DECEMBER 7

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Monday, December 7, 1992 - 10:00 a.m.- 1:00 p.m.

Senate Finance Committee Room - M-451

1. Approval of Minutes - Meetings November 8 and 9, 1992

2. Review of Legislative Rules:

   a. Air Pollution Control Commission - Regulations to Prevent and Control Air Pollution From the Emission of Volatile Organic Compounds

   b. State Emergency Response Commission - SERC Legislative Rules

   c. Division of Labor - West Virginia Manufactured Housing Construction and Safety Standards Act

   d. Worker's Compensation - Definition of Employer

   e. Division of Natural Resources - Regulations Concerning Prohibitions When Hunting and Trapping

   f. WV Board of Examiners for Registered Professional Nurses - Limited Prescriptive Authority for Nurses in Advanced Practice

   g. Health Care Cost Review Authority - Temporary Approval of Discount Contracts for Border Hospitals

   h. Division of Tax - Sales Tax Interpretive Rules

   i. Division of Tax - Division of Forestry Woodland Fees

   j. Division of Tax - Bingo Rules and Regulations

   k. Insurance Commissioner - Filing Fees for Purchasing Groups, and for Risk Retention Groups Not Chartered in this State

l. Insurance Commissioner - Individual and Employer Group Minimum Benefits Accident and Sickness Insurance Policies, Series 33

m. Insurance Commissioner - Long-Term Care Insurance

n. Insurance Commissioner - Standards for Uniform Health Care Administration

o. Insurance Commissioner - Regulation of Credit Life Insurance and Credit Accident and Sickness Insurance

p. Insurance Commissioner - Group Coordination of benefits

q. Dept. of Health and Human Resources - Residential Board and Care Homes

r. Division of Forestry - Sediment Control During Commercial Timber-Harvesting Operations - Licensing, Series 2

s. Division of Forestry - Sediment Control During Commercial Timber-Harvesting Operations - Logger Certification, Series 3

t. Division of Rehabilitation Services - Fair Market Price Determination

u. Division of Rehabilitation Services - Qualifications for Participation: Committee for the Purchase of Commodities and Services from the Handicapped

v. Division of Rehabilitation Services - Procurement List: Committee for the Purchase of Commodities and Services from the Handicapped

w. Attorney General - Consumer Lease Disclosures in Rent To Own Transactions

3. Other Business:

Monday, December 7, 1992

10:00 a.m.-1:00 p.m. Legislative Rule-Making Review Committee
(Code §29A-3-10)

Keith Burdette
ex officio nonvoting member

Robert "Chuck" Chambers,
ex officio nonvoting member

Senate	House
Wooton, Chairman	Grubb, Chairman
Chafin (absent)	Burk
Manchin, J.	Faircloth
Tomblin	Roop
Wiedebusch	Love
Boley	Gallagher

The meeting was called to order by Mr. Wooton, Co-Chairman.

The minutes of the November 8 and 9, 1992 meetings were approved.

Debra Graham, Committee Counsel, told the Committee that the rule proposed by the Division of Labor, West Virginia Manufactured Housing Construction and Safety Standards Act, had been laid over at the Committee's last meeting to allow Leff Moore, representing the manufactured housing industry, to file proposed modifications with the Committee. She stated that Mr. Moore had not filed any proposed modifications.

Mr. Roop moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the Department of Health and Human Resources, Residential Board and Care Homes, and reminded the Committee that the proposed rule had been laid over at the Committee's last meeting. Nancy Tolliver, Commissioner, Bureau of Administration and Finance, Darrell Cross, Chief Deputy Fire Marshal, Pat Ahwash, of Greenbrier Care Home, and Barbara Morris, of Home Providers, Inc., addressed the Committee regarding the proposed rule and answered questions from the Committee.

Mr. Manchin moved that the proposed rule lie over until the Committee's January meeting. The motion was adopted.

Ms. Graham explained the rule proposed by the Health Care Cost Review Authority, Temporary Approval of Discount Contracts for Border Hospitals, and stated that the proposed rule had been laid over at the Committee's last meeting. Bob Coda, Health Plan of the Upper Ohio Valley, and Marianne Stonestreet, General Counsel to the Authority,

commented on the proposed rule and responded to questions from the Committee.

Mr. Wiedebusch moved that the proposed rule lie over until the Committee's January meeting. The motion was adopted.

Mike Mowery, Counsel to the House Judiciary Committee, explained the modifications recommended by the Air Pollution Control Commission at its meeting of November 10, 1992, relating to the Commission's proposed rule, Regulations to Prevent and Control Air Pollution from the Emission of Volatile Organic Compounds. Mr. Mowery explained that there are numerous technical changes and corrections in response to comments from the Federal Environmental Protection Agency and to comments made by Michael McThomas, former counsel to the Committee. Further, modifications were necessitated as a result of the Governor's Executive Order 8-92, transferring functions of the Commission from the Division of Natural Resources to the Division of Environmental Protection. Mr. Mowery pointed out that Section 40 of the proposed rule presents the only area still in controversy. On November 10, the Commission adopted language for Section 40 which is acceptable to the West Virginia Manufacturers' Association. However, the Office of Air Quality is not in agreement with the language and desires a further modification to Section 40 which that office perceives would be acceptable to the Federal EPA. Dale Farley, Chief of the Office of Air Quality, and John Cummings, representing the West Virginia Manufacturers' Association, addressed the Committee and responded to questions from Committee members.

Mr. Love moved that the proposed rule be approved as modified with the technical changes and corrections which are not in controversy and that the language approved by the Commission at its November 10, 1992, meeting with regard to Section 40 be included. The motion was adopted.

Mr. Mowery told the Committee that the rule proposed by the State Emergency Response Commission, SERC Legislative Rules, had been laid over at the Committee's last meeting to allow the Commission to review modifications suggested by the Committee. He stated that the commission has agreed to the modifications and that it was also requesting to make a few more technical modifications. Mr. Mowery answered questions from the Committee. Carl Bradford, Chairman of the Board, and Mr. Cummings commented on the proposed rule.

Mr. Love moved that the proposed rule be approved as modified. The motion was adopted. Mr. Faircloth voted "No".

Mr Mowery distributed a memo on the Worker's Compensation Rule, Definition of Employer, and suggested that the Committee use the approach taken by the federal government where the responsible persons are those who should be liable. He suggested that a specific section

be amended into the rule establishing liability, but that the definition of "employer" not be broadly expanded. John Kozak, Executive Secretary of the Workers Compensation Commission, responded to Mr. Mowery's comments and stated that the Commission would be willing to amend the rule. Mr. Wooton requested that Mr. Mowery discuss the amendment with Mr. Kozak and report back to the Committee in January. Paul Clay, a Beckley attorney, addressed the Committee.

Ms. Graham told the Committee that the rule proposed by the Division of Natural Resources, Regulations Concerning Prohibitions When Hunting and Trapping, had been laid over at the Committee's last meeting to allow the Division to respond to Mr. Love's concerns regarding Section 3.6 of the proposed rule. Major William Daniel, Assistant Chief of Law Enforcement for the Division, told the Committee that the Division was willing to modify the proposed rule to delete the section in its entirety.

Mr. Love moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reminded the Committee that it had laid over the rule proposed by the WV Board of Examiners for Registered Professional Nurses, Limited Prescriptive Authority for Nurses in Advanced Practice, to allow the Board to draft a modification on the diversion of drugs and to work with the Board of Medicine to establish a more comprehensive formulary. Barbara Koster, a Nurse practitioner representing the Board, addressed the Committee and answered questions from the Committee. Mr. Gallagher requested a further modification to the proposed rule to which the Board agreed.

Mr. Gallagher moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Mowery that he had researched the issue of interpretive rules versus legislative rules in West Virginia and had been unable to find a clear answer as to whether the Sales Tax Interpretive Rules promulgated by the Division of Tax should be promulgated as legislative rules. Mr. Mowery stated that the issue could be resolved by including a section in the rules which makes clear that the rules are not to be cited or used as precedent in any administrative hearing or court proceeding. Dale W. Steager, Counsel to the Department of Tax and Revenue, stated to the Committee that the inclusion of such language in each of three interpretive rules would be acceptable to the Division.

Mr. Love moved that Counsel for the Committee and Mr. Steager come to agreement on specific language to be added to the rules, and that the Committee recognize the rules, as modified, as properly promulgated interpretive rules.

Alison Patient, Counsel to the House Finance Committee, reviewed her abstract on the rule proposed by the Division of Tax, Division of Forestry Woodland Fees. James Rymer, President of the West Virginia Taxpayers Association, Mike Ross, Senator-elect, and Arnold Cyrus, Putnam County Citizens for Better Government, commented on the proposed rule.

Mr. Wooton asked if there was an objection to the rule being laid over to the Committee's January meeting. There being no objection, the proposed rule was laid over until the Committee's January meeting.

Ms. Patient explained the rule proposed by the Division of Tax, Bingo Rules and Regulations. John Montgomery, Tax Division Counsel, responded to questions from the Committee.

Mr. Roop moved that the proposed rule be approved. The motion was adopted. Ms. Boley voted "No".

Marjorie Martorella, Counsel to the House Government Organization Committee, told the Committee that the rule proposed by the Insurance Commissioner, Filing Fees for Purchasing Groups, and for Risk Retention Groups Not Chartered in this State, had been laid over at the Committee's last meeting. She stated that the Commissioner has agreed to technical modifications and distributed copies of her letter to the Chairman expressing the opinion that the proposed rule should be filed as an emergency rule. Linda Gay, Associate Counsel to the Insurance Commissioner, commented on the proposed rule and asked that the Committee send a letter to the Secretary of State requesting the approval of an emergency rule.

Mr. Grubb moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Grubb moved that the Committee resolve that the filing of the proposed rule as an emergency rule is in the public's best interest and request the Secretary of State approve the emergency rule and that the resolution contain an expression of the Committee's appreciation of the Secretary of State's diligent review of the propriety of emergency filings. The motion was adopted and staff was directed to forward a copy of the resolution to the Secretary of State.

Ms. Martorella reviewed her abstract on the rule proposed by the Division of Forestry, Sediment Control During Commercial Timber-Harvesting Operations - Licensing, Series 2, and stated that the Division has agreed to technical modifications. Mr. Rymer, Delbert Taylor, a logger of Pleasants County, Mr. Arnold Cyrus of Putnam County, Mrs. Delbert Taylor, Mr. Ross, and Earl White, a small timber cutter, commented on the proposed rule.

Mr. Roop moved that the Committee adjourn. The motion failed.

Mr. Tomblin moved that Section 6.7 of the proposed rule be amended to increase the exemption from $10,000 to $50,000.

Bill Gillespie, Director, Division of Forestry, commented on the proposed amendment and answered questions from the Committee.

Ms. Boley moved to amend Mr. Tomblin's motion to provide that Section 6.7 of the proposed rule also be amended to provide that the exemption applies to timber cut on any property, not just the logger's property. The motion was adopted. In response to a question by the Chair, Ms. Martorella stated that, in her opinion, the amendment, as amended, was not in conformity with the underlying statute.

Mr. Tomblin's motion, as amended, was adopted.

Mr. Tomblin moved that the proposed rule be approved as modified and amended. The motion was adopted.

Mr Love moved that the meeting be adjourned. The motion was adopted.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: Dec 7, 1992

TIME: 10:00 a.m.

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Grubb, David, Co-Chair	✓			
Burk, Robert W., Jr.	✓			
Faircloth, Larry V.	✓			
Gallagher, Brian A.	✓			
Love, Sam	✓			
Roop, Jack	✓			
Burdette, Keith, President				
Wooton, William R., Co-Chair	✓			
Boley, Donna	✓			
Chafin, Truman H.				
Manchin, Joe, III	✓			
Tomblin, Earl Ray	✓			
Wiedebusch, Larry	✓			
TOTAL				

RE: _____

_____

_____

_____

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: _____ DATE: _____

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly JOHN KOZAK	WORKERS' COMP	WCD	
DALE FARLEY	CHARLESTON	DEP - OAQ	X
SUSANNA KOSTER	DUNBAR WV	NURSE PRACTITIONER	X
Pat Alvarez	So. Chas. WV	Greenview Care Home	X
Sylvia Fitzwater	Fairmont WVA	Adult Care Homes	X
Shirley Dean	Buckhannon WVA	Administrator	
Bill Daniel	Chas	DNR LAW	✓
BOB KITA	Wheeling, W Va.	Health Plan of Upper Ohio Valley	✓
Sandy Barker	Ravenswood, WV	WVPCPA	✓
Marianne K Shoenfelt	Chas -	HCCPA	if requested
Debra Gombarcik	Clarksburg, WV	Golden Circle Private Care	X
Wade Steager	Tax	Capitol	as needed
John V Montgomery	Tax	Capitol	as needed
Bob Hoffman	Tax	Capitol	as needed
Richard N Knoguler	DuPont, Belle	SERC	✓
Paul L Bradley	EMERGENCY SERVICES	STATE EMERGENCY RESPONSE COMMISSION	✓
John C. Cummings s/ Kim Gilliland	600 Virginia St	West Virginia MFG. Association	as needed APCC Series 21 SERC rule
R. L. Foster	405 Capitol St.	WVMA	as needed

LS-C-66-1a

Dist Handout 12-7-92

WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-152, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

Senator William R. Wooton, Co-Chair
Delegate David Grubb, Co-Chair

Debra A. Graham, Counsel
~~Michael McKinney, Associate Counsel~~
Marie Nickerson, Admr. Assistant

November 16, 1992

Hon. William Wooton
117 Granville Avenue
Beckley, WV 25801

Hon David Grubb
1564 Virginia Street, East
Charleston, WV 25311

Gentlemen:

At the November 8, 1992, meeting of the Legislative Rule-Making Review Committee I was directed to furnish you with my opinion as to the propriety of filing, as an emergency rule, an Insurance Commissioner rule designated "Filing Fees for Purchasing Groups, and for Risk Retention Groups not Chartered in this State."

An opinion by Deputy Secretary of State A. Renee Coe concludes that sufficient objective evidence has not been presented to establish that an an emergency exists, and further suggests that the recommendation of the Legislative Rule-Making Review Committee be taken into account in making a final determination on this issue.

I am fully in accord with Ms. Coe's opinion that the effective date of a statute does not in and of itself create an emergency. However, in this case, the statutory language, effective July 1, 1992, (1) mandates filings, (2) prohibits any group which has not filed from offering insurance or doing business in the state, and (3) mandates that the insurance commissioner set the fees which accompany the filings.

If the fees are not permitted to be set by emergency rule, then the result would be to require the Insurance Commissioner to either absorb the cost of processing filings, to the public detriment, until such time as the fee rule is approved by the Legislature; or refuse to permit groups not chartered in this state to file, or sell insurance, or do business, until such time as the rule is approved. I do not believe that following either course of action would reflect Legislative intent or preserve the public interest.

For this reason, I advised the Committee that I believed that the effective date, together with this specific mandatory statutory language, created a time limitation, and that the filing of an emergency rule would be appropriate. The Committee then directed that this opinion be reduced to writing and forwarded to you, and copied to the Secretary of State for whatever use he may consider appropriate.

I hope that this information may be of assistance.

Very truly yours,

Marjorie Martorella
Attorney

cc: Hon. Ken Hechler
Hanley Clark

Dist 12-7-92

MEMORANDUM

December 7, 1992

To: Legislative Rule-Making Review Committee

From: M. E. Mowery, Counsel

Re: Workers' Compensation
Proposed legislative Rule "Enforcement of Reporting and Payment Requirements"

W.Va. Code, §23-2-5a provides in part as follows:

> In addition to the foregoing provisions of this section, any payment, interest and penalty thereon due and unpaid under this chapter shall be a *personal obligation* of the employer immediately due and owing to the commissioner and shall, in addition thereto, be a lien enforceable against all the property of the employer. . . [Emphasis added.]

In promulgating a legislative rule for enforcing this "personal obligation" of the employer, a question arises as to who is an employer against whom this obligation may be enforced. Generally, the term "employer" is defined or described in *W.Va. Code* §23-2-1, which reads, in part, as follows:

> (a) The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, political subdivisions of the state, any volunteer fire department or company and other emergency service organizations as defined by article five, chapter fifteen of this code, and all persons, firms, associations and corporations regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state, are employers within the meaning of this chapter and are hereby required to subscribe to and pay premiums into the workers' compensation fund for the protection of their employees and shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rate, classification and premium payment. . .

In proposing to interpret and apply the statutory language providing for personal liability for premium payment, the Commissioner has expanded the meaning of the term "employer." In the proposed legislative rule, the following definition is found in section 2.8:

> 2.8 The term "employer" has the meaning ascribed to that term by West Virginia Code, 23-2-1, which includes, but is not limited to, any individual, firm, partnership, limited partnership, copartnership, joint venture, association, corporation, organization, receiver, estate, trust, guardian, executor, administrator, *and also any owner, partner, official, officer, employee or member of any of the foregoing who, as such owner, partner, official, officer, employee or member, is by virtue of his or her position under a duty to perform or to cause performance by another or who is responsible for the performance of an act prescribed by the provisions of the Act or the various rules promulgated by the commissioner.* [Emphasis added.]

By expanding the definition of the term "employer," the Commissioner seeks, among other things, to avoid the shield of corporate immunity from liability otherwise afforded to corporate authorities, and make individuals within the corporation personally liable for unpaid premiums.

The concept of cutting through the shield of organizational form and imposing personal liability on persons actually responsible for an employer's failure to collect and pay over taxes or other funds is not uncommon. For example, in the Federal tax code, 26 U.S.C. §6672 provides as follows:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Under this provision, the federal government imposes personal liability on responsible persons who willfully fail to collect or pay over income withholding, social security and other taxes. Although the statute prescribes three duties (i.e., to collect, truthfully account for, and pay over any taxes), in actuality, it is addressed to a person or entity who has authority to direct or control the payment of corporate funds for reporting periods for which the corporation should have, but did not, pay over taxes. It is knowledge of delinquency and authority over the decision to pay or not to pay the taxes which is at issue, not who has the duty of filling out the forms. The underlying theory is that a trust is created with regard to the funds involved, and it is a violation of the trust for persons who possess the ultimate authority over a corporation, who make the final decisions and determine which creditors are to be paid and the order of their payment, to fail to segregate and timely pay trust fund taxes.

If the proposed rule of the Commissioner is viewed in this light, it would appear that the approach taken in the rule to impose personal liability is too broad. By expanding the definition of "employer" to include anyone who has *any* duty under the statutory or regulatory law of Workers' Compensation would create much broader liability than that imposed under tax statutes which impose personal liability on "responsible persons." Aside

from the question of liability for the payment of premiums, other questions arise from this expanded definition of employer. For example, under the Workers' Compensation law, an employer who is delinquent on premiums is liable to his employees for injury or death, both in Workers' Compensation benefits and in damages at common law or by statute. The broad definition of employer set forth in the proposed rule would expose any officers or employees of a delinquent corporation who had any duties under the law to such liability for injury or death.

Counsel would suggest that rather than broadening the scope of the term "employer," that a better approach would be to simply set forth a specific section within the rule which imposes personal liability on responsible persons, as well as the business entity, for the diversion of premiums required to be paid.

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already pending when the provision was repealed. Turner v. United States, 410 F2d 837 (CA 5th, 1969); United States v. Haughton, 413 F2d 736 (CA 9th, 1969).

§ 41.10. Tax legislation.

Tax statutes may be retroactive [1] if the legislature clearly so intends.[2] As explained by one court "the need of the Government for revenue has been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seems consonant with justice and the conditions were not such as would ordinarily involve hardship." [3] It is sometimes said that a tax statute may be retroactive if it does not violate the obligation of contract or divest vested rights.[4] Although the statement is accurate, the issue is better framed in terms of reasonableness.[5] If the retroactive feature of a tax law is arbitrary and burdensome, the statute will not be sustained.[6] The reasonableness of each retroactive tax statute depends on the circumstances of each case.

State constitutional provisions which expressly prohibit retroactive laws may be construed as mandatory, in which case retroactive tax laws are also proscribed.[7] Tax legislation is not an exception to rules against retroactivity.[8] Income taxes as well as other kinds may be retroactive.[9] The United States Supreme Court has explained that "as respects income tax statutes, it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this court have recognized this practice and sustained it as consistent with the due process clause of the Constitution." [10] Whether or not the period of retroactivity is reasonable is again the fundamental consideration. A statute retroactively imposing a tax on income earned between the adoption of an amendment making income taxes legal and the passage of the income tax act is not unreasonable.[11] Likewise an income tax not retroactive beyond the year of its passage is clearly valid.[12] The longest period of retroactivity yet known to have been sustained has been three years.[13] In general, the fact that income was earned recently even though prior to enactment of the statute taxing it appears to be a factor weighing in favor of the validity of the tax.[14]

In raising the problem of retroactivity in income tax statutes a clear understanding of what constitutes retroactivity is necessary. A statute taxing the present income from a transaction made in the

past is not retroactive, as the tax is on the present privilege of receiving income.[15] Only those statutes which impose a tax on income received prior to the enactment of the statute are truly retroactive.

A statute imposing an excise or transaction tax on transactions that were completed before the statute was passed is of doubtful constitutionality,[16] as it would arguably amount to an unreasonable interference with the security of transactions. For this reason a decision sustaining a retroactive federal gift tax [17] was reversed by the circuit court of appeals, the appellate court apparently considering the matter so obvious that no opinion was written.[18]

A statute imposing a death tax upon property transferred prior to its enactment and not in contemplation of death is unreasonably retroactive and invalid, even though the conveyance was intended to take effect at or after the death of the grantor.[19] It has been held, however, that Congress may enact a retroactive statute making insurance received by beneficiaries other than the executor from policies on a decedent's life part of the decedent's gross estate for the federal estate tax.[20] A statute imposing a tax on estates not finally settled is not truly retroactive and will be sustained.[21] And a specifically retroactive proration statute applying to federal and state excise taxes was held valid within the due process clause when applied to a person who died before the passage of the act.[22]

[1] **United States.** Reinecke v. Smith, 289 US 172, 77 L Ed 1109, 53 S Ct 570 (1933), revg 61 F2d 324, certiorari granted 288 US 596, 77 L Ed 973, 53 S Ct 397 (1933); Consolidated Utilities Co. v. Commissioner of Internal Revenue, 84 F2d 548 (1936); Hudson v. United States, 12 F Supp 620 (1936).

Arkansas. Du Laney v. Continental Life Ins. Co., 185 Ark 517, 47 SW2d 1082 (1932).

California. Filoli Inc. v. Johnson, 4 Cal2d 662, 51 P2d 1093 (1936).

Maryland. Diamond Match Co. v. State Tax Commission, 175 Md 234, 200 A 365 (1938).

New York. People v. Graves, 265 NY 431, 193 NE 259 (1935), affg 241 App Div 896, 271 NYS 1031 (1934).

Utah. Mechan v. State Tax Commission, 17 Utah2d 231, 410 P2d 1008 (1966).

Cf. United States v. Pownall, 65 F Supp 147 (1946) (where the retroactive operation of the Renegotiation Act was held valid by analogy to the power to levy retroactive taxes).

[2] **United States.** United States v. Binder, 453 F2d 805 (CA 2nd 1971) (equalization tax); Bloomington Limestone Corp. v. United States, 315 F Supp 1255 (SD Ind 1970) (concerning legislation governing the retroactivity of administrative regulations on tax matters).

Arkansas. Du Laney v. Continental Life Ins. Co., 185 Ark 517, 47 SW2d 1082 (1932).

Massachusetts. Magee v. Treasurer, 256 Mass 512, 153 NE 1 (1926).

New York. People v. Graves, 265 NY 431, 193 NE 259 (1935), affg 241 App Div 896, 271 NYS 1031 (1934).

Dist Hand Out 12-7-92

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION
1558 Washington Street, East
Charleston, WV 25311-2599

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

December 1, 1992

Honorable William R. Wooton
Co-Chairman, Legislative Rule Making Review Committee
Delegate from the 22nd District
117 Granville Avenue
Beckley, WV 25801

Honorable David Grubb
Co-Chairman, Legislative Rule Making Review Committee
Delegate from the 23rd District
1564 Virginia Street, East
Charleston, WV 25311

Dear Co-Chairmen Wooton and Grubb:

In regard to proposed Rule 45CSR21 "To Prevent and Control Air Pollution from the Emission of Volatile Organic Compounds" scheduled for discussion at the December 7, 1992 interim meetings, this office will be requesting that the Committee consider technical corrections and other appropriate changes to be made to the proposed rule.

These suggested technical changes and corrections are in response to USEPA's much delayed comments to the proposed rule filed with the Committee on December 18, 1991; the former LRMRC Associate Counsel's comments; and changes resulting from Governor's Executive Order 8-92 transferring many functions of the Air Pollution Control Commission to the Division of Environmental Protection. Suggested technical changes (copy attached) were submitted to the LRMRC on October 28, 1992.

The technical changes were discussed with the Air Pollution Control Commission during the Commission's November 10, 1992 meeting. Representatives of the WV Manufacturers Association (WVMA) were present and were previously given copies of the technical changes. The technical changes were discussed in an open meeting format and subsequent to that discussion, the Commission recommended that the LRMRC consider the changes. We do not believe that there are any objections from any party to the proposed technical changes.

In regard to Section 40 of the proposed rule, this office received comments from USEPA on May 15, 1992 indicating that portions of this section would not be acceptable unless accompanied by a full technical support document. Section 40

establishes requirements for facilities or sources that emit greater than 100 tons per year of VOC emissions and are not subject to emissions control requirements in other sections of the rule.

This office has had numerous discussions with USEPA and the WVMA concerning the minimum requirements of Section 40 and as a result, both this office and the WVMA mutually agreed that changes were necessary for final acceptance by USEPA.

Office of Air Quality (OAQ) staff and the WVMA prepared and exchanged several suggested revisions to Section 40 and agreed on revisions to several sub-sections except one, subsection 40.1.a. Subsection 40.1.a is the "applicability" sub-section that defines the facilities or sources that are subject to Section 40 requirements.

Based upon OAQ's review of USEPA technical documents and guidance and numerous discussion with USEPA regional and headquarters offices, we believe the intent of Section 40 is to include sources that fall below the applicability thresholds in other sections of the rule and, thus, would be subject to the RACT control requirements of this section. Our position is supported by the attached November 10, 1992 letter from USEPA.

The WVMA believes that facilities exempt from other sections of the rule because they fall below applicability levels specific to those sections should not be re-considered under Section 40 for RACT controls even when they are a part of a "major" air pollution source. This issue was discussed at some length with the Commission and the WVMA at the November 10th Commission meeting. The Commission considered the WVMA's suggested applicability language for revision of sub-Section 40.1.a. and accepted the WVMA proposal after some discussion. OAQ staff recommended alternative language and cautioned the Commission that the WVMA language would most likely result in USEPA disapproval of the rule.

The attachment entitled "WVMA's Suggested Changes to 45CSR21, Section 40" contains the WVMA's suggested changes to 40.1.a and the mutually agreed upon changes to other subsections of Section 40. The Commission approved these changes and requested that the LRMRC consider the changes when the Committee reconsiders proposed 45CSR21.

The Office of Air Quality must take exception to the WVMA drafted language for sub-section 40.1.a. that was accepted by the Commission. Based on USEPA's earlier guidance documents and USEPA's letter of November 10, 1992, (received after the November 10, 1992 Commission Meeting) we believe that USEPA will not approve the language adopted by the Commission on November 10, 1992 and consequently will not approve the rule as a State Implementation Revision as required by the Clean Air Act

Amendments of 1990. The OAQ respectfully requests that the Committee consider "OAQ's Suggested Changes to 45CSR21, Section 40". This version of 40.1.a. will be presented at the December 7th hearing. A copy of "OAQ's Suggested Changes to Section 40", is attached. We welcome the opportunity to discuss this matter on that date.

With respect to comments made on the proposed rule by Mr. Curt Hassler, Appalachian Hardwood Center, at the Committee's November 9th meeting, we spoke to Mr. Hassler after the meeting and briefly discussed the rule requirements. Mr. Hassler originally stated that approximately 40-50 wood processing operations may be affected by the rule. Through our emission inventory survey to date, only one wood processing/coating facility, has been identified that will be affected by the rule. That facility, the Ames Corporation in Parkersburg is aware of the requirements and is in the preliminary stages of compliance plan development. We have asked the Appalachian Center to assist this office in identifying any other facilities that may be affected by the rule (copy of the letter is attached). The purpose of this request is to advise the wood processing/coating facilities of the requirements and to provide the facilities any assistance required to meet their compliance objectives. We have also provided the Appalachian Hardwood Center with a list of all referenced documents associated with the development of 45CSR21.

Sincerely,

G. Dale Farley, Chief
Office of Air Quality

JAB/GDF/jkg

cc: Michael Mowery, Counsel
Legislative Rule Making Review Committee

John Benedict, Asst. Chief
Department of Environmental Protection -
Office of Air Quality

Attachments

Proposed Technical Changes To 45CSR21
October 6, 1992

The conversion of 0.3 kPa to 0.044 in Hg is incorrect and occurs eight times. The equivalent value of 0.3 kPa is 0.09 in(inches) Hg. Change 0.3 kPa (~~0.044~~ 0.09 in Hg):

1. section 26.2.c., page 80, line 27
2. section 26.2.c., page 80, line 30
3. section 29.2.e., page 95, line 10
4. section 29.2.e., page 95, line 13
5. section 37.2.c., page 151, line 14
6. section 37.2.c., page 151, line 17
7. section 37.9.b.1., page 155, line 11
8. section 37.9.b.2., page 155, line 14

The following eight changes are recommended for clarification and consistency due to comments received from U.S. EPA on May 19, 1992.

1. Section 4.5.b.10., page 19, line 12 should be changed to ... "most recent performance test that demonstrated that the facility was in compliance; and"

2. Section 5.3.b.A., page 22, line 5 should be changed to ... "during the most recent performance test that demonstrated that the facility was in compliance."

3. Section 5.3.b.B., page 22, line 9 should be changed to ... "during the most recent performance test that demonstrated that the facility was in compliance."

4. Section 21.4.a., page 67, line 5 should be changed to ... "shall maintain daily records showing the quantity ..."

5. Section 22.3.c., page 70, line 16 should be changed to ... "all potential sources of vapor and liquid leakage in the terminal's vapor collection system ..."

6. Section 22.3.d., page 70, line 22 should be changed to ... "with sections 22.2.f. and ~~22.2.9.~~ 22.2.i. is as follows:"

7. Section 22.4.a., page 72, line 19 should be changed to ... "documentation required under section ~~22.2.e.1.~~ 22.2.c. shall be kept ..."

8. Section 23.3., page 75, line 28 should be changed to ... "section 23. shall maintain daily records showing the quantity ..."

The following changes were suggested by Mr. Michael McThomas, Associate Counsel to the Legislative Rule-Making Review Committee, in a September 14, 1992 meeting.

1. Add new definition section 2.5. - "ASTM" means American Society For Testing And Materials.

2. Section 12.7.a., page 36, line 19 should be changed to ... "and reporting requirements in section ~~42.~~ 4.2.;"

3. Section 12.7.b., page 36, line 23 should be changed to ..."and reporting requirements in section ~~4.4.~~ 4.3."

4. Section 20.6.a.2.C., page 59, line 25 should be changed to ..."as calculated using the equation under section ~~20.6.a.1.B.~~ 20.6.a.1.D."

5. Section 20.6.b.1., page 60, line 6 should be changed to ... "a coating line referenced in section ~~20.3.~~ 20.6.b. shall certify ..."

6. Section 20.6.b.2., page 60, line 20 should be changed to ..."a coating line referenced in section ~~20.6.a.~~ 20.6.b. and complying ..."

7. Section 20.6.b.3., Page 60, line 31 should be changed to ..."coating line referenced in section ~~20.6.a.~~ 20.6.b. shall notify ..."

8. Section 20.6.b.3.B., page 61, line 8 should be changed to ..."the coating line referenced in section ~~20.6.a.~~ 20.6.b."

9. Section 20.6.c.1., page 61, line 18 should be changed to ..."be in compliance with ~~section 20.6.c.~~ the requirements of the applicable section of this regulation on and after ..."

10. Section 27.5.a.1., page 89, line 16 and section 28.5.a.1., page 92, line 19 should be changed to "Records of the types of ~~volatile~~ petroleum liquids stored ..."

11. Section 38.7.b., page 168, line 13 should be changed to ..."or section ~~38.4.b.~~ 38.4.a."

Moot

12. Section 40.1.a., page 184, line 8 should be changed to ..."not regulated under sections 10. through 39. ~~or are not regulated as specified in section 40.1.c.~~, provided that ..."

The Office of Air Quality also recommends that new section 9.6. be added.

9.6. Severability. -- The provisions of this regulation are severable and if any provision or part thereof shall be held invalid, unconstitutional, or inapplicable to any person or circumstance, such invalidity, unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, sections, or parts of this regulation or their application to any persons and circumstances.

Proposed Changes To 45CSR21 Due To Executive Order

As a result of the Governor's Executive Order 8-92, effective July 1, 1992, the definitions "Chief of Air Quality", "Division of Environmental Protection", and "Director" should be added or changed to reflect current terminology.

1. Add new definition section 2.11. - "Chief of Air Quality", or "Chief" means the chief of the Office of Air Quality or his or her designated representative, appointed by the director of the Division of Environmental Protection pursuant to the provisions of W.V. Code §22-1-1, et seq.

2. Change definition section 2.23. - "Director" means the director of the ~~West Virginia Air Pollution Control Commission~~ Division of Environmental Protection or his or her designated representative.

3. Add new definition section 2.24 - "Division of Environmental Protection" means that division of the West Virginia Department of Commerce, Labor and Environmental Resources created by the provisions of W.V. Code §22-1-1, et seq.

Renumber sections as required.

In addition, in all instances where the term "Director" is currently used, the term "Chief" or "Chief of Air Quality" should be substituted.

"Chief" or "Chief of Air Quality should also be substituted for the term "Commission" in those occurrences which do not refer to the commission's appellate or rule-making authority.

(The term "Commission" would be retained only in the title, section 1.1., section 2.13., section 9.4., and section 9.5.)

Insert new line 5 at top of page 1.

TITLE 45
LEGISLATIVE RULE
DIVISION OF ENVIRONMENTAL PROTECTION AS PROMULGATED BY
THE WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107- 4431

NOV 10 1992

Mr. G. Dale Farley, Chief
Office of Air Quality
Division of Environmental Protection
West Virginia Department of Commerce,
Labor & Environmental Resources
1558 Washington Street, East
Charleston, West Virginia 25311

Dear Mr. Farley:

This letter serves as an addendum to our November 6, 1992 comment letter, regarding additional changes to West Virginia's proposed 45CSR21 - "Regulations to Prevent and Control Air Pollution from the Emission of Volatile Organic Compounds."

§45-21-40. Other Facilities that Emit Volatile Organic Compound (VOC).

EPA supports the changes to paragraph (a.), which clarifies the applicability of sub-section 40.1., to cover all sources exempt from emission control standards of sections 10 through 39, within a facility whose total VOC emissions exceed 100 tpy.

In accordance with EPA's May 25,1988 VOC regulatory guidance (Bluebook), page 2-3 (Definition of 100 TPY Non-CTG Source), a facility is considered applicable if the aggregated emissions of all nonregulated sources (include those sources which would have been covered by a CTG's emission standards if they had been above the EPA-accepted size cutoff) is greater than or equal to 100 tpy.

Should you have any questions regarding our comments, please feel free to contact me at (215) 597-4713 or your staff may contact Ms. Jacqueline Lewis at (215) 597-6863.

Sincerely,

Marcia L. Spink, Chief
Air Programs Branch

WVMA's Suggested Changes To 45CSR21, Section 40.
November 10, 1992

1. Change section 40.1., page 184 to:

40.1. Applicability.

a. This section 40. applies to any facility that has aggregate maximum theoretical emissions of 90.7 megagrams (mg) (100 tons) of volatile organic compound (VOC) or more per calendar year in absence of control devices.; provided that ~~and is not subject to regulation under sections 10. through 39. In addition, a source or sources within a facility are subject to this section 40. if the source or sources are not regulated under sections 10. through 39. or are not regulated as specified in section 40.1.c., provided that such source or sources, along with any source or sources at the same facility which are regulated under sections 10. through 39. but which fall below the applicability thresholds of those sections and thus are not subject to the control requirements of those sections, as a group have maximum theoretical emissions of 90.7 megagrams (Mg) (100 tons) or more per calendar year of VOC in the absence of control devices.~~ this section 40. applies to any source or sources within such facility other than those sources subject to regulation under sections 10. through 39. VOC emissions from sources regulated under sections 10. through 39. but which fall below the applicability threshholds of those sections and thus are not subject to the emissions control standards of those sections shall be included in the determination of maximum theoretical emissions for a facility but shall not be subject to the requirements of this section 40. Emissions from sources listed in section 40.1.d. shall not be included in the determination of maximum theoretical emissions for a facility.

b. The owner or operator of a coating line or operation whose emissions are below this applicability threshold shall comply with the certification, recordkeeping, and reporting requirements of section 40.4.a.

c. The owner or operator of a non-coating source whose emissions are below this applicability threshold shall comply with the certification, recordkeeping, and reporting requirements of section 40.4.b.

d. The requirements of this section 40. shall not apply to coke ovens (including by-product recovery plants), fuel combustion sources, barge loading facilities, jet engine test cells, vegetable oil processing facilities, wastewater treatment facilities, iron and steel production, surface impoundments, pits, and boilers, industrial furnaces, and incinerators with destruction efficiency of 95 percent or greater.

e. The requirements of this section 40. shall not apply to any facility bound by an order or permit, enforceable by the

chief and the U.S. EPA, which limits the facility's emissions to less than 100 tons of VOC per calendar year without the application of control devices.

2. Change section 40.2., page 184 to:

40.2. Standards. -- The owner or operator of any source at a facility subject to this section 40. shall~~:~~

~~a. Install and operate emission capture and control techniques, or use of complying coatings that achieve an overall reduction from uncontrolled VOC emissions, as determined by 1990 base year emissions, of at least 81 weight percent;~~ comply with a control plan developed on a case-by-case basis that meets the definition of reasonably available control technology (RACT) in section 2.57. and has been approved by the chief and by the U.S. EPA.

~~b. For any coating line, limit the daily weighted average VOC content to 0.40 kilograms VOC per liter (kg VOC/L) (3.5 pounds VOC per gallon [lb VOC/gal]) or less of coating, as applied, (minus water and exempt compounds) as calculated in section 43.; or~~

~~c. Comply with an alternative control plan that has been approved by the commission and the U.S. EPA.~~

3. Change section 40.5., page 185 to:

40.5. Reporting and Recordkeeping Requirements for Subject Non-CTG Coating Sources.--

~~a.~~ An owner or operator of a coating line or operation subject to this section 40. and complying with section 40.2.~~a. by the use of complying coatings~~ shall comply with the certification, recordkeeping, and reporting requirements in section 4.~~3.~~

~~b. An owner or operator of a coating line or operation subject to this section 40. and complying with section 40.2.b. by daily weighted averaging shall comply with the certification, recordkeeping, and reporting requirements in section 4.4.~~

~~c. An owner or operator of a coating line or operation subject to this section 40. and complying with section 40.2.a. or section 40.2.c. by the use of control devices shall comply with the testing, reporting, and recordkeeping requirements in section 4.5.~~

OAQ's Suggested Changes To 45CSR21, Section 40.
November 10, 1992

1. Change section 40.1., page 184 to:

40.1. Applicability.

a. This section 40. applies to any facility that has aggregate maximum theoretical emissions of 90.7 megagrams (mg) (100 tons) of volatile organic compound (VOC) or more per calendar year in absence of control devices. ~~and is not subject to regulation under sections 10. through 39. In addition, a source or sources within a facility are subject to this section 40. if the source or sources are not regulated under sections 10. through 39. or are not regulated as specified in section 40.1.e., provided that such source or sources, along with any source or sources at the same facility which are regulated under sections 10. through 39. but which fall below the applicability thresholds of those sections and thus are not subject to the control requirements of those sections, as a group have maximum theoretical emissions of 90.7 megagrams (Mg) (100 tons) or more per calendar year of VOC in the absence of control devices.~~ This section 40. also applies to any source or sources within such facility other than those sources subject to the emissions control standards of sections 10. through 39. Emissions from sources listed in section 40.1.d. shall not be included in the determination of maximum theoretical emissions for a facility.

b. The owner or operator of a coating line or operation whose emissions are below this applicability threshold shall comply with the certification, recordkeeping, and reporting requirements of section 40.4.a.

c. The owner or operator of a non-coating source whose emissions are below this applicability threshold shall comply with the certification, recordkeeping, and reporting requirements of section 40.4.b.

d. The requirements of this section 40. shall not apply to coke ovens (including by-product recovery plants), fuel combustion sources, barge loading facilities, jet engine test cells, vegetable oil processing facilities, wastewater treatment facilities, iron and steel production, surface impoundments, pits, and boilers, industrial furnaces, and incinerators with destruction efficiency of 95 percent or greater.

e. The requirements of this section 40. shall not apply to any facility bound by an order or permit, enforceable by the chief and the U.S. EPA, which limits the facility's emissions to less than 100 tons of VOC per calendar year without the application of control devices.

2. Change section 40.2., page 184 to:

40.2. Standards. -- The owner or operator of any source at a facility subject to this section 40. shall~~:~~

~~a. Install and operate emission capture and control techniques, or use of complying coatings that achieve an overall reduction from uncontrolled VOC emissions, as determined by 1990 base year emissions, of at least 81 weight percent;~~ comply with a control plan developed on a case-by-case basis that meets the definition of reasonably available control technology (RACT) in section 2.57. and has been approved by the chief and by the U.S. EPA.

~~b. For any coating line, limit the daily weighted average VOC content to 0.40 kilograms VOC per liter (kg VOC/L) (3.5 pounds VOC per gallon [lb VOC/gal]) or less of coating, as applied, (minus water and exempt compounds) as calculated in section 43.; or~~

~~c. Comply with an alternative control plan that has been approved by the commission and the U.S. EPA.~~

3. Change section 40.5., page 185 to:

40.5. Reporting and Recordkeeping Requirements for Subject Non-CTG Coating Sources.--

~~a.~~ An owner or operator of a coating line or operation subject to this section 40. and complying with section 40.2.~~a. by the use of complying coatings~~ shall comply with the certification, recordkeeping, and reporting requirements in section 4.~~3.~~

~~b. An owner or operator of a coating line or operation subject to this section 40. and complying with section 40.2.b. by daily weighted averaging shall comply with the certification, recordkeeping, and reporting requirements in section 4.4.~~

~~c. An owner or operator of a coating line or operation subject to this section 40. and complying with section 40.2.a. or section 40.2.c. by the use of control devices shall comply with the testing, reporting, and recordkeeping requirements in section 4.5.~~

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION
1558 Washington Street, East
Charleston, WV 25311-2599

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

November 24, 1992

Tammy Vandivort
Appalachian Hardwood Center
206-F Pencival Hall
Morgantown, WV 26506-6125

Dear Ms. Vandivort:

Enclosed for your information is a listing of reference material for proposed rule 45CSR21 "To Prevent and Control Air Pollution From the Emission of Volatile Organic Compounds". The reference material may be helpful in determining how standards were established in this rule.

During Mr. Hassler's presentation at the November 9, 1992 LRMRC hearing on rule 45CSR21, he stated that approximately 40-50 wood product facilities may be affected by the requirements of this rule. Section 20 of the rule establishes Reasonably Available Control Technology (RACT) standards for flatwood paneling coating lines and is the only section that specifically affects the wood product industry. Section 40 establishes RACT requirements for major stationary sources of VOC emissions (greater than 100 tons per year) and could also potentially affect this industry.

Preliminary results from this Office's emission inventory survey has yet to identify a wood product facility that would be affected by Section 20. Should you be aware of such facilities we would appreciate being advised. With regard to Section 40, only one facility, to date, has been identified that will be affected by this section, and that source, Ames Corp., has been advised of those requirements.

Historically, this Agency has been relatively reasonable in establishing emission limits for sources of air pollution with the primary objectives of meeting air quality goals and minimize impacts on affected facilities. However, the Clean Air Act Amendments of 1990 (CAAA) specifically requires that states with moderate ozone nonattainment areas adopt, at a minimum, RACT requirements for all major stationary sources of VOC emissions and all sources where Control Techniques Guidance (CTG) documents have been issued by USEPA.

The rule requirements for the coating of flatwood paneling were derived from the CTG document issued by EPA in June 1978 and the May 1988 EPA document titled "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations". This office believes the Section 20 and Section 40 requirements are consistent with EPA guidance and CAAA requirements.

If you office has any comments or suggestions, please feel free to contact me at (304) 558-0430.

Sincerely,

John Benedict, Section Chief
Air Programs

JAB/jkg

West Virginia Department of
Commerce, Labor & Environmental Resources
Air Pollution Control Commission

1558 Washington Street, East
Charleston, West Virginia 25311

Telephone: (304)348-4022
or (304)348-3286
Fax: (304)348-3287

REFERENCE MATERIAL FOR 45CSR21 "REGULATIONS TO PREVENT AND CONTROL AIR POLLUTION FROM THE EMISSION OF VOLATILE ORGANIC COMPOUNDS"

Photocopies of Reference Material Provided
to Secretary of State's Office

EPA-450/3-88-018
Protocol for Determining the Daily Volatile Organic Compound Emission Rate of Automobile and Light-Duty Truck Topcoat Operations - December 1988

EPA-450/2-78-051
Control of Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems

EPA-450/2-78-029 (Appendix B)
Control of Volatile Organic Compound Emissions from Manufacture of Synthesized Pharmaceutical Products

EPA-450/2-78-041
Measurement of Volatile Organic Compounds

EPA-340/1-86-016
A Guideline for Surface Coating Calculations

EPA-450/3-84-019 (Revised June 1986)
Procedures for Certifying Quantity of VOC Emitted by Paint, Ink, and Other Coatings

EPA-450/2-82-015
APTI Course SI 417 - Controlling VOC Emissions from Leaking Process Equipment

EPA-340/1-86-015
Portable Instrument User's Manual for Monitoring VOC Sources

EPA-450/3-88-010
Protocols for Generating Unit-Specific Emission Estimates for Equipment Leaks of VOC and VHAP

EPA-340/1-80-008
Petroleum Refinery Enforcement Manual (Appropriate Excerpts)

EPA Traceability Protocol 1
Traceability Protocol for Establishing True Concentrations of Gases Used for Calibration and Audits of Continuous Source Emission Monitors

Federal Register. October 26, 1989.
Appendix D: Performance Specifications for Continuous Emissions Monitoring of Total Hydrocarbons in Hazardous Waste Incinerators, Boilers and Industrial Furnaces. 54:206 pp. 43743-43745.

American Society of Testing & Materials (ASTM) -
D2879
D2879-83
D396-78
D2880-78
D975-78
D323-72
E260
E168
E169
D86
D97-66
D322-80
D2504-67
D2382-76(77)
D1946-77
D3925
E300
D4457-85

American Petroleum Institute Bulletin 2517
Evaporation Loss from External Floating-Roof Tanks

Distr-7-92 DRAFT

TITLE 19
LEGISLATIVE RULES
WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES

SERIES 8
LIMITED PRESCRIPTIVE AUTHORITY
FOR NURSES IN ADVANCED PRACTICE

§19-8-1. General.

1.1. Scope. -- This rule establishes the requirements whereby the Board authorizes qualified nurses in advanced practice to prescribe prescription drugs in accordance with the provisions of West Virginia Code §30-7-15a, 15b, 15c, and §30-15-1 through 7c. An authorized advanced nurse practitioner may write or sign prescriptions or transmit prescriptions verbally or by other means of communication.

1.2. Authority West Virginia Code §30-7-15a, and §30-15-7a.

1.3. Filing Date: _____

1.4. Effective Date: _____

§19-8-2. Definition.

2.1. The nurse in advanced practice is a nurse who has been recognized by the Board for Announcement of Advanced Practice as provided for in Legislative Rules 19CSR7.

2.2. The certified nurse-midwife is a nurse who has been licensed by the Board to practice nurse-midwifery as provided for in West Virginia Code §30-15.

2.3. Nurses in advanced practice shall be referred to in these rules as:

2.3.1. Advanced Nurse Practitioners, and

2.3.2. Certified Nurse-Midwives.

§19-8-3. Application and Eligibility for Limited Prescriptive Authority.

3.1. The advanced nurse practitioner or certified nurse-midwife shall submit a notarized application for prescriptive authority on forms provided by the Board along with a fee of $125.00.

3.1.1. A voided sample of the prescription form shall be submitted with the application.

3.1.2. The advanced nurse practitioner or certified nurse-midwife shall submit written verification of an agreement to a collaborative relationship with a licensed physician for prescriptive practice on forms provided by the Board. The applicant shall certify on this form that the collaborative agreement includes the following:

3.1.2.1. Mutually agreed upon written guidelines or protocols for prescriptive authority as it applies to the advanced nurse practitioner's or certified nurse-midwife's clinical practice;

3.1.2.2. Statements describing the individual and shared responsibilities of the advanced nurse practitioner or certified nurse-midwife and the physician pursuant to the collaborative agreement between them;

3.1.2.3. Provision for the periodic and joint evaluation of the prescriptive practice;

3.1.2.4. Provision for the periodic and joint review and updating of the written guidelines or protocols.

3.1.3. The advanced nurse practitioner or certified nurse-midwife with prescriptive authority shall submit additional documentation of the regulations of Section 3.1.2. of this rule at the request of the Board.

3.2. The Board shall forward a copy of the verification specified in Section 3.1.2. of this rule to the Board of Medicine or to the Board of Osteopathy, whichever is indicated.

3.3. The advanced nurse practitioner applicant for prescriptive authority shall meet all eligibility requirements as specified in West Virginia Code §30-7-15b.

3.3.1. If any evidence exists that all eligibility requirements have not been met, the Board shall not grant prescriptive authority.

3.4. The certified nurse-midwife applicant for prescriptive authority shall meet all eligibility requirements as specified in West Virginia Code §30-15-7b.

3.4.1. If any evidence exists that all eligibility requirements have not been met, the Board shall not grant prescriptive authority.

3.5. If at the time of application for prescriptive authority, the Board obtains information that a nurse, although not currently addicted to or dependent upon alcohol or the use of controlled substances, has had any addiction or dependency problem in the past, the Board may grant prescriptive authority with any limitations it considers proper. The limitations may include, but

are not limited to, restricting the types of schedule drugs a nurse may prescribe.

3.6. Upon satisfactory evidence that the applicant has met all requirements for prescriptive authority as set forth in West Virginia Code §30-7-15a, 15b, 15c, §30-15-1 through 7c, and this rule, the Board may grant authority to prescribe drugs as set forth in this rule and shall assign an identification number.

3.6.1. The Board shall notify the Board of Medicine, the Board of Osteopathy, and the Board of Pharmacy of those advanced nurse practitioners or certified nurse-midwives who have been granted prescriptive authority, and shall also provide the prescriber' identification number and effective date of prescriptive authority.

3.6.1.1. The name of the collaborating physician(s) shall be indicated for each advanced nurse practitioner or certified nurse-midwife on the approved list.

3.7. The advanced nurse practitioner and/or certified nurse-midwife with prescriptive authority who wishes to prescribe Schedules III - V drugs will comply with federal DEA requirements prior to prescribing controlled substances.

3.8. The advanced nurse practitioner and/or certified nurse-midwife will immediately file any and all of his/her DEA regulations and numbers with the Board.

3.9. The Board shall maintain current record of all advanced nurse practitioners and/or certified nurse-midwives with DEA registrations and numbers.

§19-8-4. Renewal of Prescriptive Privileges.

4.1. The applicant for renewal of prescriptive authority shall meet all eligibility requirements as specified in West Virginia Code §30-7-15b for advanced nurse practitioners or West Virginia Code §30-15-7b for certified nurse-midwives.

4.2. The applicant shall maintain national certification as an advanced nurse practitioner or certified nurse-midwife as required for initial authorization for limited prescriptive privileges.

4.3. The applicant shall complete during the two years prior to renewal a minimum of eight (8) contact hours of pharmacology education that have been approved by the Board.

4.4. The Board shall renew prescriptive authority for advanced nurse practitioners or certified nurse-midwives biennially by June 30, of odd-numbered years.

4.5. The nurse shall submit an application for renewal of prescriptive authority on forms provided by the Board. The

application must be notarized, and the fee of $125.00 must accompany the application.

§19-8-5. Pharmacology Course Requirements.

5.1. Prior to application to the Board for approval for limited prescriptive authority, the applicant shall successfully complete an accredited course(s) of instruction in clinical pharmacology and clinical management of drug therapy approved by the Board of not less than forty-five (45) contact hours, provided that fifteen (15) of these hours have been completed within two years prior to application for prescriptive authority.

5.2. The applicant shall submit official transcripts or certificates documenting completion of pharmacology course work. The Board may request course outlines and/or descriptions if necessary to evaluate the pharmacology course's content and objectives.

§19-8-6. Drugs Excluded from Prescriptive Authority.

6.1. The advanced nurse practitioner or certified nurse-midwife shall not prescribe from the following categories of drugs:

6.1.1. Schedules I and II of the Uniform Controlled Substances Act.

6.1.2. Anticoagulants.

6.1.3. Antineoplastics.

6.1.4. Radio-pharmaceuticals.

6.1.5. General anesthetics.

6.2. Drugs listed under Schedule III are limited to a seventy-two hour supply without refill.

6.3. Prescriptions for Schedules IV - V shall not exceed the quantity necessary for thirty (30) days; no more than five (5) refills allowed; prescription expires in six (6) months.

6.4. In addition, no parental preparations may be included in prescribing practices except insulin and epinephrine.

6.5. The prescribing protocols may be revised annually, and shall include the following designated sections:

6.5.1. Choice of drugs used less commonly in primary care outpatient settings not to be prescribed by advanced nurse practitioners and/or certified nurse-midwives who have completed designated additional study in pharmacology approved by the Board and who have satisfied the requirements set forth under this rule shall have the following limitations:

a. The maximum dosage shall be indicated in the protocol and in no case exceed the manufacturer's average therapeutic dose for that drug.

b. Each prescription and subsequent refills given by the advanced nurse practitioner and/or certified nurse-midwife shall be entered on the patient's chart.

c. The advanced nurse practitioner and/or certified nurse-wife authorized to issue prescriptions for Schedules III - V controlled substances shall write on the prescription for the federal DEA number issued to that advanced nurse practitioner and/or certified nurse-midwife.

d. The maximum amount of Schedule IV or V drugs shall be no more than ninety (90) dose unites or a thirty (30) day supply, whichever is less.

e. Phenodiazepines and bensodiazepines shall be limited to a seventy-two (72) hour supply non-refillable.

f. Specific antidepressants, to include tricyclics, MAO inhibitors, and miscellaneous antidepressants of buprophin, flexetin, maprotline, trazedone, shall be limited to non-toxic quantities and non-refillable.

g. Non-controlled substances of antipsychotics, and sedatives to be prescribed by the advanced nurse practitioner and/or certified nurse-midwife are not to exceed the manufacturer's recommended average therapeutic dose for that drug; shall not exceed the quantity necessary for a thirty (30) day supply; no more than five (5) prescription refills allowed and prescription expires in six (6) months.

h. Other prescription drugs shall not be prescribed or refillable for a period exceeding six (6) months.

i. Combination drugs containing drugs fully excluded in section 6.1. of this rule shall not be prescribed.

j. Limitations set forth in this rule applies to any other combination drug.

6.6. An advanced nurse practitioner and/or certified nurse-midwife may administer local anesthetics.

6.7. ~~6.3.~~ The advanced nurse practitioner or certified nurse-midwife who has been approved for limited prescriptive authority by the Board is authorized to sign for, accept, and provide to patients samples of drugs received from a drug company representative.

6.8. ~~6.4.~~ The form of the prescription shall comply with all state and federal laws and regulations.

6.8.1. All prescriptions shall include the following information:

6.8.1.1. Name, title, address and phone number of the advanced nurse practitioner and/or certified nurse-midwife who is prescribing;

6.8.1.2. Name and address of patient;

6.8.1.3. Date of prescription;

6.8.1.4. The full name of the drug, dosage, route of administration and directions for its use;

6.8.1.5. Number of refills;

6.8.1.6. Expiration date of prescriptive authority;

6.8.1.7. Signature of prescriber on written prescription;

6.8.1.8. DEA number of the prescriber.

6.8.2. Records of all prescriptions will be documented in patient records.

6.8.3. An advanced nurse practitioner and /or certified nurse-midwife will, within thirty (30) days of the initial prescription, record in the client record his or her evaluation of the effectiveness of controlled substances prescribed.

6.8.4. An advanced nurse practitioner and/or certified nurse-midwife shall not prescribe refills of controlled substances unless the refill prescription is in writing.

6.8.5. Drugs considered to be proven human teratogens shall not be prescribed during pregnancy by the advanced nurse practitioner and/or certified nurse-midwife, and includes all Category D and X drugs from the FDA Categories of teratogen risks (FDA, Federal Register, 1980: 44:37434). Category C drugs should be given only if the patient benefit justifies the potential risk to the fetus and only after consultation with the collaborating physician.

6.9. ~~6.5.~~ The Board may, in its discretion, approve a formulary classifying pharmacologic categories of all drugs which may be prescribed by an advanced nurse practitioner or certified nurse-midwife with prescriptive authority.

§19-8-7. Termination of limited prescriptive privileges.

7.1. The Board may deny or revoke privileges for prescriptive authority if the applicant or licensee has not met conditions set

forth in the law or this rule, or if the applicant has violated any part of West Virginia Code §30-7-1 et seq. or §30-15-1 et seq.

7.2. The Board shall notify the Board of Pharmacy, the Board of Osteopathy, and the Board of Medicine within twenty-four hours after termination of, or a change in, an advanced nurse practitioner's or certified nurse-midwife's prescriptive authority.

7.3. The Board shall immediately terminate prescriptive authority of the advanced nurse practitioner or certified nurse-midwife if disciplinary action has been taken against his/her license to practice registered professional nursing in accordance with West Virginia Code §30-7-11.

7.4. Prescriptive authority for the advanced nurse practitioner terminates immediately if the license to practice registered professional nursing in the State of West Virginia lapses.

7.5. Prescriptive authority for the certified nurse-midwife terminates immediately if either the license to practice registered professional nursing or the license to practice as a nurse-midwife in the State of West Virginia lapses.

7.6. Prescriptive authority is immediately and automatically terminated if national certification as an advanced nurse practitioner or certified nurse-midwife lapses.

7.7. If authorization for prescriptive authority is not renewed by the expiration date which appears on the document issued by the Board reflecting approval of prescriptive authority, the authority terminates immediately upon expiration.

7.8. Any advanced nurse practitioner or certified nurse-midwife who allows her or his prescriptive authority to lapse by failing to renew in a timely manner, may be reinstated by the Board on satisfactory explanation for the failure to renew and submission of prescriptive authority application and fee.

7.9. An advanced nurse practitioner and/or certified nurse-midwife shall not prescribe controlled substances for self or members of her/his immediate family.

7.10. An advanced nurse practitioner and/or certified nurse-midwife shall not provide controlled substances or prescription drugs for other than therapeutic purposes.

7.11. An advanced nurse practitioner and/or certified nurse-midwife with prescriptive authority will not delegate the prescribing of drugs to any other person.

§19-8-8. Adoption/revision of rules/policies.

8.1. The Board has the authority to adopt and revise such rules and/or policies as may be necessary to enable it to carry into effect the provisions of §30-7.

Distinguish

THE SCOPE OF PRACTICE OF THE ADVANCED NURSE PRACTITIONER

The nurse practitioner is a registered nurse prepared through a formal, organized educational program that meets guidelines established by the profession. This education prepares the nurse practitioner to provide a full range of primary health care services. Practitioners engage in independent decision making about health care needs and provide health care to individuals, families, and groups across the life span.

Primary health care is a way of delivering health care. It is the care the client receives at the first point of contact with the health care system that leads to a decision of what must be done to help resolve the presenting health problem. It also is continuous and comprehensive care, including all the services necessary for health promotion, prevention of disease and disability, health maintenance, and in some cases rehabilitation. Primary health care includes identification, management, and/or referral of health problems, as well as promotion of health-maintaining behavior and prevention of illness. It also is holistic care, which takes into account the needs and strengths of the whole person.

In their direct nursing care role as primary health care providers, they:

Assess the health status, illness conditions, response to illness, and health risks of individuals, families, and groups, employing the skills of taking histories, conducting physical examinations, and using laboratory data. They also assess resources, strengths and weaknesses, coping behaviors, and the environment.

Diagnose the actual or potential health problem or need, based upon analysis of the data collected.

Plan therapeutic intervention jointly with the client. The goal is to develop the problem-solving and self-care abilities of the client to the greatest possible extent. Interventions may include, but are not limited to, direct nursing care, prescription of medications or other therapies, and consultation with or referral to other health care providers. Nurse practitioners have the responsibility for coordination of care that involves other health professionals or resources. Nurse practitioners provide continuity and help the client deal effectively with the health care system.

Evaluate with the client (and, when indicated, with the collaborating health care provider or team) the effectiveness, comprehensiveness, and continuity of the intervention. If necessary, a new or modified plan and intervention are initiated. Overall evaluation of the nurse practitioner's work as a primary care provider is accomplished through ongoing self-evaluation, the peer review process, and institutional quality assurance programs.

Collaboration is a collegial, working relationship with another health care provider in the provision of patient care. Collaborative practice may include the discussion of patient diagnosis and cooperation in the management and delivery of care. Each collaborator is available to the other for consultation either in person or by communication device, but need not be physically present on the premises at the time the actions are performed. Collaboration connotes joint effort, working together as equals.

Protocol sets forth various steps to be followed in the assessment or diagnosis of a condition. Depending upon the results for each step or the aggregate process, specifies what treatments or drug therapies are to be implemented.

Dated 12/7/92

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Gaston Caperton
Governor

December 4, 1992

The Honorable William R. Wooten, Co-Chair
The Honorable David Grubb, Co-Chair
Legislative Rule-Making Review Committee
Room M-152, State Capitol
Charleston, West Virginia 25305

Dear Senator Wooten and Delegate Grubb:

The Department of Health and Human Resources has received notification from the Legislative Rule-Making Review Committee that the Committee will consider the Department's proposed Residential Board and Care Home rule at its meeting Monday, December 7.

Unfortunately, Ms. Lynda Kramer, director of the Office of Health Facilities Licensure and Certification (OHFLAC), and all OHFLAC staff who are involved in the Residential Board and Care Home program administration and development are unable to be present to speak concerning the proposed rule due to their mandated participation in an examination administered by the United States Department of Health and Human Services, Health Care Financing Administration.

I understand from Senator Manchin that a number of individuals who wish to comment on the proposed rule will be present at the meeting and believe that they should be given the opportunity to speak on Monday. There will be Department staff at the meeting to observe and listen to the comments and discussion. The Department would, however, appreciate an opportunity for Ms. Kramer to address the Committee concerning the proposed rule.

I am, therefore, requesting that the Committee defer its final consideration of the rule to its January meeting. This is a much needed rule and I believe the Committee will find Ms. Kramer's presentation beneficial in making its decision.

Sincerely,

Nancy J. Tolliver, Commissioner
Bureau of Administration & Finance

NJT:ksm

Dist'd
12/7/92

Facts Related to Proposed Residential Board and Care Regulations

* Legislation requiring the licensure of Residential Board & Care Homes was passed in 1988, but rules have not been adopted.

* The rule is needed to ensure that appropriate care is being provided and that residents are suitable for the level of care which a Residential Board and Care Home is supposed to provide.

* Many aged and mentally or physically impaired adults reside in unlicensed Residential Board & Care Homes.

* Most of these same aged and mentally or physically impaired individuals receive subsidy through Social Security Insurance benefits (SSI).

* Board and Care facilities serving a "substantial number" (as determined by the State) of SSI recipients are required under the 1976 Keys Amendment to the Social Security Act to meet state minimum standards.

* The State Fire Code 14.07 for Residential Board and Care Homes, which is derived from the National Life Safety Code and State law, requires Residential Board and Care Homes sheltering four (4) to eight (8) residents to have a 13D sprinkler system. State Law, W. Va. Code §16-5C-9, requires a sprinkler system for Residential Board and Care Homes with four (4) or more beds, while W. Va. Code §16-5H-2a specifies a 13D sprinkler system for homes with five (5) or more residents. These two statutory sections are not consistent.

* The required 13D sprinkler systems have been reported to cost from $6,000 to $10,000.

* Some current Residential Board and Care Home providers may be forced to close because of the regulations:

    - In most instances, this will be due either to the cost of the sprinkler system or because the residents will not be able to "self preserve" or because they have care needs which would more appropriately be served in a personal care or nursing home setting.

    - Some homes may choose to reduce their census to two (2) residents so that they are not required to be licensed.

- Other physical facility requirements may result in initial costs, but the Department has tried to take into account that many of these 13D sprinkler systems are or will be put into existing residential structures.

- The programmatic requirements should not place an undue burden on homes who are providing good care.

* SSI recipients, according to provisions of the Social Security Act, are eligible for food stamps if they reside in a licensed residential board and care home, based upon need. This would provide some financial relief to these clients in smaller provider settings of four (4) to eight (8).

* Private individuals may currently provide services to one (1) or two (2) persons requiring personal assistance without a license.

* Medicare eligible clients may benefit by the care and services which are available to them only in an unlicensed setting.

* Some relief may be provided to clients desiring a small homelike environment and the small service provider by changing the State statute to raise the threshold for licensure of residential board and care homes, personal care homes and nursing homes from three (3) to four (4) or more residents to conform to the State fire protection requirements.

* A home closed because licensure standards are not met means someone may be prevented from being hurt.

* A home closed due to abuse, neglect or exploitation means that someone has already been hurt.

Your support is urged for passage of the Residential Board and Care Home regulations and raising the licensure threshold to four (4) or more. Questions may be directed to Lynda Kramer, Director, or Sandra Daubman, Program Administrator, with the Office of Health Facility Licensure and Certification at 558-0050.

LGK:cz

Dist IV-7-92

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