



WEST VIRGINIA MANUFACTURERS ASSOCIATION

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Comments of the

WEST VIRGINIA MANUFACTURERS ASSOCIATION

Regarding the

PROPOSED HAZARDOUS WASTE ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT RULE

August 7, 2012

I. INTRODUCTION

The West Virginia Department of Environmental Protection (DEP) has solicited comments on its proposed Hazardous Waste Administrative Proceedings and Civil Penalty Assessment Rule (33 CSR 27) ("Rule"). The West Virginia Manufacturers Association ("WVMA") believes that there are certain aspects of the proposed Rule that should be considered for revision or clarification. We offer these comments in the hope that they will be helpful to the DEP as it determines how best to make any changes to the final rule.

II. COMMENTS

The WVMA notes that there is an existing rule regarding the assessment of civil administrative penalties for the West Virginia Hazardous Waste Management Act (33 CSR 22). There is no need for this new rule. When W.Va. Code §22-18-17(b)(2) was passed by the 2012 Legislature, it mandated rulemaking "to establish a mechanism for the administrative resolution of violations set forth in this section through consent order or agreement as an alternative to initiating a civil action." The DEP already has a system for assessing administrative penalties (33 CSR 22), and what it sought from the Legislature is the ability to reach agreement on penalties without going through the administrative or civil processes.

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That being the case, it makes more sense to amend 33 CSR 22 to use the same matrix but a different penalty assessment process. There is no need for an entirely new rule, with a new matrix.

We are also interested in knowing what effect the DEP will give to that hazardous waste administrative penalty system in 33 CSR 22 if the new rule is approved. Will the DEP use it as a default penalty process or will all penalties be assessed under the new “voluntary” consent order process, where the DEP doesn’t have to be concerned about appeals?

Further, it is the WVMA’s collective understanding that the proposed Rule is patterned after the DEP rule for the civil penalties associated with the Water Pollution Control Act. However, the Penalty Adjustment Factors section of the proposed Rule (§6.2) omits two factors that are included in the corresponding Water Pollution Control Act’s civil penalty assessment rule : (1) cooperation with the Secretary and (2) public interest. The WVMA believes that these are important factors that should be included in the proposed Rule if the DEP moves forward with this Rule as they facilitate cooperation and take the public interest into consideration.

We also note that the penalty assessment factors are incredibly subjective. The rule identifies the penalty-setting factors in Sections 6.1.a. and 6.1.b., but there is no indication how these will be weighed. Losing a hazardous waste manifest or failing to put a hazardous waste label on a container that is otherwise properly maintained, should be a minor/minor violation. Sections 6.1.a.6 and 6.1.b.2. grant far too much discretion to the Secretary to decide whether a violation is minor, moderate or major. At the very least, the Rule should provide that major violations are those that pose actual and substantial risk to human health or the environment, and do not include paperwork violations. No violation should rise above minor unless there is some actual or imminent threat of release of hazardous waste. The hazardous waste system is complex, and failure to comply with paperwork requirements that pose no threat to humans or the environment should never be more than minor violations.

III. CONCLUSION

The WVMA appreciates this opportunity to offer comments on the proposed Hazardous Waste Administrative Proceedings and Civil Penalty Assessment rule.

A handwritten signature in black ink, appearing to read "Karen S. Price", is written over a horizontal line.

Karen S. Price, President
West Virginia Manufacturers Association

RESPONSE TO COMMENTS – PROPOSED RULE 33CSR 27

I. Commenter: West Virginia Manufacturers Association (“WVMA”)

Comment A: The West Virginia Department of Environmental Protection (WVDEP) already has a system for assessing penalties (33 CSR 22) and it makes more sense to amend this rule as opposed to create a new one.

Response A: The existing rule assigns penalties in a unilateral fashion with provision for an appeal process. The existing Rule and associated statutory language place restrictions and limit applicability. Also, the existing rule addresses penalties only and has no provision for injunctive relief. WVDEP believes that adding the option of negotiating the details of a formal enforcement document that addresses both penalties and injunctive relief prior to an official agency action is an asset. It will allow a single action on behalf of the agency as opposed to a penalty action accompanied by a unilateral Order. WVDEP also believes the consensual nature of the settlement will allow full resolution of the matter in a more timely manner.

Comment B: The commenter advocates the continued use of the matrix found in 33 CSR 22.

Response B: WVDEP believes that the matrix found in 33 CSR 22 cannot adequately address the more serious hazardous waste violations that are documented by WVDEP staff. Absent any other option, this limited penalty ability leads to WVDEP initiating civil law suits through its Office of Legal Services. The promulgation of this rule is an attempt to provide a mechanism to address these violations in an effective and timely administrative manner.

Comment C: The commenter inquires as to what effect DEP will give to the existing penalty system in 33 CSR 22 given the promulgation of the newer system.

Response C: It is difficult to predict the future; however, WVDEP will use the existing civil administrative penalty system (33 CSR 22) for lesser RCRA violations when appropriate. It is anticipated the proposed Rule will enable and enhance WVDEP’s administrative enforcement proceedings.

Comment D: The commenter states that it is their understanding that the proposed Rule is patterned after 47 CSR 1. The commenter notes that two Penalty Adjustment Factors, cooperation with the Secretary and public interest, found in 47 CSR 1 are absent in the proposed Rule. The commenter advocates the addition of these two Penalty Adjustment Factors.

Response D: The proposed rule is patterned after 47 CSR 1 in form. The content of the proposed Rule draws many specific items, to include penalty adjustment factors, from the USEPA’s 2003 RCRA Civil Penalty Policy. The two specific factors mentioned are not part of the Penalty Policy, however, WVDEP believes that cooperation with the Secretary is a valid adjustment factor. Therefore, WVDEP will add this penalty adjustment factor to the proposed Rule.

Comment E: The commenter states that the penalty assessment factors of the proposed rule are “incredibly subjective” and notes that no indication is given how they will be weighted.

Response E: The factors used for determining the base penalty are taken directly from the USEPA’s 2003 RCRA Civil Penalty Policy. Consideration of the potential for harm and extent of deviation is customary in penalty calculation. As currently outlined in the proposed rule, these factors are objective enough to ensure consistent calculations while allowing case-by-case consideration of relevant factors.

Comment F: The commenter advocates that all violations be treated as “minor” unless there is an actual or imminent threat of a release of hazardous waste.

Response F: WVDEP strongly disagrees with this comment. While actual or imminent releases of hazardous waste or contamination will be considered during penalty calculation, these conditions will not be considered mandatory for assessment of a larger penalty. While violations of some RCRA requirements (paper work violations for example) may not appear to give rise to significant risk of contamination, non-compliance with these requirements does directly increase the threat of harm to human health and the environment. These types of requirements are based squarely on protection concerns and are fundamental to the overall goals of RCRA to proactively handle wastes in a safe and responsible manner. For example, preparation and maintenance of manifests and proper labeling of waste containers is vital to ensure that hazardous waste is not mishandled.

Amendment – Added “Cooperation with the Secretary” as a penalty adjustment factor. It is located at 6.2.b.3.

Reason – The absence of this adjustment factor was commented on by the Manufacturers Association. It is present in 47 CSR 1 which establishes Administrative Proceedings and Civil Penalty Assessment for violations of the Water Pollution Control Act. The Agency believes Cooperation with the Secretary is a valid adjustment factor which may be considered and is therefore included in this proposed Rule.