

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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Form #3

REVISED 11/3/93

OFFICE OF THE SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE

AND

FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: DCL&ER, Division of Environmental Protection TITLE NUMBER: 47

CITE AUTHORITY §20-5F-2b(b)

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

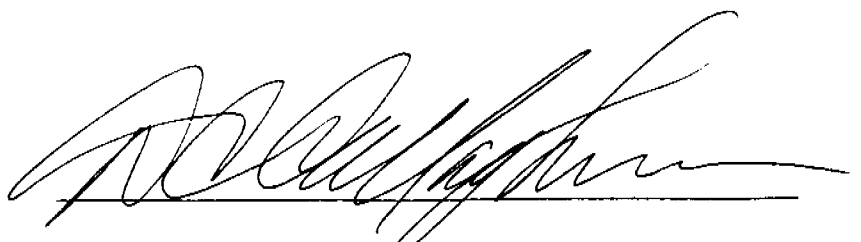
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 38D

TITLE OF RULE BEING PROPOSED: Sewage Sludge Management Regulation

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.



David C. Callaghan, Director
Division of Environmental Protection

10.80

FISCAL NOTE FOR PROPOSED RULE

Rule Title: Sewage Sludge Management Regulations 47 C.S.R. 38D

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Environmental Protection

Address: #10 McJunkin Road, Nitro, West Virginia 25143-2506

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$500,000		0	500,000	500,000
Personal Services	\$375,000		0	375,000	375,000
Current Expenses	\$100,000		0	100,000	100,000
Repairs & Alterations	\$				
Equipment	\$ 25,000		0	25,000	25,000
Other	\$				

2. Explanation of above estimates: The promulgation of these rules will result in the need of personnel, equipment and other related costs to efficiently and orderly regulate sewage sludge. §20-5F-2b(b) establishes that a land application fee be levied and imposed to sufficiently cover the costs of the Sewage Sludge Management Program.

3. Objectives of this rule: To require permits for all facilities and activities which generate, process or dispose of sewage sludge and to develop and implement a comprehensive program for the regulation and management of sewage sludge.

4. Explanation of Overall Economic Impact of Proposed Rule.

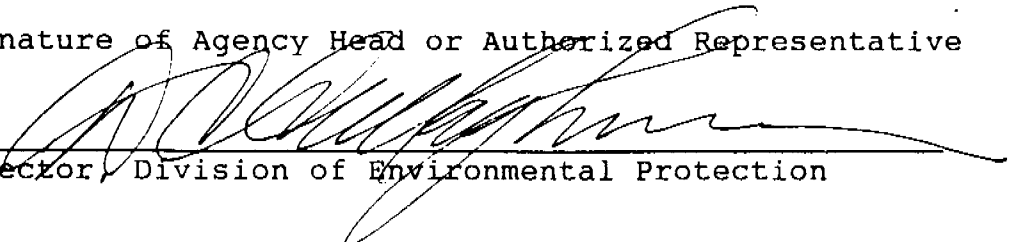
A. Economic Impact on State Government: The agency will require funding support and will use the fees provided for by the legislation to manage the program and provide for environmental remediation.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens: Possible increase in sewage treatment fees to cover the costs of implementing land application requirements.

C. Economic Impact on Citizens/ Public at Large: Same as B. above.

Date:

Signature of Agency Head or Authorized Representative


Director, Division of Environmental Protection

DATE: November 5, 1993

TO: Legislative Rule-Making Review Committee

FROM: Department of Commerce, Labor and Environmental Resources; Division of Environmental Protection

LEGISLATIVE RULE TITLE: Sewage Sludge Management Regulations

1. Authorizing statute(s) citation: §20-5F-2b(b)

2.a. Date filed in State Register with Notice of Hearing: May 24, 1993

2.b. What other notice, including advertizing, did you give of the hearing? State-wide press release.

2.c. Date of hearing(s): June 23, 1993

2.d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments;
Attached X No comments received _____

2.e. Date agency approved proposed Legislative Rule filed in State Register following public hearing: July 7, 1993,
revised agency approved rule filed November 5, 1993.

2.f. Name and telephone of agency contact: Bill Brannon,
558-2108

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

3.a. Date on which a notice of the time and place of hearing for the taking of evidence and a general description of the issues to be decided was filed in the State Register:
N.A.

3.b. Date of hearing: N.A.

3.c. Date the required findings and determinations together with reasons therefor were filed in the State Register:
N.A.

3.d. Findings and determinations, and reasons (attached). N.A.

**PREAMBLE TO A PROPOSED RULE
CONCERNING
SEWAGE SLUDGE MANAGEMENT REGULATIONS**

AGENCY: Department of Commerce, Labor, and Environmental Resources; Division of Environmental Protection.

REGULATION: Title 47, Series 38D, "Sewage Sludge Management Regulations."

ACTION: Filing of an agency approved rule, filing with the Legislative Rule-Making Review Committee, and filing of an emergency rule. Filing of a revised agency approved rule with the Secretary of State and the Legislative Rule-Making Review Committee. The purpose of the revised filing is to make the agency approved rule equivalent to the emergency rule, which addresses the Legislative Rule-Making Review Committee earlier concerns.

SUMMARY: During the 1993 Legislative session, Senate Bill No. 288 amended §20-5F of the West Virginia Code, in part, by adding Section 2b. This section provided for the management of sewage sludge, and authorized the filing of rules along with their emergency filing. The filed rules implement a comprehensive sewage sludge management program in West Virginia.

**TITLE 47
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION**

**SERIES 38D
SEWAGE SLUDGE MANAGEMENT REGULATIONS**

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TITLE 47
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION Nov 5 2 22 PM '93
SERIES 38D
SEWAGE SLUDGE MANAGEMENT REGULATIONS OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

§47-38D-1. GENERAL.

1.1. **Scope and Purpose.** -- This legislative rule establishes requirements for the permitting, siting, bonding, installation, establishment, construction, modification, and operation of any facility that generates, processes, recycles and/or disposes of sewage sludge by whatever means, including, but not limited to, land application, composting, incineration, mixed waste composting, or any other method of handling sewage sludge within the state. This rule applies to any person who owns or operates a sewage sludge facility or who is responsible for the processing or disposal of sewage sludge.

1.2. **Authority.** -- W. Va. Code §20-5F-2b(b).

1.3. **Filing Date.** --

1.4. **Effective Date.** --

1.5. **Incorporation by Reference.** -- Whenever federal or state statutes or regulations are incorporated into this rule by reference, the reference is to the statute or regulation in effect on the effective date of this rule.

§47-38D-2. DEFINITIONS.

The following definitions shall apply to this rule unless otherwise specified herein:

2.1. "Agronomic rate" means the whole sewage sludge application rate, by dry weight, designed: (1) To provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, cover crop or vegetation on the land; and (2) To minimize the amount of nitrogen in sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the ground water.

2.2. "Applicant" means the person applying for a commercial solid waste facility permit or similar renewal permit and any person related to such person by virtue of common ownership, common management or family relationships, as the Director of the Division may specify, including the following: spouses, parents, children and siblings.

2.3. "Approved solid waste facility" means a solid waste facility or practice which has a valid permit under W. Va. Code §20-5F.

2.4. "Backhauling" means the practice of using the same container to transport solid waste and to transport any substance or material used as food by humans, animals raised for human consumption or reusable item which may be refilled with any substance or material used as food by humans.

2.5. "Bulking Agent" means materials such as yard waste, wood chips, leaves and other living or dead plant tissues approved by the Chief as suitable to promote the passage of air through a static pile or windrow.

2.6. "Chief" means the Chief of the Office of Waste Management of the Division.

2.7. "Commercial recycler" means any person, corporation or business entity whose operation involves the mechanical separation of materials for the purpose of reselling or recycling at least seventy percent (70%) by weight of the materials coming into the commercial recycling facility.

2.8. "Commercial solid waste facility" means any solid waste facility which accepts solid waste generated by sources other than the owner or operator of the facility and shall not include an approved solid waste facility owned and operated by a person for the sole purpose of disposing of solid wastes created by that person or such person and other persons on a cost-sharing or nonprofit basis and shall not include land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation and similar applications.

2.9. "Composting" means the aerobic, thermophilic decomposition of natural constituents of solid waste to produce a stable, humus-like material.

2.10. "Composting facility" means any solid waste facility processing solid waste by composting, including sludge composting, organic waste or yard waste composting, but does not include a facility for composting solid waste that is located at the site where the waste was generated.

2.11. "Curing area" means an area where organic material that has undergone the rapid initial stage of decomposition is further stabilized into a humus-like material.

2.12. "Director" means the Director of the Division.

2.13. "Distributor" is a person who prepares the product for distribution and marketing and is responsible for distributing and marketing the product.

2.14. "Division" means the Division of Environmental Protection.

2.15. "Domestic septage" means either liquid or solid material (septage) removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap at a restaurant.

2.16. "Energy recovery incinerator" means any solid waste facility at which solid waste is incinerated with the intention of using the resulting energy for the generation of steam, electricity or any other use not specified herein.

2.17. "Importer" means any person receiving sewage sludge from any source whatsoever for the purpose of processing.

2.18. "Incineration technologies" means any technology that uses controlled flame combustion to thermally break down solid waste, including refuse-derived fuel, to an ash residue that contains little or no combustible materials, regardless of whether the purpose is processing, disposal, electric or steam generation or any other method by which solid waste is incinerated.

2.19. "Incinerator" means an enclosed device using controlled flame combustion to thermally break down solid waste, including refuse-derived fuel, to an ash residue that contains little or no combustible materials.

2.20. "Landfill" means any solid waste facility for the disposal of solid waste on land. Such facility is situated, for purposes of W. Va. Code §20-5F, in the county where the majority of the spatial area of such facility is located.

2.21. "Materials recovery facility" means any solid waste facility at which source-separated materials or materials recovered through a mixed waste processing facility are manually or mechanically shredded or separated for purposes of reuse and recycling, but does not include a composting facility.

2.22. "Mixed solid waste" means solid waste from which materials sought to be reused or recycled have not been source-separated from general solid waste.

2.23. "Mixed waste processing facility" means any solid waste facility at which materials are recovered from mixed solid waste through manual or mechanical means for purposes of reuse, recycling or composting.

2.24. "Municipal solid waste incineration" means the burning of any solid waste collected by any municipal or residential solid waste disposal company.

2.25. "Open dump" means any solid waste disposal which does not have a permit under W. Va. Code §20-5F, or is in violation of state law, or where solid waste is disposed in a manner that does not protect the environment.

2.26. "Person" or "persons" mean any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; state of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; industry; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any legal entity whatever.

2.27. "Producer" means any person producing sewage sludge at a publicly owned treatment works (POTW).

2.28. "Publicly owned treatment works" or "POTW" means any device or system used in the conveyance and/or treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality as defined by section 502 (4) of the Clean Water Act, any other treatment works treating domestic sewage (TWTDS), or wastewater treatment device or system, regardless of ownership (including federal facilities) used in the storage, treatment, recycling and reclamation of municipal or domestic sewage.

2.29. "Recycling facility" means any solid waste facility for the purpose of recycling at which neither land disposal nor biological, chemical or thermal transformation of solid waste occurs: Provided, That mixed waste recovery facilities, sludge processing facilities and composting facilities are not considered recycling facilities nor considered to be reusing or recycling solid waste within the meaning of W. Va. Code §§20-9 and 11.

2.30. "Representative sample" means a sample collected from a population or whole that exhibits the average or typical properties of the larger population or whole.

2.31. "Sewage sludge" means solid, semi-solid or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes, but is not limited to, domestic septage, scum or solids removed in primary, secondary or advanced wastewater treatment processes and a material derived from sewage sludge. Sewage sludge does not include ash generated during the firing of sewage sludge in a sewage sludge incinerator.

2.32. "Sewage sludge processing facility" is a solid waste facility that processes sewage sludge for land application, incineration or disposal at an approved landfill. Such processes include, but are not limited to, composting, lime stabilization, thermophilic digestion and anaerobic digestion.

2.33. "Sludge" means any solid, semisolid, residue or precipitate, separated from or created by a municipal, commercial or industrial waste treatment plant, water supply treatment plant or air pollution control facility or any other such waste having similar origin.

2.34. "Solid waste" means any garbage, paper, litter, refuse, cans, bottles, waste processed for the express purpose of incineration; sludge from a waste treatment plant, water supply treatment plant or air pollution control facility; and other discarded materials, including offensive or unsightly matter, solid, liquid, semisolid or contained liquid or gaseous material resulting from industrial, commercial, mining or community activities but does not include solid or dissolved material in sewage or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources and have permits under W. Va. Code §20-5A, or source, special nuclear or by-product material considered by federal standards to be below regulatory concern, or a hazardous waste either identified or listed under W. Va. Code §20-5E, or refuse, slurry, overburden or other wastes or material resulting from coal-fired electric power or steam generation, the exploration, development, production, storage and recovery of coal, oil, and gas and other mineral resources placed or disposed of at a facility which is regulated under W. Va. Code §22, 22A, or 22B, so long as such placement or disposal is in conformance with a permit issued pursuant to such chapters.

2.35. "Solid waste disposal" means the practice of disposing of solid waste including placing, depositing, dumping or throwing or causing to be placed, deposited, dumped or thrown any solid waste.

2.36. "Solid waste disposal shed" means the geographical area which the solid waste management board designates and files in the state register pursuant to W. Va. Code §16-26-8.

2.37. "Solid waste facility" means any system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of solid waste, including landfills, transfer stations, materials recovery facilities, mixed waste processing facilities, sewage sludge processing facilities, composting facilities and other such facilities not herein specified but not including land upon which sewage sludge is applied in accordance with W. Va. Code §20-5F-2b. Such facility shall be deemed to be situated, for purposes of this rule, in the county where the majority of the spatial area of such facility is located: Provided, That a salvage yard licensed and regulated pursuant to the terms of W. Va. Code §17-23, is not a solid waste facility.

2.38. "Source separated materials" means materials separated from general solid waste at the point of origin for the purpose of reuse and recycling but does not mean sewage sludge.

2.39. "Source separated organic waste" means readily degradable organic material such as food waste, yard waste and wood waste, except pressure-treated wood waste, which is collected separately from the mixed solid waste stream. It does not include sewage sludge or domestic septage.

2.40. "Stabilization" means the decomposition of organic material to the point where it neither reheats when wetted nor gives off offensive odors and does not include pathogens, toxins or vectors in excess of the provisions of 40 CFR 503.

§47-38D-3. STANDARDS FOR USE, DISPOSAL AND PROCESSING OF SEWAGE SLUDGE.

3.1. Incorporation of Federal Regulations. -- Federal regulations, 40 CFR 503, excluding sections 503.10(b)(1) and 503.20 through 503.29 inclusive, in effect on the effective date of this rule, are hereby fully incorporated and implemented as a part of these sewage sludge management regulations promulgated under the authority of W. Va. Code §20-5F-2b. Provided, That in instances where similar provisions exist, the more stringent requirement (state or federal) shall apply.

3.2. Sewage Sludge Land Application Siting Restrictions and Location Standards.

3.2.1. Sludge will not be applied to land that meets any of the following conditions:

3.2.1.a. Land that is frozen, snow-covered, or known to be flooded on a regular basis unless the applicant can demonstrate to the Director that the land application will not cause runoff into streams or wetlands.

3.2.1.b. Land within 50 feet of surface water to include streams, springs, ponds, wetlands, or other collection points for surface water.

3.2.1.c. Land within 200 feet of drinking water supply wells or other personal water supply.

3.2.1.d. Land within 200 feet of an occupied dwelling.

3.2.1.e. Land within 50 feet of a federal or state highway.

3.2.1.f. Land within 100 feet of an adjacent property owner's property line.

3.2.1.g. Land from which drainage leads into a sinkhole.

3.2.1.h. Land that has been tested and determined to have a pH of less than 6.2, unless the pH is adjusted to 6.2 or greater.

3.2.1.i. Land that has a slope greater than fifteen percent (15%).

3.2.1.j. Land that has a seasonal high groundwater table less than 2 feet from the surface.

3.2.1.k. Land that has less than 6 inches of soil over bedrock or an impervious pan.

3.2.1.l. Land containing soil with surface permeability of less than 0.6 inches/hour or greater than 6 inches/hour.

3.2.2. No person or entity shall be allowed to apply sewage sludge to land in a manner that will result in exceeding the maximum soil concentration for all pollutants, including, but not limited to, arsenic, cadmium, chromium, copper, lead, mercury, molybdenum, nickel, selenium and zinc, to be determined based upon cumulative loading rates of 40 CFR 503.13(b)(2), Table 2 of this rule, and soil testing requirements of this rule.

3.2.3. No land, except a solid waste facility, shall be allowed to accept or store so much sewage sludge as to exceed the agronomic rate or a rate of fifteen dry tons per acre per year, whichever is less: Provided, That up to twenty-five dry tons per acre per year may be applied in the reclamation of surface mine land.

3.2.4. No person shall be allowed to store sewage sludge at a land application site for a period longer than one week; except, storage shall be allowed for no longer than three months where provisions, approved by the Chief of the Office of Water Resources of the Division, have been made to prevent leachate runoff into surface or groundwater. Septage storage shall only be allowed in-tank and for no more than three days, or as otherwise authorized by the Chief of the Office of Water Resources of the Division.

3.2.5. No person shall be allowed to land apply sludge except during the hours of daylight.

3.3. Sewage Sludge Processing Facility Operational and Design Requirements.

3.3.1. Sewage sludge processing facilities must adhere to the following requirements:

3.3.1.a. Areas used for processing, curing and storage of raw materials, intermediate and final products, loading and unloading areas, impoundments, pipelines, ditches, pumps and drums, sumps and tanks, must be designed, constructed and operated to prevent release of contaminants to the groundwater and surface water. Storage of finished products from the facility shall be limited to one year.

3.3.1.b. The facility must be designed and operated to control vectors and odors.

3.3.1.c. The facility must not be operated or constructed within the one hundred year flood plain unless provisions have been made to prevent the encroachment of flood waters upon the facility.

3.3.1.d. All land areas within the boundaries of a sewage sludge processing facility upon which sewage sludge, intermediate or final products come in direct contact with the land surface must be protected in accordance with the Groundwater Protection Act, W. Va. Code §20-5M, and the rules promulgated thereunder.

3.4. Leachate Management Requirements.

3.4.1. Any liquid which comes in contact with sewage sludge at a sewage sludge processing facility must be handled as leachate and is subject to the requirements of W. Va. Code §§20-5A and 5M, and the rules promulgated thereunder.

3.5. Storm Water Requirements.

3.5.1. Storm water drainage must be directed around and away from the operating area. All storm water must be collected and discharged in compliance with State Water Quality Standards and the permit issued by the Office of Water Resources of the Division.

3.6. Landfill Disposal of Sewage Sludge. -- Sewage sludge disposed at a landfill shall contain at least twenty percent (20%) solids by weight. This requirement may be met by adding or blending sand, sawdust, lime, or soil. Alternative sludge disposal methods can be utilized upon obtaining prior written approval from the Chief.

3.6.1. Sewage sludge may not represent more than twenty-five percent (25%) by weight of the total weight of waste disposed of at the landfill on any working day.

§47-38D-4. PERMITS REQUIRED.

4.1. Applicability.

4.1.1. No person may construct or operate a sewage sludge processing facility (including mixed waste composting facilities which utilize sewage sludge) or a commercial solid waste facility which processes or handles sewage sludge or materials derived from sewage sludge without first obtaining a solid waste facility permit. Provided, That land upon which sewage sludge is applied, is not a solid waste facility.

4.1.2. On and after the effective date of this rule, all permitted facilities, whose methods of operation are not currently in compliance with this rule, shall submit an application to modify such permits.

4.1.3. No person may land apply sewage sludge without first obtaining a land application permit; Provided, That land application permit requirements may be incorporated into a modification of a facility's WV/NPDES permit required under W. Va. Code §20-5A.

4.1.4. For those publicly owned treatment works (POTW's) which produce sewage sludge and are regulated by the Division pursuant to an WV/NPDES permit required under W. Va. Code §20-5A, a sewage sludge processing facility modification will be obtained by the applicant as a part of the existing WV/NPDES permit and shall include a sewage sludge management plan approved by the Chief of the Office of Water Resources of the Division.

4.1.5. Facilities which are surface disposal sites as defined in 40 CFR 503, Subpart C, are hereby defined as "landfills" and must meet all requirements of 47 CSR 38 applicable to landfills.

4.1.6. Permits applied for under paragraph 4.1.1 of this rule, shall be subject to the provisions of 47 CSR 38, section 3 (excluding the provisions for Liner Requirements) and the closure requirements of 47 CSR 38, section 6.

4.1.7. Permits issued under paragraph 4.1.4 of this rule, shall be subject to the permit issuance procedures, procedures for permit modifications, suspension and revocation, procedures for transfer of permits, and the procedures for permit appeals of 46 CSR 2 and are not subject to the procedures outlined in paragraphs 4.1.5, 4.1.6 and 4.1.8 of this rule.

4.1.8. Permits issued under paragraph 4.1.5 of this rule, shall be subject to the procedures of 47 CSR 38, section 3 and the closure requirements of 47 CSR 38, section 6.

4.1.9. Permits issued under paragraph 4.1.3 of this rule, except for land application modifications made in WV/NPDES permits under paragraph 4.1.4 of this rule, shall be subject to the permit issuance procedures (subsections 3.17 through 3.29 inclusive) of 47 CSR 38, and are not subject to the procedures outlined in paragraphs 4.1.5, 4.1.6 and 4.1.8 of this rule.

4.2. General, Processing Facility, and Land Application Permit Requirements. -- Persons required to obtain a permit pursuant to this rule must provide the following information, in the form and manner prescribed by the Chief of the Office of Waste Management or the Office of Water Resources of the Division as appropriate. The form may require information in addition to that required by this subsection.

4.2.1. Permit Application General Requirements. -- All applicants must provide the following information:

4.2.1.a. The name, address, and location of the facility;

4.2.1.b. A description of the activities conducted or to be conducted by the applicant;

4.2.1.c. The operator's and owner's name, address, telephone number, ownership status, and status as a federal, state, private, public or other entity;

4.2.1.d. Other environmental permits issued by any local, state or federal agency;

4.2.1.e. A description of the specific source(s) of sewage sludge;

4.2.1.f. The amount of sewage sludge actually generated or imported;

4.2.1.g. The content of heavy metals, pathogens, toxins or vectors, and moisture (percent solids) present in the sewage sludge;

4.2.1.h. Each location that the sewage sludge is stored, land applied or otherwise disposed of; the amount so stored, land applied or otherwise disposed of; and the capacity of that location to accept sewage sludge;

4.2.1.i. Information relative to the quality of the sewage sludge(s) or product(s) derived from sewage sludge as required by 40 CFR 503; and

4.2.1.j. A detailed design and a description of the method to collect and control leachate and surface water runoff, including the method for treatment and disposal of leachate generated.

4.2.2. Sewage Sludge Processing Facility Permit Requirements. -- All applicants for permits for sewage sludge processing facilities, except facilities located at the site where sewage sludge is generated, must submit the following additional information:

4.2.2.a. An engineering report to construct must contain, at a minimum, the following:

4.2.2.a.A. A regional map, or maps, (of appropriate scale) that delineate the entire service area of the proposed facility (both existing and proposed); existing and proposed collection, processing, and disposal operations; the location of the closest population centers; and the transportation systems including highways, airports, railways and waterways;

4.2.2.a.B. A vicinity map (minimum scale of 1"=2000') that delineates the area within one mile of the facility boundaries, zoning and land use, residences, surface waters, access roads, bridges, railroads, airports, historic sites, and other existing and proposed man-made or natural features relating to the project;

4.2.2.a.C. A site plan (minimum scale of 1"=200' with five foot contour intervals) that delineates property boundaries, the location of existing and proposed soil boring, monitoring wells, buildings and appurtenances, fences, gates, roads, parking areas, drainage, culverts, storage facilities or areas, loading areas; existing and proposed elevation contours and direction of prevailing winds; and the location of residences, potable wells, surface water bodies, and drainage swales located within the site and in the site plan area; and

4.2.2.a.D. A map indicating wetlands and flood plains within 1,000 feet of the site, if any.

4.2.2.b. A description of the operation of the facility, detailed engineering plans and specifications for the entire facility, must be submitted by the applicant including at a minimum:

4.2.2.b.A. A schedule of operation, including the days and hours that the facility will be open, preparations before opening, and procedures followed after closing for the day;

4.2.2.b.B. Anticipated daily traffic flow to and from the facility, including the number of trips by private or public collection vehicles, and the quantity of material contained in each vehicle;

4.2.2.b.C. The procedure for unloading trucks (including frequency, rate, and method);

4.2.2.b.D. Special precautions or procedures for operation during wind, heavy rain, snow, and freezing conditions;

4.2.2.b.E. A description of the ultimate use for the finished compost or other product, method for removal from the site, and a plan for use or disposal of those finished products that cannot be used in the expected manner due to poor quality or change in market conditions;

4.2.2.b.F. A (description) copy of the label or other information source, by the distributor, that outlines the type of waste the compost product was derived from, a list of any restrictions on use, and recommended safe uses and application rates;

4.2.2.b.G. Identification of the personnel required to operate and maintain the facility and their job descriptions/responsibilities;

4.2.2.b.H. A detailed description of the source, and anticipated quality, and quantity of any bulking agent to be used in the process; and

4.2.2.b.I. A detailed description of the quantity, quality and specific source of the sewage sludge received or anticipated to be received.

4.2.2.c. The permit application must contain an operating engineering report which must include, at a minimum, the following:

4.2.2.c.A. Detailed engineering plans and specifications for the entire sewage sludge processing facility, including manufacturer's performance data for the selected equipment;

4.2.2.c.B. Contingency plans detailing corrective (or remedial) action to be taken in the event of equipment breakdown; air pollution (odors); unacceptable waste delivered to the facility; groundwater contamination; spills; and undesirable conditions such as fires, dust, noise, vectors, lack of a market for the compost product and unusual traffic conditions; and

4.2.2.c.C. An Operation and Maintenance manual. -- The manual must contain general design information, detailed operational information and instructions. In addition, the manual must list the specific procedures used or to be used in monitoring, sampling and analyzing sewage sludge and the finished product, and record keeping requirements.

4.2.2.d. A description of the design of the facility, including:

4.2.2.d.A. The type, size, and associated detention times of equipment used in the handling, processing, and storage of sewage sludge;

4.2.2.d.B. The method of measuring, shredding, mixing, and proportioning input materials;

4.2.2.d.C. A description and sizing of the storage facilities for amendment, bulking agent, and finished product;

4.2.2.d.D. The separation, processing, storage, and ultimate disposal of materials that cannot be composted, if applicable;

4.2.2.d.E. The location of all temperature and any other type of monitoring points, and the frequency of monitoring;

4.2.2.d.F. A process flow diagram of the entire process, including all major equipment and flow streams. The flow streams must indicate the quantity of material on a wet weight, dry weight, and volumetric basis;

4.2.2.d.G. The aeration capacity of the system;

4.2.2.d.H. The method of supplying and regulating airflow;

4.2.2.d.I. The expected mass balance through the composting system;

4.2.2.d.J. A description of how the (temperature) monitoring equipment will ensure that facility qualifies as a process to further reduce pathogens, toxins, heavy metals and/or vectors;

4.2.2.d.K. If applicable, a description of the air emission collection and control technologies;

4.2.3. Land Application Permit Requirements. -- Persons performing land application of sewage sludge or materials derived from sewage sludge must submit the following information to the Chief of the Office of Water Resources of the Division in addition to that required under paragraph 4.2.1. of this rule:

4.2.3.a. Soil analysis for all land application sites including but not limited to pH; potassium, phosphorus, nitrogen, all metals listed in Table 1 of this rule and any additional chemical analysis required by the Director;

4.2.3.b. Information relative to the nitrogen content of the sludge(s) or product(s) derived from sewage sludge to be land applied;

4.2.3.c. A soils map with application sites clearly defined;

4.2.3.d. An agreement between the preparer of sewage sludge(s) or material(s) derived from sewage sludge, the applier, and the owner of the land application site indicating each party's concurrence with the application, and certifying that each will comply with applicable requirements of 40 CFR 503 and this rule;

4.2.3.e. A description of existing and future uses of the land application site;

4.2.3.f. Information relative to past application(s) of sewage sludge or material(s) derived from sewage sludge as necessary to comply with 40 CFR 503.12, and this rule;

4.2.3.g. Information relative to past fertilizer applications to the site;

4.2.3.h. In addition to the chemical analyses required in paragraph 4.2.1 of this rule, any additional chemical analyses of sewage sludge(s) or material(s) derived from sewage sludge, requested by the Chief of the Office of Water Resources of the Division, including, but not limited to sodium, chloride, fluoride, calcium and sulfates;

- 4.2.3.i. A description of the methods to be used for land application;
- 4.2.3.j. A description of the methods for transportation of sludge to the site;
- 4.2.3.k. For sewage sludge or material derived from sewage sludge, which has been imported, a copy of the POTW's NPDES permit;
- 4.2.3.l. For sewage sludge or material derived from sewage sludge, which has been imported, information relative to the significant industrial users of the POTW from which the sludge or material originated;
- 4.2.3.m. For sewage sludge or material derived from sewage sludge, which has been imported, a description of the methods by which pathogen control and vector attraction reduction are being achieved; and
- 4.2.3.n. A description of the methods to be utilized to adjust and maintain the soil to a minimum pH of 6.2 for at least 5 years from the date of application.

§47-38D-5. GENERAL, PROCESSING FACILITY, AND LAND APPLICATION PERMIT REQUIREMENTS.

5.1. Permit General Requirements. -- All permits issued pursuant to this rule shall contain the following:

5.1.1. Any requirement of 40 CFR 503, including but not limited to:

5.1.1.a. Limitations on the concentrations of pollutants (heavy metals), toxins, vectors and pathogens in the sewage sludge or sewage sludge products;

5.1.1.b. Requirements relative to monitoring sewage sludge and sewage sludge product quality and reporting the results of those analyses for pH, percent solids, organic nitrogen, potassium, phosphorus, calcium, magnesium, total nitrogen, ammonia nitrogen, pathogen test results vector attraction verification and all heavy metals listed in Table 1 of this rule, except that the frequency of monitoring shall be as described in Appendix A of this rule;

5.1.1.c. Requirements relative to reporting and certification;

5.1.1.d. Requirement to pay fees as identified in section 6 of this rule;

5.1.1.e. Requirements for the proper collection, control and disposal of leachate and stormwater runoff for the protection of ground and surface waters;

5.1.1.f. Requirements to retain records for the facility for a minimum of five years;

5.1.1.g. Requirements to monitor and report monthly to the Division the quantity of sewage sludge produced or imported and the specific source of the sewage sludge produced or imported;

5.1.1.h. Requirements not to exceed a commercial solid waste facility's tonnage limits, where applicable;

5.1.1.i. Requirements to provide copies of monthly reports to the county or regional solid waste authority in which the facility or land application site(s) is located;

5.1.1.j. Any other requirements, including additional monitoring, determined to be necessary by the Director to insure compliance with state and federal regulations;

5.2. Processing Facility Permit Requirements. -- In addition to the requirements of subsection 5.1 of this rule, any solid waste facility permit issued to a sewage sludge processing facility, pursuant to the sewage sludge regulations, must contain the following:

5.2.1. Operational requirements relative to pathogen control in accordance with 40 CFR 503.32 and its Appendix B;

5.2.2. Operational requirements relative to vector attraction reduction in accordance with 40 CFR 503.33;

5.2.3. Requirements to routinely monitor and report information relative to the quality of raw materials used in the sewage sludge processing facility including but not limited to: sewage sludge, bulking agents, and kiln dust, except that the frequency of monitoring shall be as described in Appendix A of this rule;

5.2.4. Limitations for the pollutant concentrations of the end product of the sewage sludge processing facility;

5.2.5. Labeling requirements as per 40 CFR 503.14(e), if applicable;

5.2.6. Requirements for the implementation of practices to prevent the contamination of ground and surface waters, including liners if necessary; and

5.2.7. For commercial sewage sludge processing facilities, requirements for reporting in accordance with subsection 4.12 of the Solid Waste Management Regulations (47 CSR 38).

5.3. Land Application Permit Requirements. -- In addition to the requirements of subsection 5.1 of this rule, any land application permit issued pursuant to the sewage sludge regulations shall contain the following:

5.3.1. Requirements delineating the sites for which land application is approved;

5.3.2. Limitations on the maximum amount of sewage sludge allowed to be land applied;

5.3.3. Requirements implementing the siting restrictions and location standards of subsection 3.2 of this rule;

5.3.4. Requirements limiting the types of crops that may be grown on land used for application of sewage sludge and the time between application of sewage sludge and the harvesting of crops, in accordance with 40 CFR 503.32(b);

5.3.5. Restrictions on animal grazing and public access, in accordance with 40 CFR 503.32(b); and

5.3.6. Applicable vector attraction reduction requirements of 40 CFR 503.33.

§47-38D-6. FEE AND BONDING REQUIREMENTS.

6.1. Applicability. -- Any producer or importer of sewage sludge for land application shall be subject to non-refundable fees, as described herein, which shall be used to cover the costs of the sewage sludge management program. The fees established herein in paragraphs 6.4.1 and 6.4.2 of this rule shall be assessed on forms prescribed by the Chief of the Office of Water Resources of the Division and shall be paid to said Chief quarterly.

6.2. Water Quality Management Fund. -- Fees collected for land application shall be deposited in the special revenue fund designated the "Water Quality Management Fund" established under the provisions of W. Va. Code §20-5A-6a except as otherwise specified herein.

6.3. Bonding. -- The Director may require a surety bond, deposit or similar instrument in an amount sufficient to cover the cost of future environmental remediation from producers and importers of sewage sludge.

6.4. Fee Assessments.

6.4.1. Producers and importers of sewage sludge or material derived from sewage sludge for land application shall be assessed a sewage sludge management program fee of \$2.00 per ton for sludge with maximum metals concentrations not exceeding those listed in Table 1 of this rule.

6.4.2. Producers and importers of sewage sludge or material derived from sewage sludge for land application shall be assessed a sewage sludge management program fee of \$3.00 per ton for sludge with maximum metals concentrations exceeding those listed in Table 1 of this rule, but not exceeding the maximum metals concentrations contained in Table 2 of this rule.

6.4.3. All sewage sludge placed in, or upon, or used by a solid waste facility or processed or handled, pursuant to a permit issued by the Division, shall be subject to the same tipping and other fees as levied on the disposal of solid waste under W. Va. Code §20; Provided, That no such fees, excepting assessment fees required by this section, shall be levied upon the application of sewage sludge to land outside a solid waste facility in accordance with the statute and this rule.

APPENDIX A

FREQUENCY OF MONITORING

<u>AMOUNT OF SEWAGE SLUDGE RECEIVED</u> <u>(actual tons per 365 day period)</u>	<u>FREQUENCY</u> <u>OF MONITORING</u>
Greater than zero but less than 290	once every 6 months
Equal to or greater than 290 but less than 1,500	once per quarter (4 times per year)
Equal to or greater than 1,500 but less 15,000	once per month (12 times per year)
Equal to or greater than 15,000	once per week

TABLE 1

POLLUTANT CONCENTRATION OF METALS IN SEWAGE SLUDGE

Metal	Concentration (mg/kg)
Arsenic	41
Cadmium	25
Chromium	1000
Copper	1000
Lead	300
Mercury	15
Molybdenum	18
Nickel	200
Selenium	36
Zinc	2500

TABLE 2

MAXIMUM CONCENTRATION OF METALS IN SEWAGE SLUDGE
FOR LAND APPLICATION

Metal	Concentration (mg/kg)
Arsenic	75
Cadmium	85
Chromium	3000
Copper	4300
Lead	840
Mercury	57
Molybdenum	75
Nickel	420
Selenium	100
Zinc	7500



KEN HECHLER
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Deputy Secretary of State
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Deputy Secretary of State
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STATE OF WEST VIRGINIA
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WILLIAM H. HARRINGTON
Chief of Staff
JUDY COOPER
Director, Administrative Services
DONALD R. WALKER
Director, Corporations
(Plus all the volume
help we can give)
FAX (304) 555-6000

August 11, 1993

David G. Callaghan, Director
Division of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143-2506

Dear Mr. Callaghan

On July 8, 1993, I received the proposed emergency rule you filed, Title 47, Series 38D, "Sewage Sludge Management Regulations." Under Chapter 29A of the West Virginia Code, I have 35 days to review your proposed rule to decide whether it should be approved or disapproved. I must disapprove a rule if I determine any one of the following: 1) there is no emergency, 2) the rule was not promulgated in compliance with the Administrative Procedures Act or 3) "the agency has exceeded the scope of its statutory authority in promulgating the emergency rule." W. Va. Code, §29A-3-15a. The statute also authorizes me to conduct a further investigation if the information provided by the agency is insufficient to allow a proper determination, including requiring the agency or other interested parties to submit additional information or comment. W. Va. Code, §29A-3-15a.

Although the first two criteria are satisfied, I need additional information to reach a determination about whether the Division of Environmental Protection is exceeding the scope of its statutory authority. I am reviewing your proposed emergency rule very carefully. Not only have I received many public comments opposing it, but the Legislative Rule-Making Review Committee sent me a letter recommending that I disapprove your proposed emergency rule.

Therefore, I ask that you respond to the following concerns that suggest that the Division is exceeding the scope of its statutory authority. In the interest of time, I am briefly describing these concerns here. Attached are public comments that I received which describe in greater detail the basis of the concern.

0-5F-2b(b)(6)
20-5F-2
(FF)

1. At 3.1. of the proposed emergency rule, on page 6, the rule incorporates 40 CFR 503 by reference and it is incorporated throughout the rule, thereafter. Is the substance of "Federal 503" authorized by W. Va. Code, §20-5F-2b and compatible with it? Please provide me with a copy of 40 CFR 503 or the portion of it that is being incorporated by reference.
2. At 3.2.3. of the proposed emergency rule, on page 7, the rule exempts solid waste ~~authorities~~, whereas, §20-5F-2b(e) explicitly includes solid waste ~~authorities~~ *facilities*.
3. At 6.3. of the proposed emergency rule, on page 16, the fees are applied to "dry" tons of sewage sludge. Does this mean that fees will not

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be assessed for "wet" sewage sludge? The statute does not allow for such an exception.

4. Again, at 6.3., the rule assesses fees on sewage sludge intended for land application. This language appears to create a loophole because fees are assessed at the time of delivery to a solid waste facility. It is possible that some sewage sludge that is applied to land may not have been intended for land application at the time of delivery. Whereas, §20-5F-2b requires that certain fees be assessed for all land application of sewage sludge.

5. At 6.3.3. of the proposed emergency rule, on page 16, please clarify the meaning of that provision. It appears to apply only one of the fees assessed by Chapter 20, whereas, §20-5F-2(b)(e) requires that all the fees assessed by Chapter 20 must be applied to any sewage sludge that is subject to its provisions.

6. Finally, as a general concern, will the rule permit any grandfathering of existing solid waste facilities? §20-5F-2(b) applies to the operations of all licensed solid waste facilities, including those that are currently licensed. Please explain how the rule ensures that all currently licensed solid waste facilities will comply with §20-5F-2(b), particularly the reporting requirements that are contained in 4.2.1., 4.2.2. and 5.1.1. since these appear to apply only to new applicants for permits.

I look forward to receiving your response to these concerns.

Sincerely,
Ken Hechler
Ken Hechler
Secretary of State

Attachments

letter to withdraw & resubmit
asap.

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

10 McJunkin Road
Nitro, WV 25143-2506
October 12, 1993

Gaston Caperton
Governor
John M. Ranson
Cabinet Secretary

David C. Callaghan
Director
Ann A. Spaner
Deputy Director

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, WV 25305-0770

Dear Mr. Hechler:

On July 8, 1993, the Division of Environmental Protection filed proposed emergency regulations, Title 47, Series 38D, "Sewage Sludge Management Regulations," with your office. On August 11, 1993, I received your letter questioning whether the agency had exceeded its statutory authority in certain areas. The issues were delineated in your correspondence. The agency felt it would be appropriate to take adequate time to review your concerns prior to developing a response. We therefore withdrew the proposed rule and have modified it for a formal resubmittal as an emergency rule. We intend to submit the modified version to the Legislative Rule-Making Committee at the appropriate time.

The revised submission has been modified to reflect not only your concerns but issues which the agency has since been informed are necessary for potential assumption of the federal program. In addition, changes were made to conform this rule to the relevant portions of an opinion we received from the Attorney General's office on September 10, 1993. The following discussion will summarize the concerns expressed in your letter, provide an explanation of the agency's position and describe revisions made to the regulations:

1. Compatibility of 40 CFR 503, the federal regulations, with the proposed rule.

40 CFR 503 encompasses all forms of sewage sludge disposal and, subsequent to its promulgation in November of 1992, represents the minimum requirements to be imposed on all producers in the nation. At 3.1 of the regulations, the agency excluded certain provisions of 40 CFR 503 which did not adequately address the intent of the West Virginia statute (S.B. 288). The current modification recognizes that the statutory intent was to be more restrictive in some instances than 40 CFR 503. The proposed rule now includes language which requires that the more stringent provisions of each regulation applies.

The agency has been involved in negotiations with the U.S. Environmental Protection Agency on the possibility of assuming primacy for the federal program. This would prevent dual permitting and possible conflicting requirements for sewage sludge disposal in the state. During negotiations, EPA suggested that a definition be included for Treatment Works Treating Domestic Sewage (TWTDS) in order to address sewage sludge from all domestic sludge generated by NPDES permitted facilities not just Publicly Owned Treatment Works (POTW's). In response, the definition of publicly owned treatment works has been modified at 2.28.

2. Exemption for solid waste authorities.

Apparently there is a misunderstanding of this section of the regulations. 3.2.3 is taken verbatim from the statute at Chapter 20-5F-2b(b)(7) and addresses "facilities" not "authorities".

3. "Wet" versus "dry" ton for the assessment of land application fees.

The agency attempted to develop a fee assessment strategy which would provide adequate support for the sewage sludge management program from fees generated by the producers and importers. Initially the agency attempted to assess the fee against actual tons (wet) but encountered strong opposition from the municipal facilities which would be forced to pay significant fees for land application. The revised fee for "dry" tons was an attempt to provide some relief to those facilities. In either event, the fee to be imposed is a land application fee, and is not intended to replace nor circumvent any fees which currently exist under solid waste laws. The agency now assesses the fee on an actual per ton basis.

4. Use of the word "intended" at 6.3 of the proposed regulations.

The fees described in Section 6 of the regulation of the regulations are exclusively land application fees. The word intended has been removed to prevent confusion.

5. Confusion as to the applicability of Chapter 20 fees.

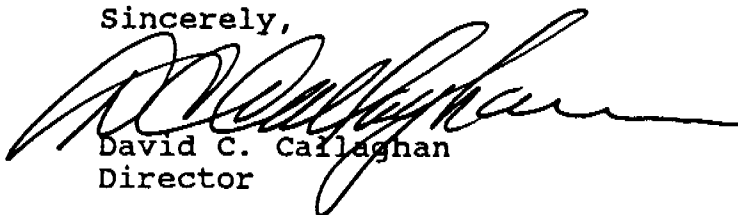
The language of 6.3.3 has been modified in new Section 6.4.3 to resolve any confusion.

6. Grandfathering of existing solid waste facilities.

This rule will apply to all existing solid waste facilities permitted and operating and all reporting requirements, plus every other requirement of this regulation will become effective and enforceable upon emergency promulgation. Section 4.1.2 requires that all existing and permitted facilities come into compliance with this rule.

I hope this addresses the concerns. We hereby respectfully resubmit the "Sewage Sludge Management Regulations" as amended herein, for filing as emergency. Should you have any questions, please do not hesitate to contact this office. Thank you.

Sincerely,



David C. Callaghan
Director

DCC/asb



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

10 McJunkin Road
Nitro, WV 25143-2506

August 18, 1993

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

The Honorable Darrell V. McGraw, Jr.
Attorney General
Building 1, Room 226
Charleston, West Virginia 25305

Dear General McGraw:

I am writing to request an Attorney General's opinion interpreting the meaning of Senate Bill 288 from the 1993 legislative session, and the newly-enacted code section 20-5F-2b, dealing with sludge management. The bill is attached as Appendix A. Specifically, §2b(e) states a number of requirements for assessment of solid waste fees, as well as inclusions in a facility's total tonnage. This opinion request focuses on the tonnage issues.

In light of our understanding of the legislative intent of S.B. 288, despite the questions we believe exist as to how some of the bill's language is fairly construed, pending receipt of your advice, DEP will count the amount of sludge received by a solid waste facility toward that facility's monthly tonnage cap. Due to the nature of the sludge composting process, we intend to measure the sludge on a dry weight basis, again pending receipt of your opinion.

Subsection (e) of §20-5F-2b reads as follows:

- (e) All sewage sludge placed in, or upon, or used by a solid waste facility or processed or handled, pursuant to a permit issued by the division of environmental protection, shall be subject to the same tipping and other fees levied by this chapter on the disposal of solid waste and shall be included in said facility's total tonnage, subject to the limitations established in this article and the provisions of article nine of this chapter: Provided, That no land within a solid waste facility, but outside a landfill disposal cell, be allowed to accept the permanent application of so much sewage sludge as to exceed the agronomic rate or a rate of fifteen dry tons per acre per year, whichever is less: provided however, That no such fees, excepting assessment fees provided for in subdivision (12), subsection (b) of this section shall be levied upon the application of

The Honorable Carroll W. McGraw, Jr.
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sewage sludge to land outside a solid waste facility in accordance with this section. (emphasis added)

The key language of the subsection provides:

All sewage sludge placed in, or upon, or used by a solid waste facility or processed or handled, pursuant to a permit issued by [DEP]. . . shall be included in said facility's total tonnage, subject to the limitations established in this article and in the provisions of article nine of this chapter. . . .

This is the specific language of which we request your interpretation.

Heretofore, under state solid waste law, a "facility's total tonnage" has been the number of tons reflected on the face page of the facility's permit as the maximum allowable monthly tonnage for disposal in the landfill. The limitations on tonnage established in article 5F of Chapter twenty appear at §§20-5F-4c and 20-5F-4d. The relevant provisions of article nine appear at §§20-9-12a, 20-9-12b, 20-9-12c, 20-9-12d, 20-9-12e and 20-9-12f. In the fall of 1991 the Legislature enacted a bill to limit the size of landfills by establishing a monthly tonnage cap of 30,000 tons for Class A landfills. The purpose of the tonnage caps is to classify landfills and maintain adequate disposal capacities. There are nine classes established by regulation, three of which have tonnage limits. The relevant regulatory definitions are attached as Appendix A.

We note that certain other provisions of S.B. 288 may be relevant to your interpretation of the section in question. There are a number of new or revised definitions appearing in §20-5F-2, including: "commercial solid waste facility", "sludge", "solid waste facility", "Class A facility", "sewage sludge processing facility", "composting facility" and "sewage sludge", as well as the new requirement that composting or sewage sludge processing facilities obtain separate DEP permits, which appear at §20-5F-2b(d).

Where both a landfill and a composting or sewage sludge processing facility operate on the same site, are they two separate facilities? Further, if there are two separate permitted facilities, are their tonnages combined or separate? Does each "solid waste facility," as defined at §20-5A-2(o), have a total tonnage limit? What total tonnage limit applies to an operation currently permitted as a single facility which, under the new definitions, appear to constitute two or more "solid waste facilities" on the same site, such as a landfill and a composting facility?

The Honorable Darrell V. McGraw, Jr.
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August 18, 1993

The maximum monthly tonnage figure in a facility's permit reflects the allowable maximum monthly tonnage for that facility as requested by the applicant and approved by the PSC, the local solid waste authority, the county commission, and DEP. Present law requires approval from these four governmental entities and potential public referenda to increase a landfill's total allowable tonnage. The tonnage so regulated has historically pertained exclusively to the solid waste allowed to be deposited into the landfill disposal cell. This would consist of garbage, trash, municipal solid waste (MSW) and the like. Does S.B. 283 require the DEP to count sewage sludge tonnage together with landfill tonnage, even though the sludge is not disposed of in the landfill?

Another question raised by the bill involves when and how tonnage is measured. When a facility receives MSW, it is weighed on a truck scale going in, and the empty truck is then weighed going out. The difference is the weight disposed of, and its total is included as part of the monthly tonnage. When a facility accepts sewage sludge for processing or composting, the volume of material received is reduced dramatically by processing, primarily through evaporation of the water. It is estimated that 80% of incoming sewage sludge is water. Therefore, with regard to the DEP's duty to count tonnages of sewage sludge placed in, or upon, or used by the solid waste facility, or processed or handled pursuant to a permit issued by DEP, it is important to know which tonnage, wet or dry, is to be "included in said facility's total tonnage" as required by the statute. Should DEP count sewage sludge in total tonnage based on wet or dry weight?

There is a qualitative difference in the destiny of the waste brought into a landfill for disposal, versus the sewage sludge brought in for processing. Simply stated, the trash never leaves, but the compost does. The material derived from the composting process may leave the landfill where it has been processed, it may be applied to land within the permitted area, or it may be used as cover material on the disposal cell (required by Solid Waste Regulation 47 CCR 13 §4.6.2.b, attached as Appendix C). Most commonly, composted sewage sludge is used in land application as a form of fertilizer or soil amendment. Given this factual background, does S.B. 283 require that all incoming sewage sludge be counted toward total tonnage caps? When sludge compost is used at landfills to meet daily cover requirements, should the owner/operator include the cover material in the total allowable tonnage, or is a credit given for "reuse and recycling" as suggested in the statutory and regulatory definitions of "commercial solid waste facility"? (See Appendix A.) Should tonnage credit be granted for compost which is transported for land application outside the solid waste facility in accordance with the statute and regulations? As a matter of policy, DEP currently does not count sludge compost toward landfill tonnage.

The Honorable Darrell V. McGraw, Jr.
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August 18, 1993

In summary, we request an Attorney General's opinion which instructs this agency on how the provisions of §20-5F-2b(e) are to be interpreted and applied.

1. As applied to any existing permitted solid waste facility which has both a landfill and a composting facility:
 - a. Is sewage sludge for composting counted along with solid waste for disposal in the facility's total allowable monthly tonnage?
 - b. Is tonnage to be counted toward monthly maximums on a wet or a dry basis?
 - c. Is all sewage sludge received to be included in total tonnage or can any departing compost or "cover material" be subtracted from the facility's total tonnage?
2. Is each type of solid waste facility enumerated in the statutory definition subject to a separate tonnage cap under the other relevant provisions of the statute and regulations?
3. May this new statute legally alter permit rights retroactively?

Thank you for any direction you can provide in this matter.

Sincerely,

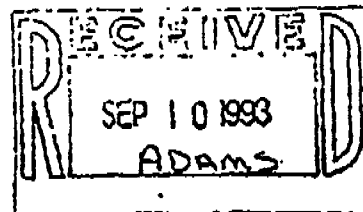


David C. Callaghan
Director

DCC/asb



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25306



DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

(304) 558-2021
FAX (304) 558-0140

September 9, 1993

Director David C. Callaghan
State of West Virginia
Department of Commerce, Labor and Environmental Resources
Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

Dear Director Callaghan:

The Division of Environmental Protection has submitted a request for an opinion to the Office of the Attorney General, dated August 18, 1993, regarding Senate Bill 288, enacted in the 1993 Legislative Session.

The request asks how the provisions of recently enacted SB 288, which inter alia added W. Va. Code § 20-5F-2b(a), are to be interpreted and applied, and specifically asks:

1. As applied to any existing permitted solid waste facility which has both a landfill and composting facility;
 - a. Is sewage sludge for composting counted along with solid waste for disposal in the facility's total allowable monthly tonnage?
 - b. Is tonnage to be counted toward monthly maximums on a wet or a dry basis?
 - c. Is all sewage sludge received to be included in total tonnage or can any departing compost or 'cover material' be subtracted from the facility's total tonnage?
2. Is each type of solid waste facility enumerated in the statutory definition subject to a separate tonnage cap under other relevant provisions of the statute and regulations?
3. May this new statute legally alter permit rights retroactively?

Our short answers to these questions are:

1. a. Yes.

b. There is no statutory basis for using a "dry ton" basis for counting tonnage toward monthly maximums; an actual tonnage basis must be used.

c. All sewage sludge received is to be included in total tonnage, excepting certain disposal fees for departing land-applied sewage sludge.

2. No.

3. The relevant provisions of SB 288 should be applied across-the-board, including to those who were handling sewage sludge prior to the bill's passage and had a "permit" that related to their sludge handling.

Our detailed reasoning and analysis are as follows:

West Virginia's current waste management scheme has been crafted by the Legislature over the past five years, and is found primarily in W. Va. Code §20-5F-1 et seq. and §20-9-1 et seq., and also scattered as needed in related statutes. This opinion will omit specific statutory citations to the numerous provisions of law underlying our initial discussion of the overall statutory scheme, focussing on the ones most germane to the request.

A central and integral principle, purpose, and mechanism of West Virginia's solid waste management scheme is to require and impose a system of approvals, certificates, rules, limitations, fees and classifications - for the purpose of regulating, governing and limiting the tonnage of solid waste materials generated, received, transported, processed, handled and disposed in West Virginia.

Our statutory scheme recognizes the inherently attendant concerns and consequences of large tonnage solid waste operations. These concerns and consequences implicate the fundamental police and parens patriae powers of the State.

They include the environmental and infrastructure consequences of the transportation, handling and/or permanent dumping and storage of large tonnages of waste; their effect on incentives to reduce the generation of solid waste; their effect on capacities to dispose of waste on a long-term regional basis; and upon local and statewide legitimate concerns about what constitutes desirable economic development; and on matters of land use, property values, and community pride.

West Virginia's statutory scheme seeks to create a system of deliberate, rational solid waste management and planning, locally based to the extent possible, emphasizing solid waste reduction, emphasizing the need to meet local and regional needs, and giving to affected local people a voice in considering the utility and desirability of large tonnage solid waste operations.

These foregoing-described legitimate purposes, principles and mechanisms of West Virginia's statutory solid waste management scheme, including tonnage-related classifications and limitations, have been judicially approved and recognized in Wetzel County Solid Waste Authority v. DNR, 401 S.E.2d 227 (W. Va. 1990); and they were extensively, ably and successfully defended by WVDZP, in a recent case in which these purposes, principles and mechanisms were challenged by the West Virginia Landfill Association.

Germane to this opinion, W. Va. Code §20-5f-2(1993) states:

(1) "Solid waste" means any garbage, paper, litter, refuse, cans, bottles, waste processed for the express purpose of incineration; sludge from a waste treatment plant, water supply treatment plant or air pollution control facility; and other discarded materials including offensive or unsightly matter, solid, liquid, semisolid or contained liquid or gaseous material....

(c) "Solid waste facility" means any system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of solid waste, including landfills, transfer stations, materials recovery facilities, mixed waste processing facilities, sewage sludge processing facilities, composting facilities and other such facilities not herein specified, but not including land upon which sewage sludge is applied in accordance with subsection (b), section two-b of this article.

(f) "Commercial solid waste facility" means any solid waste facility which accepts solid waste generated by sources other than the owner or operator of the facility and shall not include an approved solid waste facility owned and operated by a person for the sole purpose of disposing of solid wastes created by that person or such person and other persons on a cost-sharing or nonprofit basis and shall not include land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation and similar applications.

W. Va. Code § 20-5F-2(p) defines a "Class A facility" as one which "handles" an aggregate of between ten to thirty thousand tons

of solid waste per month. W. Va. Code § 20-5F-4c prohibits the operation of any commercial solid waste facility "handling" between ten and thirty thousand tons of solid waste per month without appropriate approvals. W. Va. Code §20-9-12c requires certain approvals for facilities "handling" Class A solid waste tonnage. This is not an exhaustive compilation; the word "handle" is the consistently operative term in the statutes setting forth tonnage-based classifications and limitations.

Title 47, Legislative Rules of the Department of Natural Resources Series 38, defines a Class B solid waste facility as one which "receives or is expected to receive" on average less than ten thousand tons of solid waste per month.

It is apparent from the foregoing that the West Virginia scheme's classifying and regulating by tonnage is (and was prior to the passage of SB 288) based on the tonnage of all solid waste received and/or handled or processed in any fashion. These statutes unambiguously reflect the legislative purpose that all solid waste tonnage received and/or handled in any fashion be included in tonnage calculations.

In the Legislative Session that produced Senate Bill 288, resolutions were passed in both the House of Delegates and the State Senate.

The resolutions stated that "applications and contracts for large scale use of sewage sludge for composting purposes are being considered in a number of counties in the state"; and that "sewage sludge is being accepted at state landfills without payment of landfill tipping fees, without regard to annual tonnage limits placed on landfills and without adequate quality standards and regulations having been established".

The Governor was requested to introduce a bill, which he did, and which ultimately became SB 288.

We are mindful of the opinion request letter's statements of how some sewage sludge was being treated at some solid waste facilities, prior to the enactment of Senate Bill 288. The Senate and House resolutions report similar circumstances.

We have also reviewed pleadings in a motion requesting a rule to show cause, in the above-cited Wetzel County Solid Waste Authority case, filed on March 3, 1993 in the West Virginia Supreme Court. That motion was refused without prejudice to be refiled in a lower court.

In that motion it was alleged inter alia that a commercial solid waste business subject to Class B tonnage limitations was importing, receiving and handling large quantities of sewage sludge, and not counting that sludge against its applicable tonnage

limitations, nor paying applicable fees; and claiming a "recycling" exemption from such tonnage limitations and fees.

SB 288 required and set minimum standards for the development of a comprehensive program for the management of sewage sludge, and at W. Va. Code § 20-5F-2b(e) provided that:

'All sewage sludge placed in, or upon, or used by a solid waste facility or processed or handled, pursuant to a permit issued by the division of environmental protection, shall be subject to the same tipping and other fees levied by this chapter on the disposal of solid waste and shall be included in said facility's total tonnage, subject to the limitations established in this article and the provisions of article nine of this chapter....'

SB 288 also amended W. Va. Code 20-5F-2(f), the definition of a "commercial solid waste facility", to its above-quoted form. This definition formerly read at its end: "and shall not include the legitimate reuse and recycling of materials for structural fill, road base, mine reclamation, and similar applications."

SB 298 substituted: "and shall not include land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation and similar applications."

SB 288 also deleted from the definition of "solid waste" at W. Va. Code § 20-5F-2(1) the phrase: "Solid waste shall not include materials which are recycled by being used or reused to make a product, as an effective substitute for commercial products, or are returned to the original process as a substitute for raw material feedstock."

SB 288 also enacted, at W. Va. Code § 20-5F-2(o), (u), and (v)-(ee), other related definitional language regarding sewage sludge, sewage sludge processing facilities, recycling facilities, composting facilities, etc.

While SB 288's requirement that the state implement a comprehensive sewage sludge management program, and many of the substantive features required of that program, were new; it is our opinion that SB 288's language regarding the inclusion of all sewage sludge received and handled in tonnage calculations was duplicitous of existing law.

Before SB 288, sewage sludge was specifically included in the definition of solid waste, W. Va. Code § 20-5F-2(1)(1992). Any "...system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for

processing, recycling or disposal of solid waste...." were within the regulatory sweep of being treated as a solid waste facility, W. Va. Code § 20-5F-2(c)(1992). A commercial solid waste facility was one which "accepts" solid waste from outside sources, W. Va. Code § 20-5F-2(f)(1992). And as detailed above, "handling" and receiving and accepting solid waste was and is the basis of the waste's inclusion in tonnage-based calculations and limitations.

The above-quoted pre-SB 288 "recycling exemption" language was clearly intended to exempt from the requirement of permitting as a "commercial solid waste facility," locations such as mining reclamation sites or road fills, where certain re-used or recycled waste materials were being incidentally used or applied.

In our opinion, the pre-SB 288 "recycling exemption" language cannot be reasonably read to have excluded sewage sludge from its specific statutory inclusion as solid waste; nor to have excluded from solid waste regulation, commercial operations which were importing, handling, receiving and processing large quantities of sewage sludge solid waste. This would be an absurd and impermissible construction.

That is, prior to the passage of SB 288, the "recycling exemption" could not legitimately serve as a massive loophole, through which might pour unlimited amounts of unregulated sewage sludge.

In our opinion, therefore, the language of SB 288 stating that all sewage sludge solid waste received and handled counts toward tonnage caps, and that sludge-importing and processing operations are to be regulated like all other commercial solid waste facilities, reiterated existing law, in a more detailed and explicit fashion; but made no changes.

In any event, West Virginia's current law requires that all sewage sludge be counted both for tonnage maximums and for fees; unless, as the opinion request letter notes and SB 288, W. Va. Code § 20-5F-2B(e) provides, a specific statutory limitation provides an exemption.

Our review of the statutes reveals no exemptions from inclusion in tonnage maximum calculations for all sewage sludge received and handled - whether the sludge is composted or not; whether it is ultimately disposed of within a solid waste facility or otherwise; and whether or not, as part of such disposal, it is denominated "cover material" for other waste.

However, there appears to be an exemption of certain sewage sludge solid waste from disposal fees. W. Va. Code § 20-5F-5a; §20-5N-4; §20-11-5a; §20-11-5b; and §20-9-13 assess fees upon the disposal of waste. But SB 288, W. Va. Code §20-5F-2b(e)(1993) exempts from such fees sewage sludge which is land applied outside

a solid waste facility:

"....Provided, however, That no such fees [levied by Chapter 20], excepting assessment fees provided for in subdivision (12), subsection (b) of this section [land application fees for sewage sludge] shall be levied upon the application of sewage sludge to land outside a solid waste facility in accordance with this section." *Id.*

This statutory provision appears to require a credit or refund of the disposal fees assessed for sewage sludge received and handled at a solid waste facility, if the sewage sludge actually leaves the facility for land application outside of a solid waste facility according to applicable standards.

In light of the foregoing discussion, it is our opinion that the answer to the opinion request letter's question number 1.a. is "yes"; and the answer to question number 1.c. is that "all sewage sludge received and/or handled is to be included in tonnage calculations, except for the above-discussed disposal fee credit."

With respect to the opinion request letter's question 1.b., we have reviewed a letter from the West Virginia Secretary of State dated August 11, 1993, rejecting certain proposed DEP emergency rules. The Secretary's letter stated the opinion that "the statute does not allow for ... an exception" allowing disposal fees to be calculated on a "dry" tonnage basis, as opposed to actual or "wet" tonnage.

The concept of "dry" tonnage is found in our review only in W. Va. Code § 20-5F-2b(7), relating to permissible rates of land application. It otherwise appears that the terms "ton" or "per ton," (such as for fee and tonnage limitation calculation purposes), are unqualified everywhere else in the relevant statutes.

Also, W. Va. Code § 20-5F-2b(b)(1)(ii) requires the reporting of the "amount of sewage sludge actually generated or imported."

It is also our understanding that in fact tonnage for all waste materials other than sewage sludge is calculated on an actual-tonnage-received basis, without adjustment for the waste's moisture content.

The Legislature has found at W. Va. Code §20-5F-5a that: "The costs of maintaining and policing the streets and highways of the state and its communities are increased by long distance transportation of large volumes of solid waste." A dry-tonnage-based fivefold increase in actual tonnage transported would appear to undermine at the very least the infrastructure and transportation concerns reflected in West Virginia's tonnage-based scheme.

The legislature clearly knew what a "dry" ton is, and chose not to use such a qualifier in its recent enactments regarding sewage sludge, in any area except land application rates. It is our opinion in response to the opinion request letter's question number 1.b., that an actual tonnage basis for sewage sludge must be used to calculate fees and for tonnage limitation calculations.

With respect to the opinion request letter's question number 2, regarding "separate tonnage caps", W. Va. Code § 20-5F-2 lists a number of different types of activity which may require an operation to be regulated as a solid waste facility, but the list is not exclusive. The statute identifies landfills, transfer stations, materials recovery facilities, mixed waste processing facilities, sewage sludge processing facilities, and composting facilities as kinds of operations or activities which may require that an activity be treated as a "solid waste facility".

Senate Bill 288, W. Va. Code § 20-5F-2b(d), requires that any solid waste facility which seeks to land apply, compost, incinerate or recycle sewage sludge must obtain an appropriate permit from the division for such operations; and SB 288 also sets forth more specific definitions, describing what activity constitutes a composting, mixed waste processing, or other type of solid waste facility.

The opinion request letter questions whether the requirement of a obtaining a sludge-handling permit, or the separate statutory definitions describing types of solid waste facility, authorize a separate and additional tonnage cap for each separately named type of activity or facility.

Our foregoing discussion of tonnage limitations and their role in West Virginia's solid waste management scheme is relevant to this inquiry. For example, W. Va. Code § 20-5F-4c, makes it unlawful to handle certain tonnages of waste, absent certain approvals, without regard to the method(s) of handling waste, or types of waste handled.

Had the Legislature wanted to authorize the "stacking" of separate tonnage caps, for each type of processing or handling of solid waste received at a commercial solid waste operation, it could have easily done so in a forthright fashion. Nothing in SB 288, including the bill's added definitional statements or sludge-permit requirements, evidences a legislative intent to implement or authorize a "separate tonnage cap" system, that would dramatically alter the significance and effect of the strict tonnage-based approval requirements, limitations and caps set by the statutes.

Our answer to the opinion request letter's question number 2 is therefore "no".

The opinion request letter's question number 3 asks whether Senate Bill 288 generally may "legally alter permit rights retroactively".

First, as discussed above, we do not believe that SB 288's provisions respecting the inclusion of all sewage sludge on an actual tonnage basis for fee and tonnage calculations, under one tonnage cap, were a retroactive change in the law.

Second, the generic question which is asked cannot be fully answered in the abstract, as to all possible "permit rights"; the term used is simply too broad and uncertain. It should be noted that no "permit right" which contravened applicable law would in any event be legitimate or enforceable.

Third, with the above caveats, in response to the opinion request letter's question number 3, it is our opinion that the relevant provisions of SB 288 are intended to and should be applied across-the-board, including to those who were handling sewage sludge prior to the bill's passage, and who had some sort of "permit" that related to their sludge handling.

SB 288 calls for a "comprehensive" program for the management of sewage sludge, not just "some" sewage sludge. Permits are authorized for "all" facilities which handle sewage sludge in any way. Reporting is required by entities "producing" or "importing" sludge. Monitoring is required for "all sewage sludge related activities." "No person or entity" may be allowed to exceed contaminant levels. "All" facilities must meet design specifications. Existing POTWs must obtain permits, and "any facility" seeking to land apply, etc. sludge must obtain a sludge permit. And "all sludge" handled pursuant to any DEP permit is subject to disposal fees and tonnage calculation inclusion. (Specific citations omitted).

The bill's language is broadly inclusive. And while explicit provisions for "grandfathering" appear in West Virginia solid waste management statutes, no such explicit grandfathering is evident in SB 288, in relation to "permit rights" or otherwise.

Thus, in our opinion, SB 288's language does not authorize "grandfathering" existing sludge-related operations from relevant tonnage-related requirements and standards, permitting, other solid waste regulations and approvals, applicable fees, substantive environmental protection standards, and other provisions of the law.

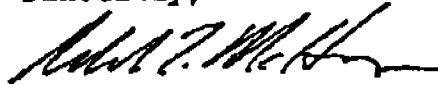
Fourth, even actual, clear and substantive "retroactive" effects of governmental regulation are not inherently fatal to such regulation, see Shell v. Metropolitan Life Ins. Co., 360 S.E.2d 183 (W. Va. 1989); and see Keystone Bituminous Coal Assn. v

DeBenedictis, 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232 (1987).

The intended inclusive application of SB 288 does not facially seem constitutionally or otherwise infirm to us, in light of the principles enunciated in these and similar cases. In any event, such considerations are basically outside of the agency's mandate, which is ordinarily to apply the statute as written.

Thank you for the opportunity to provide this opinion.

Sincerely,



DEBORAH L. MCHENRY
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Governor

JOHN M. RANSON
Cabinet Secretary

October 12, 1993

David C. Callaghan
Director
Division of Environmental Protection
#10 McJunkin Road
Nitro, West Virginia 25143-2506

OFFICE OF THE SECRETARY
SECRETARIUM OF STATE

Oct 12 4 11 PM '93

11/11/93

**Re: Title 47, Series 38D - Emergency Rule - Sewage
Sludge Management Regulations**

Dear Mr. Callaghan:

Pursuant to West Virginia Code Section 20-5F-2b(b),
I hereby consent to the filing of the rule specified
above.

You may attach a copy of this letter to your filing
with the Secretary of State as evidence of my consent.

Sincerely yours

John M. Ranson
John M. Ranson
Cabinet Secretary

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