secure a minimum of three (3) written bids to perform site activities necessary to comply with the requirements set forth in 40 C.F.R. §280.66 §§280.62, 280.63, 280.64, 280.65, and 280.66 when these activities are required by the division.~~

8.5. Acceptance of Bid.

The ~~owner or operator~~ insured is required to accept the lowest bid.

8.6. Reimbursement.

The ~~board director or the administrator~~ is responsible for reimbursing the owner or operator insured for all eligible expenses at an amount no greater than the lowest bid less the owners or operators insured's deductible.

~~8.7. Initial Site Assessment.~~

~~The board will not pay the cost of the initial site assessment.~~

~~§47-37A-9. §33-32-9. Non-Emergency Claims.~~

9.1. Notification of Claim.

The division insured shall must notify the board director and the administrator of a potential claim, an accidental release, real or alleged, within twenty-four (24) hours of the discovery of the release. The insured must notify, or verify that notice has been provided to, the director and the administrator of any occurrence which may result in a claim.

9.2. Bids Secured.

The owner or operator insured shall must secure a minimum of three (3) written bids to perform site activities necessary to comply with the requirements set forth in 40 C.F.R. §280.66 §§280.62, 280.63, 280.64, 280.65, and 280.66 when these activities are required by the division.

9.3. Acceptance of Bid.

The ~~owner or operator~~ insured is required to accept the lowest bid.

9.4. Reimbursement.

The board director or the administrator is responsible for reimbursing the owner or operator insured for all eligible damages expenses as enumerated in the West Virginia petroleum underground storage tank insurance policy at an amount no greater than the lowest bid less the owner or operator insured's deductible.

~~9.5. Initial Site Assessment.~~

~~The Board will not pay the cost of the initial site assessment.~~

~~§47-37A-10. §33-32-10. Notification Requirements.~~

10.1. Notification Requirements.

Owners and operators of underground storage tanks who have not fulfilled the notification requirements pursuant to title 47 33, series 36 30, section 4 of the Code of State Regulations (~~47 C.S.R. 36-54~~) (33 C.S.R. 30 §4) shall not be eligible for insurance coverage pursuant to these regulations, until such notification is made and approved by the director.

~~§47-37A-11.~~ §33-32-11. Powers and Duties of the Advisory Committee.

11.1. Advisory Committee Powers, Duties, and Responsibilities.

In addition to all other powers, duties, and responsibilities aforementioned in these regulations and W. Va. Code ~~§20-5H-7~~ §22-17-7, the advisory committee shall:

~~11.1.1.~~ 11.1.a. Have the authority to review and make recommendations to the director regarding all claims; and

~~11.1.2.~~ 11.1.b. Have the authority to function as an appeals board for resolving the hear and make recommendations to the director regarding disputes that may arise from the operation of the underground storage tank insurance program established under W. Va. Code ~~§20-5H-22~~ §22-17-22 and these regulations this rule; and.

~~11.1.3.~~ Have the authority, to authorize the board to use funds from the premium pool to pay for corrective action when:

~~11.1.3.a.~~ An owner or operator submits a written request to the committee claiming he has no available financial means to pay the costs incurred not covered by the Insurance Trust Fund under sections 8 and 9 of these regulations; or

~~11.1.3.b.~~ Upon request of the division.

~~11.2.~~ The approval or denial of a request shall be determined at the discretion of the committee based on facts presented with the request. A record shall be retained by the committee stating the reasons for the decision to approve or deny the request. The committee, upon approval of a request, shall direct the board to pay the appropriate costs.

~~§47-37A-12.~~ §33-32-12. Severability of Requirements.

12.1. Severability of Requirements.

If any requirement of these regulations or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other requirements or applications of ~~these regulations this rule~~ and to this end the requirements of ~~these regulations this rule~~ are declared to be severable.



**DIVISION OF ENVIRONMENTAL PROTECTION**

1356 Hansford Street  
Charleston, WV 25301-1401

GASTON CAPERTON  
GOVERNOR

LAIDLEY ELI McCOY, Ph.D.  
DIRECTOR

**Transcript**

**Public hearing**  
**August 13, 1996**  
**6:30 p.m.**  
**Waste management conference room**  
**1356 Hansford St.**  
**Charleston, WV 25301**

**Jessica Welsh, Facilitator**

This is a public hearing for the Division of Environmental Protection, Office of Waste Management's proposed rules for legislative consideration. Public comments will be accepted on the following proposed rules:

- 47CSR35- Hazardous Waste Management, and
- 47CSR37A- to remove the requirement that the state Board of Risk and Insurance Management administers the Underground Storage Tank insurance fund.

The public comment period ends today, August 13, 1996, at the close of this hearing. No one is present at this hearing. The record is now closed.

**Public Information Office**  
**Telephone: (304)558-4253 Fax: (304)558-4530 TDD: (800)422-5700**



# MINUTES

## DEP ADVISORY COUNCIL

July 17, 1996

The special meeting of the DEP Advisory Council was held July 17, 1996, at DEP's headquarters in Nitro, West Virginia. The meeting was called to order at 1:00 p.m. by Chairman Eli McCoy.

### ATTENDING - Advisory Council:

Eli McCoy (Chairman)	William Raney
William Samples	Larry Harris
Rick Roberts	Jacqueline Hallinan

### DEP:

Mark Scott	Jerry Ray
Dick Cooke	Mike Dorsey
Ken Ellison	Dale Farley
Britt Ludwig	Wendy Radcliff
Ken Politan	Charlie Sturey
Ken Ward	

Eli McCoy began the meeting by welcoming the Council members to the Nitro Office for a special meeting that was scheduled to discuss the proposed amendments to DEP's 1997 rules. Mark Scott said that in accordance with WV Code §22-1-3(c), which requires the Director of the Division of Environmental Protection to consult with the Advisory Council prior to proposing any new rule and that Council's recommendations will be recorded and made part of the rule package when it is filed with Legislative Rule-Making and the Secretary of State's Office the end of August.

Mark briefly reviewed the proposed rules provided to the Council. He noted that an amendment to an existing Environmental Quality Board rule was filed recently regarding water quality standards. Since this is a Board rule, and only requires the approval of the Director for filing, it is not part of the DEP rule package the Council has before them. He stated that a copy will be made available to them if they would like to review it.

### 47CSR35 - "Hazardous Waste Management Rule"

Mike Dorsey, Office of Waste Management, gave the Council a brief explanation of the Hazardous Waste Management Rule. He

explained that all the proposed amendments, excluding one sentence, were made to adopt the federal hazardous waste regulations by reference.

Bill Samples asked Mike whether someone complying with the federal rule would also be in compliance with the state requirements.

Mike replied that if you are complying with the federal rules, you are also considered in compliance with the state rule.

No specific comments on the rule were made by the Council.

#### 46CSR32 - "Underground Storage Tank Insurance Trust Fund"

Ken Ellison, Office of Waste Management, gave a brief summary of the changes that are being proposed for the Underground Storage Tank Insurance Fund. General discussion was held concerning changes in the UST rule, but no specific comments were made by the Council.

#### Proposed Brownfields Legislation

Ken Ellison also explained the proposed Brownfields Legislation.

Bill Samples asked if remediation standards are being developed.

Ken answered yes, they are in the process, but they are very preliminary at this point.

Bill Raney asked if the Brownfields rule will supersede other existing federal or state requirements.

Ken said no - all other environmental rules have to be adhered to.

Bill Samples asked about the time frame on the proposed rule package.

Ken stated that the rule-drafting committee, which is totally voluntary, has set a date of September to try to get the first draft out. The law states that the agency only has to propose the rule within a year of the effective date of the law.

Bill Samples said he believes it is important to get this in place and implemented as soon as possible.

Larry Harris asked if the rule-drafting committee seems to be working toward a consensus.

Ken stated that the Governor had requested Dr. Mary Wimmer, Professor of Biochemistry at WVU, and Dr. Paul Hill, Chief Executive Officer of the National Institute for Chemical Studies, to co-chair the rule-making committee, and he feels they are the real strength to achieving a consensus. He believes that the participants are taking this task seriously and trying very hard to reach a consensus.

Jackie Hallinan asked Ken what appears to be the most contentious issue.

Ken replied that the most contentious issues are risk assessment and risk management. There still needs to be a consensus on a range of scientific and technical parameters to use in risk assessment, and there is a different degree of certainty as to what the results will be depending on which parameters are selected. Risk management decisions have to be made within a framework that recognizes that the risk assessor may not be able to quantify the risk for many constituents. At that point, the risk management decision becomes more of a combination of analysis and deliberation of all the interested and affected parties' issues.

Since these rules are still in draft form, no specific comments were made by the Council.

#### **47CSR38 - "Solid Waste Management Rule"**

Dick Cooke, Office of Waste Management, briefly described the changes proposed in the Solid Waste Management rule. To receive EPA approval, one sentence in the state code pertaining to the \$8,000 per acre cap on bonding needs to be removed.

Bill Samples asked if EPA has a limit set per acre. Dick said that EPA does not have a limit.

Bill Samples said that as far as the code change DEP is simply eliminating the \$8,000 cap without substituting and not imposing any restriction on bonding. Dick replied that is correct.

#### **38CSR2 - "Surface Mining & Reclamation Rules"**

Charlie Sturey, Office of Mining & Reclamation, explained the changes in the Surface Mining and Reclamation Rule. He also stated that all changes in the rule have a corresponding code change.

The main concerns in the surface mining rule were as follows:

11.6 - Site Specific Bonding - Removal of the \$5,000 cap: Bill Raney asked the basis for removing the cap. Director McCoy stated that removal of the \$5,000 cap was at the insistence of OSM. OSM believes that the cap when set at \$5,000 would be insufficient to reclaim some areas, i.e., coal preparation areas or sites we have bonded at higher costs.

14.11 - Procedures to Obtain Inactive Status - Bill Raney said he has concerns regarding the 10-year cap on inactive status for prep plants or load-out facilities; especially for the larger facilities that maintain good security.

Eli stated that prior to 1988 there was a problem with reclamation of inactive sites, and regulations were promulgated to take care of the problem. He said it doesn't seem to be a big problem now. He also stated that inactive status can be renewed and regardless of what the agency's action may be, the decision can be appealed before the Surface Mine Board, and they can overrule any agency decision if they believe otherwise.

Eli asked Bill Raney if, from industry's point of view, he would like to see those numbers removed and propose some idea to allow the inactive status to be extended longer.

Bill Raney stated that longer is not necessarily the concern; going into active and back into inactive is, but feels this is not the time to work out the details.

Larry Harris asked if we have a list of those inactive sites. Eli said DEP does have a database list of over 200 inactive sites.

After Section 14.15 "Contemporaneous Reclamation Standards" of the surface mining rule was explained, Bill Raney stated he would like to go on record stating that this requirement in the state rule is in excess of all federal requirements.

Larry Harris asked if there is a tax or fee charged on the basis of disturbed acres. Charlie Sturey replied that the bond is not released.

A discussion was then held on Section 28 of the Code as it relates to special authorization for reclamation of existing abandoned coal on 5 acres or less if they are doing a certain type of project.

The main concern with this proposed change was the removal is limited to 5 acres. Rick Roberts asked what happens if you

have a 40-acre development site and 20 acres of coal needs to be removed. Director McCoy stated he did not realize there is a 5-acre limit in the rule. He said DEP needs to look into that and weigh the pros and cons of limiting the removal to 5 acres.

#### 47CSR30 - "WV/NPDES Regulations for Coal Mining Facilities"

Ken Politan, Office of Mining and Reclamation, explained the changes in the NPDES Regulation for Coal Mining Facilities. There was general discussion among the Council members but no specific comments concerning the changes.

#### 47CSR11A - "Wasteloads"

Jerry Ray, Office of Water Resources, gave a brief review of the proposed new wasteload rule and explained the reason for the new rule. He said the Office of Water Resources had originally planned to file it as an Interpretative rule, but after review by the Secretary of State's Office, it will be filed as a Legislative rule.

Rick Roberts expressed his concern with limiting the wasteload allocation to 12 months. He believes that with limitations on funding to construct wastewater treatment facilities, or the time it takes to obtain other permits, the time frame should be extended and asked if there is a waiver to extend the permit in certain circumstances. Jerry Ray answered no, there is no waiver.

Director McCoy stated that the problem with wasteload allocations has only existed in the last 5 years. In the past, anyone could obtain a wasteload allocation and continue to get it renewed for an undetermined amount of time. There is a potential for someone to get a wasteload allocation, never use it, and then sell their property and believe they are selling a wasteload allocation with it to get greater value from the property.

#### 38CSR10 - "Environmental Advocate"

Wendy Radcliff, DEP's Environmental Advocate, explained to the Council the circumstances behind refiling the Advocate rule. When the office was created in 1994, DEP was asked to promulgate rules setting forth the duties of the advocate office. DEP filed those rules as Interpretive rules with approval from the Secretary of State's office. A legislative performance audit of the Advocate office was conducted in April of this year. One of the recommendations was to refile the rules as legislative rules. These are identical to the interpretive rules filed in 1994.

There were no comments from the Council members.

45CSR1 - "Confidential Information"; 45CSR25 - "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal Facilities"; "45CSR34 - Emission Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 63"; and 45CSR16 - "Standards of Performance for New Stationary Sources Pursuant to 40 CFR Part 60"

Dale Farley, Chief of the Office of Air Quality said that three of these rules (45CSR25, 45CSR34, and 45CSR16) are incorporating by reference federal requirements that are necessary to keep the program up to date under Title 5. He then went on to explain the federal requirements to the Advisory Council.

There were no substantive comments from the Council members on these three DEP rules.

Dale briefed the Council members on the fourth DEP rule - "Confidential Information". Compared to the other sections in DEP, Air Quality seems to deal more with confidential information than any other. He said the most significant change in the rule would allow DEP to move away from the situation of inspecting the files, identifying all the documents, and then reviewing them again to determine if the files are confidential.

Jackie Hallinan said she had read the proposed rule and believes it is a step in the right direction to hopefully improve the FOIA process when information requested is contained in files that also house confidential information.

After the discussion of the Air Quality rules, Mark Scott reminded the Council members that they could also submit written comments on any of the proposed rules until the close of the public hearing for that particular rule. He told the Council that DEP will mail them a list of the public hearings that will include the date, time, and location.

Director McCoy then adjourned the meeting at approximately 4:00 p.m.

**COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS ASSOCIATION  
ON THE  
DIVISION OF ENVIRONMENTAL PROTECTION  
OFFICES OF WATER RESOURCES AND WASTE MANAGEMENT  
UNDERGROUND STORAGE TANK INSURANCE TRUST FUND REGULATIONS  
47 CSR 37A**

**AUGUST 13, 1996**

**I. INTRODUCTION**

**A. The Proposed Regulation**

The Division of Environmental Protection (DEP) regulates the storage of regulated substances in underground storage tanks (USTs) in West Virginia. The State Underground Storage Tank Act requires tank owners and operators to demonstrate financial responsibility before they may operate tanks; the statute authorizes the Director of DEP to establish a UST insurance fund to assist tank owners and operators in meeting their financial responsibility obligations. W. Va. Code § 22-17-22(a).

The Director has specific authority to promulgate rules providing for (1) assessment of a capitalization fee from tank owners and operators for the "initial establishment" of the UST insurance fund; (2) procedures and amount of fees to be assessed for the UST insurance fund; (3) procedures for making expenditures from the UST insurance fund; and (4) methods by which a tank owner or operator may demonstrate financial responsibility. W. Va. Code § 22-17-7(b)(6)-(8). The Director also has authority to require an annual financial responsibility assessment from tank owners and operators who cannot otherwise satisfy financial responsibility requirements. W. Va. Code § 22-17-22(a).

**RECEIVED**

AUG 13 1996

The DEP's proposed modifications on which we comment today are to the rule implementing the UST insurance fund, 47 CSR 37A, the Underground Storage Tank Insurance Trust Fund Regulation. The proposed changes are minor and non-substantive in nature, with the exception that the proposed rule provides that the Director may designate an Administrator to manage the UST Insurance Trust Fund.

**B. The West Virginia Manufacturers Association**

The West Virginia Manufacturers Association (WVMA), with approximately 250 member companies, represents the interests of its member businesses throughout West Virginia. WVMA members engage in a wide variety of manufacturing activities throughout the State.

Many WVMA members own or operate USTs regulated by the DEP, and the WVMA has maintained an active interest in the development of the West Virginia UST program since its inception. The WVMA has provided comments to the DEP and its predecessor agencies for many years, and continues to be interested in the development of a streamlined program that minimizes costs on WVMA members while protecting the environment.

**II. COMMENTS**

On the whole, the WVMA agrees with the changes proposed by the DEP to the Underground Storage Tank Insurance Trust Fund Regulation. We present the following brief comments.

**A. Section 1.1 "Scope and Purpose"**

We understand that the insurance fund is maintained by fees assessed on petroleum USTs, and that the fund only insures occurrences from petroleum USTs. For clarification purposes, a brief statement should be included clarifying that this rule does not cover USTs containing non-petroleum regulated substances.



**B. Section 3.2 “Administrator”**

This section should be revised slightly to indicate that either private or state individuals, organizations, agencies, companies, corporations, or other persons may be Administrator of the UST Insurance Fund. This section should also clarify that authority to administer the fund is a function delegated by the Director in accordance with the authorizing statute.

**C. Section 3.10 “Regulated Substance”**

This section defines “regulated substance.” Assuming that DEP intends to include the definition of “regulated substance” at all (which we believe to be unnecessary), paragraphs 3.10(a) and 3.10(b) should be connected by the conjunctive “and” rather than the disjunctive “or” (see also 40 C.F.R. § 280.12 (definition of “regulated substance” is certain CERCLA § 101(14) substances and petroleum)). We suggest that the better approach is to omit the definition of “regulated substance” and retain the definition of “petroleum.”

**D. Sections 3.10, 5.2, 6.3, 8.1, 8.6, 9.1, 9.4, 11.2 “Director's Administrator”**

References to the “director's administrator” should be changed to “administrator” throughout the rule because “administrator” is fully defined in section 3.2.

**E. Section 8.1 Notification of Claim (Emergency Claims)**

The reference to “real or alleged” accidental releases should be omitted; it does not clarify the insured's obligations further. The phrase “see to it” does not clearly set out the insured's obligations; this should be changed to “notify or verify that notice has been provided to.” The phrase “occurrence or an offense” should be changed to “occurrence.” This rule does not address offenses; it addresses releases and occurrences that may have certain effects on persons or the environment allowing insurance funds to be claimed or expended. We suggest that the revised paragraph read as follows:

The insured must notify the director and the administrator of an accidental release within twenty-four (24 hours) of discovery of the release. The insured must notify, or verify that notice has been provided to, the director and the administrator of any other occurrence which may result in a claim prior to the filing of that claim.

**F. 8.2 Initial Response Requirements (Emergency Claims)**

This section should replace the article “the” before the clause “initial response requirements” with the word “applicable” to clarify that the insured must conform to all applicable federal requirements contained in 40 C.F.R. § 280.61.

**H. 8.3 Written Itemization (Emergency Claims)**

This section, as it has existed in the rule, requires the immediate submission of a written itemization of project contract cost. Exactly when this “immediate” requirement is triggered is unaddressed by the rule. We suggest that the DEP take this opportunity to inform the regulated community when the “immediate” requirement begins to run. A sound approach would be for DEP to require that the insured provide DEP written itemization of project costs prior to the time that the insured accepts written bids in accordance with Sections 8.4 and 8.5.

**I. Section 9.1 Notification of Claim (Non-Emergency Claims)**

This section should mirror the same language in Section 8.1 for the reasons outlined above.

**J. 9.4 Reimbursement**

“Eligible expenses” should be defined in Section 3.

**K. 10.1 Notification Requirements**

For purposes of consistency, “shall” should be changed to “must” throughout the rule.

**L. 11.1 Advisory Committee Powers, Duties, and Responsibilities**

The Advisory Committee has those powers, duties, and responsibilities set out in W. Va. Code

§ 22-17-7. The DEP Director has authority to delegate other powers to the Committee in accordance with W. Va. Code §§ 22-1-6 and 22-1-8. Accordingly, the Committee may certainly review all claims regarding the expenditure of funds from the UST Insurance Trust Fund, and is empowered to make recommendations to the Director regarding those claims. Similarly, the Committee may review the denial of coverage under the UST Insurance Trust Fund and again make advisory recommendations to the Director. Sections 11.1.a and 11.1.b, while highlighting the valuable roles that the Advisory Committee has undertaken to assist the Director in implementing the statute, should clearly reflect the Advisory Committee's limited statutory role of providing advice and recommendations to the Director. The Advisory Committee does not have the authority to review all claims, nor may it act as a true appeals board, and the language of the rule should not suggest that the Committee may do either. For purposes of clarification, we suggest the following minor revisions to the proposed sections 11.1.a and 11.1.b:

11.1.a. Have the authority to review and make recommendations regarding all claims made in accordance with this rule to the Underground Storage Tank Insurance Trust Fund; and

11.1.b. Have the authority to hear and make recommendations to the Director regarding disputes that may arise from the operation of the underground storage tank insurance program established under W. Va. Code § 22-17-22 and this rule.

#### **IV. Conclusion**

The WVMA congratulates DEP on its careful and tailored proposed modifications to the Underground Storage Tank Insurance Trust Fund rule. We appreciate the opportunity to provide comments. Questions or requests for additional information should be addressed to the WVMA.

Respectfully submitted this 13th day of August, 1996.

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## RESPONSE TO COMMENTS

Comments submitted by the West Virginia Manufacturers Association:

The commenter have agreed that the proposed changes are minor in nature. Specific comments are:

- §1.1 - The commenter suggests that a statement be inserted clarifying that this rule does not cover USTs containing non-petroleum regulated substances. Rather than making the insertion in §1.1, the insertion of "petroleum" has been made in §2.1 concerning applicability.
- §3.2 - Agree with commenter. Changes have been made.
- §3.10 - The connective conjunctive has been changed to "and" as suggested. The definition of "regulated substance" remains unchanged so that it will mirror the federal and state statutes and rules.
- §3.10, 5.2, 6.3, 8.1, 8.6, 9.1, 9.4, 11.2 - Suggested change has been made.
- §8.1 - Some of the suggested changes have been made. The wording "real or alleged" has been left unchanged because it is important that the insurance fund be notified of any potential claims against the fund.
- §8.2 - Suggested change has been made.
- §8.3 - Suggested change has been made.
- §9.1 - Change made as in §8.1.
- §9.4 - Rather than inserting a limiting definition of "eligible expenses" in Section 3, the phrase "as enumerated in the West Virginia petroleum underground storage tank insurance policy" has been inserted.
- §10.1 - Wording was not changed.
- §11.1 - Suggested changes have been made. Section 11.2 has also been deleted.

Other amendments made to the rule after the filing of the "Notice of Hearing on the Proposed Rule" are numbering changes to Title 33 Series 32.