WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED
4/15/2024 5:29:01 PM

Office of West Virginia
Secretary Of State

NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE

AGENCY: Emergency Management TITLE-SERIES: 170-02

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Industrial Accident Rapid Response Rule

CITE STATUTORY AUTHORITY: W. Va. Code 15-5B-3a.

The above rule has been authorized by the West Virginia Legislature.

Authorization is cited in (house or senate bill number) Senate Bill 36

Section 64-6-2 Passed On 3/8/2024 12:00:00 AM

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

April 15, 2024

This rule shall terminate and have no further force or effect from the following date:

August 01, 2029

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes
Brandolyn N Felton-Ernest -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 170
LEGISLATIVE RULE
WEST VIRGINIA DIVISION OF EMERGENCY MANAGEMENT

SERIES 2
INDUSTRIAL ACCIDENT RAPID RESPONSE RULE

§170-2-1. General.

1.1. Scope. -- The purpose of this rule is to coordinate rapid and appropriate response to industrial accidents; to govern participation by public agencies in response to industrial accidents; to identify the various entities that are required to report to the Mine and Industrial Accident Rapid Response System (MIARRS); to establish procedures for the implementation of this program; to establish penalties for violations of the provisions of §15-5B-3a and its subsections and, to govern protections of privacy and security for the state's citizens regarding the emergency event, as well as to govern the distribution generally of records and information collected during response operations.

1.2. Authority. -- W. Va. Code §15-5B-3a.

1.3. Filing Date. -- April 15, 2024.

1.4. Effective Date. -- April 15, 2024.

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, 2029.

§170-2-2. Definitions.

The following terms shall have the meaning as used in this Rule unless in a context that requires a different meaning:

2.1. "Industrial facility" means:

2.1.a. Any facility that is required to submit a risk management plan to the United States Environmental Protection Agency pursuant to regulations promulgated under Section 112(r) of the Clean Air Act of 1990, 42 U. S. C.§7412(r), including the property upon which the facility is located and any buildings appurtenant thereto or associated therewith, including storage facilities; or

2.1.b. A facility which is a factory, mill, plant or refinery, other than a coal facility, including the property upon which a factory, mill, plant or refinery is located and any buildings appurtenant thereto or associated therewith, including storage facilities, found by the director to be of a type to have a reasonable potential to have an emergency event and for which the director has provided actual written notice via certified mail, return receipt requested, to the facility's owner or operator of the facility's coverage under this rule and of the obligations imposed by the provisions of W. Va. Code §15-5B-3a and this rule.

2.2. "Appropriate state and local officials" means the Governor or his or her representative, the Director of the Division of Emergency Management, a representative designated by the Director of the Division of Emergency Management who has been trained and qualified by the Federal Emergency Management Agency's (FEMA) National Incident Management System (NIMS) program and/or a representative of a local emergency management agency who has been trained and qualified by FEMA's NIMS program.

2.3. "Director" means the Director of the Division of Emergency Management within the Department of Homeland Security.

2.4. "Emergency event" means an unplanned event including, but not limited to: an explosion; a fire that cannot be contained within fifteen minutes of discovery; the release of a reportable quantity, as specified in 40 C. F. R. §302 (2009) or its successor or by the director through this rule, of an extremely hazardous substance listed in the appendices to 40 C. F. R. §355 (2009) or its successor; loss of life or serious personal injury as defined by 29CFR1910 at an industrial facility.

2.5. "Unplanned event" means an event that is not otherwise authorized or permitted pursuant to state and/or federal law or a planned event that results in unplanned consequences such as an explosion or fire that cannot be controlled within the parameters set forth for the planned event.

§170-2-3. Reporting of Emergency Incidents by Industrial Facilities.

3.1. All industrial facilities are to report emergency events to the Division of Emergency Management at the Mine and Industrial Accident Call Center at 1-866-987-2338, or other such number as may be identified by the Director within fifteen minutes of ascertaining the occurrence of an emergency event at an industrial facility. Industrial facilities may satisfy this requirement by contacting the local 911 center.

3.2. The initial notification reported as described above shall include the following minimum information:

3.2.a. The name and title of the individual making the report;

3.2.b. The name and address of the facility; and,

3.2.c. Notification that an emergency event has occurred.

3.3. If the caller has ready access to the following information, he or she shall also provide:

3.3.a. Then-available information concerning the nature and extent of the emergency event, including any information that concerns the existence or nonexistence of potential threats to the public health;

3.3.b. In the event of an unplanned fire that cannot be contained within fifteen minutes, explosion or release, preliminary information regarding the type of substance involved and, if a release, the estimated amount released, if known; and,

3.3.c. The name, title and contact information of the individual designated to serve as a contact person on behalf of the industrial facility.

3.4. Any local 911 center receiving an initial notification shall immediately forward all information received to the Division of Emergency Management at the Mine and Industrial Accident Call Center at 1-866-987-2338, or other such number as may be identified by the Director.

3.5. All calls received by the Division of Emergency Management at the Mine and Industrial Accident Call Center published line shall be recorded for documentation purposes. Recording of calls shall be automatic, and the recorded call information, including time of call and complete voice transcripts, shall be made available to any representative of a government agency responsible for enforcing rules and regulations and investigating violations relating to industrial safety upon written request. Requests from government agencies must describe why the information is needed and the

purpose for which it will be used.

3.6. The facility may choose to provide a written report to follow-up on the initial report of an emergency event. The director may prescribe a format to be used to provide such report.

§170-2-4. Event Communications and Access to Public Officials.

4.1. Event Communications. As soon as practicable after providing the notice required under section 3 of this rule, the industrial facility shall implement a communications system designed to provide timely information to appropriate state and local officials. At a minimum, the industrial facility shall designate a person to serve as a contact for state and local emergency responders and provide the name of the designated person via the Industrial Accident Call Center reporting line. Any person so designated shall, upon the request of an appropriate state or local official, provide such additional information known or subsequently known that may be necessary to assess the extent of the emergency or to provide appropriate public assistance.

4.2. Access to Public Officials. As soon as practicable after the occurrence of an emergency event, the industrial facility shall, upon request, provide appropriate state and local officials with timely authorized access to the person or persons charged with managing the event on behalf of the facility and the area(s) where the emergency event is being managed or the industrial facility's response to the emergency event is being coordinated. The industrial facility shall also provide appropriate state and local officials with timely authorized access to any areas affected by the emergency event: Provided, That the industrial facility has determined those areas to be reasonably safe: Provided, however, That within thirty minutes of obtaining information that affects the public health, safety and welfare, state and local officials shall notify the public of any hazardous materials or events which may affect the area.

4.3. The Director shall establish a policy to ensure compliance with the requirement for notification to the public.

§170-2-5. Penalties.

5.1. Penalty Amount. The director may impose a civil penalty on the industrial facility if he or she determines that the industrial facility failed to comply with the reporting or communications and access requirements in this rule. In no case shall the total penalty for all violations exceed $100,000 for an emergency event.

5.2. Categories of violations of W. Va. Code §15-5B-3a.

5.2.a. Reporting violations are failures to report an incident within fifteen minutes of becoming aware of the reportable incident and failing to report all information required by this rule and W. Va. Code §15-5B-3.a.(b).

5.2.b. Communication/Access violations are failures to comply with the requirements of this rule and applicable statutory provisions regarding communication with appropriate state or local officials and/or denying appropriate state or local officials access to the location where the facility is managing its response to the emergency event as required by this rule and W. Va. Code §15-5B-3.a.(c) and (d).

5.3. Determination of Penalty. The following factors related to a violation shall be considered by the Director in determining the penalty:

5.3.a. The category of the violation;

5.3.b. The extent of the deviation from the requirements of the statute or this rule; and

5.3.c. The potential for harm to the public as a result of the violation.

5.4. Category of the violation. The Director shall categorize each violation as a reporting violation (Table A) and/or a communication/access violation (Table B).

5.5. Extent of deviation. The Director shall evaluate each violation of this rule and the applicable statutory provisions to determine the extent of deviation from the rule or statutory requirement. Each violation shall be assigned a value of minor, moderate, or major depending on the severity of the deviation from the requirement on a case-by-case basis. The Director shall consider any mitigating circumstances which prevented the facility from complying with a requirement of this rule or applicable statutory provision in assigning a value for this factor.

MAJOR
No notification within 2 hours after the industrial facility had knowledge that an emergency event has occurred.

MODERATE
No notification within 1 hour but less than 2 hours after the industrial facility had knowledge that an emergency event has occurred.

MINOR
Notification is made within one hour, but after 15 minutes.

5.6. Potential for harm to the public. The Director shall evaluate the potential for harm to the public that resulted from the violation. Each violation shall be assigned a value of minor, moderate, or major depending on the severity of the deviation from the requirement. Emphasis shall be placed on the potential harm posed by a violation rather than the actual harm which occurred. There need not be any showing of actual harm to the public to support a finding of potential harm and this factor shall be assessed on a case by case basis.

5.7. Penalty Adjustment Factors.

5.7.a. The penalty may be adjusted at the discretion of the Director after consideration of information available to him.

5.7.b. The Director may consider the following factors in determining whether an adjustment in the civil penalty assessment is justified;

5.7.b.1. Degree of or absence of willfulness and/or negligence.

5.7.b.2. Good faith efforts by the industrial facility before and immediately after an alleged violation.

5.7.b.3. Cooperation with the appropriate local and state officials.

5.7.b.4. Previous compliance/non-compliance history.

5.7.b.5. Ability to pay a civil penalty. The Director may use the Environmental Protection Agency's process for this determination. The industrial facility would be required to supply all required financial documentation prior to the process being used for consideration.

5.7.b.6. The public interest.

5.7.b.7. Other factors deemed relevant by the Director which may be present on a case-by-case analysis.

5.8. Procedures for imposing penalties.

5.8.a. The Director will review all data available regarding incidents at covered facilities. Such review shall include a meeting with representatives of the industrial facility, and may also include a meeting with other involved parties to ascertain: the impact of delays in notification to the overall response; the access provided by the facility owner or operator to appropriate state and local officials; and, the impact or potential impact of the incident to off-site interested parties.

5.8.b. Based on the results of such review and input from involved parties, the Director will determine the appropriate penalties to be imposed, based on methods described above.

5.8.c. The Director will cause written notice be delivered by certified mail with return receipt requested to the facility owner or operator. Such notice will include the following information: date and time of incident involved; action warranting the penalty being imposed; amount of penalty being imposed per instance; procedures for requesting a waiver of penalties imposed; and, procedures for requesting appeal of penalties.

5.9. Waiving of penalties.

5.9.a. The Director may waive all or part of any penalties imposed under this rule.

5.9.b. The owner or operator of a facility having penalties imposed under this rule may request a single waiver of the penalties, based on extenuating circumstances. The facility shall have thirty days from receipt of the notice required by subsection 5.8.c to submit a written request of a waiver of the penalties. The filing of a request for waiver stays any obligation to pay such penalty until the resolution of the waiver request. The written request for waiver of penalties must be delivered to the Director, West Virginia Division of Emergency Management, 1900 Kanawha Boulevard, East, Building 1, Room 400-W, Charleston, WV 25305.

5.9.c. Such written request for waiver must include reference to the date and time of the incident involved and any and all factors the facility owner or operator considers pertinent to the situation. Factors involved may include, but are not limited to the following: cause for delay in notification beyond the facility's control; corrective actions being undertaken; financial hardship considerations; and, other information the owner or operator considers pertinent.

5.9.d. The Director will review all such requests for waiver and provide written notice to the facility owner or operator within 10 working days of receipt of the request for waiver by certified mail with return receipt requested. The written notification will include the determination of whether the request was approved and the amount of penalty being waived per instance.

5.10. Appeals of fines and penalties imposed. Facility owners or operators may file notice of appeal of fines and penalties with the Intermediate Court of Appeals as the Intermediate Court of Appeals has appellate jurisdiction over all "[f]inal judgements, orders, or decisions of an agency or administrative law judge entered after June 30, 2022" per West Virginia Code §51-11-4(b)(4).

§170-2-6. Requirement for Public Officials to Notify the Public.

Notification to the Public of emergency events that have the potential to affect the public in close proximity to an emergency event shall be made by appropriate local or state officials designated in local

emergency plans within 30 minutes in accordance with those plans.

§170-2-7. Requests for Information – General Provisions.

The Director of the Division of Emergency Management is the custodian of all records of the Center for the purpose of complying with W. Va. Code §29B-1-1, et seq.

7.1. All requests for information must include the following information in order for the request to be considered sufficiently specific:

7.1.a. Name of the individual making the request; and,

7.1.b. Approximate dates and times of incidents on which information records are requested.

7.2. Requests for information shall be processed in accordance with W. Va. Code §29B-1-1, et seq.

§170-2-8. Trade Secrets and Confidential Information.

8.1. Covered facilities requesting protection of information considered trade secrets or proprietary information must provide justification for such requests in writing.

8.2. Information received shall otherwise be released to appropriate regulatory or investigative agencies upon written request and upon approval by the Director or his or her designee.

§170-2-9. Lists of Covered Industrial Facilities.

9.1. The lists of industrial facilities to which this rule applies shall be maintained by the Director. The Director shall update the list from time to time, as necessary, to add or delete facilities from the list. In order for a facility to be subject to 170CSR2, it must have received written notice via certified mail, return receipt required of the facility's inclusion thereon. In developing the initial list and determining whether to add or delete facilities from the list, the Director shall consider the following:

9.1.a. Facilities required to maintain a risk management plan.

9.1.a.1. A facility may be added to the list of covered facilities subject to this rule pursuant to W. Va. Code § 15-5B-3a(a)(1)(A) if such facility is required to have a risk management plan under Section 112(r) of the Clean Air Act of 1990, 42. U.S.C. § 7412(r).

9.1.a.2. A facility may be deleted from the list of covered facilities subject to this rule pursuant to W. Va. Code § 15-5B-3a(a)(1)(A) where it is demonstrated that the facility is no longer required to have a risk management plan under Section 112(r) of the Clean Air Act of 1990, 42. U.S.C. § 7412(r). The fact that a facility is no longer required to have a risk management plan shall not preclude the Director from determining that the facility should be listed pursuant to section 9.1.b of this rule.

9.1.b. Other covered facilities.

9.1.b.1. A facility may be added to the list of covered facilities under this rule pursuant to W. Va. Code § 15-5B-3a(a)(1)(A) upon a finding by the Director that there is a potential that an emergency event at the facility would result in harm or a risk of harm to the public, based on the presence of extremely hazardous substances at the facility or upon the decision of the Director that a facility may present a danger to responders or the public in an emergency event and upon the provision of actual written notice specified in section 2.1.b. of this rule.

9.1.b.2. A facility may be deleted from consideration under §170-2-9.1.b.1 above, if the Director determines that there is no reasonable potential that an emergency event at the facility would result in harm or a risk of harm to the public.

TABLE 170-2 A
Penalty Determination Guide for Notification Infractions

		Extent of Deviation from Requirement		
		MAJOR	MODERATE	MINOR
Potential for Harm to Health and/or Environment	MAJOR	$100,000	$75,000 to $99,999	$50,000 to $75,000
	MODERATE	$75,000 to $99,999	$50,000 to $75,000	$25,000 to $50,000
	MINOR	$50,000 to $75,000	$25,000 to 50,000	Up to $25,000

TABLE 170-2 B
Penalty Determination Guide for Communications/Access Infractions

		Extent of Deviation from Requirement		
		MAJOR	MODERATE	MINOR
Potential for Harm to Health and/or Environment	MAJOR	$100,000	$75,000 to $99,999	$50,000 to $75,000
	MODERATE	$75,000 to $99,999	$50,000 to $75,000	$25,000 to $50,000
	MINOR	$50,000 to $75,000	$25,000 to 50,000	Up to $25,000