

WEST VIRGINIA  
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY 20-5M-5-C

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 6B

TITLE OF RULE BEING PROPOSED: Primary and Secondary Containment  
of Fertilizers

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.

  
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U.S. DEPARTMENT OF AGRICULTURE  
WASHINGTON, D.C.

TITLE 61 SERIES 6B

PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS

Summary and Description of the rule

This rule substantially follows the Model Rules for Primary and Secondary Containment of Fertilizers adopted by the Association of American Plant Food Control Officials.

This rule requires that facilities storing fertilizers in quantities over 5,000 gallons (fluid) or 25 tons (dry) (if in a non-packaged form) shall have the capability of keeping spills within the containment site. Should a discharge of fertilizers occur from the containment area, the facility is required to have plans to clean up the discharge.

There is a Fertilizer Storage Facility Permit required at an annual fee of \$25.

Circumstances requiring this rule

This rule is required to comply with the mandates of the Groundwater Protection Act which states that each groundwater protection agency shall take action necessary to assure that facilities under their jurisdiction maintain and protect groundwater at existing quality.

The storage of large quantities of fertilizer is a potential source of groundwater contamination, so these facilities are regulated under this rule so as to be operated in a manner protective of groundwater.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

TITLE 61, SERIES 6B

PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS

Type of rule: Legislative

Agency: West Virginia Department of Agriculture  
 Compliance Division  
 1900 Kanawha Boulevard, E.  
 Charleston, West Virginia 25305

| Effect of Proposed Rule<br>Estimated Total Cost | ANNUAL         |                | FISCAL YEAR   |            |                  |
|---|----------------|----------------|---------------|------------|------------------|
|   | Increase<br>\$ | Decrease<br>\$ | Current<br>\$ | Next<br>\$ | Thereafter<br>\$ |
| Personal Services                               | 0              | 0              | 0             | 0          | 0                |
| Current Expense                                 | 1,000          | 500            | 0             | 1,000      | 1,000            |
| Repairs and Alterations                         | 0              | 0              | 0             | 0          | 0                |
| Equipment                                       | 0              | 0              | 0             | 0          | 0                |
| Other   | 0              | 0              | 0             | 5,000      | 1,000            |

2. Explanation of above estimates:

The estimates are based on the assumption that an annual inspection will be performed on an estimated 20 firms, for an increase in current expense of \$1,000. The \$500 decrease in cost is due to the collection of the fees for the facility permits. The estimate for "other" assumes that the Department will need to hire an outside consultant for training and may need to hold seminars with the operators of the firms during the initial years of this program.

3. Objectives of these rules:

The objective of this rule is to mandate storage conditions for fertilizer stored in large quantities in bulk so as to protect the groundwater resources of this state. The Groundwater Protection Act designated the Department of Agriculture as the regulatory agency for the application and use of fertilizers and required the agency to develop practices to prevent groundwater contamination in this area.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government.

This rule increases the responsibility of the Department of Agriculture. The impact on state government will be that another program will be added to a staff that is already working at capacity. (However, the additional work is not expected to be enough to justify another position.) There will be increased current expense and a reduction of the amount of time spent on other mandated programs. Due to the completely new nature of this program, the estimates of cost can be expected to be inaccurate.

B. Economic Impact on Political Subdivisions, Specific Industries, Specific groups of citizens.

approximately \$2,000,000

The economic impact on the agricultural industry and those served by it will be very high. It is estimated that the capitol cost to each firm installing primary and secondary containment for fertilizers is between \$50,000 and \$150,000. There are 17 retail firms that will need to install containment and an unknown number of farmers and other firms that will also need to construct these areas.

Procedures will need to be developed to identify these (currently unknown) farmers and firms that will result in the "long arm of the law" further invading the public and private lives of citizens.

C. Economic Impact on Citizens/Public at Large.

The economic impact on citizens and the public at large will be that costs of fertilizer will increase by \$10-20 per ton (from one source) or by \$75 per ton (from another source).

As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules.

Date: September 15, 1992



Signature of Agency Head or Authorized Representative

DATE: September 15, 1992

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Barbara J. Smith, Director of Compliance, WV Dept. of Agriculture

LEGISLATIVE RULE TITLE: Primary and Secondary Containment of Fertilizers

1. Authorizing statute(s) citation 20-5M-5-C

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

June 5, 1992

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

copy rule sent to all fertilizer formulators; Class I

legal ad in Charleston Daily Mail and Morgantown Dominion Post;

press release to all state newspapers; others according to attached list.

c. Date of hearing(s): July 20, 1992, Charleston, WV

July 24, 1992, Morgantown, WV

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

Attached X No comments received                     

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

September 15, 1992

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

Barbara Smith, 558-2226

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TITLE 61

WEST VIRGINIA DEPARTMENT OF AGRICULTURE

SERIES 6B

PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS

**§61-6B-1. General**

1.1 Scope. - These rules establish primary and secondary containment standards for fertilizers for the purpose of protecting the groundwater resources of the state of West Virginia.

1.2 Authority - WV Code 20-5M-5-c

1.3 Filing Date. -

1.4 Effective Date. -

1.5 This is a new legislative rule.

**§61-6B-2. Definitions**

2.1. "Abandoned container" means a storage container or other container used at a storage facility to hold fluid bulk fertilizer or fertilizer rinsate that has been out of service for more than 6 months because of a weakness or leak, or has been out of service for any reason for more than 2 years and no integrity test has been performed.

2.2. "Approved" means approval by the commissioner except where otherwise stated.

2.3. "Aqua ammonia" means an aqueous solution of anhydrous ammonia generally containing from 18 to 30 percent of ammonia (NH<sub>3</sub>) by weight and having a vapor pressure usually varying from 0 to 10 psig at 104 degrees F.

2.4. "Commissioner" means the Commissioner of the West Virginia Department of Agriculture or his appointed agent.

2.5. "Discharge" means a release outside the secondary containment area of fluid fertilizer in a quantity exceeding fifty-five (55) U.S. gallons and/or of dry bulk fertilizer in a quantity exceeding two hundred (200) pounds, unless otherwise specified in The Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. 9601, Title III Emergency Planning and Community Right-to-Know provisions. The term discharge does not include the normal loading and transportation of fertilizers from the facility or the lawful

distribution use, disposal or application of fertilizers.

2.6. "Dry bulk fertilizer" means nonfluid fertilizer in nonpackaged form.

2.7. "Elephant ring" means a storage container with open top serving as a secondary containment vessel into which a smaller primary storage container(s) is placed.

2.8. "Fertilizer" means any substance containing one or more recognized plant nutrients which is used for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth. The term fertilizer will not include agricultural liming materials, unmanipulated animal and vegetable manures, wood ashes, gypsum and other products exempted by regulation of the commissioner.

2.9. "Field operations" means the application of fertilizer to soil or plants in the course of normal agricultural or horticultural practice.

2.10. "Fluid bulk fertilizer" means fluid fertilizer in an undivided quantity exceeding 55 gallons.

2.11. "Fluid fertilizer" means fertilizer in fluid form, and includes solutions, emulsions, suspensions and slurries. "Fluid fertilizer" does not include anhydrous ammonia.

2.12. "Load or loading" means the transfer of bulk fertilizer from the storage facility to transport vehicles, application equipment, or mobile containers, unless the use of the word in the context means otherwise.

2.13. "Low pressure nitrogen solutions" means an aqueous solution of ammonium nitrate and/or urea and/or other nitrogen carriers, containing various quantities of free ammonia exceeding two percent (2%) by weight. Aqua ammonia and non-pressure nitrogen solutions commonly referred to as 28%, 30%, or 32% nitrogen solutions are excluded from this definition.

2.14. "Operational area" means an area or areas at a fertilizer storage facility where fertilizers are transferred, loaded, unloaded, mixed, or where fertilizers are cleaned or washed from application equipment, storage containers, or transportation equipment.

2.15. "Operational area containment" means any structure or system designed and constructed to effectively intercept and contain operational spills, including container or equipment wash water and rainwater, and to prevent runoff or leaching from a storage facility.

2.16. "Operator" means any person who is responsible for the transferring, loading, unloading, mixing and/or storing of

fertilizers and may include an owner, operator or manager.

2.17. "Person" means an individual, partnership, association, fiduciary, firm, company, corporation or any organized group of persons whether incorporated or not.

2.18. "Primary containment" means the storage of fluid or dry bulk fertilizer in storage containers at a storage facility.

2.19. "Roofed" means protected from precipitation and any subsequent drainage.

2.20. "Secondary containment" means any structure used to contain product spills from primary storage containers and prevent runoff or leaching.

2.21. "Storage container" means:

2.21.a. a container used for the storage of fluid or dry bulk fertilizer; or

2.21.b. a rail car, nurse tank, or other mobile container used for the storage of fluid bulk or dry fertilizer; but does not include

2.21.b.A. a mobile container storing fluid bulk or dry fertilizer at a storage facility for less than 15 days, if this storage is incidental to the loading or unloading of a storage container at the storage facility,

2.21.b.B. a mobile container located on property not owned, operated or controlled by an operator of a storage facility, nor

2.21.b.C. a container used solely for short-term emergency storage of leaking fertilizer containers.

2.22. "Storage facility" means a location at which fluid bulk fertilizer in undivided quantities in excess of five thousand hundred (5,000) U.S. gallons or dry bulk fertilizer in undivided quantities exceeding 25 tons is held in storage where the total quantity of the product at the firm may be divided into more than one storage container and still be considered "undivided"; and where that storage occurs for more than a total of 30 days during a 12 month period.

2.23. "Unload or unloading" means the transfer of bulk fertilizer in an unaltered state from the transport vehicle to the storage facility.

### §61-6B-3. General program and policy.

3.1. The commissioner recommends that every operator of a

storage facility utilize the services of a competent engineer for planning any construction or alterations to their operational area and that the publications "Environmental Handbook for Fertilizer and Agrichemical Dealers" published by the Tennessee Valley Authority, TVA Technical Library, P.O.Box 1010, Muscle Shoals, AL 35660-1010 and "Designing Facilities for Pesticide and Fertilizer Containment" published by Midwest Plan Service, 122 Davidson Hall, Iowa State University, Ames, Iowa 50011-3080 be used to assist in the development of the planning and construction of operational areas.

3.2. The commissioner strongly recommends that every operator of a storage facility take action to remove or mitigate existing contamination under the site of the proposed operational area that has the potential to contaminate groundwater prior to any construction or alteration to the operational area.

3.3. The operator will be responsible for maintenance of the operational area to comply with these rules and in a manner adequate to minimize the risk of a discharge so that the groundwater resources of this state are protected.

#### §61-6B-4. Powers and duties of the commissioner.

4.1. The commissioner has the power and authority to:

4.1.a. enter and inspect, during reasonable hours, any location where fertilizers are, or may be, stored in such quantities so as to come under these rules;

4.1.b. take samples to determine compliance with these rules;

4.1.c. review design plans where appropriate to determine compliance with these rules;

4.1.d. audit records of shipments of fertilizers, inspections, and maintenance;

4.1.e. promote the protection of groundwater through educational programs for operators;

4.1.f. collect and expend monies under the terms of this rule;

4.1.g. conduct hearings as provided by this rule;

4.1.h. assess civil penalties, negotiate agreements and refer violations to a court of competent jurisdiction;

4.1.i. obtain court orders directing any person refusing to submit to inspection, sampling or auditing to submit;

4.1.j. issue, suspend or revoke permits or deny a permit application;

4.1.k. issue orders requiring compliance with these rules; and

4.1.l. promulgate additional regulations as necessary to protect groundwater within the statutory mandates that may include but not limited to licensing and certification, operational management, closure, remediation and monitoring for water quality.

#### §61-6B-5. Permits and Design Plans.

5.1. No person may operate a storage facility, except as provided by these rules, without a valid Fertilizer Storage Facility Permit posted prominently at the local office of the storage facility. One permit may apply to a storage facility that stores both dry bulk and fluid fertilizer.

5.2. Any person intending to construct and operate a storage facility must obtain a Fertilizer Storage Facility Permit from the commissioner prior to the construction of primary or secondary storage. The application must be made at least 30 days prior to the beginning of construction of the facility for firms that are not in operation on the effective date of this rule. Any person operating a storage facility on the effective date of this rule must, within 6 months of the effective date of this rule, make application for a Fertilizer Storage Facility Permit.

5.3. Any person seeking to renew the Fertilizer Storage Facility Permit must make application within 15 days of the expiration date of the permit.

5.4. Application forms shall be furnished by the commissioner and shall contain the following information: the corporate or company name; the location; the mailing address; the phone number; the operator's name; the owner's name; and any other information relevant to the containment of bulk fertilizers.

5.5. Each application must be signed and dated by the operator or his or her authorized representative under sworn statement. The application must be accompanied by a permit fee of \$25.00. An additional \$10 penalty fee shall be assessed if the application is not made within the time periods outlined in this section of the rule.

5.6. The commissioner shall issue a non-transferable Fertilizer Storage Facility Permit to each person meeting the requirements of this section. Each permit shall expire on June 30 following the date of issue.

5.7. The commissioner may deny any application for a Fertilizer Storage Facility Permit whenever the permit has been

applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner or the applicant is determined to be not in compliance with, or not able to comply with these rules.

5.8. The commissioner may suspend or revoke a Fertilizer Storage Facility Permit whenever a hazard to the environment exists or is believed to exist, said permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the permit holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with the provisions of this rule. Any person whose Fertilizer Storage Facility Permit has been suspended or revoked shall immediately discontinue all operations covered under the permit.

5.8.a. Prior to the suspension or revocation order, the commissioner will give written notice to the permit holder, stating that the suspension or revocation of the permit is being contemplated and giving the reasons therefore. The notice shall appoint a time and place for a hearing to be held in this matter. The notice shall be mailed by certified mail to the business address of the permit holder at least 10 days prior to the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to his decision in the matter of suspension or revocation of the permit.

5.8.b. At the end of the period of suspension, the permit holder may resume operations covered by the Fertilizer Storage Facility Permit without reapplication for a permit.

5.8.c. At the end of the period of revocation, the permit holder must reapply for a permit.

5.9. Each person with a Fertilizer Storage Facility Permit shall submit design plans and specifications for construction to the commissioner prior to the start of construction, or for a storage facility that is operating on the effective date of this rule, a description of the current facility and plans to bring the facility into compliance shall be submitted within 12 months of the effective date of this rule.

5.9.a. The commissioner will allow significant lack of compliance with these specifications if they are clearly indicated on the design plans and a certification from a registered engineer accompanies these design plans stating that the design plans and specifications as submitted will not reduce the effectiveness of the facility to protect groundwater.

5.9.b. The commissioner will review the design plans and specifications with the provisions of this rule and notify the person promptly if any significant lack of compliance with these rules is found. The review of these plans by the commissioner does not eliminate the responsibility of the operator for constructing and maintaining a facility that will protect the groundwaters of

this state.

5.10. Each person submitting design plans and specifications will notify the commissioner promptly of any significant change to the design plans and specifications prior to proceeding with construction.

#### §61-6B-6. Inspection, Maintenance and Record Keeping Requirements

6.1. Every storage facility shall be inspected by the operator of the storage facility at intervals of not greater than seven days during operational periods and thirty days during non-operational periods. The inspection frequency shall be adequate to minimize the risk of a discharge. The operator will make a written record of the inspection made on the day of that inspection. In addition to the routine inspection report made on the day of the inspection, written records shall be maintained as follows, where applicable:

6.1.a. a weekly record of the condition of valves for storage containers for fluid fertilizers whenever the containers are being used for storage;

6.1.b. a weekly record of the condition of loading and unloading pads and catch basins during operational periods, or at least monthly during periods of non-use;

6.1.c. a monthly record of the fluid fertilizer levels in each storage container when in use and a comparison of the measured level versus the calculated level based on shipments in and out of the container;

6.1.d. a monthly record of the condition of primary containers and elephant rings;

6.1.e. a semi-annual inventory reconciliation, showing the amount of fluid bulk fertilizer and dry bulk fertilizer from each storage container which is lost or unaccounted for at the end of each semi-annual period; and

6.1.f. other inspection records pertaining to the condition of storage containers, appurtenances, operational area containment, and secondary containment facilities.

6.2. The operator will take immediate effective action when inspections determine non-compliance with these rules, or that a greater than minimal risk of a discharge exists. The operator will maintain a written record of the actions taken on the day of the maintenance.

6.3. The operator of a storage facility shall maintain the records required by this rule for a minimum of 5 years at each storage facility or at the nearest local office from which the

storage facility is administered and shall make all records required by this rule available to the commissioner upon request.

#### **§61-6B-7. Discharge Response Plan**

7.1. The operator of a storage facility shall prepare a written Discharge Response Plan for the storage facility. The plan shall include:

7.1.a. the identity and telephone number of the persons or agencies who are to be contacted in the event of a discharge, including persons responsible for the stored fertilizer;

7.1.b. for each bulk fertilizer stored at the facility, a complete copy of the labeling required by WV Code §19-15-1 et seq. (except for the net weight);

7.1.c. an identification, by location, of every storage container located at the storage facility, and the type of fertilizer stored in each storage container;

7.1.d. for each type of bulk fertilizer stored at the facility, the procedures to be used in controlling and recovering, or otherwise responding to a discharge; and

7.1.e. procedures to be followed in using or disposing of a recovered discharge.

7.2. The operator shall keep the Discharge Response Plan current at all times.

7.3. The operator shall keep a copy of the Discharge Response Plan readily available at the storage facility or at the nearest local office from which the storage facility is administered, and shall make the plan available for inspection and copying by the commissioner.

7.4. The commissioner will require the operator of each facility existing on the effective date of this rule complete a Discharge Response Plan within 2 years of the effective date of this rule.

#### **§61-6B-8. Storage and Handling of Dry Bulk Fertilizer**

8.1. No person will store dry bulk fertilizer in undivided quantities exceeding 25 tons unless the storage is inside an operational area containment structure consisting of a sound structure or device having a cover or roof top, sidewalls, and a base sufficient to prevent contact with precipitation and surface waters.

8.2. No person will load, unload, mix or handle dry bulk

fertilizer, except for those procedures performed in the field of application, without using a containment method, device, or structure suitable to prevent or minimize groundwater contamination. The containment method, device, or structure shall be of a size and design that will contain the fertilizer and operated to minimize emission of dust and/or vapors beyond the facility boundaries. Any collected material shall be applied at agronomic fertilizer rates or otherwise recycled.

8.3. The operator will promptly recover, so as to prevent possible seepage or run-off to the groundwaters of this state any dry bulk fertilizer which is spilled while being loaded to or from storage when the spillage would exceed a quantity greater than 200 lbs.

8.4. The commissioner will consider approval of containment devices, structures, or methods which include, but are not limited to:

8.4.a. paving and curbing of outdoor handling areas with materials which allow for collection and recycling of the spilled products;

8.4.b. enclosing conveyors and equipping conveyors with dust control boots. Manually extendible boots may be adaptable to upright and auger type conveyors;

8.4.c. collection and recycling of product dust from rooftops of roof-filled storage structures; or

8.4.d. daily cleanup of the non-roofed areas each day when in use.

8.5. No person will store dry bulk fertilizer without a complete label as required by WV Code §19-15-1 et seq. (except for the net weight) posted on the storage container or on a placard erected on the product.

8.6. No person may construct an operational area for dry bulk fertilizer storage in undivided quantities exceeding 25 tons closer than 100 feet from a wellhead, unless that operation is in use on the effective date of this rule.

8.7. No person may store dry bulk fertilizer on land with a reasonable expectation of having a flood event from a 25 year - 24 hour frequency storm during the storage period unless the storage area is adequately protected from inundation by flooding.

8.8. The commissioner will allow firms that operate a storage facility for dry bulk fertilizer on the effective date of this rule 5 years to fully comply with this rule as long as the operator submits a plan for full compliance with this rule within 2 years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of

the current facility.

**§61-6B-9. Primary Containment: Storage Containers and Appurtenances for Fluid Fertilizer**

9.1. No person may store fluid fertilizer in storage containers and appurtenances unless the containers and appurtenances are

9.1.a. constructed, installed and maintained so as to prevent the discharge of fluid fertilizer;

9.1.b. constructed of materials which are resistant to corrosion, puncture or cracking;

9.1.c. made or repaired with materials that are not of a type which react chemically or electrolytically with stored fluid fertilizer in a way which may weaken the storage container or appurtenances, or create a risk of discharge;

9.1.d. made with metals used for valves, fittings and repairs on metal containers that are compatible with the metals used in the construction of the storage container, so that the combination of metals does not cause or increase corrosion which may weaken the storage container or its appurtenances, or create a risk of discharge;

9.1.e. equipped with supports for pipes and fittings that are adequate to prevent sagging and possible breakage because of gravity and other forces which may be encountered in the ordinary course of operations;

9.1.f. are protected against reasonably foreseeable risks of damage by trucks and other moving vehicles engaged in the loading or unloading of fluid bulk fertilizer;

9.1.g. designed to handle all operating stresses, taking into account static head, pressure buildup from pumps and compressors, and any other mechanical stresses to which the storage containers and appurtenances may be subject in the foreseeable course of operations;

9.1.h. anchored, as necessary, to prevent flotation or instability which might occur as a result of liquid accumulations within a secondary containment facility; and

9.1.i. equipped with a liquid level gauging device secured in a safe manner to protect against breakage or vandalism on each storage container whereby the level of fluid in the storage container can be readily and safely determined, unless

9.1.i.A. the level of fluid in a storage container can be readily and reliably measured by other means, provided that

external sight gauges may not be used unless they are securely attached against the container wall and provided with a manually operated shut off valve which is locked in the shut off position at all times the level of fluid is not being determined.

9.2. The commissioner recommends that the storage containers and appurtenances be vented to manufacturer's specifications for the product being stored in the container.

9.3. No person may store fluid fertilizer in an underground or lined pit storage container, except for:

9.3.a. a watertight catch basin used for the temporary collection of runoff or rinsate from transfer, loading and unloading areas, and expeditiously emptied following use;

9.3.b. a 316 or 317 stainless steel storage container;  
or

9.3.c. in another approved container, if the storage container is enclosed within an approved liner and an approved program of groundwater monitoring to detect leakage is established.

9.4. The commissioner prohibits the use of storage containers and appurtenances

9.4.a. that are constructed of copper, brass, zinc, or copper base alloys;

9.4.b. used for the storage of fluid fertilizers containing phosphates (>0.1%) or chlorides that are constructed of aluminum or aluminum alloys;

9.4.c. used for the storage of low pH (<5) fluid fertilizers that are constructed of ferrous materials other than stainless steel unless the materials are coated or treated with protective substances which are adequate to inhibit corrosion;

9.4.d. used for the storage of low pressure nitrogen solutions that are constructed of mild steel, fiberglass, polyolefins or plastic;

9.4.e. used for the storage of phosphoric acid that are constructed of ferrous materials other than 316 or 317 (or superior) stainless steel unless the container is lined with a suitable substance to prevent corrosion; or

9.4.f. used for the storage of fluid fertilizers containing potassium chloride (muriate of potash) that are constructed of ferrous materials other than stainless steel, unless:

9.4.f.A. the containers and appurtenances are coated or treated with protective substances which are adequate to

inhibit corrosion; or

9.4.f.B. the container or appurtenance is used for storage periods of not more than 6 months, and is completely emptied between storage periods, and, the empty containers and appurtenances are cleaned and inspected for leaks prior to being refilled for any subsequent period.

9.5. No person may store fluid fertilizer unless the

9.5.a. storage containers and appurtenances are fenced or otherwise secured by an approved means to provide reasonable protection from wildlife, vandalism and unauthorized access which may result in a discharge;

9.5.b. valves on storage containers containing fluid fertilizers are locked or otherwise secured except when persons responsible for facility security are present at the facility; and

9.5.c. valves on rail cars, nurse tanks, and other mobile fertilizer containers containing fluid fertilizer parked overnight at a storage facility are locked or secured except when persons responsible for facility security are present at the facility.

9.6. No person may fill storage containers beyond the capacity for which they are designed, taking into account the density of the fluid being stored and thermal expansion during storage.

9.7. No person may store fluid fertilizer in a storage container without a clear and prominent label identifying the contents of the storage container with the requirements of WV Code §19-15-1 et seq. (except for the net weight).

9.8. No person may store fluid fertilizers on land that has a reasonable expectation of having a flood event resulting from a 25 year - 24 hour frequency storm during the storage period unless the storage area is adequately protected from inundation by flooding.

9.9. No person may construct an operational area for fluid fertilizers closer than 100 feet from a wellhead, unless that operation is in use on the effective date of this rule.

9.10. Any person owning an abandoned underground container, or abandoned underground catch basin shall thoroughly clean and remove it from the ground or thoroughly clean and fill it with an inert solid and shall maintain a permanent record of any abandoned container or catch basin (that remains underground) size, location, and method of closing at the storage facility or at the nearest office from which the storage facility is administered.

9.11. Any person owning an abandoned container or abandoned

catch basin, whether underground or not, shall disconnect and seal all connections and vents and secure all hatches and sever and/or seal all valves and connections.

9.12. The commissioner will not consider a secondary containment facility to be abandoned merely because there have been no operational spills into the secondary containment facility.

9.13. The commissioner will allow facilities that are in operation on the effective date of this rule 3 years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-10. Secondary Containment: Operational Area Containment for Fluid Fertilizer**

10.1. No person may store fluid fertilizer unless the area used for the loading of fluid bulk fertilizer into storage containers, or for unloading fluid bulk fertilizer from storage containers into mobile containers is curbed and paved with asphalt, concrete or other material approved by the commissioner. Such curbed and paved area must provide an impervious surface where the curbed and paved area is

10.1.a. of sufficient size to hold the entire mobile container during loading and unloading; and

10.1.b. designed, constructed and maintained to handle all loading conditions to which it is exposed; and

10.1.c. maintained by keeping all cracks and seams sealed and be impervious to leakage from any spillage.

10.2. The requirements of this section do not apply to mobile containers used to nurse field operations when at a field unloading site.

10.3. No person may store fluid fertilizers unless the operational area containment has a curbed and paved surface that drains into a liquid-tight catch basin

10.3.a. that is of adequate design and size to contain a minimum of one thousand five hundred (1,500) gallons of an operational spill when at least one person is available during the entire loading and unloading process that is capable of stopping the loading or unloading process in the case of an operational spill; but if no person is available to monitor the loading and unloading process then the design and size shall be adequate to contain a total of 110% of the volume of the largest vehicle to be loaded or unloaded; and

10.3.b. which may include a sump and an above-ground container, provided that a pump is installed for transfers of the contents into the above-ground container.

10.4. All operators are responsible for promptly recovering any operational spill from the operational area containment so that the capacity required in this section is available at all times.

10.5. All operators will be responsible for maintaining all secondary containment free of debris and foreign matter.

10.6. The commissioner will allow adjoining secondary containment areas to share common walls.

10.7. The commissioner will allow facilities that are in operation on the effective date of this rule 3 years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

#### §61-6B-11. Secondary Containment of Fluid Bulk Fertilizer - Dikes and Elephant Rings.

11.1. No person may store fluid bulk fertilizer unless the primary storage area is located within a diked area that is constructed with a base, perimeter wall and sloped floor drain or is located within an elephant ring as provided by this section.

11.2. No person may use the diked area for storage of other products other than fluid bulk fertilizers and equipment used in the operational area. All operators must maintain the minimum capacity requirement at all times. The minimum capacity requirement for the diked area for containment shall contain, below the height of the dike, 125% of the volume of the largest storage container within the diked area plus the submerged portions of all other storage containers, fixtures, and materials in the area, except that if the diked area is covered to prevent the accumulation of rainfall, a capacity equal to 100% of the volume of the largest container is the minimum capacity required.

11.3. No person may operate a operational area containment facility with drainage tile within or underlying the area unless the drainage tile is used as a method of monitoring the integrity of the primary and secondary containment structures.

11.4. The commissioner requires that dikes meet the following requirements:

11.4.a. the walls of a secondary containment facility shall be constructed of earth, steel, concrete or solid masonry, or other material specifically approved by the commissioner, and be

designed to withstand a full hydrostatic head of any discharged fluid and weight load of material used in construction;

11.4.b. cracks and seams shall be sealed to prevent leakage;

11.4.c. walls constructed of earth or other permeable materials shall be lined as provided in this section;

11.4.d. earthen walls shall have a horizontal-to-vertical slope of at least 3 to 1, unless a steeper slope is consistent with good engineering practice, and shall be packed and protected from erosion;

11.4.e. the top of earthen walls shall be no less than 2.5 feet wide;

11.4.f. walls may not exceed 6 feet in height above interior grade unless provisions are made for normal access and necessary emergency access to tanks, valves and other equipment, and for safe exit from the secondary containment facility;

11.4.g. walls constructed of concrete or solid masonry shall rest upon a floating base of concrete prepared as in this section or upon suitable concrete footings which extend below the average frost depth to provide structural integrity;

11.4.h. the base of a secondary containment facility, and any earthen walls of the facility shall be lined with asphalt, concrete, an approved synthetic liner, or a clay soil liner designed to limit permeability of the base and walls. Liners shall meet the following requirements.

11.4.h.A. Asphalt or concrete liners shall be designed according to good engineering practices to withstand any foreseeable loading conditions, including a full hydrostatic head of discharged fluid and static loads of storage containers, including appurtenances, equipment, and contents. Cracks and seams shall be sealed to prevent leakage.

11.4.h.B. Synthetic liners and installation plans shall be approved by the commissioner. A synthetic liner may not be approved by the commissioner until the manufacturer of the liner provides the commissioner with a written confirmation of suitability including compatibility with the stored materials, and a written estimate of the life of the liner. Synthetic liners shall have a minimum thickness of 30 mils (0.8 millimeters); and shall be installed under the supervision of a qualified representative of the manufacturer or a professional engineer. All field constructed seams shall be tested, and repaired if necessary, in accordance with the manufacturer's recommendations.

11.4.h.C. Soil liners shall be constructed by sealing the surface of the soil, including the berm of an earthen

dike with a sealing agent such as sodium bentonite, attapulgite or a similar clay material. The soil liner shall be constructed in accordance with reliable civil engineering practices, to achieve a coefficient of permeability not to exceed  $1.0 \times 10^{-6}$  cm/sec, with a thickness of not less than 6 inches. The floor of the containment area within the soil liner shall be protected with a layer of gravel or crushed stone at least 6 inches thick placed on top of the clay liner.

11.5. The commissioner will not require that a liner be installed directly under a storage container having a capacity of one hundred thousand (100,000) U.S. gallons or more which has been constructed on site and put into use prior to the effective date of this rule provided that one (1) of the following alternative procedures is complied with, certified in writing by an official of the company which owns the storage container, and the certificate is filed with the commissioner.

11.5.a. Alternative 1: The original bottom of the storage container shall be tested for leaks before the sand layer and second bottom are installed. A record of the test shall be kept on file at the storage facility. A second bottom made of steel shall be constructed for the storage container. The second bottom shall be placed over the original bottom and a layer of smooth, fine gravel or coarse sand having a minimum thickness of three (3) inches. The newly constructed bottom shall be tested for leaks before any fluid fertilizer is stored on the newly constructed bottom. A record of the test shall be kept on file at the storage facility, or at the nearest local office from which the storage facility is administered.

11.5.b. Alternative 2: The container shall be emptied, cleaned, and tested for leaks. The walls and floor of the container shall be tested to assure that welds and thickness of steel plates are sound and adequate to contain the fertilizers. A record of the inspection, test results, and of any repairs made shall be submitted to the control official and maintained by the operator. The interior floor and wall areas of the container shall be coated with an approved liner to inhibit corrosion. A record of this procedure shall be submitted to the commissioner and maintained by the operator. A test for leaks and liner deterioration approved by the commissioner shall be conducted every five (5) years thereafter. A record of the test findings and of indicated repairs and maintenance shall be maintained by the operator.

11.5.c. Alternative 3: Monitoring devices shall be installed in angled borings under each tank. These monitoring devices shall constitute a leak detection system for each tank in advance of the point at which any leak would reach groundwater. The number, length, and depth of each boring shall be determined on the basis of site characteristics. The array of monitoring devices under each tank shall constitute the best practical early warning detection system for tank leakage. Each monitoring plan under this

alternative shall be implemented only upon review and approval of the commissioner.

11.6. The commissioner will not require a secondary containment structure to be used for rail cars that are periodically moved into and out of the storage facility.

11.7. The commissioner will allow individual storage containers not exceeding three thousand (3,000) gallons to be contained within an "elephant ring" in lieu of a diked secondary containment area. The commissioner requires that secondary containment areas using elephant rings meet the following requirements:

11.7.a. both the primary storage container and the elephant ring shall be fabricated of material compatible with each other and with the fertilizer being stored;

11.7.b. if dissimilar metals between the primary storage container and the elephant ring are used that may contribute to electrolytic corrosion provisions must be made to prevent such corrosion;

11.7.c. the height of the elephant ring wall shall not exceed 4 feet unless provisions are made for escape should flooding occur;

11.7.d. the volume contained within the secondary storage walls of the elephant ring up to the working height of the elephant ring shall be sufficient to contain a volume 15% greater than the volume contained in the primary storage container plus the volume displaced by the footings of any equipment (i.e. pumps, meters, etc.) placed within the secondary containment vessel;

11.7.e. the elephant ring shall be maintained free of leaks and structural defects at all times;

11.7.f. the base shall be protected from corrosion, both from inside and outside the ring, and shall be underlain by a concrete pad or with eight inches of compacted gravel beneath four inches of compacted sand, or clay, or as recommended by the manufacturer of the elephant ring and approved by the commissioner;

11.7.g. all piping connections to the primary storage container shall be made over the wall of the elephant ring and shall be adequately supported and braced;

11.7.h. have a sump pump within the elephant ring or an exterior portable pump available for removing operational discharges; and

11.7.i. pumps and other fixtures, if located within the elephant ring containment structure, shall be placed on an elevated platform above the top of the elephant ring or otherwise protected

from flooding.

11.8. The commissioner will allow facilities that are in operation on the effective date of this rule 3 years to fully comply with this section of the rule as long as the operator submits a plan for full compliance with this section of the rule within 2 years of the effective date of this rule and the operator takes immediate action to prevent groundwater pollution within the capability of the current facility.

**§61-6B-12. Drainage from Secondary Containment Areas.**

12.1. No person may operate a diked secondary containment area with a relief outlet and valve.

12.2. The commissioner will require that a diked earthen or prefabricated secondary containment area shall have a base that slopes to a collecting spot where storm water can be discharged by a manually-operated pump over the berm for use in the blending process or for proper disposal in accordance with local requirements for disposal of storm water.

12.3. The commissioner will require that an asphalt or concrete lined secondary containment area shall have

12.3.a. a recessed catch drain running through the center of the base; or

12.3.b. a sump located within the containment area, that shall have no valve plumbed into the sump unless that sump is a part of a permanent recessed catch drain as specified in this section.

12.4. The commissioner will allow storm water or other drainage to be removed from the secondary containment area if used for makeup water in fertilizer mixes or disposed of in accordance with local requirements if it is known or believed to be free of chemical residues that could contaminate groundwater.

12.5. No operator may use a collection tank as a storage area.

12.6. All operators are responsible for removing operational spills from the secondary containment area promptly in order to maintain the capacity for future operational spills.

**§61-6B-13. Hearings.**

13.1. The commissioner will offer a person an opportunity for an informal hearing prior to issuing an order in all cases except where the protection of the public health requires immediate action to protect groundwaters in this state.

**§61-6B-14. Civil and criminal penalties.**

14.1. When determining the assessment of civil or criminal penalties the commissioner shall consider the following factors in determining the unreasonableness of any harm referred to in this rule which shall include, but need not be limited

14.1.a. to the extent of harm to public health, environment, beneficial use of the groundwater;

14.1.b. to the burden and fairness of requiring a person to bear the loss;

14.1.c. to the causing of harm in the conduct of reasonable activities utilizing practices conducted in conformity with federal and state laws and regulations;

14.1.d. to the person's history of compliance that indicates continued noncompliance or disregard for compliance;

14.1.e. to the person's knowledge of the rules and regulations that were violated; and

14.1.f. to activities that were conducted in a negligent, reckless or intentional manner, where negligence means a failure to exercise reasonable care.

**§61-6B-15. Special revenue account and Groundwater remediation fund.**

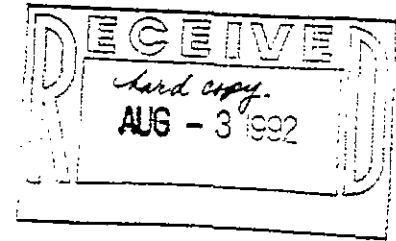
15.1. The commissioner will deposit all fees, penalties or other monies collected under the provisions of this rule into a special revenue account and expended upon the order of the commissioner for the purpose of the enforcement and administration of this rule; except for the net proceeds of civil penalties collected pursuant to W.Va. Code §20-5M-10-a or any civil administrative penalties collected pursuant to W. Va. Code §20-5M-10-c that will be deposited in the groundwater remediation fund established in W. Va. Code §20-5M-1 et seq.



**CHEMLAWN®**

3 Page FAX to 304-558-3594

*rec'd fax on July 31*  
July 31, 1992



Ms. Barbara Smith  
Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Re: General Groundwater Protection Rules for Fertilizer and Manures  
and Primary and Secondary Containment of Fertilizers

Dear Ms. Smith:

I am submitting my comments on behalf of ChemLawn, a nationwide landscape care company providing services to customers in 44 states. ChemLawn shares the states' growing concern regarding chemical runoff into surface water and chemical leaching into groundwater and is in the process of working with committees in several states as they address these issues. ChemLawn commends your department's efforts to construct reasonable regulations and best management practices for the protection of our nation's groundwater. I appreciate this opportunity to comment on these proposed regulations and to offer suggestions where applicable.

General Groundwater Protection Rules for Fertilizer and Manures

§61-6A-5. Powers and duties of commissioner.

5.1.K. ChemLawn is unfamiliar with the referenced Groundwater Coordinating Committee and requests a description of the responsibilities of this committee as well as its participants.

§61-6A-6. Protection of groundwater from point sources.

6.6. - This section specifies that fertilizers should be stored inside a "sound structure or device having a cover or roof top, sidewalls and a base sufficient to prevent contact with precipitation and surface water." It is ChemLawn's practice to store its liquid bulk fertilizers in tanks outside of the actual facility. This section is unclear as to whether this storage arrangement would require that the tanks be enclosed.

6.7. - ChemLawn supports this provision for a mixing/loading pad for fertilizers, as well as pesticides, and has, in fact, sponsored legislation in several states promoting this type of containment. (Please refer to ChemLawn's *Model Landscape Care Act* enclosed.)

§61-6A-7. Protection of groundwater from non-point sources.

7.1.b. - The use of the term "snow-covered" is somewhat vague. ChemLawn requests clarification of this term.

7.1.d. - ChemLawn is concerned with the recommended 50-foot buffer zone around a wellhead, particularly as it applies to turf. Research indicates that well maintained turf may be one means of protecting the water supply. (Please refer to copies of recent studies enclosed.) Therefore, ChemLawn does not feel that there is any scientific justification for a 50-foot buffer zone around wellheads for lawn care type applications.

As a matter of company policy, ChemLawn maintains a 3-foot "ring of responsibility" around all water sources. It would be our recommendation that the State of West Virginia adopt this type of best management practice.

Primary and Secondary Containment of Fertilizers

§61-6B-5. Permits and Design Plans.

ChemLawn supports the fertilizer storage facility permit system as a means of ensuring the protection of groundwater through properly designed and maintained containment systems. However, ChemLawn would like clarification on the following sections of this process.

5.6 - This section specifies that a non-transferable permit will be issued to each person meeting the requirements of this section. Shouldn't the permit be issued to the facility in the event that the responsible person leaves the company?

§6.1-6B-9. Primary Containment: Storage Containers and Appurtenances for Fluid Fertilizer.

9.1.h - ChemLawn requests clarification of the term "anchored."

9.4.f(a) - ChemLawn requests clarification of the "protective substances" that are deemed adequate to prevent erosion" by the Department, as well as the tank areas that need to be protected.

§61-6B-10 - Secondary Containment - Operational Area Containment for Fluid Fertilizer.

10.1 - 10.1.a - In many facilities in our industry it is very difficult to meet the requirements of these provisions for the unloading containment areas where the suppliers fill the existing facility storage containers. It is ChemLawn's recommendation that consideration be given to the use of a portable containment system to be used to recover any material that might be lost during this filling process. Enclosed is language adopted in Illinois that allows for this type of portable containment system and still meets the requirements for protection.

I appreciate the opportunity to address these issues and would encourage you to contact me if you have any questions or require additional information.

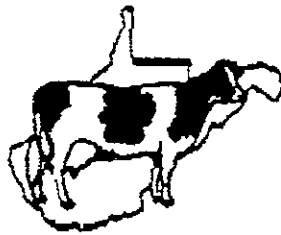
Very truly yours,

ChemLawn



Forrester D. Potter  
Manager, Legislative Affairs

jhm  
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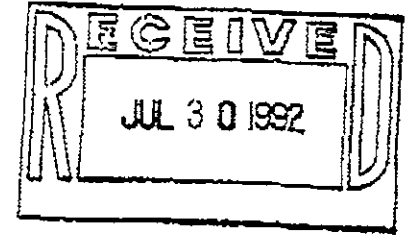


**West Virginia  
Holstein Association**

Mrs. Cathy Britvec, Secretary/Treasurer  
620 Adaline Avenue  
Morgantown, WV 26505  
(304) 296-5028

CC: Bob Fiamel  
Barbara

July 28, 1992



The Honorable Cleve Benedict  
Commissioner of Agriculture  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Commissioner Benedict:

At our last board of directors meeting Steve Hannah, Executive Secretary, WV Farm Bureau, spoke to us about the following proposed legislation:

- Title 61 - Series 6A - General Groundwater Protection Rules for Fertilizer and Manures
- Title 61 - Series 6B - Primary and Secondary Containment of Fertilizers
- Title 61 - Series 12H - Bulk Pesticides Operational Rules
- Title 61 - Series 12I - Non-Bulk Pesticide Rules for Permanent Operation Areas
- Title 61 - Series 12G - General Groundwater Protection Rules for Pesticides
- Title 61 - Series 22 - Best Management Practices for Temporary Operational Areas of Non-Bulk Pesticides

Mr. Hannah supplied us with a copy of these regulations and I understand the deadline for comments on these regulations is July 30th.

We discussed the economic impact these regulations would have on the agricultural industry as well as state and local government. Considering the following found in the Economic Impact Statement of Title 61, Series 6B - Primary and Secondary Containment of Fertilizers: "As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules", we feel adequate study must be done to determine the financial impact these regulations will have on individuals, companies, state, county, and local government.

Mr. Hannah has commented on specific parts of each proposed legislation and we trust you will view these comments favorably. We are concerned about the economic impact upon the dairy industry which is already overburdened with expenses and with low milk prices. We appreciate the efforts of the WV Farm Bureau to reflect the concern of the agriculture industry in this state.

Sincerely,

*Ivan McCombs*

Ivan McCombs  
President



# SIERRA CLUB WEST VIRGINIA CHAPTER

P. O. Box 4142  
Morgantown, WV 26504



July 23, 1992

Barbara Smith  
Compliance Division  
West Virginia Dept. of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Ms. Smith:

I am submitting the following comments regarding the proposed groundwater regulations on behalf of the West Virginia Chapter of the Sierra Club. We have long advocated strong groundwater protection legislation for West Virginia and are strong supporters of West Virginia's Groundwater Protection Act of 1991. Thus it is disappointing to see such weak and ineffective rules being promulgated to enforce the Act. We believe that these proposed regulations violate the intent of the Legislature in passing the Groundwater Protection Act.

The Act states "it is the public policy of the state of West Virginia to maintain and protect the state's groundwater so as to support the present and future beneficial uses and further to maintain and protect groundwater at existing quality where the existing quality is better than that required to maintain and protect the present and future beneficial uses." It further states "Pollution of groundwater shall not be considered a beneficial use." The Legislature intended that the regulations proposed under the Act "provide for the establishment of groundwater protection programs consistent with this Article;" and "provide for such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program." I cannot believe that these proposed regulations will even come close to fulfilling the intent of the law.

I wish to first cite several major gaps which exist in groundwater regulations currently being developed that are relevant to these regs. Specific comments on the weaknesses of the proposed regs and suggestions for their amendment will follow.

1. The issue of land application of various sludges, soil amendments, fly ash, and other solid wastes being applied as beneficial uses has not been addressed, in spite of frequent requests to do so. While many of these materials are actually solid wastes that are being disposed of on land, their organic matter or mineral nutrient content allows them to be exempted from solid waste regs under the beneficial use provisions. Although we do not wish to impede the application of those

*"Not blind opposition to progress, but opposition to blind progress."*

materials that truly do present benefit to the land, many of these substances produce a leachate that may be high in heavy metals, toxic organic compounds, or strongly alkaline or acid forming constituents. The definition of fertilizers and manures must be expanded to include these so-called beneficial materials into a regulatory program in order to assure that these beneficial uses are in fact beneficial and not just a convenient way for industry to avoid solid waste regulations.

2. Underground storage tanks for fuels used on farms were not included in regulations proposed by DNR to regulate groundwater impacts from these tanks because "Dept. of Ag will handle those" or so environmentalists were told. While the volume of these tanks is generally smaller than for many commercial facilities, their potential to contaminate groundwater is still very significant. An enforceable maintenance and monitoring program is needed.

3. These regs do not contain adequate remediation requirements if contamination should occur. Furthermore, no mention is made of how victims of pollution are to be compensated. As such, there is very little enforcement incentive to encourage voluntary compliance with these regs. Obviously, prevention is considerably cheaper than remediation, unless the cost of remediation is borne only by downstream users and not the polluter. Without the "stick" of remediation and cleanup costs, there is no incentive to follow the carrot of prevention by complying with these regs. Thus the Dept. is left with an enforcement nightmare.

4. These regs also lack any mention of a monitoring program. Without even a semblance of a monitoring program, the regs are totally unenforceable. Section 5 Paragraph (d) of the Act clearly states that agencies shall develop practices to prevent groundwater contamination and states specifically that such practices shall include "remediation and monitoring".

Areas discussed in these regs which must be amended include:

5. Enforcement. Regulatory actions by the Commissioner are discretionary. The regs should be amended to make regulatory action by the Commissioner mandatory when pollution is occurring. Citizens must have some assurance that their groundwater will be protected and that action to stop pollution will be forthcoming. A regulatory agency should not have the discretion to knowingly ignore pollution which violates West Virginia's groundwater protection law. Other states, such as Wisconsin, have adopted regulations which require regulatory agencies to evaluate, among other regulatory responses, "the practicality of stopping the further release" of a pollutant that exceeds groundwater standards, and "the risks and benefits of continued operation of a facility, practice, or activity." Unless these enforcement options are spelled out and made mandatory when pollution is occurring, the enforcement program simply is not credible.

6. Definitions of regulated facilities. Series 12-I defines "non-bulk permanent operational areas" as those exceeding 300 gallons liquid, 3000 pounds dry weight, or 1500 pounds active ingredient handled over thirty days. Areas smaller than these are not regulated. Series 6A defines feedlots to be regulated as those with more than 1000 animal units (500 in vulnerable areas). Facilities handling much smaller volumes of pesticides, or feedlots with many fewer animal units, could present very serious risks to groundwater, yet these regs do not provide for any mandatory enforcement activities for these facilities. As such, these regs clearly fail in their legislatively-mandated purpose of "providing such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program".

7. Timetable for implementation. Various timetables are proposed for mandatory portions of these regs, ranging from three years for bulk pesticide storage facilities, up to ten years for feedlots. I believe that these timetables are simply too long to provide any incentive for a credible groundwater protection program. Our experience has shown that, if given three years to implement a rule, nothing will be done for two and a half years. If given ten years, nothing will get done for nine and a half years. Is there any credible justification for delaying implementation of these rules more than two years?

8. Findings. Many of the policy statements not only contradict those of the Act, but are contradicted internally within the regs as well. For example, in Series 6A and in 12-G, paragraph 4.1, the Commissioner finds that current knowledge is not sufficient to develop mandatory practices that will effectively protect groundwater. Yet in the next paragraph, 4.2, he believes voluntary practices will be effective in protecting groundwater. How can voluntary practices be effective, while mandatory ones won't?

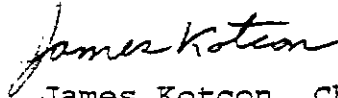
9. Making voluntary regs mandatory. Paragraphs 4.4 and 4.5 of series 6A and 12-G reserves the right of the Commissioner to make mandatory various practices when monitoring data indicate that pollution has occurred. This provision is directly contrary to the provisions of the law and to the principle of prevention. After contamination has occurred, it is too late to prevent it through mandatory rules. The Legislature mandated a policy to protect and maintain existing groundwater quality "unless it is established that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives." If the mandatory provisions are technically feasible after contamination has occurred, they are also feasible before. If the provisions are made mandatory after contamination has occurred, then the contamination clearly is not justified based on economic or societal objectives, otherwise mandatory provisions would not be needed. While I recognize the value of a phased in regulatory program, the

procedures identified in this section are clearly inconsistent with the intent of the Act as well as the processes spelled out in the Act.

10. Penalties. This section needs to spell out specific penalties for specific acts, or alternatively, indicate the liability incurred for contaminating groundwater. Paragraph 9.1 in particular clearly limits the Commissioner's ability to assess penalties and, furthermore, places a substantial burden of proof on him to show that violations were "grossly negligent, reckless or intentional". This is directly contrary to the need, which I have expressed above, for nondiscretionary enforcement actions for violations. The language throughout this section seems to imply that just about any excuse will relieve a polluter of any liabilities for penalties.

In conclusion, we urge the Dept. of Agriculture to revise and strengthen these regs to address our concerns and to bring them into compliance with the Groundwater Protection Act. We cannot support these regs as currently drafted because they undermine both the intent and the letter of the law. We anticipate submitting additional comments regarding specific language before the close of public comment. Thank you for the opportunity to present our views.

Sincerely,



James Kotcon, Chair  
West Virginia Chapter of the Sierra Club

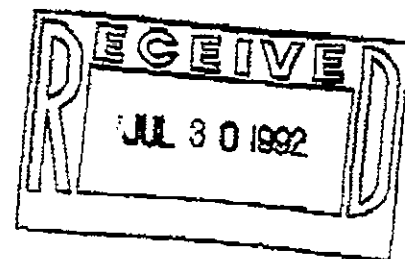
cc:  
Chuck Chambers, Speaker, WV House of Delegates  
Dr. Eli McCoy, Chief, Water Resources Section



Mr. & Mrs. Russell T. Linger, Jr.  
(304) 336-4434

## LINGER FARMS INC.

P. O. Box 14  
Huttonsville, WV 26273



July 28, 1992

The Honorable Cleve Benedict  
Commissioner of Agriculture  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Commissioner Benedict,

I am making a few comments on the proposed regulations for ground water protection from fertilizer, manure and pesticides.

I feel these regulations will have a serious economic impact on farmers and farm supply business of the state. If surrounding states do not have equal or more stringent rules on storage of fertilizer and pesticides, the small suppliers in West Virginia will be forced to discontinue their service and farmers in West Virginia will be forced to go out of state to get these products. Our farm, on occasion, stores trailer load lots of bulk fertilizer for up to 5 months if they can be bought at a more competitive price earlier in the season. With these being stored in a sound building with a concrete floor. I can see no possibility of the fertilizer getting into the ground water. Also, I feel if pesticides are stored, locked in a good building, there is no danger.

I believe that instead of listing some of the management practices for the spreading of manure and fertilizer that reference be made to the Soil Conservation Service manual. They have the technical expertise and would keep this updated as the need arises.

I realize we must protect our environment and our farm strives to do this. It would be damaging to the agriculture economy of the state if we set up more stringent rules than are necessary until a problem is located, especially since this state is a low user of these products compared to other more dense agriculture states.

Thank you for your consideration to these points. I hope that we can end up with final regulations that will protect our ground water supply but will not put an untimely or unnecessary economic burden on the agriculture economy.

Sincerely,

  
Russell T. Linger, Jr.

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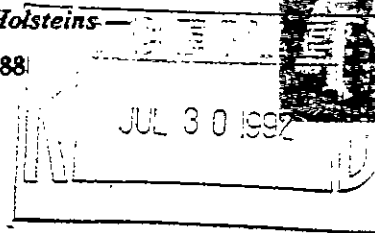


## SHADY GROVE FARM

MR. & MRS. JAMES L. LOUTHAN  
P.O. Box 142  
Rippon, W. Va. 25441

— Home of Gaylord Holsteins —

(304) 725-5388



July 26, 1992

Ms. Barbara Smith  
W. Va. Dept. of Ag.  
Compliance Division  
1900 Kanawha Blvd.  
Charleston, W. Va. 25305

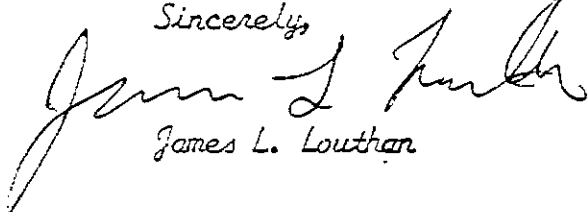
Dear Madam,

Thanks to Luther B. Smith West Virginia Extension Service, I have been forwarded a copy of the West Virginia Groundwater Protection Act. Title 61, Series 6 A and 6 B.

Is this law or a proposed law? If proposed who is backing it and who is bucking it? I am familiar with the Clean Water Act, so I know where it is coming from.

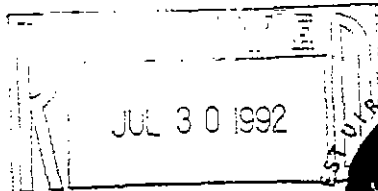
I am quite disappointed that no hearings were scheduled here in the Eastern Panhandle where we have more animal and crop agriculture. I am much more dismayed that due to the Karst limitations that hearings were not held here in the Eastern Panhandle.

Sincerely,

  
James L. Louthan

# West Virginia Farm Bureau

Member of American Farm Bureau Federation

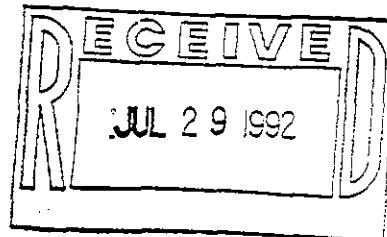


1 Red Rock Road, Buckhannon, WV 26201

304/472-2080

July 27, 1992

The Honorable Cleve Benedict  
Commissioner of Agriculture  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305



RE: COMMENTS ON PROPOSED REGULATIONS

Title 61 - Series 6A - General Groundwater Protection  
Rules for Fertilizer and Manures

Title 61 - Series 6B - Primary and Secondary  
Containment of Fertilizers

Title 61 - Series 12H - Bulk Pesticides Operational Rules

Title 61 - Series 12I - Non-Bulk Pesticide Rules  
for Permanent Operation Areas

Title 61 - Series 12G - General Groundwater Protection  
Rules for Pesticides

Title 61 - Series 22A - Best Management Practices  
for Temporary Operational Areas of Non-Bulk Pesticides

Title 61 - Series 22 - Generic State Management Plan for Pesticides  
and Fertilizers in Groundwater

Dear Commissioner Benedict:

This is to respectfully comment on the proposed above-cited rules as they pertain to agriculture in West Virginia.

First, we would like to make some general comments on the regulations.

While we appreciate your decision to fully comply with the Groundwater Protection Act particularly 20-5M-5(c) which requires the various agencies and departments to promulgate rules as they may be necessary to implement the authority granted them, we feel that the regulations filed by your department exceed the intent of the law.

We can certainly understand your desire to take the lead on this important issue; but we believe that it will be difficult to implement some of these regulations until the Water Resources Board establishes standards as provided in 20-5M-6(a)(2). Obviously, there is chronological ambiguity in the statute.

Copies sent to:

- Brenda Harper
- Barbara Smith

-N

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Commissioner of Agriculture  
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We are also very concerned with the economic impact these regulations will have on the agricultural industry as well as state and local government. In several instances, the impact is not clear, however "significant".

Given the scope and impact of these regulations, adequate study must be done to determine as nearly as possible the financial impact these regulations will have on individuals, companies, state, county and local government.

The Groundwater Protection Act capped fees at \$1 million and therefore did not intend to expand the cost to citizens, businesses and government.

We compliment you on the approach that was used in the Generic State Management Plan for Pesticides and Fertilizer in Groundwater. We feel these regulations comply with the law, particularly 20-5M-6(c) (1) thru (5), where voluntary cooperation is encouraged, to conduct studies, research, experiments, demonstrations, and to develop public education programs.

Following are the specific comments on each set of Regulations:

Title 61 - Series 6A - Groundwater Protection  
Rules for Fertilizer and Manures

The fiscal note provides for an expenditure of \$28,000 by the Department of Agriculture. Since the authority cited is 20-5M, we believe that these expenditures should be included in the Groundwater Protection Act Fee Schedule Regulations 47-CSR-55 which have been filed as emergency regulations by the Department of Natural Resources, and not taken out of the department's budget.

We are also very concerned about the economic impact on those farms that need to install manure holding facilities. The projected costs range from \$12,000 to \$100,000 with additional auxiliary equipment cost of \$20,000 to \$50,000. This could put some farms out of business. We would suggest that an in depth study be made on each site to determine if alternative methods are available.

We concur with your assessment that the impact on the agricultural community by using Best Management Practices will be low. However, we believe it will take an extensive education program by the Department of Agriculture, the Cooperative Extension Service and Soil Conservation Service. The West Virginia Farm Bureau is willing to provide any assistance that we can in this matter.

#### 61-6A-6 Protection of Groundwater from Point Source

6.3 and 6.3a - We recommend that these two sub-sections be deleted. We feel that sections 6.2 and 6.2a adequately cover those areas that are most likely to cause pollution. The description in 6.3 and 6.3a are vague and leaves room for different interpretation by different people. These items would best be covered under voluntary best management practices.

6.4 - It is recommended that this sub-section be deleted. This statement is unclear. It is very difficult to determine the volume of manure that would be produced. It is also unclear as to what time frame is covered. Again, this item would best be covered under voluntary best management practices.

6.5 thru 6.11 - It is recommended that these sub-sections be deleted. These are generally considered to be non-point source and not point source. Again, we feel these areas would best be addressed under the voluntary best management program.

#### 61-6A-7 - Protection of Groundwater from Non-Point Sources

7.1 thru 7.3g - It is recommended that these sub-sections be deleted and replaced by reference to the Soil Conservation Service Technical Guide.

The SCS manual provides a complete list of Best Management Practices. The BMP are developed so that they may be used for site specific locations.

The SCS also updates this manual as new technology is developed.

We believe that if the manual is referenced rather than listing a few of the items that are listed in the regulations, the farm community and the environment will be better served.

#### Title 61- Series 6B - Primary and Secondary Containment of Fertilizers

Fiscal note - Again, we point out that if the regulations are being promulgated under the authority of Groundwater Protection Act, funds should come from that act and not from the budget of the Department of Agriculture.

Economic Impact - We are very concerned with the "very high" impact these regulations will have on the agricultural industry.

The \$50,000 to \$150,000 cost that retail firms will be required to spend is a considerable investment. If these firms do spend this kind of money, we believe that the cost of fertilizer to farmers will increase more than the \$10-\$20 that has been projected. Southern States Co-op projects \$75/Ton if the capitol costs are amortized over a 10 yr. period.

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Commissioner of Agriculture  
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The other alternative that these businesses have is to not make the expenditure and not provide the service to farmers. If this happens, farmers may need to purchase fertilizer from out-of-state, incurring additional transportation cost and terrific inconvenience.

As is pointed out in the Economic Impact Statement, "As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules." We, therefore, recommend that these regulations be withdrawn until:

1. The Division of Natural Resources develops a central groundwater data management system, as provided in 20-5M-6(a) (2).
2. The Department of Agriculture develops procedures to identify currently unknown farmers and firms that will be affected by these regulations.
3. The Department of Agriculture develops a procedure to determine an accurate estimate of the cost to farmers and firms for the installation of the facilities required.

#### Title 61 - Series 12H - Bulk Pesticide Operational Rules

61-12-H-2 Definitions - 2.7 Recommends changing the definition of discharge to mean any spill, etc. outside of the secondary containment area. The purpose of the secondary containment is to prevent such "spills" from escaping.

#### Title 61 - Series 12I - Non-Bulk Pesticide Rules for Permanent Operational Areas

Fiscal Note: The Groundwater Protection Act Fee Schedule establishes \$75,000 from the Department of Agriculture for pesticides. These regulations as well as Series 12G indicate that \$75,000 will be needed for each 12I and 12G.

We do not believe that the extra \$75,000 should come from the Department of Agriculture's general funds.

#### Economic Impact on State Government

One must ask the question, "With the state in dire economic times and no indication that pesticides have contaminated groundwater, is the cost benefit ratio justified?"

#### Economical Impact on Political Subdivisions

Specific Industries and Groups of Citizens (Same as above.)

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#### Economic Impact on Citizens/Public at Large

With an estimated total cost of implementation these regulations at \$11,520,000 and the statement that "these costs would cause some small businesses to close", we respectfully request that these regulations be withdrawn.

We do not believe that it was ever the intent of the Legislature in passing the Groundwater Act to put people out of business, especially when there has been no indication that a problem exists.

#### Title 61-12G - General Groundwater Protection Rules for Pesticides

Fiscal Note: \$75,000 - We recommend that this money come from the Groundwater Protection Act Fees.

We totally agree with the program and policy statement listed in 61-12G-4.1 thru 4.4.

We would encourage the Department of Agriculture in Cooperation with other State and Federal Agencies to develop an aggressive education program on the use of Best Management Practices.

As stated in 4.4, we also agree that other steps may be necessary, but only after "valid predictive technology or valid groundwater data indicates that pesticides are contaminating the groundwater of the state and when technology develops to indicate the mandatory best management practices will be effective in the protection of groundwater".

#### Title 61 - Series 22A - Best Management Practices for Temporary Operational Areas of Non-bulk Pesticides

In general, these regulations are satisfactory. However, we are somewhat concerned by the lack of information that the department has on the number of sites that will be affected. Again, an educational program would be most beneficial.

#### Title 61 - Series 22 - Generic State Management Plan for Pesticides and Fertilizer in Groundwater

Fiscal Note: \$75,000 as stated previously, there is only a total of \$75,000 in the Groundwater Protection Act Fee Schedule for use by the Department of Agriculture.

General Comments: It is our belief that it is this type of regulations that was intended by the Legislature. That is to say, prior to adopting other very costly regulations, one must first put in place an educational program, provide for an assessment and planning phase mandated in 61-22-8 and establish a monitoring program as mandated in 61-22-11.

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In summary, we feel that the regulations are chronologically not possible to implement at this time. If other agencies have not performed their statutory responsibility then these agencies should be held accountable for such non performance.

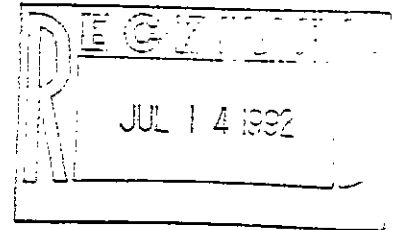
The 13,000 member West Virginia Farm Bureau considers itself and its individual members to be very environmentally responsible and our comments should be construed as constructive criticism. We trust you and your agency will view these comments favorably.

Sincerely,



Richard S. (Steve) Hannah  
Executive Secretary

RSH/vg



Tennessee Valley Authority, Post Office Box 1010, Muscle Shoals, Alabama 35660

July 10, 1992

Ms. Barbara Smith  
Director, Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305

Dear Barbara:

Thank you for allowing me to review the proposed rules General Groundwater Protection Rules for Fertilizer and Manures (61-6A) and Primary and Secondary Containment of Fertilizers (61-6B). Comments for 61-6A are as follows:

- (1) Impressed that at least at this stage they are voluntary.
- (2) In section 6.2 it seems very lenient to allow 5 + 5 years for final implementation of a Nutrient Management Plan.
- (3) The allowable limits of animal units in sections 6.2.a. and 6.3.a appear very high.
- (4) All conditions in sections 6.4 - 6.11 and 7.1 - 7.3 obviously have been well researched and seem reasonable and attainable.

In general, the 61-6A document shows the result of thorough investigation and careful preparation. It should be submitted to the AAPFCO subcommittee charged with developing a model Nutrient Management Plan.

Turning our attention to document 61-6B I also have a few comments to offer.

- (1) On page 2 of Appendix B under 4.c. it is stated that containment will increase the cost of fertilizer by \$10-\$20 per ton. This seems very high and I am curious how these numbers were obtained.

Ms. Barbara Smith  
Page 2  
June 9, 1992

- (2) Thank you for the recommendation in section 3.1, but you may also want to add "Designing Facilities for Pesticide and Fertilizer Containment" by Midwest Plan Service, 122 Davidson Hall, Iowa State University, Ames, Iowa 50011-3080. This is a 116 page bulletin that gives a lot of engineering details.
- (3) Other than adding some special sections and placing the retained sections in a different order you followed the AAPFCO model rules rather faithfully.

I believe you have done an excellent job of drafting the containment rules. Hopefully your public hearings scheduled for next week will go smoothly and the proposed rules will be ready for adoption.

If I can be of further assistance do not hesitate to call on me.

Sincerely,



Frank J. Johnson  
Projects Manager  
Field Programs Department  
National Fertilizer and  
Environmental Research Center

PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS RULE (61-6B)

Public Hearing to Consider Proposed Rule  
Oral Comments

Building 2, Guthrie Agricultural Center  
Charleston, West Virginia

July 20, 1992  
11:00 a.m.

Present: Jerry H. Gass, Southern States Coop., Inc.  
Jim K. Stutler, Southern States Coop., Inc.  
Danny D. Montgomery, Southern States Coop., Inc.  
Kenneth W. Raines, Southern States Coop., Inc.  
Marc Harman, West Virginia Farm Bureau  
John McCallister, Southern States Coop., Inc.  
W. B. Buffaloe, Rhone-Poulenc, Inc.

Barbara Smith, Director of Compliance Division, WVDA  
Bob Frame, Director of Pesticides Division, WVDA  
Dwayne O'Dell, Marketing & Development, WVDA  
Paula Moore, Compliance Division, WVDA  
Randy Teubert, Soil Conservation

Note: Due to the number of people present at the July 20, 9:00 a.m. hearing and to expedite the day's schedule, Mr. Gass requested and was allowed the opportunity to comment on this rule earlier.

1 MR. GASS: I am Jerry Gass with Southern States. These  
2 are my comments on 6B.

3 Starting with 2.4.b., there are seventeen retail firms  
4 that will need to install containment and an unknown number of  
5 farmers and other firms that will also need to construct these  
6 areas. Of those seventeen, the majority are ours and with the  
7 costs that are listed, most of them, very frankly, could not afford  
8 to build secondary containment for fertilizers anywhere in this  
9 range. They simply do not have that large an operating margin. We  
10 have a couple of stores in the state that could.

11 I went through, specifically, the reports from nine

1 others. Of them, one possibly could. The other eight simply could  
2 not.

3 I would just point out here, we are not just talking  
4 about taking money out of a business, but when these businesses  
5 lose money or fail to make money, then that is dollars out of  
6 farmers' pockets, because these are farmer-owned coops. The  
7 marginal structures are just too slim, particularly in the  
8 fertilizer area, as some of you know, for that and we are concerned  
9 about this being an economic disadvantage for the farmers of West  
10 Virginia.

11 If the containment facilities have to be built, you know,  
12 the only way to pay for them, one way or the other, is through  
13 taking it from the farmers.

14 Paragraph 2.6., "dry bulk fertilizer means non-fluid  
15 fertilizer in non-packaged form." We are now using some two  
16 thousand pound bags for transportation of this fertilizer to larger  
17 farms. You may want to address that.

18 Paragraph 2.2.2., talking about a storage facility,  
19 "...means a location at which fluid bulk fertilizer in undivided  
20 quantities in excess of 2,500 U.S. gallons or dry bulk fertilizer  
21 exceeding 12 tons." We would suggest changing that to 5,000  
22 gallons and 25 tons being more appropriate. Twenty-five tons is  
23 just over a trailer-load. As far as the liquid concerned, the  
24 2,500 gallons is just about a trailer-load, but suggesting there to  
25 make the dry bulk a full trailer-load of 5,000 gallons. I am  
26 sorry. I am backwards on that.

27 In 4.1.b., we have a question about the word "samples" in

1 line one. Water samples, soil samples, air samples or samples of  
2 the product itself? We think that needs to be specified.

3 In 8.1., in keeping with our earlier comment, we would  
4 suggest that that 12 ton requirement in line two be changed to 25  
5 tons.

6 That is the end of my comments on 6B. Again, I  
7 appreciate very much the opportunity and appreciate the opportunity  
8 that our environmental specialist had to review that with you  
9 earlier. It was very helpful.

10 (Hearing recessed at 9:30 a.m. and reconvened  
11 at 11:00 a.m.)

12 MS. SMITH: This hearing is to discuss the regulation  
13 that the Department has proposed for primary and secondary  
14 containment of fertilizers. The rule was passed and based on the  
15 provisions of the Groundwater Protection Act that was passed by the  
16 Legislature a year ago, it has been in operation for one year.

17 This hearing is being held at 11:00 a.m., July 20, 1992.  
18 My name is Barbara Smith. I am the Director of the Compliance  
19 Division. This is Bob Frame. He is the Director of the Pesticides  
20 Division. This is my administrative assistant, Paula Moore. She  
21 is here to help with the tape and I think she gets to do a lot of  
22 the typing of the transcripts. She will appreciate it if, when you  
23 get up to talk, that you talk fairly clearly.

24 I would like to just explain a little bit about what  
25 happens to this rule from this point on. We have filed this with  
26 the Secretary of State, that is, the public notice that there was  
27 going to be a hearing, so that all interested persons could get a

1 copy. We did send out copies to quite a few of you, personally.

2 After the written and oral comment periods are over, we  
3 do have an additional week to send in any written comments if  
4 something occurs to you later on.

5 We prepare a transcript. The transcript and all of the  
6 materials from this hearing are available to the public for a five-  
7 year period. We prepare a summary of all of the comments that are  
8 made and our response to them. We have to consider all of the  
9 comments that are made and the suggestions.

10 Once that is done, if we feel we should amend the rule,  
11 we do amend the rule, send it back to the Secretary of State and  
12 also a committee of the Legislature, which is called the  
13 Legislative Rule-Making Committee. That committee, sometime in the  
14 next few months, will bring up that rule on their agenda. They  
15 will look at it. At that point, they do ask for public comment.

16 Depending on what happens with that committee, if they  
17 pass it out of that committee, the next step is when the full  
18 Legislature meets. Then the regulation goes through two committees  
19 in the House and two committees in the Senate. Finally, if it goes  
20 through all those hurdles, then it is put in an Omnibus Rules Bill  
21 and is usually passed at the last second of the Legislature.

22 There are a lot of opportunities for public comment, even  
23 past this one, that you need to be aware of. A lot of people do  
24 not understand how we go about rule-making, so I did want you to  
25 know that.

26 If everyone has signed in, we do have the right to limit

1 the length of comments, but with the few number here, I think that  
2 that is not necessary. This hearing is just to take comments on  
3 the rule. We will start with any comments anyone wants to make.  
4 At the end of that time, we will adjourn. If you have any  
5 questions, comments or if you want to have a discussion, fine. At  
6 the end of that time, we will reconvene the hearing. If you have  
7 any additional comments you want to make for the record, you can do  
8 so at that time.

9 Does anyone want to make a comment for the record at this  
10 time? Please identify yourself before your comments, please.

11 MR. STUTLER: I am Jim Stutler, District Manager for  
12 Southern States and I work about two-thirds of the geographical  
13 area of West Virginia.

14 My comments relate to the original drafting of the  
15 regulations that came out. I had an opportunity, when that time  
16 came, to visit with several of our Boards of Directors, since we  
17 are a member-owned and controlled organization as a cooperative.  
18 They have very much a concern about it, primarily from the area  
19 what they suspected to be an economic hardship upon their industry  
20 and their particular operations within that industry.

21 I have put some figures together at their request. At  
22 that time, the stores that I was working with, there were four of  
23 them that had fertilizer blending and application facilities and  
24 equipment. When we amortized the foreseeable costs, the possible  
25 costs, as those regulations were originally written, we would be  
26 looking at something like \$75 a ton increase in fertilizer, if we

1       amortized those over ten years.

2               So this causes great concern. I have met with two of  
3 those Boards of Directors after I put the figures together. It was  
4 fairly obvious that if the regulations were adopted as originally  
5 presented, then there is no question but what we would have to  
6 close all four of those facilities.

7               Since that time, I have inherited a couple of other  
8 locations with those types of facilities. The tonnage in those  
9 would be slightly greater, but not enough to change the end figure  
10 significantly.

11               As a farmer-owned controlled organization, it would mean  
12 that we would have to eliminate services to those key farmers in  
13 the community that are large enough to use commercial fertilizers  
14 in bulk and eliminate the spreading service, as well.

15               The other comment that I have a concern about, and this  
16 is becoming more and more prevalent in our territory, is that our  
17 Board at this point cannot see where there have been any  
18 regulations drawn up to control sludge, sewage sludge. We know  
19 that they are being dumped in the watersheds in the local areas and  
20 they have a real concern that that was not included in these  
21 regulations, because there may be a time when farmers have no  
22 recourse because of the damage that is inflicted upon their land.  
23 Since we realize in the future that we will probably be testing for  
24 parts per trillion, so zero tolerance today may not be applicable  
25 down the road.

26               We have, in my comments, reflected the concern that

1 farmers have for the future of their already somewhat mature  
2 industry and the economic hardships that they already endure. It  
3 looks to be a greater consequence than what it has been in the  
4 past.

5 That is basically my comments.

6 MS. SMITH: Thank you, Jim.

7 MR. STUTLER: Thank you.

8 MS. SMITH: Is there anyone else? We will adjourn for  
9 some discussion and comments then.

10 (Hearing was recessed at 11:20 a.m. and  
11 reconvened at 11:35 a.m.)

12 MS. SMITH: It is now 11:35 a.m. and we have had a short  
13 discussion period. At this time, no one wishes to make any  
14 additional comments for the record, so this hearing is now closed.  
15 Thank you all for coming.

16 (Hearing closed at 11:40 a.m.)

17

PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS (61-6B)

Public Hearing to Consider Proposed Rule  
Oral Comments

Room 315/316 Percival Hall, Forestry Building  
Evansdale Campus, West Virginia University  
Morgantown, West Virginia

Thursday, July 23, 1992  
7:00 p.m.

Present: Leslie A. Clark, Enviro Con Ltd., Fairmont, WV  
Hayward G. Helmick, Southern States, Monon. County  
Livestock Growers and Farm Bureau, Morgantown, WV  
James Linton, Linton Brothers, Inc., Martinsburg, WV  
James Kotcon, West Virginia Sierra Club, Morgantown, WV  
Charles H. Moyers, Bruceton Ag Services, Bruceton Mills,  
WV  
Ken Raines, Southern States, Morgantown, WV  
Timothy Russell, Prescription Lawn and PCOA of WV,  
Bridgeport, WV  
Jennifer Y. Scott, West Virginia Farm Bureau, Buckhannon,  
WV  
Richard Woodworth, Potomac State College  
  
Barbara J. Smith, Director of Compliance Division, WVDA  
Bob Frame, Director of Pesticides Division, WVDA

1 MS. SMITH: This is the hearing for the primary and  
2 secondary containment of fertilizers. It is 7:00 p.m., Thursday,  
3 July 23.

4 This regulation is promulgated under the authority of the  
5 Groundwater Protection Act. All persons here were here at the  
6 previous hearing and have heard the ground rules for the hearing  
7 and also the process that these rules in the future, so I am not  
8 going to go over that.

9 I will just ask for people to come forward to make  
10 statements. Ken, you were the first one.

11 MR. RAINES: I am Ken Raines representing Southern States

1 Morgantown Cooperative. Again, I would like to reiterate deferral  
2 on all of the comments made earlier by Jerry Gass and Jim Stutler  
3 from Southern States, Incorporated, Richmond.

4 I just want to make a couple of comments on this law. We  
5 understand, Southern States, that this was coming and welcome it.  
6 We understand that this environmental issue definitely needs to be  
7 addressed.

8 The thing that concerned us was the original draft on  
9 this proposed rule. As originally proposed, it would raise the  
10 cost of fertilizer close to \$70 to \$75 per ton at our bulk  
11 facility. Of course, that is not anyway economically feasible.  
12 What would happen, we would be forced to go out of the bulk  
13 fertilizer business at the Morgantown store.

14 This would cause several problems, I think, driving a  
15 business out of its bulk facility. There are several bulk  
16 facilities throughout the State of West Virginia and they keep the  
17 price of bagged fertilizer in check, because with our ability to  
18 cut costs, the bagged retailers and bagged manufacturers from out  
19 of state have to meet our prices. We are able to keep their prices  
20 out.

21 What inevitably will happen, if myself and many other  
22 bulk fertilizer plants in West Virginia have to go out of business,  
23 is there would be a significant increase, I think, of bagged prices  
24 to the farmers in the area.

25 The other thing I would like to see in these rules is  
26 some type of protection or grandfather clause. At Southern States,

1 we had plans to implement about a \$5,000 expenditure to try to  
2 comply with some of the stormwater acts and groundwater acts, as  
3 far as putting in a catch basin, seep concreting all of the truck  
4 loading and unloading facilities, but at this point, we are afraid  
5 to start pouring any cement that eventually they are going to come  
6 back and say that we are going to have to tear this up to do some  
7 core drilling or completely change the design.

8 Here we are in a situation where we are ready to try to  
9 do the right thing and because of these regs coming out, we are  
10 afraid to try to do the right thing until we see exactly what is  
11 going to come about.

12 That is all I have to say. Thanks, Barbara.

13 MS. SMITH: Does anyone else want to make a statement?  
14 I will recess the hearing and see if there is more comments later  
15 on.

16 (Hearing recessed at 7:15 p.m.)

17 MS. SMITH: There were no more comments. Hearing  
18 concluded.

19 (Hearing concluded at 7:30 p.m.)

*mailing list page 081*  
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Dennis E. Meadows  
P.O. Box 52  
Meadow Bridge, WV 25976

Mr. Jeff Motter  
ChemLawn Supply Corp.  
8275 N. High Street  
Columbus, Ohio 43235-1499

Ms. Rachel B. Tompkins  
W.Va. Extension  
Room 817, Knapp Hall  
PO Box 6031  
Morgantown, WV 26506-6031

ASCS - USDA  
Dick Brown  
PO Box 1049  
Morgantown, WV 26507

Jim Kotcon  
WV Sierra Club/WVU  
Rt. 12, Box 400  
Morgantown, WV 26505

Mr. Dick Sherman  
Environmental Coordinator  
E.I. du Pont de Nemours & Co.  
300 West DuPont Avenue  
Martinsburg, WV 25415

WV Division Natural Resources  
Bill Browning  
1200 Greenbrier Street  
Charleston, WV 25305



STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

State Capitol  
Charleston, WV 25305

June 17, 1992

Cleve Benedict  
Commissioner

Charleston Newspapers  
1001 Virginia Street, East  
Charleston, West Virginia 25301

ATTENTION: CLASSIFIED ADS

Dear Sir/Madam:

Please print the attached public hearing notice in the Legal Notices section of the Charleston Daily Mail, pursuant to Article 59, Chapter 3 of the West Virginia Code.

Please send invoicing to:

Administrative Services Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0170

Please send the notarized affidavit and copy of the ad to my attention at the following address:

Barbara J. Smith, Director  
Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0170

Should you have any questions, please call me at 304-558-2226.  
Thank you for your assistance in this matter.

Sincerely,

Barbara J. Smith, Director  
Compliance Division  
FAX: 304-558-3594

BJS:pm:legadch  
Enclosure (1)

## NOTICE OF PUBLIC HEARINGS

The Commissioner of Agriculture has scheduled hearings for the proposed rules affecting groundwater protection from fertilizers and pesticides in accordance with the provisions of the West Virginia Groundwater Protection Act. These rules affect the use and storage of fertilizers, manures and pesticides by any person in this state.

Both written and oral comments will be accepted at the hearings. Written comments will also be accepted by mail until July 30, 1992 and should be addressed Barbara Smith, Compliance Division, WV Dept. of Agriculture, 1900 Kanawha Blvd., E., Charleston, WV 25305-0170.

Each rule will have one public hearing in the Charleston area where oral and written comments will be received. Each hearing will be held at the J.T. Johnson Conference Room, Building 2, Guthrie Agricultural Center, Charleston, WV:

Non-Bulk Pesticide Rules for Permanent Operational Areas (61-12I)  
Monday, July 20 at 1:00 p.m.

General Groundwater Protection Rules for Fertilizer and Manures  
(61-6A) Tuesday, July 21 at 9:00 a.m.

Primary and Secondary Containment of Fertilizers (61-6B) Monday,  
July 20 at 11:00 a.m.

General Groundwater Protection Rules for Pesticides (61-12G)  
Monday, July 20 at 3:00 p.m.

Bulk Pesticide Operational Rules (61-12H) Monday, July 21 at 1:00  
p.m.

Generic State Management Plan for Pesticides and Fertilizer in  
Groundwater (61-22) Tuesday, July 21 at 1:00 p.m.

Best Management Practices for Temporary Operational Areas of Non-  
Bulk Pesticides (61-22A) Tuesday, July 21 at 11:00 a.m.



STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

State Capitol  
Charleston, WV 25305

June 17, 1992

Cleve Benedict  
Commissioner

The Dominion-Post  
Greer Building  
Morgantown, West Virginia 26505

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Sincerely,

Barbara J. Smith, Director  
Compliance Division  
FAX: 304-558-3594

BJS:pm:legadmj  
Enclosure (1)

NOTICE OF PUBLIC HEARINGS

*Class I Legal ad  
Morgantown Dominion  
Post.*

The Commissioner of Agriculture has scheduled hearings for the proposed rules affecting groundwater protection from fertilizers and pesticides in accordance with the provisions of the West Virginia Groundwater Protection Act. These rules affect the use and storage of fertilizers, manures and pesticides by any person in this state.

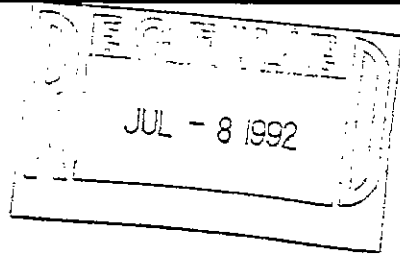
Both written and oral comments will be accepted at the hearings. Written comments will also be accepted by mail until July 30, 1992 and should be addressed Barbara Smith, Compliance Division, WV Dept. of Agriculture, 1900 Kanawha Blvd., E., Charleston, WV 25305-0170.

Each rule will have one public hearing in the Morgantown area where oral and written comments will be received. Each hearing will be held at Room 315/316 Percival Hall, Forestry Building, Evansdale Campus, West Virginia University, Morgantown, WV:

- Non-Bulk Pesticide Rules for Permanent Operational Areas (61-12I)  
Thursday, July 23 at 3:00 p.m.
- General Groundwater Protection Rules for Fertilizer and Manures  
(61-6A) Thursday, July 23 at 5:00 p.m.
- Primary and Secondary Containment of Fertilizers (61-6B) Thursday,  
July 23 at 7:00 p.m.
- General Groundwater Protection Rules for Pesticides (61-12G)  
Friday, July 24 at 8:00 a.m.
- Bulk Pesticide Operational Rules (61-12H) Friday, July 24 at 10:00  
a.m.
- Generic State Management Plan for Pesticides and Fertilizer in  
Groundwater (61-22) Friday, July 24 at 1:00 p.m.
- Best Management Practices for Temporary Operational Areas of Non-  
Bulk Pesticides (61-22A) Friday, July 24 at 2:30 p.m.



*Press release*



STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

State Capitol  
Charleston, WV 25305

Cleve Benedict  
Commissioner

FOR IMMEDIATE RELEASE:  
July 7, 1992

**WVDA To Hold Public Hearings on Groundwater Rules**

CHARLESTON, W.Va. -- The West Virginia Department of Agriculture (WVDA) has scheduled public hearings for proposed rules affecting groundwater protection from fertilizers and pesticides in accordance with the Groundwater Protection Act, Commissioner of Agriculture Cleve Benedict announced.

These regulations affect the use and storage of fertilizers, manures and pesticides by any person in the state.

Both written and oral comments will be accepted. Written comments will be accepted until July 30, 1992, addressed to Barbara Smith, Compliance Division, WVDA, 1900 Kanawha Blvd., East, Charleston, WV 25305.

Each rule will have two public hearings where oral and written comments will be received. The hearings will be held at:

Location 1: J.T. Johnson Conference Room, Building 2, Guthrie Agricultural Center, Charleston, WV.

Location 2: Room 315/316 Percival Hall, Forestry Building, Evansdale Campus, West Virginia University, Morgantown, WV.

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Non-Bulk Pesticide Rules for Permanent Operational Areas (61-12I)

Location 1: Monday, July 20, 1 pm; Location 2: Thursday, July 23, 3 pm

General Groundwater Protection Rules for Fertilizer and Manures (61-6A)

Location 1: Tuesday, July 21, 9 am; Location 2: Thursday, July 23, 5 pm

Primary and Secondary Containment of Fertilizers (61-6B)

Location 1: Monday, July 20, 11 am; Location 2: Thursday, July 23, 7 pm

General Groundwater Protection Rules for Pesticides (61-12G)

Location 1: Monday, July 20, 3 pm; Location 2: Friday, July 24, 8 am

Bulk Pesticide Operational Rules (61-12H)

Location 1: Monday, July 20, 9 am; Location 2: Friday, July 24, 10 am

Generic State Management Plan for Pesticides and Fertilizer in Groundwater (61-22)

Location 1: Tuesday, July 21, 1 pm; Location 2: Friday, July 24 1 pm

Best Management Practices for Temporary Operational Areas of Non-Bulk Pesticides (61-22A)

Location 1: Tuesday, July 21 11 am; Location 2: Friday, July 24 2:30 pm

For information, contact Compliance Division, WVDA, at (304) 558-2208.

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AMENDMENTS MADE TO THE RULE  
"PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS"

TITLE 61, SERIES 6B

AS A RESULT OF COMMENTS RECEIVED

Amendments were made to Sections 2.8, 2.22, 3.1, 4.1.b, 4.1.c., 5.9, 8.1, 8.6 and 10.1.a.

Explanations of the comments received and the agency response are included in the "Summary of Comments Received" that follows.

RECEIVED

SUMMARY OF COMMENTS RECEIVED AND AGENCY RESPONSE TO  
TITLE 61, SERIES 6B  
PRIMARY AND SECONDARY CONTAINMENT OF FERTILIZERS

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NOTE: In some cases the comments did not specify which section of the rule was applicable. For clarity, the comments are listed as if the commenter noted the actual section.

COMMENT #1: Various comments were received on the overall regulation. One commenter stated that the draft of the rules was excellent. One commenter stated that the rules are weak, ineffective and violate the intent of the law and requested reconsideration of this rule. Two commenters requested that this rule be withdrawn until studies can be made to determine if there is a groundwater pollution problem from fertilizers.

AGENCY RESPONSE TO COMMENT #1: The WVDA believes that these regulations do not violate the intent of the Groundwater Protection Act and at the same time allows for adequate enforcement of the GWP Act. The Act does not allow regulation of a groundwater pollution problem to begin only after it is identified. Note that the WVDA was given a deadline of one year from the effective date of the rule to file regulations (§20-5M-5-c) while the legislative findings were that "West Virginia's groundwater resources are geologically complex, with the nature and vulnerability of groundwater aquifers and recharge areas not fully known;" (§20-5M-2-a-4).

COMMENT #2: Seven comments were received about the cost of implementation of these rules by the industry. A Southern States Cooperative estimated that their costs would require an increase of up to \$75 per ton (even when amortizing the cost over 10 years) and might require them to stop offering fertilizer blending services. They indicated that they would consider these costs to be similar for other fertilizer formulators in this state. One commenter stated that the costs outweighed the benefits and it was not the intent of the law to put people out of business. One commenter recommended withdrawal of the rules due to lack of information on the economic impact of the rules and the lack of information on effects of the rules on the quality of groundwater. One commenter stated that the estimate of an increase of \$10-20 per ton seemed high.

AGENCY RESPONSE TO COMMENT #2: The WVDA believes that the Groundwater Protection Act did not allow the WVDA to exempt practices and facilities on the basis of cost; however the Act does allow for a person to petition the Director of the Division of Natural Resources (DEP) for a deviation on the

basis that the measures needed to preserve existing quality are not technically feasible or economically practical and that a change in the groundwater quality is justified based on economic or societal objectives. (\$20-5M-5-f)

COMMENT #3: One commenter stated that he was concerned about the economic disadvantage to the state farmers if other states did not have equivalent rules.

AGENCY RESPONSE TO COMMENT #3: The fact that other states may or may not have equivalent regulations does not mean the WVDA is relieved of its mandate to promulgate rules to protect groundwater.

COMMENT #4: One commenter stated that all costs for implementation of the program by WVDA should come from the Groundwater Protection Act fund, not other funds.

AGENCY RESPONSE TO COMMENT #4: The Groundwater Protection Fund fees are assessed to persons who own or operate facilities or conduct activities subject to the article. There are so few persons that conduct these activities that the assessment of a GWP fee sufficient to support the program would put an untenable burden on the industry without further protecting groundwater. Therefore, the WVDA declines its option to fund the program solely with GWP fees.

COMMENT #5: One commenter asked for a grandfather clause for existing facilities as his facility has plans to begin construction, but now are afraid to begin without knowing what the final form these regulations will take.

AGENCY RESPONSE TO COMMENT #5: The intent of the GWP was that no person would be allowed to pollute groundwater. If any current facilities are designed such that containment is already occurring, then we could grandfather them in as long as the design meets the current national standards for containment. The legislative process mandated by Chapter 29A of the West Virginia code is complex and the rule is likely to change prior to adoption. This process cannot be circumvented by the Department of Agriculture.

COMMENT #6: One commenter was concerned that the issue of sewage sludge is not addressed and that farmers will have no recourse for land damage from sludge application.

AGENCY RESPONSE TO COMMENT #6: This would require a change in legislation to give the Department of Agriculture the authority to regulate sewage sludge. The definition of fertilizers and manures cannot be expanded beyond that given in the "West Virginia Fertilizer Law" (§19-15-1 et seq.) The Groundwater Protection Act does give the DEP (DNR) the

authority to regulate sludge. Note that in the proposed regulations of the Division of Natural Resources Title 47, Series 58 "Groundwater Protection Regulations" that Section 15 is reserved for "Requirements for Reuse of Sludges Generated by Facilities Permitted Under Chapter 20, Article 5A of the W. Va. Code".

COMMENT #7: One commenter asked that there be a monitoring program in this regulation as provided in §20-5M-5-d stating that without a monitoring program no enforcement is possible.

AGENCY RESPONSE TO COMMENT #7: The WVDA interprets the reference to §20-5M-5-d to mean that the WVDA can require firms to have a monitoring system. §20-5M-6-a-7 indicates that the DNR (DEP) shall promulgate rules for monitoring and analysis of groundwater. Therefore the WVDA cannot have a monitoring program until the DNR (DEP) promulgates their regulations for monitoring.

COMMENT #8: One commenter stated that the time table for implementation is too long and asked for a justification of the existing time table.

AGENCY RESPONSE TO COMMENT #8: The WVDA believes that the cost to each firm is significant. Current estimates indicate that if a firm constructs these facilities, that bulk fertilizer will increase by \$75 per ton when their costs are averaged over a 10-year period. The industry must have time to implement this program in a cost effective manner in order to continue to serve their customers or stay in business.

COMMENT #9: One commenter asked if this is law or proposed law; who is backing this and who is bucking it? This commenter was disappointed that hearings were not scheduled in the karst limestone areas of this state.

AGENCY RESPONSE TO COMMENT #9: This rule is proposed and would not become law until passed by the legislature. This rule was proposed to comply with the Groundwater Protection Act which was passed by the legislature and became effective on June 8, 1991.

COMMENT #10: One commenter asked if their 2000 lb. packages were to be considered dry bulk fertilizer.

AGENCY RESPONSE TO COMMENT #10: The response is that under the definition of "Dry bulk fertilizer" (section 2.6) they would be considered a packaged product and, therefore, not bulk. No modification of the rule was made.

AGENCY CHANGE TO THE RULE: The WVDA has reconsidered and reformulated the definition of "Fertilizer" in Section 2.8 to be

comparable to the definition of "Commercial Fertilizer" in §19-15-1 et seq. in response to a comment made to the definition in Title 61, Series 6A.

COMMENT #11: Two commenters recommended that the amount of fertilizer noted in Section 2.22 be raised to 5,000 gallons liquid and 25 tons of dry as these are the amounts in a full truck load of dry and liquid.

AGENCY RESPONSE TO COMMENT #11: The WVDA considered this comment and modified the rule accordingly.

COMMENT #12: One commenter noted that the policy statements in Section 3 were contradictory and once contamination occurred, it would be too late for prevention.

AGENCY RESPONSE TO COMMENT #12: The WVDA considers this comment not applicable to this rule.

COMMENT #13: One commenter suggested that an additional reference be used for planning purposes, "Designing Facilities for Pesticide and Fertilizer Containment".

AGENCY RESPONSE TO COMMENT #13: This document was included in a modification to Section 3.1.

COMMENT #14: One commenter asked that the commissioner's discretionary powers (outlined in Section 4) be made mandatory and asked that the Wisconsin concept be utilized in this rule. This concept would require mandatory action and evaluation of the practicality of stopping further release of a pollutant that exceeds groundwater standards as well as the risks and benefits of stopping the pollution. The commenter thinks that if prevention is technically feasible before data shows, then these practices should be implemented before pollution occurs.

AGENCY RESPONSE TO COMMENT #14: The WVDA believes that these rules are sufficient to provide for groundwater protection and made no modification of the rule.

COMMENT #15: Two commenters asked if the term "samples" in Section 4.1.b could be made more specific, such as samples of water, soil, air, product?

AGENCY RESPONSE TO COMMENT #15: The WVDA believes that samples could include water, soil, materials, product, etc depending on the circumstances. The WVDA talked with one of the commenters and determined that the confusion was that the sentence mentioned both taking samples and reviewing design plans. The conclusion was that addressing these two items in different phrases would reduce the confusion and satisfy the commenter. Section 4.1.b has been revised, section 4.1.c.

added and the remainder of the section renumbered.

COMMENT #16: One commenter asked if the term "person" in Section 5.6 would cause a problem, as personnel of the company often change.

AGENCY RESPONSE TO COMMENT #16: The term "person" as defined in this rule does not necessarily mean individual. No change needed.

AGENCY CHANGE TO THE RULE: The WVDA has rearranged and renumbered Section 5.9 for clarity without changing the meaning. The term "significant deviation" has been changed to "significant lack of compliance with these specifications" as the word "deviation" has a different meaning in the law than was used here.

AGENCY CHANGE TO THE RULE: The quantity of fertilizer in Section 8.1 was changed to be consistent with the revised definition of "storage facility" (section 2.22).

AGENCY CHANGE TO THE RULE: The quantity of fertilizer in Section 8.6 was changed to be consistent with the revised definition of "storage facility" (section 2.22).

COMMENT #17: One commenter asked for clarification of the term "anchored" in Section 9.1.h.

AGENCY RESPONSE TO COMMENT #17: The term indicates a method used to prevent flotation or instability and will not be defined to allow for flexibility in the facility design. No modification to the rule was made.

COMMENT #18: One commenter requested clarification of the term "protective substances" used in Section 9.4.f.A. and asked where the protective substances would need to be applied.

AGENCY RESPONSE TO COMMENT #18: This term is not defined in order to give flexibility in the design of facilities so that current and future technology can be used. The storage containers would need to be protected from corrosion from the product stored and from other environmental forces. For instance, the outside of a tank that would rust would need a protective substance (e.g. paint) to prevent corrosion due to rust.

COMMENT #19: One commenter stated that in their industry it was difficult to meet the requirements of sections 10.1. and 10.1.a. for unloading containment areas and suggested that portable containment systems be allowed.

AGENCY RESPONSE TO COMMENT #19: The WVDA considers that Section 10.1 would include both permanent and temporary (or

portable) containment. Section 10.1.a. has been modified to remove a reference to "300 square feet" to "of sufficient size to hold the entire mobile container...".

COMMENT #20: One commenter requested that this rule assess specific penalties for specific acts.

AGENCY RESPONSE TO COMMENT #20: The DNR (DEP) rule Title 47 Series 56 "Assessment of Civil Administrative Penalties" provides for specific penalties and is applicable to this rule. Therefore, the WVDA did not respond to this request for a modification.