





**DIVISION OF ENVIRONMENTAL PROTECTION**

GASTON CAPERTON  
GOVERNOR

10 McJunkin Road  
Nitro, WV 25143-2506

DAVID C. CALLAGHAN  
DIRECTOR

August 15, 1994

Ms. Judy Cooper  
Director, Administrative Law Division  
Secretary of State's Office  
Building 1, Suite 157K  
Charleston, West Virginia 25305

RE: CSR-47-38B - Proof of Proper Solid Waste  
Disposal

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned rule with your Office and with Legislative Rule-Making Review Committee as an agency approved rule.

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

Sincerely yours,

A handwritten signature in cursive script, appearing to read "D. Callaghan".

David C. Callaghan  
Commissioner  
Bureau of Environment

DCC;RTH:cc

Attachment



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES  
**DIVISION OF ENVIRONMENTAL PROTECTION**

1356 Hansford Street  
Charleston, WV 25301-1401

Gaston Caperton  
Governor

John M. Ranson  
Cabinet Secretary

David C. Callaghan  
Director

Ann A. Spaner  
Deputy Director

STATEMENT OF CIRCUMSTANCES REQUIRING THIS RULE AMENDMENT

The current rule limits enforcement to the Division of Natural Resources and fails to incorporate the statutory civil penalty for failure to comply. This revision expands enforcement to all law enforcement officers, the Division of Environmental Protection, and local Solid Waste Authorities. It also provides for the statutory penalty for failure to show proof of proper disposal.

**APPENDIX B**

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Proof of proper Solid Waste Disposal

TYPE OF RULE: X Legislative        Interpretive        Procedural

Agency Bureau of Environment Address Office of Waste Management  
1356 Hansford St. Charleston WV 25301

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
Personal Services	0	0	0	0	0
Current Expense	\$180	0	0	\$180	\$180
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

**2. Explanation of above estimates:**

These regulations will have minimal impact on those persons currently obeying the mandator garbage disposal law. The impact on violators will vary depending upon the cost of solid waste collection and disposal in their county. This is expected to approximate currently per household \$180.00 a year plus any assessed penalty. A state wide total is impossible to determine.

**3. Objectives of these rules:**

To clarify approved methods of providing proof of proper disposal and establish guidelines for the assessment of penalties for failure to provide proper proof.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

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

Will vary depending upon involvement in enforcement of the Mandatory Garbage Disposal Law.

C. Economic Impact on Citizens/Public at Large.

For violators it will increase their expenditures an estimated \$180.00 per year.

Date: July 12, 1994

Signature of Agency Head or Authorized Representative

Roger A. Mall

DATE: August 15, 1994

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Bureau of Environment, Office of Waste Management

LEGISLATIVE RULE TITLE: Proof of proper solid waste disposal

1. Authorizing statute(s) citation 22C-4-10

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

July 13, 1994

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

New Release dated July 20, 1994

c. Date of hearing(s): August 15, 1994

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

Attached X No comments received \_\_\_\_\_

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

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

Jim Hudson 598-2505

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.

No Findings or Determinations are Required

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b. Date of hearing: NA

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

NA

d. Attach findings and determinations and reasons:

Attached NA



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SUMMARY

TITLE 47  
LEGISLATIVE RULES

SERIES 38B  
PROOF OF PROPER SOLID WASTE DISPOSAL

This rule was previously an interpretive rule which did not adequately address the issue of mandatory garbage disposal. The previous rule limited enforcement to the Division of Natural Resources. This revision expands the enforcement to the Division of Environmental Protection, and local Solid Waste Authorities as entities which may require proof of proper disposal. This revision also includes new standards on record keeping by solid waste disposal facilities, and clarifies the civil penalty, and assessment for unpaid fees provided for in Chapter 22C, Article 4, Section 10.

TITLE 47  
INTERPRETIVE RULES LEGISLATIVE RULES  
DIVISION OF ENVIRONMENTAL PROTECTION

SERIES 38B  
PROOF OF PROPER SOLID WASTE DISPOSAL

47-38B-1. Scope and Authority.

1.1. Scope and Purpose. -- This rule provides guidance to establishes requirements for persons occupying a residence or operating a business establishment in this State regarding the approved method of providing proof of proper solid waste disposal to the Department Division of Environmental Protection, Division of Natural Resources, or local solid waste authorities within five days of a request by a representative of the appropriate agency.

1.2. Authority. -- W. Va. Code 22C-4-10

1.3. Filing Date. --

1.4. Effective Date --

1.5. Determination of Stringency -- There is no federal counterpart regulation.

1.6. Constitutional Takings Determination -- No constitutional takings of real property are anticipated as a result of this rule.

47-38B-2. Proof of Proper Solid Waste Disposal.

2.1. Each person occupying a residence or operating a business establishment in this State must be able to provide proof to the Department Division of Environmental Protection, Division of Natural Resources, and the appropriate local solid waste authority that his solid waste was disposed of at an approved solid waste facility. Records establishing such proof must be maintained for a minimum of three years.

2.1.1. To constitute proper disposal, at least one instance of disposal for each quarter the person has resided in the county, or the business has been in operation, must be shown.

2.2. Proof of proper solid waste disposal includes:

2.2.1. Records demonstrating that a person has subscribed to and used a solid waste collection service and has paid the fees established therefore; or

2.2.2. Records, including bills of receipt, demonstrating that a person has delivered his waste to an approved solid waste facility for disposal.

Note: The term "solid waste collection service" means a collection service offered either by a common carrier certificated which holds a certificate of convenience and necessity issued by the West Virginia Public Service Commission (or a similar body of a contiguous state) or by a municipality or other governmental body.

2.3. The owner or operator of each approved solid waste facility in this State must provide a receipt and maintain records of each delivery of solid waste made by an individual who is not in the business of hauling or disposing of solid waste. Provided, that only one such receipt or record is required for each delivery. Such receipt and records must include:

2.3.1. The name and address of the individual who delivered the waste for disposal;

2.3.2. A description of the origin, type, and estimated amount of the waste delivered for disposal; and

2.3.3. A copy of the bill of receipt for the waste delivered for disposal.

2.4. All records required under section 2.3. of these regulations must be maintained for a minimum of three (3) years and be made available for inspection by an authorized representative of the Director of any agency listed above in Section 1.1, upon request.

#### 47-38B-3. Penalty.

3.1. Any person who fails to provide proof of proper disposal within five days of a request by a duly authorized representative of any agency listed above in Section 1.1, shall be subject to a civil penalty of \$150.00 to be paid to the agency which initiates the request for proof of proper disposal.

3.2. Any person who fails to provide proof of proper disposal within five days of a request by a duly authorized representative of any agency listed above in Section 1.1, shall be required to subscribe to a solid waste collection agency within thirty days and submit proof of proper disposal within ninety days or shall be subject to a second penalty of \$150.00.

3.3. Any person who has used a solid waste collection service and has failed to pay the fees established therefore; shall be required to pay the unpaid fees for every year that a fee has not been paid. These payments shall not be assessed for more than three (3) years and shall be paid to the solid waste collection service which has provided the service.



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MANDATORY GARBAGE DISPOSAL RULES

PUBLIC HEARING REPORT

The public hearing on the Mandatory Garbage Disposal Rules were held on August 15, 1994 at ten o'clock in the morning. The official transcript will be submitted as soon as it is typed.

The following individuals attended this hearing:

Tom Degan, West Virginia Environmental Council,  
Norm Steemstra, West Virginia Citizens Action Group,  
Leonard Knee, Bowles, Rice, McDavid, Graff and Love,  
Brian Levine,  
Bill Raggette, Lincoln County Solid Waste Authority,

Sue McGuire, representing the Ritchie County Solid Waste Authority and Edward J. George, Robinson & McElwee, representing the West Virginia Manufacturers Association, submitted written comments.

The first comment requested the removal of the constitutional takings determination section. The Office of Waste Management has considered this comment. Although Chapter 22 does not require the constitutional takings determination to be included within the rule, the statute does not preclude the Office of Waste Management doing so. Therefore, the Office of Waste Management elects to include the constitutional determination section in the rule.

Two people commented on the rule being expanded (in Section 1.1) beyond the statutory authority by including the Public Service Commission and the Division of Natural Resources as potential enforcement agencies for this rule. The Public Service Commission was removed as a potential enforcement agency. However the Division of Natural Resources was retained to facilitate this rules use by the Litter Control Officers who are Conservation Officers employed by the Division of Natural Resources.

A comment indicated (in Section 3.1) the penalty being assessed upon failure to provide proof upon request was unreasonable and should indicate that the penalty would be assessed upon failure to provide proof within twenty-four hours of request. This section and section 1.1 were amended to indicate the penalty would be assessed for failure to provide proof within five days of request.

A comment indicated an error in citing the authority as West Virginia Code 20-9-9. The recent reorganization bill changed this section to 22C-4-10. This correction has been made.

A comment was received indicating the rule should allow as many options as possible such as including green boxes, dumpsters and bins in Section 2.2.2. The Office of Waste Management feels these options are available under the rule as it is currently written. It would be difficult, if not impossible, to write a rule which itemizes every possibility.

Several comments were received concerning Section 3.1. which directs the penalty to be split between the Solid Waste Enforcement Fund and the Local Solid Waste Authority. This section has been changed to indicate the penalty shall be paid to the agency initiating the request.

Several comments were received against and for Section 3.2. which requires persons unable to show proof to subscribe to a collection service and show proof within ninety days or be subject to a second penalty. After considering both sides of this issue the Office of Waste Management has decided to retain the language as written.

One comment was received concerning Section 3.3. which requires persons using a solid waste collection service and not paying for it be required to pay the unpaid fees. It was suggested that this section require the fees be paid to the solid waste collection hauler who provided service. This change was made.

One comment was made indicating monthly would be more appropriate in Section 2.1.1. than quarterly. After deliberation this suggestion was rejected and the language was retained as written.

One comment was made suggesting that only the person delivering the waste receive a receipt from a solid waste facility under section 2.3. It was felt one individual could obtain receipts for a number of others and pass them around to friends as needed. This addition to the rules was made.

No other comments to these regulations were received.

OWM 558-0256  
FAX TO : DEP 759-0526 FOR PUBLIC HEARING, DIRECTORS CONF. RM. 10am



**Ritchie County**  
**Solid Waste Authority**  
P. O. Box 161, Ellenboro, WV 26346

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Date: August 15, 1994  
TO: DEP/OWM Attn: Jim Hudson  
From: Sue Maguire, Coordinator for RCSWA  
RE: Comment on Amendment to Proof of Proper Solid Waste Disposal, Series 38B-Title 47

2.2.2.  
add after facility: or green boxes, bins and dumpsters

3.1.  
delete: Solid Waste Enforcement Fund  
add: agency that made the request

3.2.  
delete: be required to subscribe to a solid waste collection agency within thirty days and

3.3.  
add: Payment shall go to the solid waste collection service that was used.

Thank you for your attention to these comments.

*Sue Maguire*



Recycle for a sustainable future

August 14, 1994  
Tom Degen  
HC 75 Box 324  
Chloe, WV 25235

WV DEP/Office of Waste Management  
1356 Hansford Street  
Charleston, WV 25301

### Comments on Title 47 Series 38B Proof of Proper Solid Waste Disposal

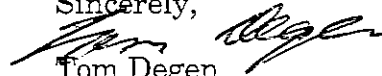
I feel that there should be as many options open to people as possible for satisfying the mandatory disposal requirement. For example, some people use their employer's dumpster (with the employer's permission); in some cases a municipality or county provides a dumpster for the use of the public for a fee; and I have even heard of private individuals who rent a dumpster for the use of neighbors for a fee. All of these are regulated in 47 CFR 38 Section 5.6.1 Green Boxes, Bins, and Dumpsters. Section 2.2.2. of this proposed rule should reflect that these options are allowed, if the division does not consider them to be an "approved solid waste facility."

Section 3.1 should split the civil penalty between the agency that made the request that resulted in the penalty and the local solid waste authority. This would give the PSC and the DNR an incentive to enforce the provisions of the rule.

In order to provide for flexibility and give citizens the full range of options, Section 3.2. should be amended as follows: "Any person who fails to provide proof of proper disposal upon request by a duly authorized representative of any agency listed above in Section 1.1. shall be required to ~~subscribe to a solid waste collection agency within thirty days and~~ submit proof of proper disposal within ninety days or shall be subject to a second penalty of \$150.00."

Or perhaps as follows: "Any person who fails to provide proof of proper disposal upon request by a duly authorized representative of any agency listed above in Section 1.1. shall be required to subscribe to a solid waste collection agency within thirty days and/or submit proof of proper disposal within ninety days or shall be subject to a second penalty of \$150.00."

Thank you for the opportunity to comment on this rule.

Sincerely,  
  
Tom Degen

Norm Steenstra, Environmental Director Citizens Action Group  
Wendy Radcliff, Environmental Advocate DEP

**RECEIVED**

AUG 12 1994

Division of Environmental Protection  
Office of Waste Management

COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS  
ASSOCIATION REGARDING PROPOSED AMENDMENTS  
TO 47 CSR 38B "PROOF OF PROPER  
SOLID WASTE DISPOSAL"

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August 15, 1994

COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS  
ASSOCIATION REGARDING PROPOSED 47 CSR 38B  
"PROOF OF PROPER SOLID WASTE DISPOSAL"

I. Introduction

On July 13, 1994, the West Virginia Division of Environmental Protection ("DEP") filed with the Secretary of State proposed amendments to an interpretive rule pertaining to proof of proper solid waste disposal as statutorily authorized at Chapter 22C, Article 4 of the West Virginia Code. The amended rule is proposed for inclusion as a legislative rule in the Code of State Regulations at Title 47, Series 38B ("the proposed rule").

The West Virginia Manufacturers Association ("WVMA") represents a broad cross-section of large, medium and small industrial concerns in West Virginia. It is in keeping with the WVMA's supportive position regarding the development of West Virginia's solid waste management program that the WVMA offers these comments.

II. Comments

1. Section 1.6. (page 1); Constitutional Takings Determination

The WVMA asserts that it is inappropriate to incorporate this section into the proposed rule. A "constitutional takings determination" or assessment is required in limited circumstances-- and the promulgation of amendments to this rule does not appear to be one of them. Under W.Va. Code 22-1A-3(a), such an assessment is required if the action being contemplated by DEP is:

reasonably likely to deprive a private real property owner of his or her property in fee simple or to deprive an owner of all productive use of his or her property\*\*\*.

The mere promulgation of amendments to an existing rule (or, for that matter, the promulgation of a new one) does not automatically meet the above test for when an assessment is required if its effect is merely to limit certain uses pursuant to state or federal statute. The Legislature also did not intend that such determinations be incorporated within the rule, thereby becoming law upon final adoption. Accordingly, the WVMA urges that Section 1.6 be deleted from the proposed rule and that an appropriate "takings" determination be supplied by the Director in the supporting documents accompanying the final rule upon filing with the Secretary of State.

**2. Section 1.1. (page 1); Scope and Authority**

This section, as proposed, is overbroad and goes beyond its statutory authority as it would confer upon the DEP, local solid waste authorities, the Division of Natural Resources ("DNR") and the Public Service Commission ("PSC") authority to require of resident individuals and businesses proof of prior solid waste disposal. However, the proposed rule's enabling statute only authorizes the DEP and local solid waste authorities to exercise such enforcement powers. In fact, the DNR's jurisdiction over solid waste enforcement has, through prior executive order and statutory enactment, been transferred virtually completely to the DEP's Office of Waste Management. Additionally, the PSC's jurisdiction in the area of solid waste regulation is limited and

fails to include mandatory disposal enforcement. Accordingly, this section of the proposed rule (together with Section 2.1) should be revised to reflect the statutory limitation of mandatory disposal enforcement power to the DEP and local solid waste authorities.

**3. Section 3.1. (page 2); Penalty**

This section, as proposed, would subject a person to a civil penalty of \$150 for failure to provide proof of proper disposal "upon request." The WVMA asserts that under a literal application of such provision, a duly authorized representative of the DEP, for instance, could request any person -- at any time (e.g., as they stroll down the street or while sitting at a restaurant) -- to produce the required proof. Should such unfortunate person maintain, but not actually possess at the time and on the spot, such proof, a civil penalty could be assessed. The WVMA recognizes the unlikelihood of this being the intent of DEP in its drafting of this provision. However, in order to provide clarity in application of this proposed section, the WVMA suggests that it be revised to state that the civil penalty may be assessed upon failure to provide proof of proper disposal within twenty-four hours of request therefor.

**4. Section 1.2. (page 1); Statutory Authority**

As drafted, this section of the proposed rule incorrectly cites as its statutory authority "W.Va. Code 20-9-9." This section should be amended to reflect the re-codification of the State's environmental statutes pursuant to the recent passage of H.B. 4065

(the "DEP Reorganization Bill"). Accordingly, the proposed rule should be revised to cite as its enabling authority "W.Va. Code 22C-4-10."

### III. Conclusion

The WVMA wholeheartedly supports the DEP's efforts to provide a comprehensive and efficient program for the responsible management of solid waste in West Virginia, including the requirements of mandatory disposal service subscription or proof of proper disposal. It is in this spirit of cooperation that the WVMA offers these comments.

Respectfully submitted on this 15th day of August, 1994 by

Karen S. Price, President  
West Virginia Manufacturers Association  
2001 Quarrier Street  
Charleston, WV 25311  
(304) 342-2123

Prepared by:  
Robinson & McElwee  
P. O. Box 1791  
Charleston, WV 25326  
Contact: Edward J. George, Esquire  
(304) 347-8319

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Division of Environmental Protection; Office of  
Waste Management

Subject: Proof of Proper Waste Disposal- 47CSR38B

PERTINENT DATES

Filed for public comment: July 13, 1994  
Public comment period ended: August 15, 1994  
Filed following public comment period: August 15, 1994  
Filed LRMRC: August 15, 1994  
Filed as emergency:

Fiscal Impact: The fiscal note prepared represents the estimated impact of this rule on individual households in West Virginia (estimated at \$180.00 per year), and does not address the fiscal impact to any state agency.

ABSTRACT

This rule establishes a civil penalty of \$150.00 for each person occupying a residence or operating a business who fails to properly dispose of solid wastes. The penalty also applies to persons who fail to subscribe to a solid waste collection service. Section 3.2 provides that if a person fails to show proof of obtaining service within 90 days of an agency's request that he or she get service, then that person will be assessed another \$150.00 fine.

Section 3.3 of the rule provides that any person who fails to pay for solid waste collection service must pay the waste collection service up to three years of unpaid back fees in addition to the \$150.00 civil penalty.

AUTHORITY

Statutory authority: W. Va. Code, §22C-4-10, provides, in part, as follows:

The director of the division of environmental protection shall promulgate rules pursuant to chapter twenty-nine-a of this code regarding an approved method or methods of supplying ... proof [of

disposal of solid waste at an approved  
solid waste facility.]

#### ANALYSIS

#### I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

Yes.

I. W. Va. Code, §22C-4-10 provides the following: "A civil penalty of one hundred fifty dollars shall be assessed to the person not receiving solid waste collection services in addition to the unpaid fees for every year that a fee is not paid." Although the wording of this code section is unclear, there is no authority stated regarding paying back collection fees to a solid waste collection service as provided in Section 3.3. The language provides that there is a \$150.00 fine and "in addition" an assessment of unpaid fees for every year "that the fee is not paid." If a collection service has been providing collection service to an individual, then it does have civil remedies regarding collecting monies owed. This rule is not needed to allow the collection service a method of collecting back fees. These back fees should be collected as part of the penalty assessed for the failure to have collection service.

II. The three year limitation of assessment of back fees established in Section 3.3 is not authorized in the code. W.Va Code, §22C-4-10 provides that persons who fail to receive collection service shall pay "for every year that a fee is not paid."

III. W. Va. Code, §22C-4-10 is also limited in its granting of rule-making authority. It states that "[t]he director of the division of environmental protection shall promulgate rules pursuant to chapter twenty-nine-a of this code regarding an approved method or methods of supplying such proof." This code section provides only the authority to promulgate a rule dealing with methods of proof of receipt of garbage service. Neither in this code section or any other is there authority for the agency to promulgate a rule concerning assessing or collecting a penalty. Granted that this code section does establish a penalty to be collected but does not grant the Division of Environmental Protection any authority to create a rule setting out the method of assessment, or of a subsequent fine for failure to arrange for solid waste service. Therefore the provisions of Section 3 of the rule are not statutorily authorized. In W.Va. Code, § 22C-4-23 (3) Regional and County Development Authorities are authorized to implement the provisions of sections nine and ten of article four. It appears that Regional and County Development Authorities are the state agencies authorized to assess and collect civil penalties provided for in §22C-4-10 and not the Division of Environmental Protection.

This rule exceeds its statutory mandate and does not comply with the above mentioned statutory language.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

No. See above comments.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

No.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

No. The Division included in its rule a statement of stringency to comply with W.Va. Code, §22-1-3(a). This is not necessary. This requirement only applies to agencies in Chapter 22 of the code and not those in Chapter 22C. Also, per the code the statement of stringency should be filed with the rule and not be part of it.

The Division also did not file a statement regarding its consultation with the Advisory Council. This is required by W.Va. Code, §22-1A-3. The Council has not yet been appointed, and a statement saying that should have been filed with the rule.

The constitutional takings provision is also unnecessary. This assessment is only to be done if a takings occurs, per W. Va. Code, §22-1A-3.

VIII. OTHER.

Counsel has several technical modifications to suggest.