

**TITLE 47
INTERPRETIVE RULE
DIVISION OF ENVIRONMENTAL PROTECTION
WATER RESOURCES - WASTE MANAGEMENT**

**SERIES 40B
HAZARDOUS WASTE EMERGENCY RESPONSE FUND
REGULATIONS INTERPRETIVE RULES
CONCERNING FEE ASSESSMENT**

§47-40B-1. General.

1.1. Scope. -- The purpose of these regulations is to provide interpretations for implementing the power, duties, and responsibilities vested in the director pursuant to Chapter 20, Article 5G of the West Virginia Code as they relate to the assessment of hazardous waste generator fees.

1.2. Authority. -- W. Va. Code §§20-5G-5(d) and 19A-3.

1.3. Applicability. -- The regulations in this series provide interpretations for generators of hazardous waste. The Hazardous Waste Emergency Response Fund requires generators to pay a fee based upon the amount of hazardous waste generated as reported to the director in the generator's most recent annual report submitted pursuant to the Hazardous Waste Management Act.

1.4. Filing Date. -- April 14, 1987

1.5. Effective Date. -- May 14, 1987

1.6. Incorporation By Reference. -- Whenever either federal statutes or regulations or State statutes or regulations are incorporated by reference into these regulations, the reference is to the statute or regulation in effect on the date of enactment of the legislation authorizing these regulations.

1.7. Promulgation History. -- Legislative rules on this subject were originally promulgated on May 9, 1985 on an emergency basis. Such rules expired on November 9, 1985. The current interpretive rules were filed on

April 14, 1987 and became effective on May 14, 1987.

§47-40B-2. Definitions.

2.1. "Annual Report" means that report required to be submitted to the chief pursuant to the annual reporting requirements of the DNR Hazardous Waste Management Regulations, Section 6.4.2.

2.2. "Chief" means the chief of the Division of Waste Management of the Department of Natural Resources.

2.3. "Generator" means any person, corporation, partnership, association, or other legal entity, by site location, whose act or process produces hazardous waste as identified or listed by the director in regulations promulgated pursuant to Section 6 of Chapter 20, Article 5E of the West Virginia Code in an amount greater than twelve thousand kilograms (12,000 kg) per year.

2.4. "HWERF" or "The Act" means the Hazardous Waste Emergency Response Fund, Chapter 20, Article 5G of the West Virginia Code.

2.5. "HWMA" means the Hazardous Waste Management Act, Chapter 20, Article 5E of the West Virginia Code.

2.6. "HWMR" or "DNR Hazardous Waste Management Regulations" means West Virginia Administrative Regulations, Department of Natural Resources, Series 35, promulgated pursuant to Chapter 20, Article 5E of the West Virginia Code.

2.7. "Series 40A" means West Virginia Administrative Regulations, Department of Natural Resources, Series 40A, Hazardous Waste Emergency Response Fund Regulations, Procedural Rules Concerning Fee Assessment.

2.8. All other terms shall have the meaning as prescribed in the DNR Hazardous Waste Management Regulations and Chapter 20, Article 5G of the West Virginia Code.

§47-40B-3. List Of Provisions And Issues Interpreted.

3.1. Hazardous wastes not subject to fee assessment under Chapter 20-5G-4(a) of the West Virginia Code (Section 4).

3.1.1. Exclusion of discharges to the waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or State law (Section 4.2.1.).

3.1.2. Exclusion of hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks (Section 4.2.2). (Reserved).

3.2. Interest accrual and surcharge imposition under chapter 20-5G-4(d) of the West Virginia Code (Section 5).

3.2.1. Ability to establish a payment schedule (Section 5.2.1).

3.2.2. Interest accrual (Section 5.2.2).

3.2.3. Surcharge imposition (Section 5.2.3).

3.3. Enforcement under Chapter 20-5G-5(f) of the West Virginia Code (Section 6).

3.3.1. Failure to report (Section 6.2.1).

3.3.2. Failure to Remit Fee (Section 6.2.2).

§47-40B-4. Hazardous Wastes Not Subject To Fee Assessment.

4.1. Provision interpreted: West Virginia code §20-5G-4(a).

The HWERF establishes a fee schedule designed to encourage environmentally sound treatment and disposal practices. Accordingly, the Act establishes a graduated fee assessment whereby the generator pays less per ton of generated hazardous waste if the selected treatment or disposal practice conforms to the Act's preferred practices. These practices and their associated fee levels are as follows: Full assessment for generated hazardous waste treated or disposed off-site; ninety percent (90%) of the full assessment for generated hazardous waste treated or disposed on-site; seventy-five percent (75%) of the full assessment for generated hazardous waste treated off-site so that such waste is rendered nonhazardous; and twenty-five percent (25%) of the full assessment for generated hazardous waste treated on-site so that such waste is rendered nonhazardous.

In addition to graduated fee assessments, the HWERF exempts from fee assessment certain types of hazardous waste or hazardous waste which is handled in a specific manner. The exclusions are a part of the Act's goal to not only provide the State with funds for emergency response but to also provide an incentive to the generator to utilize the most environmentally sound handling practice. Accordingly, the Act enumerates categories of hazardous waste which are excluded from fee assessment.

The first group includes those wastes listed in West Virginia Code §20-5E-6(a)(2)(A) and enumerated in Sections 4.1.1 through 4.1.4 of these regulations. These wastes are currently excluded from regulations as hazardous waste under the HWMA until the completion of studies by the United States Environmental Protection Agency that are required by the federal Solid Waste Disposal Act. The second group encompasses either hazardous waste which is not regulated as a hazardous waste under the HWMA or hazardous waste which is handled in a manner which the HWERF is designed to

encourage. These are enumerated in Sections 4.1.5 through 4.1.9 of these regulations.

For the purpose of determining and reporting the amount of hazardous waste generated under the Hazardous Waste Emergency Response Fund, the following wastes shall not be included:

4.1.1. Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

4.1.2. Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.

4.1.3. Cement kiln dust waste.

4.1.4. Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy.

4.1.5. Sludge from any publicly owned treatment works in the State.

4.1.6. Any discharge to waters of the State of hazardous waste pursuant to a valid water pollution control permit issued under federal or State law. (Note: This exclusion applies only when the point of generation is the actual point of discharge specified for such valid permit.)

4.1.7. Any hazardous wastes which are beneficially used or reused or legitimately recycled or reclaimed.

4.1.8. Hazardous wastes which are created or retrieved pursuant to an emergency or remedial action.

4.1.9. Hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks.

4.2. Issues interpreted.

4.2.1. Exclusion of discharges to the waters of the State of hazardous wastes pursuant to a valid water pollution control permit issued under federal or State law (West Virginia Code §20-5G-4(a), Proviso 3).

This proviso is designed to exempt from fee assessment only the discharge to waters of the State of a treated hazardous waste when the point of generation is the actual point of discharge specified in a valid water pollution control permit. Hazardous waste which is sent to a wastewater treatment facility for treatment is included in the fee assessment calculation.

4.2.2. Exclusion of hazardous wastes which are hazardous wastes based solely on the characteristic of corrosivity and which are subjected to on-site elementary neutralization in containers or tanks (West Virginia Code §20-5G-4(a), Proviso 6). (Reserved).

§47-40B-5. Interest Accrual And Surcharge Imposition.

5.1. Provision interpreted: West Virginia Code §20-5G-4(d).

Section 4(d) of the HWERF contains specific provisions concerning accrual of interest and imposition of surcharges in cases where the payment of an assessed fee is overdue. If a fee assessed upon a generator has not been paid in full by the due date, interest accrues upon the unpaid amount until full payment is made. In addition, if a generator fails to pay the fee assessment in full within seventy-five (75) days of the prescribed date established under Section 5.2.1 of Series 40A, that generator must also pay a surcharge equivalent to the total amount of the fee assessed.

5.2. Issues interpreted.

5.2.1. Ability to establish a payment schedule.

The Department believes that the establishment of payment schedules is possible

under the provisions of Section 4(d) of the Act. Payments are due on the prescribed date established under Section 5.2.1 of Series 40A. A generator unable to make full payment by this date may request, in writing, that a payment schedule be approved by the Department which provides for full payment of the fee and all interest accrued within a specified period of time. The Department will not allow such schedules to exceed one hundred and eighty (180) days beyond the original due date. An approved payment schedule will be an agreement signed by the director and the generator and does not constitute a waiver from the imposition of a surcharge as required by the Act and interpreted in Section 5.2.3 of these regulations.

5.2.2. Interest accrual.

Under Section 4(d) of the HWERF, if a fee assessed upon a generator has not been paid by the prescribed date, "interest shall accrue upon the unpaid amount at the rate of ten percent (10%) per annum from the date due until payment is actually made". The Department interprets this provision to mean that interest on unpaid fees, or portions thereof, should accrue starting the day after the payment due date and continue until the full fee assessment, excluding any surcharge, is paid. Interest will be calculated only on the fee assessed, excluding any surcharge or accrued interest. Interest will accrue monthly as simple interest at a rate of 0.8333...percent on the unpaid balance of the fee. This monthly rate is equivalent to the ten percent (10%) per annum rate imposed under the Act.

Interest accrual is required by law to be applied to any unpaid balance of the fee assessed and may not be waived by the Department due to a "good faith" partial payment or any other reason. Partial payments will be applied to the retirement of the fee principal first to minimize the amount of interest accrued. Once the fee amount has been paid, interest accrual will cease.

5.2.3. Surcharge imposition.

Section 4(d) of the Act provides for the automatic imposition of a surcharge equivalent to the total amount of the fee assessed if that fee is not paid within seventy-five (75) days of the prescribed date established under Section 5.2.1 of Series 40A. Rules, Series 40A. The Department believes that this provision does not provide the Department with the discretion to waive surcharge imposition or extend its payment. The surcharge is intended to be an incentive for timely fee payment as well as a penalty for late payment.

§47-40B-6. Enforcement.

6.1. Provision interpreted: West Virginia Code §20-5G-5(f).

Under Section 5(f) of the HWERF, the director is authorized to institute a civil action against any generator for failure to pay any fee assessed pursuant to the Act. Such action against a generator may be brought in either Kanawha County or the county in which the generator does business. The generator must pay all attorney fees and costs of such action if the director prevails.

6.2. Issues interpreted.

6.2.1. Failure to report.

Failure by the generator to report information as required in Section 4.2 of Series 40A, in the manner prescribed in that section, shall result in a fee assessment based on the amount of hazardous waste generated, as reflected in the generator annual report required under Section 6.4.2 of the HWMR or the facility annual report required under Section 8.5.6 of the HWMR, and other information available to the director to reasonably ascertain the total amount of hazardous waste generated. However, in no event may the fee assessed exceed the fee assessment for the total amount of hazardous waste reported in the annual reports filed pursuant to the HWMR provisions at the full rate of assessment.

6.2.2. Failure to remit fee.

If an assessed fee is not paid by the date prescribed pursuant to Section 5.2 of Series 40A, interest shall accrue as interpreted in Section 5.2.2 of these regulations. Such interest will be deposited in the Fund.

If any generator subject to fee assessment pursuant to these regulations fails to pay the fee imposed within seventy-five (75) days of the prescribed payment remittance date, there shall be imposed in addition to the fee and interest determined to be owed, a surcharge equivalent to the total amount of the fee assessed, which shall also be collected and deposited in the Fund.