

US EPA ARCHIVE DOCUMENT

3.

ATTORNEY GENERAL'S STATEMENT



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

ARCH A. MOORE, JR.
Governor

November 25, 1985

RONALD R. POTESTA
Director
MICHAEL A. FOTOS
Deputy Director

Ms. Renee Gruber
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Dear Renee:

Pursuant to your telephone call, I am herewith enclosing the original versions of the following:

- 1) Attorney General's Statement for Final Authorization (signed May 17, 1985);
- 2) Attorney General's Statement for Final Authorization Supplemental Response (signed October 29, 1985);
- 3) Letter from DNR Director Ronald R. Potesta regarding response to EPA RCRA Final Authorization comments; and
- 4) Memorandum of Agreement between the State of West Virginia and the U.S. Environmental Protection Agency, Region III (signed by all state agencies)

Please guard these with your life.

Sincerely,

A handwritten signature in cursive script that reads "Ron Shipley".

Ron Shipley
Special Assistant to the Director

RS/kb

Enclosures



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25306

ARCH A. MOORE, JR.
Governor

October 29, 1985

RONALD R. POTESTA
Director

MICHAEL A. FOTOS
Deputy Director

Mr. James Seif, Regional Administrator
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Dear Mr. Seif:

Re: Response to EPA RCRA Final
Authorization Comments

On July 5, 1985, EPA Region III sent its comments regarding West Virginia's Application for Final Authorization to the West Virginia Department of Natural Resources. Later, on July 24, 1985, EPA sent additional comments.

Enclosed please find our response to those comments. Our response consists of the following:

1. A comment-by-comment response to EPA's July 5, 1985, letter entitled: "Comments on West Virginia's Final Authorization Application."
2. Attachments to item No. 1 consisting of:
 - A. Organizational charts for the Department of Highways.
 - B. DNR Hazardous Waste Activity Report Form for 1984.
3. A signed Memorandum of Agreement.
4. A Supplemental Attorney General's Statement and revised checklists to reflect both comments on the Attorney General's Statement and changes to State regulations.
5. Revised regulations for the:
 - A. Department of Natural Resources (including a complete copy of the Department's June 10, 1985 filing).
 - B. West Virginia Air Pollution Control Commission.

Mr. James Seif
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- C. West Virginia Department of Highways.
- D. Public Service Commission of West Virginia.
- 6. Emergency Rulemaking filed by the Department of Natural Resources and the Department of Highways concerning Small Quantity Generators and Waste Minimization Certification.

Our staffs have met and reviewed these changes. We, therefore, expect expeditious approval of our application. Please note that Attachment A to the MOA replaces Table 2.1 in the Program Description.

If you or your staff have any questions regarding our response to comments, please contact Mr. Ron Shipley, State Hazardous Waste Coordinator, at 304-348-2761.

Sincerely,



Ronald R. Potesta
Director

RRP/rsb

Attachments

cc: State Hazardous Waste Management Agencies

ATTORNEY GENERAL'S STATEMENT FOR FINAL AUTHORIZATION

I hereby certify, pursuant to my authority as Attorney General of the State of West Virginia and in accordance with Section 3006(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6901 et seq.), and 40 C.F.R. 271, that, in my opinion, the laws of the State of West Virginia provide adequate authority to carry out the program set forth in the "Program Description" submitted by the West Virginia Department of Natural Resources. The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which shall be fully effective by the time the program is approved, include those identified below.

I. IDENTIFICATION AND LISTING

- A. STATE STATUTES AND REGULATIONS DEFINE HAZARDOUS WASTE SO AS TO CONTROL ALL THE HAZARDOUS WASTE CONTROLLED UNDER 40 C.F.R. 261, AS INDICATED IN CHECKLIST IA.

[Federal Authority: RCRA § 3001(b)(42 U.S.C. 6921); 40 C.F.R. 261, 271.9.]

Citation of Laws and Regulations

W. Va. Code § 20-5E-6(a)(2).
W. Va. Hazardous Waste Management Regulations Administrative Regulations, Series XV, DNR, Sections 3.01-3.04.
W. Va. Air Pollution Control Commission Administrative Regulation, Series XXV, Section 3.01.
W. Va. Administrative Regulations, Series VII, Department of Highways, Section 2.01.
Public Service Commission's Rules and Regulations for the Government of Transportation of Hazardous Waste by Rail, "Statement of Authority."

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981
Effective date of statute - July 9, 1981
Effective date of DNR Regulations - July 12, 1985
Effective date of APCC Regulations - June 14, 1984

Effective date of DOH Regulations - April 18, 1984
Effective date of PSC Regulations - July 13, 1984

Remarks of the Attorney General

The Department of Natural Resources is designated by the State Hazardous Waste Management Act to be the lead agency for the purposes of Subtitle C of RCRA. In addition to his general administrative responsibilities, the Director is given the overall responsibility for promulgating rules and regulations to implement the Act. The Director is charged under § 20-5E-6(a)(2) to promulgate:

"Rules and regulations establishing criteria for identifying the characteristics of hazardous waste, and listing particular hazardous wastes which are subject to the provisions of this article."

The other rule-making agencies under the State Act, the Air Pollution Control Commission, Public Service Commission and the Department of Highways have essentially incorporated by reference the DNR's regulations on the identification and listing of wastes into their own regulations. For example, the Public Service Commission provides in its "Statement of Authority" in its final rules, that its rules and regulations ...

"[R]epresent a portion of the overall hazardous waste program developed in that Act, [HWMA], and to a certain extent rely on regulations promulgated by other state agencies in accordance with the Act. Accordingly, to the maximum extent possible, these regulations should be interpreted and enforced in a manner consistent with the overall hazardous waste program."

The Department of Highways, in Section 2.01 of its regulations, provides that: "Other than those terms defined in the following section, the terms used in these regulations shall have the same meaning ascribed to them in the regulations promulgated by the Director of the Department of Natural Resources pursuant to the State Hazardous Waste Management Act."

The Air Pollution Control Commission incorporates by reference DNR's definition of hazardous waste including criteria for identifying hazardous waste; the characteristics of hazardous waste; and the lists of hazardous waste in Section 3.01 of its regulations. The APCC regulation also incorporates by reference from the DNR Regulations Exclusions (Section 4.01) and Exemptions (Section 5) except that POTWs receiving hazardous waste, wastewater treatment units, and ninety day storage facilities are not exempt from its requirements.

- B. STATE STATUTES AND REGULATIONS CONTAIN A LIST OF HAZARDOUS WASTE AND CHARACTERISTICS FOR IDENTIFYING HAZARDOUS WASTE WHICH ENCOMPASSES ALL WASTES CONTROLLED UNDER 40 C.F.R. 261 as INDICATED IN CHECKLIST IB & C.

[Federal Authority: RCRA § 3001(b) (42 U.S.C. 6921); 40 C.F.R. 261, 271.9]

Citation of Laws and Regulations

W. Va. Code § 20-5E-6(a)(2)
W. Va. Hazardous Waste Management Administrative Regulations, Series XV, DNR, Sections 3.01-3.04.
W. Va. Air Pollution Control Commission Administrative Regulations, Series XXV, Section 3.01.
W. Va. Administrative Regulations, Series VII, Department of Highways, Section 2.01.
Public Service Commission's Rules and Regulations for the Government of Transportation of Hazardous Waste by Rail, "Statement of Authority."

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981
Effective date of statute - July 9, 1981
Effective date of DNR Regulations - July 12, 1985
Effective date of APCC Regulations - June 14, 1984
Effective date of DOH Regulations - April 18, 1984
Effective date of PSC Regulations - July 13, 1984

Remarks of the Attorney General

The list of hazardous wastes found in the State regulations is identical to the federal list of hazardous waste.

II. STANDARDS FOR GENERATORS OF HAZARDOUS WASTE

THE STATE HAZARDOUS WASTE MANAGEMENT PROGRAM FOR GENERATORS OF HAZARDOUS WASTE IS CONSISTENT WITH AND EQUIVALENT TO THE FEDERAL PROGRAM FOR GENERATORS, AS LISTED IN CHECKLIST II, AND THE REQUIREMENTS FOR GENERATORS SET OUT IN 40 C.F.R. 271.10 HAVE BEEN MET BY THE STATE.

[Federal Authority: RCRA § 3002 (42 U.S.C. 6922); 40 C.F.R. 262, 271.10]

Citations of Laws and Regulations

W. Va. Code § 20-5E-6(a)(3)

W. Va. Hazardous Waste Management Regulations, Administrative Regulations, Series XV, DNR, Sections 2.00(44) and 6.01-6.05.

W.Va. Air Pollution Control Commission Administrative Regulations, Series XXV, Section 5.08.

W.Va. Administrative Regulations, Series VII, Department of Highways, Sections 1.01 and 2.01(1) and (7); 3.01(1).

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981

Effective date of statute - July 9, 1981

Effective date of DNR Regulations - July 12, 1985

Effective date of APCC Regulations - June 14, 1984

Effective date of DOH Regulations - November 21, 1984

Remarks of the Attorney General

The language of W. Va. Code § 20-5E-6(a)(3) pertaining to generators is the same as that of RCRA § 3002. Additionally, Sections 6.01 - 6.05 of the DNR regulations are equivalent to the federal regulations found at 40 C.F.R. 262, as indicated in Checklist III. Thus, since the statutory language is the same and the regulations are equivalent, the State has fulfilled the requirement of 40 C.F.R. 271.10. Further, APCC regulations Section 5.08 extends the coverage of those regulations to generators storing on site for less than ninety (90) days. DOH regulations at Section 1.01, 2.01(1) and (7) address requirements for highway transportation which could affect Generators who transport; Section 3.01(1) specifically addresses manifesting requirements of generators offering or transporting hazardous waste for offsite activities.

III. STANDARDS FOR TRANSPORTERS OF HAZARDOUS WASTE

THE STATE HAZARDOUS WASTE MANAGEMENT PROGRAM FOR TRANSPORTERS OF HAZARDOUS WASTE IS CONSISTENT WITH AND EQUIVALENT TO THE FEDERAL PROGRAM FOR TRANSPORTATION, AS IS INDICATED IN CHECKLIST III, AND THE REQUIREMENTS FOR TRANSPORTERS SET OUT IN 40 C.F.R. 271.11 HAVE BEEN MET BY THE STATE.

[Federal Authority: RCRA § 3003 (42 U.S.C. 6922); 40 C.F.R. 263, 271.11]

Citation of Laws and Regulations

W. Va. Code § 20-5E-5(a), § 20-5E-6(a)(9), § 20-5E-6(12), § 20-5E-7(a)(b) & (c).

W. Va. Hazardous Waste Regulations, Administrative Regulations, Series XV, DNR, Section 4.01, 4.02 and 5.00.

W. Va. Administrative Regulations, Series VII, Department of Highways Transportation of Hazardous Waste by Highway Transporters, Section 1.01 - 6.06.

Public Service Commission's Rules and Regulations for the Government of Transportation of Hazardous Waste by Rail, Section 1.0 - 5.5.

Date of Enactment of Enabling Legislation and Adoption of Regulations.

Passage date of statute - April 10, 1981, as amended, April 13, 1985

Effective date of statute - July 9, 1981, as amended, April 13, 1985

Effective date of DNR Regulations - July 12, 1985

Effective date of DOH Regulations - April 18, 1984

Effective date of PSC Regulations - July 13, 1984

Remarks of the Attorney General

One of the purposes of West Virginia Hazardous Waste Management Act as set out in W. Va. Code § 20-5E-2(b)(2), is to "establish a program of regulation over the ... transportation ... of hazardous waste." To accomplish this purpose, three different state agencies were empowered under Article 5E to promulgate rules and regulations concerning such transportation.

W. Va. Code § 20-5E-7(a) authorizes and requires the commissioner of the Department of Highways (DOH) to promulgate rules and regulations governing the transportation of hazardous wastes by vehicle upon the roads and highways of West Virginia. W. Va. Code § 20-5E-7(b) authorizes and requires the Public Service Commission (PSC) to regulate the transportation of hazardous waste by rail. Such regulations have been promulgated by both the DOH and PSC. Those regulations are in full force and effect. Further, the regulations are consistent with and equivalent to those of the federal government. Additionally § 20-5E-7(c) is identical to § 3003(a) of RCRA.

As can be seen, the scope of the authority of the DOH and PSC has been severely limited. For example, their regulatory authority does not extend to transportation of hazardous waste by air and water. Unlike the PSC and DOH, the Director of the Department of Natural Resources (DNR) has been given broad regulatory authority and is empowered and required to promulgate "rules and regulations as are necessary to effectuate the purposes of [Article 5E]." W. Va. Code § 20-5E-6(a)(12). Another purpose of Article 5E is the assumption by the State of regulatory primacy of the Hazardous Waste Management Program. W. Va. Code § 20-5E-6(b)(4). Thus, in accordance with that purpose and in accordance with § 20-5E-6(a)(12), the Director must promulgate whatever regulations are necessary to assume primacy. Such is the case with the transportation of hazardous waste by air and water.

The PSC and DOH regulations use the word "authorized" when referring to facilities with on-site movements of hazardous waste. It is the opinion of the Attorney General that the word "authorized" in this context means "permitted" and is consequently consistent with the federal regulations.

Transporters of hazardous waste are required to obtain EPA identification numbers. Sections 4.01 and 4.02 of DNR's regulations require all persons engaged in hazardous waste activities (including transportation) to notify the chief of the division of water resources of such activities and require such persons to comply with the EPA ID number requirements. Similar requirements for the EPA-ID number are also found at DOH regulations Section 5.03.

The Director has fulfilled his obligation. Section 5.00 of DNR's regulations pertains to the transportation of hazardous waste by air and water. Section 5.00 incorporates by reference the federal regulations for air and water transportation as those regulations appear at 40 C.F.R., Part 263. Incorporation by reference is not prohibited under West Virginia law, so long as such incorporation does not attempt to include future amendments to federal regulations or statutes. Section 5.00 does not incorporate future amendments, but only the regulations in effect at the time § 5.00 was promulgated. Thus, § 5.00 is proper under State law. See, State v. Grinstead, 157 W.Va. 1001, 1011 (1974). Further, it is obvious that if federal regulations that have been incorporated by reference contain cross references to other federal regulations, only the version of the cross referenced regulations that was in existence on the effective date of incorporation is included in the state regulation. Grinstead, at 1012.

West Virginia's program for the regulation of the transportation of hazardous waste is consistent with and equivalent to the federal program.

IV. STANDARDS FOR STORAGE, TREATMENT AND DISPOSAL FACILITIES

A. STATE STATUTES AND REGULATIONS PROVIDE PERMIT STANDARDS FOR HAZARDOUS WASTE MANAGEMENT FACILITIES COVERED BY 40 C.F.R. 264, AS IS INDICATED IN CHECKLIST IV A.

[Federal Authority: RCRA § 3004 (42 U.S.C. 6924); 40 C.F.R. 264, 271.12]

Citation of Laws and Regulations

W. Va. Code §§ 20-5E-6(a)(4), 20-5E-7(d), 20-5E-7(f), 20-5E-7(i) and 20-5E-8(a)

W. Va. Hazardous Waste Management Regulations, Administrative Regulations, Series XV, DNR, Sections 8.00 - 8.13, 13.00

W. Va. Air Pollution Control Commission Administrative Regulations, Series XXV, Sections 6, 7, 8, 17

W. Va. Water Resources Board, Administrative Regulations, Series VII, Section 1.06.

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended, April 13, 1985

Effective date of statute - July 9, 1981, as amended, April 13, 1985

Effective date of DNR Regulations - July 12, 1985

Effective date of APCC Regulations - June 14, 1984

Effective date of Water Resources Board Regulations - April 25, 1984

Remarks of the Attorney General

West Virginia Code § 20-5E-6(a)(4) requires the Director of DNR to promulgate regulations establishing performance standards for treatment, storage and disposal facilities. Those regulations are applicable to owners and operators of such facilities. The language of § 20-5E-6(a)(4), with one minor exception, later discussed herein, is identical to that found in RCRA § 3004. Thus, the statutory authority of DNR to regulate TSD facilities is in accordance with the authority of EPA as set out in RCRA.

However, as with transportation, there are certain phases or portions of the regulation of TSD facilities that fall outside the authority of DNR. The State Health Department, Air Pollution Control Commission (APCC), and Water Resources Board (WRB) each have some authority over TSD facilities.

West Virginia Code § 20-5E-7(d) grants the State Board of Health authority to promulgate regulations pertaining to TSD facilities that handle hazardous wastes with infectious characteristics. However, since there are no federal regulations concerning such wastes, it is not necessary that the State promulgate regulations to be eligible for final authorization. Pursuant to § 20-5E-7(f) the APCC must promulgate regulations for TSD facilities that discharge hazardous waste to the atmosphere, and pursuant to § 20-5E-7(i) the WRB must promulgate regulations governing any discharge to state waters from a TSD facility.

DNR, APCC and the WRB have fulfilled their statutory obligations. DNR's Section 8.00 regulations are more comprehensive and thus more stringent than EPA's 40 C.F.R. 264 standards. A most notable example of DNR's more stringent regulations is the double liner requirement for existing facilities found in § 8.09.04 of DNR's regulations. The APCC regulations also go beyond EPA's requirements. For instance, APCC regulations would in some situations prohibit the storage of hazardous waste in uncovered tanks, § 7.05, Reg. XXV. Section 1.06 of the WRB regulations applies to

owners and operators of TSD facilities and prohibits a discharge to groundwater in excess of background concentrations. This is essentially a "no degradation" standard. Again, such a standard is more stringent than that of EPA. Further, pursuant to W. Va. Code § 20-5E-6(a)(4)(G), permit standards for TSD facilities are applicable to both owners and operators of those facilities.

In light of the above discussion, it is the opinion of the Attorney General that West Virginia's standards for TSD facilities are consistent with and equivalent to federal standards. Indeed, it is the Attorney General's opinion that State standards exceed those of the federal government.

Section 264.117(b)(1) permits the Regional Administrator of EPA to continue security requirements during post-closure when wastes may remain after completion of closure. The Director of DNR deleted this authority because he does not allow wastes to remain exposed after completion of closure. Consequently, there was no need to provide the chief with authority to continue the security requirements.

EPA has, however, asked for a further clarification of the post-closure security issue as it relates to waste piles and surface impoundments. It is the position of DNR that if closure of such a facility is contemplated and if wastes remain in place, the facility must be managed as a landfill, if a waste pile. If a surface impoundment, the requirements for decontamination and the requirements of § 8.09.07 and § 8.09.10 which reference other Sections and requirements for post-closure care are applicable. It is the opinion of the Attorney General that these requirements are at least equivalent to and consistent with the post-closure care requirements in 40 C.F.R. 264.110(b). They are in fact more stringent than the EPA requirement, since the state allows no waste to remain exposed, and since wastes remaining on site must be managed and the facility must comply fully with closure requirements. In the event of damage to cap or cover, the conditions of permits issued under W. Va. Code § 20-5E-8(a) would control. It is the opinion of the Attorney General that State standards for post closure security exceed those of the federal government.

EPA has also asked that the scope of the term "subsection" as used in § 20-5E-6(a)(4)(F) be defined. In RCRA, the federal equivalent to § 20-5E-6(a)(4) does not use the word subsection but refers to a specific subparagraph of § 3004. While the use of the word subsection may not be as clear as the federal language, it is clear that 20-5E-6(a)(4) was intended to parallel § 3004. Also, when § 20-5E-6(a)(4) is read as a whole, it is most reasonable to assume that the term subsection refers only to subsection (F) rather than to § 20-5E-6(a)(4) in its entirety.

- B. STATE STATUTES AND REGULATIONS PROVIDE FOR INTERIM STATUS AND INCLUDE INTERIM STATUS STANDARDS FOR HAZARDOUS WASTE FACILITIES COVERED BY 40 C.F.R. 265, AS INDICATED IN CHECKLIST IV B.
1. State statutes and regulations authorize owners and operators of hazardous waste management facilities which would qualify for interim status under the federal program to remain in operation until a final decision is made on the permit application;
 2. State law and regulations authorize continued operation of hazardous waste management facilities provided that owners and operators of such facilities comply with standards at least as stringent as EPA's interim status standards at 40 C.F.R. 265;
 3. State law and regulations assure that any facility qualifying for State interim status continues to qualify for federal interim status.

[Federal Authority: RCRA § 3005(e) (42 U.S.C. 6925), 271.13(a)]

Citation of Laws and Regulations

W. Va. Code § 20-5E-10
 W. Va. Hazardous Waste Management Regulations, DNR Administrative Regulations, Series XV, § 11.03.
 W. Va. Air Pollution Control Commission Administrative Regulations, Series XXV, § 25.03

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage Date of Statute - April 10, 1981
 Effective Date of Statute - July 9, 1981
 Effective Date of DNR regulations - July 12, 1985
 Effective Date of APCC regulations - June 14, 1984

Pursuant to W. Va. Code § 20-5E-10, any owner or operator of a facility required to have a permit under Article 5E, will be treated as having been issued such permit until a final administrative disposition is made of an application for the required permit. However, to be eligible for this interim status, the facility must have been operating and must continue to operate in compliance with the interim status requirements of the federal government that have been established pursuant to RCRA § 3005. The facility must also operate so as to "not cause or create a substantial risk of a health hazard or public nuisance or a significant adverse effect upon the environment." The owner or operator of the facility must also apply

for a permit in accordance with the appropriate rules, regulations and statutory requirements. Further, § 11.03.04 of the DNR regulations adopts the 40 C.F.R. 265 standards for interim status facilities in West Virginia. The Part 265 standards adopted by § 11.03.04 are those that were in effect on May 1, 1984, which includes the amendment to 40 C.F.R. 265.1 published November 22, 1983, at 48 Fed. Reg. 52720. The APCC, in § 25.03 of its regulations, references § 11.03 of the DNR regulations requiring facilities the APCC regulates to comply with DNR's interim status regulations. Section 25.03 of the APCC regulations incorporates federal Part 265 standards of January 4, 1984. Thus, the federal interim status standards that were in effect on that date have been included in the APCC regulations as opposed to the federal standards that were in effect on May 1, 1984. The APCC's incorporation also includes the above mentioned amendment to 40 C.F.R. 265.1.

Thus, to qualify for interim status in West Virginia, a facility must, at a minimum, comply with the Part 265 requirements. The State has, in actuality, incorporated by reference the 40 C.F.R. 265 standards. As has been discussed earlier, incorporation by reference is permissible in West Virginia so long as certain guidelines are met. West Virginia's incorporation of federal interim status requirements is within State guidelines.

The transition program in West Virginia is equivalent to RCRA's interim status scheme. No facility can qualify for interim status in West Virginia unless it likewise does so at the federal level. Thus, state facilities must be in existence on November 19, 1980, to qualify as an interim status facility.

V. REQUIREMENTS FOR PERMITS

STATE STATUTES AND REGULATION PROVIDE REQUIREMENTS FOR PERMITS AS INDICATED IN CHECKLIST V.

[Federal Authority: RCRA § 3005 (42 U.S.C. 6925); RCRA § 7004 (42 U.S.C. 6974); 40 C.F.R. 271.13 & .14]

Citation of Laws and Regulations

W. Va. Code §§ 20-5E-6(a)(4) and (5), 20-5E-7(f) and (i), 20-5E-8, 20-5E-9, 20-5E-10.

W. Va. Hazardous Waste Management Regulations, Administrative Regulations, Series XV, DNR § 8.01.02, §§ 11.00 - 11.29.

W. Va. Air Pollution Control Commission Administrative Regulations, Series XXV, §§ 11,13-23, 25, 26.

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended April 13, 1985

Effective date of statute - July 9, 1981, as amended April 13, 1985
Effective date of DNR Regulations - July 12, 1985
Effective date of APCC Regulations - June 14, 1984

Remarks of the Attorney General

State law and regulations require permits for owners and operators of all hazardous waste management facilities required to obtain a permit under 40 C.F.R., Part 270, and prohibits the operation of any hazardous waste management facility without such a permit. W. Va. Code § 20-5E-8(a) and 6(a)(4)(G). However, pursuant to W. Va. Code § 20-5E-10 a facility which qualifies for interim status under the federal program may remain in operation until a final decision is made on the facility's permit application. Such facilities must, at a minimum, continue to operate under standards at least as stringent as those of the federal government under 40 C.F.R. 265.

New hazardous waste management facilities must obtain an EPA identification number in accordance with EPA procedures. DNR regulations § 8.02.02. Further, W. Va. Code § 20-5E-8(a) prohibits the issuance of a permit for a TSD facility unless it is established that the issuance of the permit will not result in the violation of any of the provisions of Article 5E or any of the rules or regulations promulgated pursuant thereto. Thus, the issuance of a permit to a TSD facility will require that facility to comply with all applicable requirements of the State program. See, also, § 11.10.01 DNR Regulations, and § 17.01(a) APCC Regulations.

Additionally, the State has legal authority to implement each of the following provisions and that authority is at least equivalent to that as set out in the federal standards:

- a. Specific inclusions - § 11.01.01, DNR Regulations
§ 5.08, APCC Regulations
- b. Effect of permit - § 11.13 and 11.10.07, DNR Regulations
§§ 6.01 and 17.01(g), APCC Regulations
- c. Noncompliance reporting - Addressed through MOA
- d. Application for permit - § 11.02 and 11.06, DNR Regulations; §§ 14.01, 14.03, 14.04, 19.01, 19.02, 19.04, 25.01, 25.02 and 25.03, APCC Regulations.
- e. Signatories - § 11.07, DNR Regulations
§ 16, APCC Regulations
- f. Confidential information - § 11.23, DNR Regulations
§ 26.09, APCC Regulations

- g. Contents of Part A - § 11.04 DNR Regulations
§ 15.01 APCC Regulations
- h. Contents of Part B - § 11.05, DNR Regulations
§ 15.02-04, APCC Regulations
- i. Applicable permit conditions - § 11.10, DNR Regulations
§ 17.01, APCC Regulations
- j. Monitoring requirements - § 11.16 DNR Regulations
§ 17.02, APCC Regulations
- k. Establishing permit conditions - § 11.11, DNR Regulations
§§ 17.03, 17.04, 17.07,
19.10(b), APCC
Regulations
- l. Schedule of compliance - § 11.15.01, DNR Regulations
§§ 19.10 & 25.07, APCC
Regulations
- m. Permit transfer - § 11.14, DNR Regulations
§ 13.01(c), APCC Regulations
- n. Permit modifications - § 11.18, DNR Regulations
§ 14.02, APCC Regulations
- o. Permit termination - § 11.19, DNR Regulations
§ 21, APCC Regulations
- p. Duration - § 11.12, DNR Regulations
§ 20, APCC Regulations
- q. Permit by rule - § 11.08, DNR Regulations
- r. Emergency permits - § 11.09, DNR Regulations
§ 23, APCC Regulations
- s. Interim permits for UIC wells - § 11.08.03, DNR
Regulations
- t. Application for permit - Addressed through MOA
§§ 19.01, 19.02, 19.03, APCC
Regulations
- u. Modification of permits - §§ 11.17, 11.18, 11.20, DNR
Regulations, §§ 19.08, 19.09,
21.02, APCC Regulations
- v. Draft permits - § 11.21, DNR Regulations
§ 19.10, APCC Regulations

- w. Fact sheets - § 11.22, DNR Regulations
§ 19.15, APCC Regulations
- x. Public notice - § 11.24, DNR Regulations
§§ 19.12, 19.13, 19.14, 19.17, APCC Regulations
- y. Public comments and requests for hearing -
§ 11.25, DNR Regulations
§ 19.16, APCC Regulations
- z. Public hearings - § 11.16, DNR Regulations
§ 19.17, APCC Regulations
- aa. Response to comments - § 11.29, DNR Regulations
§ 19.18, APCC Regulations

Note that where no APCC regulations exist, or where APCC regulations are not as comprehensive as regulations of the DNR, the DNR regulations cited above are applicable to facilities regulated by APCC.

Questions have arisen as to what is the effect of the last clause of W.Va. Code § 20-5E-8(a). The proviso, when read in its entirety, indicates that the chief is not to issue permits for activities permitted by someone other than the chief pursuant to section 7 of Article 5E, i.e., the Air Pollution Control Commission. Section 7 sets out the instances when someone in addition to the chief is required to issue a permit pursuant to Article 5E. Thus, the chief's duties pursuant to Article 5E do not include the re-permitting of an activity permitted by another state agency. The conjunctive "and" makes this clear, that indeed such duplicative permitting is not required of the chief.

Questions also have arisen in regard to the equivalency of § 11.07.01 et seq. regarding the signatories to permit applications and reports. The effect of this requirement is that persons charged with overall responsibility for compliance with these regulations and compliance with environmental laws will implicitly be the signatories of these documents, and the signatures will bind corporate applicants and corporations reporting under the section and under the act. Although West Virginia does not expand the section to include examples of position titles as are contained in § 270.11(b)(2), it is the opinion of the Attorney General that this regulation is equivalent to that federal regulation cited infra.

Section 11.10.09 of the Hazardous Waste Management Regulations differs from the federal language at 40 C.F.R. 270.30(i)(3) and (4). However, § 11.10.09 is taken directly from the language contained in § 20-5E-12 of the state act and it is the opinion of the Attorney General that it is written broadly enough to cover all the inspection authority contained at 40 C.F.R. 270.30(i)(3) and (4).

The notice provided for in § 20-5E-9 constitutes legal notice to the public under State law.

40 C.F.R. 270.33(a) provides that, "The permit may, when appropriate, specify a schedule of compliance leading to compliance with the appropriate act and regulations." The state regulation at 11.15.01 omits the word "act" and just says regulations, but the regulations embody the act as well.

The West Virginia Legislature has granted permitting authority to more than one agency under W.Va. Code § 20-5E-1 et seq. The agencies with permitting authority under this Article are: the Division of Water Resources (DWR), Air Pollution Control Commission (APCC), and the State Health Department. Every hazardous waste facility in the State of West Virginia must obtain a permit from the chief of the division of water resources. W. Va. Code § 20-5E-8(a). However, section 8(a) also refers to all other permits required by law. Section 7 of Article 5E requires certain facilities to obtain permits in addition to that issued by the chief. The APCC, § 7(f), issues permits to facilities that have air emissions while the Health Department, § 7(d), permits facilities that treat, store or dispose of hazardous waste with infectious characteristics. Thus, while the permitting process may appear to be somewhat complex, it is nonetheless clear that the State has the authority to issue permits the various types and aspects of hazardous waste TSD facilities.

Section 7(i) of Article 5E refers to the Water Resources Board. That section states that the Board shall:

As necessary, promulgate rules and regulations governing discharges into the waters of this state of hazardous waste resulting from the treatment, storage or disposal of hazardous waste and rules and regulations governing the issuance, modification, suspension, revocation or denial of such permits related to such discharges from the treatment, storage or disposal of hazardous waste, as may be required by this article. (Emphasis supplied.)

Further, W. Va. Code § 20-5E-3(12) in defining "waste," excludes "industrial discharges which are point sources subject to permits under section 402 of the federal Water Pollution Control Act."

Article 5E does not require that the Board issue a permit to a hazardous waste facility. Indeed, the Water Resources Board is not a permitting agency, see, W. Va. Code §§ 20-5A-3 and 3a. Rather, pursuant to Article 5A, it is the function of the Board, among other things, to establish water quality standards for state waters and to promulgate regulations by which permits are issued to point sources

that discharge to State waters. Thus, under Article 5E, the Board has neither permitting nor enforcement powers.

EPA had asked whether § 20-5E-8(a) or other sections of Article 5E required permits for owners of facilities. On April 13, 1985, the State Legislature amended § 20-5E-8 to require owners of facilities to obtain permits under that section. DNR's regulations at 11.02.02 continue to require, as does EPA at 40 C.F.R. § 270.10(b), that an owner must sign the permit application of the operator of the facility or site, if the owner and operator are different persons. With the statutory revisions, the responsibility of any person owning, operating, constructing, modifying, or closing any facility or site for treatment, storage, or disposal, or any person treating, storing, or disposing of hazardous waste must obtain proper permits from the chief, and any others before undertaking those activities.

Further, Section 6 of Article 5E requires the Director to promulgate certain rules and regulations. W. Va. Code 20-5E-6(a)(4) requires that the Director promulgate rules and regulations "establishing such performance standards applicable to owners and operators." (Emphasis supplied.) Additionally, subsection (G) of § 6(a)(4) mandates that the Director promulgate rules and regulations respecting "compliance with the requirements of § 8 [§ 20-5E-8] of this Article respecting permits for treatment, storage and disposal." Thus, the requirements of § 8 are incorporated into § 6(a)(4).

What does this mean? First, the performance standards of Article 5E are applicable to owners and operators of TSD facilities. Owners are bound to comply with Article 5E performance standards. Since performance standards are terms and conditions of permits, owners are bound by the terms and conditions of TSD facility permits.

Second, by incorporating § 8 into § 6(a)(4), the State Legislature imposed upon the Director the mandatory duty to promulgate whatever regulations are necessary to effectuate compliance with § 8. The Director has fulfilled his obligation. See, § 11 of the State regulations. Those regulations are equally applicable to owners and operators. Further, § 6(a)(4) does not discriminate between facilities where the owner and operator are one and the same, and facilities with a separate owner and operator. All owners are bound to comply with the provisions of § 8. Thus, all owners are bound to comply with the terms and conditions of permits issued pursuant to that section.

The conclusion of the Attorney General is that an owner of a TSD facility is bound by the terms and conditions of permits issued pursuant to W. Va. Code § 20-5E-8, both by the specific inclusion of owners within the universe of persons required to obtain permits,

and by the operation of § 20-5E-6 and § 11.02.02 of the DNR's regulations.

The statutory basis for requiring permit application information is derived from § 20-5E-8(b) which gives the chief the authority to prescribe an application form. If the chief has the authority to prescribe a form, he has the authority to prescribe what information is required by the form. Additionally, the Director has exercised the authority, pursuant to § 20-5E-6(a)(4)(G) to promulgate rules and regulations to insure that § 8 is complied with. Therefore, there is ample authority to require the information included on a permit application. Further, DNR regulations at § 8 and APCC regulations at Section 15 require application information which is consistent with and equivalent to that required by EPA.

The State statutory basis for permit modifications is found in § 8. If a facility is to be modified, § 8 requires that the permit be modified. However, a situation may arise where a permit modification would be required for a reason other than a facility modification. In that case, since the chief has the authority in the first instance to issue a permit, he most certainly has the authority to require or allow a permit modification. Such power, if not express, is implied under § 8. If the chief had no such power, then once a permit were issued, it could not ever be modified. Such a result is absurd and would frustrate the clear intent and purpose of the State Act which an effective program for the management of hazardous waste.

As has been stated, Article 5E is a comprehensive statute designed, among other things, to effectuate the safe and adequate management of hazardous waste in West Virginia, § 20-5E-2. A central part of such a program is the permit. To be effective, a permit must not only bind the permittee, but must be able to be modified if and when conditions, rules or regulations change that require such a modification. Again, if not express, then by implication § 8 does authorize such action, by providing that the Chief shall issue permits upon such reasonable terms and conditions as he shall direct. W. Va. Code § 20-5E-8(a).

That a permit is not engraved in stone is further evidenced by § 20-5E-14(a). There the Legislature gave the chief the authority to issue an order modifying a permit. This modification can be required without the benefit of public notice and comment when necessary to correct a violation of the Article. However, it makes no sense to only allow a permit modification after a violation of Article 5E has occurred and a permittee is subject to the penalties provided for by the Article. A safe and adequate hazardous waste management program that protects the public health and safety and the environment from the effects of improper, inadequate or unsound management of hazardous waste, § 20-5E-2(b)(1)(3), must have flexibility so as to authorize not only reactions to problems, but the

prevention of the same. Such is the intent of the Legislature. The chief has the statutory authority to modify permits.

What is the statutory authority for compliance schedules? For compliance schedules incorporated into a permit, the authority is the same as discussed for modification. Flexibility in the hazardous waste management program and the fact that a facility may not be immediately able to comply with Article 5E, indicate that if not express in the Article, such authority is implied. Yet it is clear that the chief has the express authority to issue an order containing a compliance schedule, either as a modification to a permit or in and of itself, § 20-5E-14(a). There is also explicit and implied statutory authority for compliance schedules based upon the discretionary authority to issue permits on reasonable terms and conditions per § 20-5E-8(a).

It is also true that "any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the [West Virginia] Surface Coal Mining and Reclamation Act of 1980" [§ 20-5E-8(f)], is approved under the [United States] Surface Mining Control and Reclamation Act of 1977 [§ 3005(f) of RCRA]. This is true because the State of West Virginia has assumed primacy for the regulation of surface mining in this State.

Further, Section 20 of West Virginia APCC (WVAPCC) Regulation XXV is equivalent to 40 C.F.R. 270.50. The WVAPCC Regulations provide for issuance of construction permits and operating permits. Construction permits are valid for life of the facility and specify requirements to ensure that the facility will be constructed in a manner to comply with WVAPCC Regulation XXV. Operating permits are effective for ten years and specify operating requirements to ensure the facility complies with WVAPCC Regulation XXV during facility operation. For new incinerators construction and operating permits shall be issued concurrently. The construction permit approves the plans for the facility prior to construction. All items which EPA would consider in a permit renewal are reviewed by the State when an operating permit is being renewed.

Section 1.06 of the APCC regulations provides that even though WVAPCC Regulation XXV cites both statutory authorities [Code § 16-20 (West Virginia Air Pollution Control Law) and Code § 20-5E (West Virginia Hazardous Waste Management Act)] permit applications filed pursuant to Regulation XXV shall be processed in accordance with permitting procedures as set forth in Code § 20-5E. Section 1.06 provides further that permitting procedures as set forth in Code § 16-20 are not applicable. Since Code § 20-5E does not provide for the acquisition of a permit by way of agency inaction or default, and since Regulation XXV, approved by the West Virginia Legislature and finally promulgated by the Commission, has the full effect of law, it is clear that no applicant may acquire a permit by way of

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agency inaction or default. Code § 20-5E requires completion of the permit application process within a reasonable time.

EPA has noted that the DNR regulations use language which differs from the EPA convention in describing termination, revocation and reissuance, and revocation. In W. Va. Code § 20-5E-6(5), authority is given for the development of regulations specifying the terms and conditions under which the Chief shall issue, modify, suspend, revoke, or deny such permits as may be required by that article. In EPA's usage, "revoke" or "revocation" is used in conjunction with reissuance, and connotes a revocation with intent to immediately reissue. West Virginia's usage of revoke is identical, when used in the context of "revoke and reissue". However, West Virginia also uses revoke in the context of revocation and suspension, with a meaning equivalent to EPA's "terminate". It is the opinion of the Attorney General that the similarities between these usages are sufficient to constitute consistency and equivalency with the EPA usage, in spite of the slight difference in terms.

EPA has noted an apparent inconsistency with EPA and state terminology regarding the use of the terms "suspend" or "suspension", defined at DNR regulations 2.00(125). DNR views the use of "suspension" as, for example at DNR regulations 11.17, as a termination or revocation of a permit for a period during which corrective actions may be taken to remedy violations of terms and conditions of the permit. It is not viewed by DNR as an action which is automatically rescinded upon the completion of the corrective action, but rather one which requires the reinstatement of the suspended permit by the Chief. Suspension, once undertaken, is not viewed as an exclusive remedy. Absent corrective action, the Chief could proceed with the termination or revocation of the permit. Once accomplished, that termination would require a complete permit reapplication to reactivate the permit, and upon termination, the permittee would be required to begin closure. Suspension is viewed as an alternative enforcement tool to bring about an interruption of permitted activities until corrective action is undertaken and permit continuance is achieved.

The State's "suspension" is akin to EPA's Corrective Action Orders in that both produce economic pressure upon the permittee by discontinuing new activities such as receiving waste. Neither requires that closure be undertaken. Both are directed at achieving and maintaining permit compliance.

It is the opinion of the Attorney General that the State's use of the terms "suspend" or "suspension" in such a context is consistent with and equivalent to the federal program. The employment of additional or optional enforcement remedies is expressly "highly recommended" in EPA regulations in the note following 40 C.F.R. 271.16b(2)(c). The Attorney General cites this

note in express support of his position of consistency in regard to the use of these terms in W. Va. Code § 20-5E-8 and in DNR's regulations.

EPA has asked that the Attorney General specify the State's effective dates for required liability coverage for nonsudden accidental occurrences and refers the State to 40 C.F.R. §§ 264.147-(b)(4)(i) to (iii) and 265.147(b)(4)(i) to (iii). With certain amendments, Section 13 of the DNR regulations incorporates by reference subpart H of 40 C.F.R. 264 and 265. Subpart H includes § 147 of both 40 C.F.R. 264 and 265. Section 13 of the DNR regulations first became effective on March 16, 1983, and has been in effect since that date. Thus, the effective dates for required liability coverage for nonsudden accidental occurrences should be counted, as required by § 147(b)(i) and (ii) of 40 C.F.R. 264 and 265, from March 16, 1983. For § 147(b)(4)(iii) of 40 C.F.R. 264 and 265, one of the sections of Subpart H amended by DNR, the effective date will be one month after the effective date of the regulations.

VI. INSPECTIONS

STATE LAW PROVIDES AUTHORITY FOR OFFICERS
ENGAGED IN COMPLIANCE EVALUATION ACTIVITIES TO
ENTER ANY CONVEYANCE, VEHICLE, FACILITY OR
PREMISES SUBJECT TO REGULATION OR IN WHICH
RECORDS RELEVANT TO PROGRAM OPERATION ARE KEPT
IN ORDER TO INSPECT, MONITOR OR OTHERWISE
INVESTIGATE COMPLIANCE WITH THE STATE PROGRAM
INCLUDING COMPLIANCE WITH PERMIT TERMS AND
CONDITIONS AND OTHER PROGRAM REQUIREMENTS

[Federal Authority: RCRA § 3007 (42 U.S.C. 6927); 40 C.F.R. 271.15].

Citations of Laws and Regulations:

W. Va. Code § 20-5E-5(a)
W. Va. Code § 20-5E-7(a), (b), (f)
W. Va. Code § 20-5E-12
W. Va. Hazardous Waste Management Regulations, Administrative
Regulations, Series XV, DNR, § 11.10.09.
W. Va. Air Pollution Control Commission Administrative Regulations,
Series XXV, § 17.01(i).

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended April 13, 1985
Effective date of statute - July 9, 1981, as amended April 13, 1985
Effective date of DNR regulations - July 12, 1985
Effective date of APCC regulations - June 14, 1984

Remarks of the Attorney General

W. Va. Code § 20-5E-12 is a broad grant of authority to the chief with regard to inspections. Subsections (a) and (c) are especially so. Pursuant to subsection (a), the chief or his authorized designee may enter essentially anywhere or any place where hazardous wastes are being or have been generated, treated, stored, disposed of or transported in or from. This entry is authorized for the purpose of making an investigation to determine compliance with Article 5E, and/or a permit. An investigation may include sampling. In that instance, the chief must comply with subsection (d) of § 12. Thus, the chief must leave a receipt for the sample obtained and must offer to split the sample with the owner, operator or agent in charge of the premises. These requirements are equivalent to those found in RCRA § 3007. An investigation may also include the inspection and copying of records in the possession of the owner, operator or agent in charge. Subsection (c) grants the chief the authority to inspect and copy any document relating to the "storage, treatment or disposal of hazardous waste in the possession of any person who generates, stores, treats, transports, disposes of or otherwise handles or has handled such waste." All hazardous waste is either generated, stored, treated, or or disposed of. Therefore, it is the opinion of the Attorney General that the chief has the authority to inspect and copy any document relative to an investigation undertaken pursuant to subsection (a).

The same authority for sampling and inspecting documents granted the chief under subsection (a) would also apply to an inspection carried out pursuant to subsection (c). Consequently when the chief has "cause to believe" that a violation of a permit or a violation of the article has or is occurring, he may sample and inspect documents in the same manner as is discussed above.

It must also be remembered that the director of the APCC has the same inspection authority as does the chief. W. Va. Code § 20-5E-7(f) grants such authority to the director for facilities that pursuant to section 7(f) fall within his jurisdiction.

Section 12 must be read as a whole. Its subsections are not mutually exclusive. By reading the section in pari materia, the full effect and extent of section 12 is realized. For both permitted and unpermitted places and facilities the chief has the authority to sample and inspect and copy the records necessary to determine compliance with Article 5E. The State program is equivalent to that of the federal government, in the opinion of the Attorney General.

VII. ENFORCEMENT REMEDIES

State statutes and regulations provide the following:

- A. AUTHORITY TO RESTRAIN IMMEDIATELY BY ORDER OR BY SUIT IN STATE COURT ANY PERSON FROM ENGAGING IN ANY UNAUTHORIZED ACTIVITY WHICH IS ENDANGERING OR CAUSING DAMAGE TO THE PUBLIC HEALTH OR THE ENVIRONMENT.

[Federal Authority: RCRA § 3006 (42 U.S.C. 6928); 40 C.F.R. 271.16(a)(1)]

Citation of Laws and Regulations

W. Va. Code § 20-5E-7(a), (b), (f)
W. Va. Code § 20-5E-14
W. Va. Code § 20-5E-16
W. Va. Code § 20-5E-17

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended April 13, 1985
Effective date of statute - July 9, 1981, as amended April 13, 1985

Remarks of the Attorney General

It is the opinion of the Attorney General that an unauthorized activity under Article 5E is also a violation of that same Article. Since the chief can issue an order to cease and desist from a violation of Article 5E, he can therefore issue an order to immediately restrain an activity not authorized by the Article, W. Va. Code § 20-5E-14(a). The APCC director, the Public Service Commission, and the Commissioner of DOH have similar authority pursuant to W. Va. Code § 20-5E-7(a), (b), and (f).

Likewise, pursuant to W. Va. Code § 20-5E-16, the chief may seek injunctive relief to halt a violation of the Article. Since as discussed above, an unauthorized activity is a violation of Article 5E, the chief may by civil suit restrain an activity not authorized by the Article. The APCC director, Public Service Commission, and Commissioner of DOH have authority identical to that of the chief in this regard.

Further, W. Va. Code § 20-5E-17 grants both the chief and the director the authority to take whatever action is necessary, administrative or judicial, to halt activities which may present an imminent and substantial endangerment to public health, safety or the environment.

- B. AUTHORITY TO SUE IN COURT OF COMPETENT JURISDICTION TO ENJOIN ANY THREATENED OR CONTINUING VIOLATION OF ANY PROGRAM REQUIREMENT, INCLUDING PERMIT CONDITIONS, WITHOUT THE NECESSITY OF A PRIOR REVOCATION OF THE PERMIT.

[Federal Authority: RCRA § 3006 (42 U.S.C. 6928); 40 C.F.R. 271.16(a)(2)]

Citation of Laws and Regulations

W. Va. Code § 20-5E-7(a), (b), (f)
W. Va. Code § 20-5E-16
W. Va. Code § 20-7-5

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended April 13, 1985
Effective date of statute - July 9, 1981, as amended April 13, 1985
Passage date of statute (20-7-5) - March 8, 1961
Effective date of statute (20-7-5) - July 1, 1961

Remarks of the Attorney General

State statutory authority to institute civil action is similar to that of the federal government. Pursuant to RCRA § 3008(a), the administrator may institute a civil action for a violation of the subtitle. Section 3008(a) does not mention threatened violations. Likewise, W. Va. Code § 20-5E-16 grants the chief the authority to institute a civil action for a violation of Article 5E. As with RCRA, threatened violations are not mentioned.

However, the director of the DNR does have the authority to enjoin threatened violations of Chapter 20. W. Va. Code § 20-7-5 states:

"The director shall be charged with the duty and responsibility for enforcing the provisions of this chapter and to this end may call upon the attorney general, the prosecuting attorneys of the several counties, the department of public safety and all other law-enforcement officers of the State. He shall have authority to compel compliance with and to prevent violations and threatened violations of any provisions of this chapter, lawful rules and regulations promulgated hereunder, and cease and desist orders issued pursuant hereto. He may invoke the processes of any court for coercive, remedial or preventive relief by injunction, mandamus or appropriate proceedings." (Emphasis supplied.)

Furthermore, injunctive relief is available without any prior revocation of a permit. W. Va. Code § 20-5E-16 provides in pertinent part:

An application for injunctive relief ... can be filed and relief granted notwithstanding that fact that all administrative remedies provided for in this article have not been exhausted or involved against the person or persons against whom relief is sought. (Emphasis supplied.)

C. AUTHORITY TO ASSESS OR SUE TO RECOVER IN COURT CIVIL PENALTIES IN AT LEAST THE AMOUNT OF \$10,000 PER DAY FOR ANY PROGRAM VIOLATION.

[Federal Authority: RCRA § 3006 (42 U.S.C. 6928); 40 C.F.R. 271.16(a)(3)(i)]

Citation of Laws and Regulations

W. Va. Code § 20-5E-7(a), (b), (f)
W. Va. Code § 20-5E-16

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended, April 13, 1985
Effective date of statute - July 9, 1981, as amended, April 13, 1985

Remarks of the Attorney General

For any violation of any requirement of Article 5E, a civil penalty not to exceed \$25,000 may be sought. W. Va. Code § 20-5E-16. The State's authority in this regard is consistent with and in fact exceeds the minimum required by RCRA § 3006, in the opinion of the Attorney General.

D. AUTHORITY TO OBTAIN CRIMINAL PENALTIES IN AT LEAST THE AMOUNT OF \$10,000 PER DAY FOR EACH VIOLATION AND IMPRISONMENT FOR AT LEAST SIX MONTHS AGAINST ANY PERSON WHO KNOWINGLY TRANSPORTS ANY HAZARDOUS WASTE TO AN UNPERMITTED FACILITY; WHO TREATS, STORES OR DISPOSES OF HAZARDOUS WASTE WITHOUT A PERMIT; OR WHO MAKES ANY FALSE STATEMENT OR REPRESENTATION IN ANY APPLICATION, LABEL, MANIFEST, RECORD, REPORT, PERMIT OR OTHER DOCUMENT, FILED, MAINTAINED OR USED FOR THE PURPOSES OF PROGRAM COMPLIANCE.

[Federal Authority: RCRA § 3006 (42 U.S.C. 6928); 40 C.F.R. 271.16(a)(3)(ii)]

Citation of Laws and Regulations

W. Va. Code § 20-5E-7(a), (b), (f)
W. Va. Code § 20-5E-15

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended, April 13, 1985
Effective date of statute - July 9, 1981, as amended, April 13, 1985

Remarks of the Attorney General

Any person convicted of knowingly transporting hazardous waste to an unpermitted facility, or who treats, stores or disposes of such waste without a permit or in knowing violation of a permit is guilty of a felony and is subject to a fine not to exceed \$50,000 for each day of violation and is also subject to imprisonment for not less than one year or more than two. W. Va. Code § 20-5E-15(a). Such person may both fined and imprisoned.

Any person convicted of knowingly making a false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used for purposes of compliance with Article 5E is guilty of a misdemeanor and is subject to a fine not to exceed \$25,000. Also, any person convicted of the knowing destruction, alteration or concealment of any record relevant to the generation, storage, treatment, transportation, disposal or other such handling of any hazardous waste (whether such activity took place before or after the effective date of Article 5E) when such record is required to be maintained under the Article is guilty of a misdemeanor and subject to a fine not to exceed \$25,000, or imprisoned for a period not to exceed one year, or both fined and imprisoned for each violation. W. Va. Code § 20-5E-15(b).

Any person convicted of a second or subsequent offense under either Section 15(a) or (b) is guilty of a felony and is subject to a fine not to exceed \$50,000 for each day of violation, imprisonment for not less than one or more than three years, or both fine and imprisonment.

The enforcement procedures and remedies of Article 5E are fully available, as a minimum, to all hazardous waste facilities in the State. Any other procedures or remedies that may be available for any such facility under any other State law may be used to supplement Article 5E.

The definition of "person" in § 20-5E-3(9) does not narrow the universe as to whom the definition applies, when compared to the federal definition. It is true that the State definition of person lists county commission rather than just commission. The State is

confident that if a commission exists other than a county commission, then for the purposes of Article 5E, such commission would fall within one of the other terms listed in the definition, e.g., government corporation, association, etc. Thus, if need be, the State would have the authority to regulate or proceed against a commission other than a county commission.

VIII. PUBLIC PARTICIPATION IN THE STATE ENFORCEMENT PROCESS

State laws and regulations provide for public participation in the State enforcement process by providing either:

- A. AUTHORITY TO ALLOW INTERVENTION AS OF RIGHT IN ANY CIVIL OR ADMINISTRATIVE ACTION TO OBTAIN THE REMEDIES SPECIFIED IN SECTION VII, A, B & C ABOVE, BY ANY CITIZEN HAVING AN INTEREST WHICH IS OR MAY BE ADVERSELY AFFECTED; OR
- B. ASSURANCES THAT THE STATE AGENCY OR ENFORCEMENT AUTHORITY WILL:
 - 1. Investigate and provide written response to all citizen complaints duly submitted;
 - 2. Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule or regulation; and
 - 3. Publish and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

[Federal Authority: RCRA § 7004 (42 U.S.C. 6974); 40 C.F.R. 271.16(d)]

Citation of Laws and Regulations

W. Va. Code § 20-5E-18

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981, as amended, April 13, 1985
Effective date of statute - July 9, 1981, as amended, April 13, 1985

Remarks of the Attorney General

The West Virginia Hazardous Waste Management Program complies with A, above. W. Va. Code § 20-5E-18(g) states that "any person

may intervene as a matter of right in any civil action or administrative action instituted under this article."

IX. AUTHORITY TO SHARE INFORMATION WITH EPA

STATE STATUTES AND REGULATIONS PROVIDE AUTHORITY FOR ANY INFORMATION OBTAINED OR USED IN THE ADMINISTRATION OF THE STATE PROGRAM TO BE AVAILABLE TO EPA UPON REQUEST WITHOUT RESTRICTION.

[Federal Authority: RCRA § 3007(b) (42 U.S.C. 6927); 40 C.F.R. 271.17]

Citation of Laws and Regulations

W. Va. Code § 20-5E-2(b)(4)
W. Va. Code § 20-5E-4
W. Va. Code § 20-5E-5(a)
W. Va. Code § 20-5E-11
W. Va. Hazardous Waste Management Regulations, Administrative Regulations, Series XV, DNR, § 11.23(g)
W. Va. Air Pollution Control Commission, Administrative Regulations, Series XXV, § 26.07.

Date of Enactment of Enabling Legislation and Adoption of Regulations

Passage date of statute - April 10, 1981
Effective date of statute - July 9, 1981
Effective date of DNR regulations - July 12, 1985
Effective date of APCC regulations - June 14, 1984

Remarks of the Attorney General

Information obtained by any agency under this article shall be available to the public unless the chief certifies such information to be confidential. The chief may make such certification where any person shows, to the satisfaction of the chief, that the information or parts thereof, if made public, would divulge methods, processes or activities entitled to protection as trade secrets. Nothing in this section may be construed as limiting the disclosure of information by the division to any officer, employee or authorized representative of the state or federal government concerned with effecting the purposes of this article. § 11.23(g) DNR Regulations and § 26.07 APCC Regulations.

W. Va. Code § 20-5E-11 must be considered as in pari materia with the State Freedom of Information Act (FOIA) (W. Va. Code § 29B-1-1, et seq.), since both statutes govern the agency's disclosure of information to the public and the protection of trade secrets. The term "person" under the FOIA relates to who may

request information and is defined as "any natural person, corporation, partnership, firm or association. Governmental agencies such as EPA are not included in this definition, which is consistent with the Act's purpose to protect the public's right to know. Construing the provisions of W. Va. Code § 20-5E-11 and W. Va. Code § 29B-1-1, et seq. together, and considering the purposes of both acts, the Attorney General concludes that the agencies implementing and administering the State program may transmit all information regardless of confidentiality claims. This conclusion is bolstered by the DNR and APCC Regulations cited above.

Names and addresses of permit applicants and permittees will always be made public. (W. Va. Code § 20-5E-11.)

X. MEMORANDUM OF AGREEMENT

The Attorney General has reviewed the Memorandum of Agreement and it is his opinion that:

1. The State has the authority to enter into the Agreement;
2. The State has the authority to carry out the Agreement; and
3. No applicable statute (including the State Administrative Procedures Act) requires that any of the terms or conditions of the Agreement be promulgated as a rule in order to be binding.

STATE OF WEST VIRGINIA



CHARLIE BROWN
ATTORNEY GENERAL

(SEAL OF OFFICE)

DATE: 5/17/85

ATTORNEY GENERAL'S STATEMENT FOR FINAL AUTHORIZATION

SUPPLEMENTAL RESPONSE

EPA has asked that the Attorney General explain or clarify issues remaining in question after its review of the Application for Final Authorization submitted by the West Virginia Department of Natural Resources.

I hereby certify, pursuant to my authority as Attorney General of the State of West Virginia and in accordance with Section 3006(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6901 et seq.), and 40 C.F.R. 271, that, in my opinion, the laws of the State of West Virginia provide adequate authority to carry out the program set forth in the "Program Description" submitted by the West Virginia Department of Natural Resources. The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which shall be fully effective by the time the program is approved, include those identified below. Those portions of the Attorney General's Statement for Final Authorization dated May 17, 1985 not revised and certified by specific inclusion in this supplemental response are incorporated as if fully set forth herein. This supplemental response replaces in full the Attorney General's Statement Supplemental Response executed September 13, 1985.

INCORPORATION BY REFERENCE

1. The West Virginia Public Service Commission has initiated a revision of its regulations to eliminate the confusion caused by its adoption by reference of DNR regulations § 5.2.1. The effective date of the revised PSC General Order 209.2 is October 28, 1985, and the revised regulations are enclosed with the State's response to EPA comments.

TERMINATION, REVOCATION, SUSPENSION

2. EPA has sought further clarification of the termination, revocation and suspension procedures provided for by regulation. EPA has asked if these terms are synonymous with "terminate" as used by EPA. It is the opinion of the Attorney General that these terms are not all strictly synonymous, but are more precisely homologous to or analogous to EPA's "terminate."

The Attorney General has earlier explained that the provision for suspension, under W. Va. Code § 20-5E-6(a)(5) provision is a separately available remedy similar in effect to EPA's corrective

action orders. Termination and revocation as used by West Virginia are interchangeable with termination as used by EPA. One exception to this use of revoke is as a component of the term revoke and reissue, which is a termination with the intent to issue a new permit at the same instant without a gap, a usage identical to that of EPA.

In regard to the causes for termination, revocation, or suspension, § 11.19(a) at 1, 2 and 3, contrary to EPA's impression, does identify causes for termination. Section 11.19(a)1 and 2 supply causes for revocation or suspension; § 11.19(a)3 supplies cause for which revocation alone is the result. As noted in the preceding paragraph, West Virginia has used revocation and termination interchangeably in these regulations.

Activities required to be curtailed when the permit is suspended are all activities of the permitted facility, excepting any expressly allowed as a term of the suspension order. Examples of curtailed activities include the receipt of new wastes or additional waste at the site. Examples of exceptions may include those activities relating to maintaining security, integrity, or safety of materials, processes, or facilities, and those relating to the protection of human health and environment, including limited treatment, storage or disposal to achieve those ends.

Permit suspension results when the Chief makes a finding of a cause under § 11.19 for termination, revocation, or suspension. If the outcome of the decision-making process of the Chief is to suspend the permit, the tentative decision to suspend the permit is, by definition at § 11.17(e), a draft permit. A draft permit document is prepared to reflect the decision of the Chief. Such a draft permit must necessarily be prepared consistent with § 11.21 of the regulations, which incorporates, by reference, § 11.10.

Section 11.10 describes conditions applicable to all permits, and describes at § 11.10.6 those actions which may be taken for cause. Options available for the Chief, however, only include modification, revocation, reissuance, or termination. Note that suspension or further suspension is not an option for a suspended facility or permittee. Obviously reinstatement of the permit, to remain consistent with §§ 11.21 and 11.10, can only be done through the preparation of another draft permit and either permit modification or revocation and reissuance.

In summary, the tentative decision to terminate, revoke or suspend is by definition a type of draft permit. In actual effect, the determination extends the definition of draft permits to include termination, revocation and suspension in a certain specified range of circumstances. The trigger for the use of the § 11.17(e) draft permit requirement is the list of causes for termination, revocation and suspension in § 11.19. Any conditions short of the § 11.19(a) (3) conditions endangering human health and environment can be the

cause for termination, revocation or suspension in the Chief's discretion. However, any condition which meets the requirement of § 11.19(a)(3) endangering human health and environment is a condition in which the Chief may only revoke or terminate, not suspend.

EPA's regulations at § 270.43(a)1, 2, and 3 and § 270.41(b)(1) similarly empower the termination or major modification of the permit for similarly enumerated causes which parallel § 11.19(a) at 1, 2, 3. West Virginia's regulations, however, at § 11.19(a)(3) limit the Chief's response to permit revocation in the event that human health and environment are endangered.

EPA has also noted some uncertainty about the practical aspects of pursuing suspension and termination concurrently, or pursuing termination on a permittee facility under suspension. As the Attorney General has earlier explained, the remedies of suspension and termination can be undertaken at the same time, since suspension is not viewed as an exclusive remedy. As with the corrective action orders issued by EPA, other enforcement is not precluded during the period of suspension. Suspension and termination are matters undertaken under the same procedures, as pointed out in EPA's

comments. However, each requires a separate draft permit; suspension requires a draft permit which ultimately results in modification or revocation and reissuance, termination or revocation is a final action which can result in no further action.

The Attorney General reiterates his opinion that the State's use of suspension as an additional enforcement tool is entirely consistent with and equivalent to the Federal program.

CITATION

4. The citation to W. Va. Code § 20-5E-13, enacted April 13, 1985 is hereby added to Section VII.B of the Attorney General's Statement.

CHECKLIST

5. Appropriate changes to reflect EPA concerns have been made. Please see the revised checklist included in the State's Response to EPA comments.

CRIMINAL PENALTIES; STATUTORY AMENDMENT

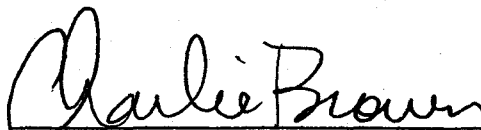
6. EPA has asked that the Attorney General indicate that the amendments to the State's Hazardous Waste Management Act now permit first offense per day/per violation penalties for making a false statement or representation in an application, label manifest, record, report, or other document. Copies of the signed bill and amended statute which place the penalties in effect are attached as an exhibit to this statement.

Therefore it is the opinion of the Attorney General that for purposes of the base program, the proposed regulations cited above will have no effect upon the State's application or upon the base program.

REGULATED UNIT DATE

9. EPA has asked that the Attorney General clarify the confusion regarding the so-called "Regulated Unit Date". Regulated Unit Date is the arbitrary date upon which or after which facilities which were actively receiving waste or received waste are subject to the requirements of the State Act. As West Virginia's date has been known to differ from EPA's, due to the difference in dates of enactment of the State Act and regulations and those of RCRA, a gap in the universe of state-regulated facilities vis-a-vis federally regulated facilities has been viewed as a possibility. The Department of Natural Resources has represented to the Attorney General that no facilities in fact received hazardous waste during the period between January 24, 1983, the EPA Regulated Unit Date, and May 4, 1983, that of West Virginia. Based upon the representations made to the Attorney General by the Department of Natural Resources, it is the opinion of the Attorney General that no non-state regulated facilities existed during the previously identified "gap" between effective dates of regulations.

STATE OF WEST VIRGINIA



CHARLIE BROWN
ATTORNEY GENERAL

(SEAL OF OFFICE)

DATE: Oct 29, 1985

ATTORNEY GENERAL'S STATEMENT FOR FINAL AUTHORIZATION

SECOND SUPPLEMENTAL RESPONSE

I hereby certify, pursuant to my authority as Attorney General of the State of West Virginia, and in accordance with Section 3006(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, (42 U.S.C. 6901 et seq.), and 40 C.F.R. 271, that, in my opinion, the laws of the State of West Virginia provide adequate authority to carry out the program set forth in the "Program Description" submitted by the West Virginia Department of Natural Resources. The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which shall be fully effective by the time the program is approved, include those identified below.

I hereby ratify and re-certify the document dated May 17, 1985, entitled "Attorney General's Statement for Final Authorization" as amended by the Supplemental Response of October 29, 1985, except as amended herein, which sets forth the opinion of the Attorney General in regard to program authority of the State of West Virginia.

1. Adoptions by Reference

As a general matter rules are adopted by reference as of the dates specified in the regulations, and if no such dates are specified, they are adopted as of the effective dates of the regulations. Therefore, the date in the fifth line of page 10 of the May 17, 1985 Attorney General's Statement is hereby amended to be April 15, 1986, since 11.3.4 incorporates by reference 40 C.F.R., Part 265 as of April 15, 1986, the effective date thereof.


4. Effective Date of Department of Natural Resources and Department
of Highways Regulations

The Attorney General's Statement of May 17, 1985, is hereby amended so that where "effective date of DNR Regulations" appears, it is followed by "April 15, 1986."

The Attorney General's Statement is also amended so that where "effective date of DOH Regulations" appears it is followed by "April 7, 1986."

SEAL OF OFFICE

STATE OF WEST VIRGINIA



CHARLES G. BROWN
ATTORNEY GENERAL

Date: April 18, 1986