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HAZARDOUS WASTE MANAGEMENT ACT—CLOSING THE CIRCLE†

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I. INTRODUCTION

Over the last fifteen years, there has been a virtual explosion of environmental lawmaking and rulemaking in the United States on both the federal and state levels. Early laws dealt primarily with the control of air and water pollution, emphasizing elimination of common or conventional pollutants. This very process of eliminating air and water pollution problems created yet another problem—the pollution of land with these removed substances. In some cases, recycling of these and other waste substances is possible. However, the great majority of such waste substances have been and continue to be disposed of in landfills.

Regulation of such landfills was left to individual states until the passage in 1976 of the Resource Conservation and Recovery Act (RCRA). RCRA put the federal government into the business of hazardous waste control in a big way and is the foundation of the most complex, ambitious, costly and widespread environmental regulatory program in history. Although RCRA Subtitle D contains provisions respecting nonhazardous solid waste disposal, those provisions do not constitute a regulatory program. Subtitle D instead provides for the development of guidelines and funding to assist states in the management of sanitary landfills and open dumps.

It is the policy of RCRA to encourage the states to develop hazardous waste management programs. Many states, including West Virginia, have begun the complex and time-consuming task of reforming and/or enacting state laws to supply the necessary statutory authority for these comprehensive programs. On April 10, 1981, the West Virginia Legislature passed the West Virginia Hazardous Waste Management Act [hereinafter referred to as the Act]. The bill was signed by Governor Rockefeller in assistance in researching and writing this article. The authors also wish to express their appreciation to Amy L. Stalnaker, formerly Paralegal, Love, Wise, Robinson & Woodroe, for her assistance in compiling data and statistics utilized throughout the article and in surveying the laws of other jurisdictions and to Noreen Adams, Paralegal, Love, Wise, Robinson & Woodroe, for her assistance in editing, proofreading and cite checking. Without the assistance of these and other persons who shall remain unnamed this article would not have been possible.

2 Although H.B. 1479, Reg. Sess. (1981) lists the official date of passage as April 10, 1981, those of us who were sitting in the visitor’s gallery of the House of Delegates chamber anxiously awaiting the final vote know that is was really 12:08
on April 27, 1981, thus closing the circle of environmental regulation in West Virginia.

The Act represents a two-year effort by a unique coalition of industry, agency and citizen representatives, all of whom favored the passage of some form of state legislation for a variety of reasons. All agreed, however, that it was in the best interest of the State to assume control of hazardous waste management within its own borders rather than to allow the EPA to manage such a program for West Virginia.

Inasmuch as the legislature has made it clear that the Act is intended to supplement existing law—and not to repeal it—an examination of pre-existing waste regulatory authority is important. A review of this now coexisting regulatory authority is especially important because West Virginia does not have a single state agency charged with the administration of its environmental laws and regulations. Little or no attempt has been made at coordination or consultation.

This regulatory problem is exacerbated in the context of the Hazardous Waste Management Act which, unlike any other state law, requires multiple state agencies to promulgate regulations governing various aspects of hazardous waste management. The Act cuts across traditional jurisdictional boundaries in West Virginia by encompassing aspects of air, water, solid and hazardous waste contamination control within a single law.

Existing hazardous waste management has been predominantly through the Department of Natural Resource's (DNR) regulation of industrial and other wastes and the Department of Health's regulation of solid waste disposal, primarily municipal refuse. The Health Department's authority in this area has long been recognized. Solid wastes generated by the coal industry

a.m. on April 11, 1981, when the bill was actually passed. At that time the vote was 95 yeas and 2 nays.

3 W. VA. CODE § 20-5E-23 (1981 Replacement Vol.).

4 For several years, the only clearinghouse for regulations was the Legislative Rulemaking Review Committee which, pursuant to W. VA. CODE §§ 29A-3-11, could approve or reject regulations subject to their review. However, on June 15, 1981, the West Virginia Supreme Court of Appeals declared W. VA. CODE §§ 29A-3-11, -12 unconstitutional as an infringement upon the required separation of powers. State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); W. VA. CONST, art. V. & 1.

are the responsibility of the DNR acting through its Reclamation Division and Water Resources Division. The Water Resources Division, having broad authority over all discharges of pollutants into the waters of the State, is very important in the current regulatory scheme. Most solid waste in the state is necessarily governed locally, through county commissions, municipalities and recently created regional planning and development councils.

In addition to the DNR and the Department of Health, other state agencies have authority over waste disposal: The Resource Recovery-Solid Waste Disposal Authority, the Air Pollution Control Commission, the Surface Mining and Reclamation Division of the DNR, the Department of Mines, Office of Oil and Gas, the State Water Reserve Board, The Department of Highways and the Public Service Commission. Various county and municipal authorities will also have a role in waste management.

As noted above, Subtitle D of RCRA establishes the framework for state management of solid waste. Subtitle C, however, creates a federal waste management program. Subtitle C provides for promulgation by EPA of criteria for identification and listing of hazardous wastes and for the publication of hazardous

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7 W. VA. CODE § 16-20-11b. The Commission also has authority over motor vehicle emission standards and fuel standards. W. VA. CODE § 16-20-11c.
8 W. VA. CODE §§ 20-6-3(b), § 20-6-4 and § 20-6C-4(b)(1) (surface and underground mining operations). W. VA. CODE § 20-6D-7 (surface mining other than coal). The Division also has authority over toxic substances, i.e., waste capable of generating acidic material which could cause stream pollution or interfere with revegetation objectives in this context. W. VA. CODE § 20-6-2 and § 20-6D-1.
9 W. VA. CODE §§ 22-4-1a to -1k and § 22-4-9 (1981 Replacement Vol.).
13 As to the question whether the state scheme has preempted local control, see notes 227-89 supra and accompanying text.
15 Judicial actions have been initiated challenging virtually the entire scheme of Subtitle C regulations. See Shell Oil Co. v. EPA, Docket No. 80-1532 (D.C. Cir. 1980).
waste and criteria lists. It further directs EPA to establish standards for generators and transporters of hazardous wastes, and for owners and operators of hazardous waste treatment, storage, and disposal facilities. There are provisions governing permit requirements for treatment, storage, and disposal facilities, and authorizing inspection and enforcement. Finally, Subtitle C establishes the procedure for eventual takeover by the states of the hazardous waste management program consistent with the standards and objectives of RCRA, and providing for continuing federal oversight of such state programs.

In order to be a "hazardous waste" a material must first be classified as a "solid waste." If a waste qualifies as a solid waste, it becomes subject to Subtitle D solid waste requirements and regulations; but, it may still not be subject to Subtitle C if the EPA does not designate it hazardous.

RCRA defines a "hazardous waste" as a solid waste which, because of its characteristics, may cause or contribute to an increase in mortality or in serious irreversible, or incapacitating reversible, illness, or may pose a substantial present or potential hazard to human health or to the environment, if improperly managed.

RCRA provides for states to assume control of their own hazardous waste programs in lieu of federal control, once the state programs have been approved by EPA. In order to gain full authorization, a state program must be "equivalent to" the federal program and "consistent with" the federal or state programs applicable in other states. The state program must also insure adequate enforcement of compliance with Subtitle C and the regulations. To encourage states to develop their own pro-

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17 § 3004, 42 U.S.C. § 6924.
18 § 3005, 42 U.S.C. § 6925.
20 § 3008, 42 U.S.C. § 6928.
grams, RCRA Section 3011\(^{25}\) authorizes federal financial assistance for development of state management plans.

Even after a state gains full authorization to manage its own program, such authorization may be withdrawn either voluntarily by the state or upon determination by EPA that the state is not administering or enforcing the program in accordance with the requirements of Subtitle C.\(^{26}\) The EPA may commence withdrawal proceedings either on its own initiative or upon petition by an interested person based on cause.

II. THE STATE HAZARDOUS WASTE MANAGEMENT ACT

The Hazardous Waste Management Act, passed during the 1981 Regular Session of the West Virginia Legislature, was the product of several significant intermediate forms.\(^{27}\)

While the Act in large part follows closely the substantive requirements of RCRA, it of necessity contains new provisions to deal with matters peculiar to West Virginia, particularly the lack of a consolidated environmental agency. This analysis of the Act will point out not only its substantive provisions but also its evolutionary development.

A. Declaration of Policy

As with RCRA, the Act recognizes as its initial legislative finding that the production of hazardous wastes is growing, not only as the result of increases in manufacture and changes in technological progress, but also because of abatement of air and water pollution.\(^{28}\) Thus, by regulating the hazardous waste gene-

\(^{26}\) § 3006(c), 42 U.S.C. § 6926(c); 40 C.F.R. § 123.14, .15 (1980).
\(^{27}\) On January 8, 1980, the Joint Judiciary Committee received a draft of the Hazardous Waste Management Act prepared by the Office of the Attorney General. That draft was later amended and introduced on January 29, 1980, as S.B. 330, Reg. Sess. (1980). The 1980 Senate Judiciary Committee appointed a subcommittee to consider and revise the Act and a report from that subcommittee presented a re-write of the Act. The 1980 Senate Judiciary Committee refused to report the Act but agreed to place the subject of hazardous waste management on an agenda of items to be studied prior to the commencement of the 1981 Regular Session. As the result of the study which followed, H.B. 1479, Reg. Sess. (1981) was prepared and introduced on March 11, 1981.

\(^{28}\) W. Va. Code § 20-5E-3[a](1). In the adoption of RCRA Congress made a similar finding. § 1002(b)(3), 42 U.S.C. § 6901(b)(3). Congress, however, specifically
rated by this pollution abatement, the Act closes the circle on the regulation of pollution and prevents air and water pollution from becoming land pollution problems.

The legislature also found, as did Congress, that if hazardous wastes are not managed properly, the public health and safety and the environment are threatened. The legislature stopped short, however, of making an expressed finding that the management of hazardous waste is an ultrahazardous activity.

With respect to technology for the management of hazardous waste, the legislature found that such was generally available to alleviate adverse health, environmental and aesthetic impacts resulting from current hazardous waste management and disposal practices. While no finding was made that such technology had not been widely used in the state prior to the passage of the Act, a finding was made that managing hazardous wastes had become a matter of statewide concern.

attributed the increased amounts of solid waste to, among other laws, the federal Clean Air Act and the federal Water Pollution Control Act. S.B. 330, Reg. Sess. (1980), as introduced, contained no comparable finding; such a finding was added to the bill by a subcommittee of the Senate Judiciary Committee.

While RCRA focuses on protecting "human health and the environment," the Act for the most part seeks to protect "public health and safety, and the environment." Aberrations from the Act's use of this phrase appear in the definition of "hazardous waste," W. VA. CODE § 20-5E-3(6), and in the section relating to monitoring, analysis and testing, W. VA. CODE § 20-5E-13(a), where the RCRA terminology appears.

This difference between the federal and state terminology appears throughout the Act. There seems to be no significant difference between the terms "public health" and "human health." In looking at environmental legislation on the state level, both terms are found in the Air Pollution Control Act, W. VA. CODE § 16-20-1 to -13. Because the two phrases are so closely tied together, it is probable that this difference in terminology was unintentional.

The initial draft of the Act submitted to the Joint Judiciary Committee of the Legislature by the Office of the Attorney General did, however, propose to make a finding that the generation, storage, transport, treatment and disposal of hazardous wastes are ultrahazardous activities. Such a provision did not appear in any later drafts of the Act, including S.B. 330, Reg. Sess. (1980) and H.B. 1479, Reg. Sess. (1981).

Such a finding had been included in S.B. 330, Reg. Sess. (1980).

The interest of the legislature in regulating
Even though the legislature clearly intended to provide for the establishment of a comprehensive program to protect public health and safety and the environment from the mismanagement of hazardous waste, it has specifically recognized that the activities which produce hazardous wastes make a significant contribution to the economy of the state. While the Act contains no specific direction as to how this finding is to be taken into account in carrying out the purpose of the Act, the legislature obviously meant this to be considered by those persons charged with implementation responsibilities.

The purposes of the Act are not only to assume authority to implement Subtitle C of RCRA, but also to develop what on its face appears to be an independent program of hazardous waste management. However, the limitations placed upon rulemaking and regulatory authority make the authorized regulatory program heavily dependent upon the substantive requirements of the federal hazardous waste management program.

B. Regulated Activities and Wastes

The heart of the Act is the requirement that a permit be obtained to “construct, modify, operate or close any facility or site for the treatment, storage or disposal of hazardous waste identified or listed under this article” or to “store, treat or dispose of any such hazardous waste.” The Act authorizes much more, however, as part of its regulation of hazardous waste management. The most notable of these additional authorizations include: (1) the regulation of certain aspects of the generation and transportation of hazardous waste, (2) the regulation of certain hazardous wastes even before they are specifically identified or listed through rules and regulations, and (3) the encouragement of recycling of potential hazardous waste. In the case of each of these regulated activities the threshold question is the identification of materials which constitute hazardous waste, as that term is defined in the Act.

hazardous waste management on a statewide versus local basis will be considered later in this section.

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56 W. Va. Code § 20-5E-2(a)(4). Among the activities cited by the legislature are manufacture, refinement, processing, treatment and use of coal, raw chemicals, ores, petroleum, gas and other natural and synthetic products.


Before a material can be deemed to be "hazardous waste" it must first be brought within the definition of the term "waste." A "waste" is defined to include garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities.

Not included within the definition of "waste" are the following materials:

- solid or dissolved material in domestics sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the federal Water Pollution Control Act, as amended, or source, special nuclear or byproduct material as defined by the federal Atomic Energy Act of 1954, as amended.

A material which comes within the above definition of "waste" becomes a "hazardous waste" because that waste either alone or in combination with other wastes is of such quantity, concentration or physical, chemical or infectious characteristic as may: "(A) cause or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial, present or potential, hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed."

The Act provides for rulemaking authority to identify and list specific hazardous wastes and their characteristics which...
satisfy this statutory definition. It is this process of identifying, through rules and regulations, specific hazardous wastes and their criteria and characteristics that triggers those provisions of the Act related to permits, standards applicable to generators, standards applicable to treatment, storage or disposal facilities, and criminal penalties.

There are, however, at least five areas of the Act in which it is arguable that hazardous wastes may be subject to the Act even though they have neither been identified nor listed pursuant to regulations promulgated under the Act. These areas include: (1) the preparation of a hazardous waste management plan including the performance of "[a]n inventory of existing and abandoned hazardous waste treatment, storage and disposal sites"; (2) the monitoring and testing of hazardous waste treatment, storage and disposal facilities; (3) "the imminent and substantial endangerment to public health, safety, or the environment" caused by "the handling, storage, transportation, treatment or disposal of any hazardous waste"; and (4) the inspection of places "where hazardous wastes are or have been generated, treated, stored, transported or disposed of"; and (5) the disclosure in deeds and leases of past or future use of property for the storage, treatment or disposal of hazardous waste.

It is in these five areas that the Act makes reference to the management of hazardous waste without expressed regard to whether the hazardous waste has been identified or listed pursuant to rules and regulations adopted under the Act.

On July 10, 1981, the Director of the DNR placed certain regulations into effect under temporary rulemaking powers. These regulations seem to recognize that, with respect to the first four of these areas, the statutory definition of "hazardous waste" may stand independently of the identification and listing.

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44 W. VA. CODE § 20-5E-6(a)(2).
45 W. VA. CODE § 29-5E-8(a).
46 W. VA. CODE § 20-5E-6(a)(3).
47 W. VA. CODE § 20-5E-6(a)(4).
49 W. VA. CODE § 20-5E-5(c)(3).
51 W. VA. CODE § 20-5E-17(a).
52 W. VA. CODE § 20-5E-12(a).
of hazardous wastes. This interpretation of the Act, however, should be compared with the following section of the Act which sets a limitation on the Director's rulemaking authority: "Rules and regulations establishing criteria for identifying the characteristics of hazardous waste, identifying the characteristics of hazardous waste and listing particular hazardous wastes which are subject to the provisions of this article."

The question is thus raised whether a material can be made subject to the provisions of this article without rules and regulations having established that its identity, criteria, or characteristics qualify it as a hazardous waste.

C. The Role of the Director of the Department of Natural Resources

1. Lead agency

The Department of Natural Resources is designated by the Act to be the lead agency for purposes of Subtitle C of RCRA. The Director of that agency is charged with the responsibility for carrying out the purposes and requirements of that subtitle. The authority of the Director to implement the Act is not,
however, exclusive; the specific roles of the other state agencies involved will be discussed elsewhere in this article.

2. Administrative powers

The Director is given a number of specific powers and duties with respect to the administration of a hazardous waste management program. Inasmuch as the Act does not otherwise grant any of the same power to other agencies, these are matters which the Director must address exclusively.

The Director's general administrative powers and duties include authority to enter into agreements for services, receive and expend money, encourage recycling and reuse of potentially hazardous waste, and provide continuing education and training of personnel. The Director must also integrate provisions of the Act, for purposes of administration and enforcement, with nine other state laws to avoid duplication to the maximum extent practicable.

delegate to the Chief the responsibility for publishing a study of hazardous waste management, encouragement of recycling and reuse, and continuing education and training for agency personnel. W. Va. Code § 20-5E-5(e) to -(h).

S.B. 330, Reg. Sess. (1980), also specifically empowered the Chief to implement the purposes and requirements of Subtitle C of RCRA "as may from time to time be amended." The Act, in its final form, limited this authority to RCRA as of the effective date of the Act. This change may have avoided constitutional problems related to unlawful delegation of legislative authority that were of concern to the West Virginia Supreme court of Appeals in State v. Grinstead, 206 S.E.2d 912 (W. Va. 1974).


One of the first responsibilities placed on the Director is to publish a study of hazardous waste management in the state. This study is significant not only because it establishes the foundation for the state program but also because it provides the Director with the power to inventory and gather information with respect to abandoned as well as existing sites. To facilitate the preparation of this study the Director or his designate may require information and issue subpoenas or subpoenas duces tecum. The study itself must be completed within 12 months after the effective date of the Act and must describe the generation, treatment, storage and disposal of hazardous wastes and contain an inventory of existing and abandoned sites.

3. Rulemaking powers

In addition to his general administrative responsibilities, the Director is given the overall responsibility for promulgating rules and regulations to implement the Act. The rulemaking powers of the Director, however, are not without both substantive and procedural limitations and restrictions.

Perhaps the most significant of these limitations is the one which prevents the Director from undertaking rulemaking with respect to subject matters more properly within the jurisdiction and expertise of the seven other agencies empowered with rulemaking authority in Section 20-5E-7 of the Act. Thus, the Act has established a basic framework for coordinating the rulemaking activities of the various agencies involved. This calls for the Commissioner of Highways, the Public Service Commission, the

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65 W. VA. CODE § 20-5E-5(e).
66 W. VA. CODE § 20-5E-5(e)(3). Similar authority is not given the EPA under RCRA.
67 W. VA. CODE § 20-5E-5(f).
68 W. VA. CODE § 20-5E-5(e). Significantly, the Act does not require the study to include a listing of criteria to be used in determining the unsuitability of areas within the state for hazardous waste facilities and sites as would have been the case had the Legislature adopted that version of this provision as was included in S.B. 330, Reg. Sess. (1980). In connection with the study and elsewhere in the Act all references to advance determinations as to whether areas of the state are unsuitable for hazardous waste facilities or sites have been deleted. As is noted elsewhere in this article, however, the Act does provide expressed authority to regulate the location of facilities.
69 W. VA. CODE § 20-5E-6(a).
70 W. VA. CODE § 20-5E-6(c).
Board of Health, the Air Pollution Control Commission, the Administrator of the Office of Oil and Gas, the Shallow Gas-Well Review Board and the Water Resources Board to promulgate rules and regulations within their jurisdiction and expertise; the Director promulgates all other necessary rules and regulations.\textsuperscript{71} Other than to provide the Director with overall responsibility for promulgating rules and regulations under the Act, no provision is expressly made for administratively resolving disputes among the various agencies involved.

Consistent with the various procedural limitations established by the Act, the Director is charged with promulgating rules and regulations with respect to: (a) "a plan for the safe and effective management of hazardous wastes";\textsuperscript{72} (b) "establishing criteria for identifying the characteristics of hazardous waste, identifying the characteristics of hazardous waste and listing particular hazardous wastes which are to be subject to the provisions of this article";\textsuperscript{73} (c) "standards applicable to generators of hazardous

\textsuperscript{71} In earlier versions of the Act, including S.B. 330, Reg. Sess. (1980), no mechanism was established for coordinating agency rulemaking although the need for coordination of the issuance of permits was recognized in the use of a "consolidated permit," issued by the Chief of the Division of Water Resources of the DNR. This eliminated the need to obtain separate permits under various named environmental laws. S.B. 330, Reg. Sess. (1980); W. VA. CODE § 20-5E-8.

\textsuperscript{72} W. VA. CODE § 20-5E-6(a)(1). The plan called for by this provision had originally been made the responsibility of the Chief of the Division of Water Resources of the DNR and was to have included a description of areas which are unsuitable for the establishment of treatment, storage and disposal facilities because of their inherent hydrogeological, topographical, climatological limitations or ecological characteristics. S.B. 330, Reg. Sess. (1980); proposed § 20-5E-5(h). The plan now has become a duty of the Director and there is no legislative mandate to identify such unsuitable areas, although the suitabilities of areas could presumably be addressed in the discretion of the Director.

\textsuperscript{73} W. VA. CODE § 20-5E-6(a)(2). This requirement has been written to make it identical to the comparable requirement of RCRA. As a result, the Act will focus upon the same universe of hazardous wastes dealt with under RCRA.

Furthermore, the requirements with respect to identifying and listing hazardous wastes contain the same exemptions as are provided for under RCRA. These exemptions extend to: (1) certain wastes generated primarily from the combustion of coal or other fossil fuels, (2) solid wastes from the extraction, beneficia-
tion and processing of ores and minerals, (3) cement kiln dust, and (4) drilling fluids and other wastes associated with oil or natural gas or geothermal energy development, exploration or production. Even as to these exempt wastes, however, owners or operators of disposal sites containing such wastes may be required to identify such sites for future reference and provide chemical and physical analysis and composition of such wastes.
waste”; 74 (d) “performance standards applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste”; 75 (e) terms and conditions for issuing, modifying, suspending, revoking or denying permits; 76 (f) maintenance of records, reports, sampling, tests and analyses, monitoring and information; 77 (g) “certification of personnel at hazardous waste treatment, storage or disposal facilities”; 78 (h) “public participation in the implementation of this article”; 79 (i) “use of a manifest during the transport of hazardous wastes”; 80 (j) submission of a plan for closure of a facility, post-closure monitoring and maintenance and sudden and nonsudden accidental occurrences; 81 (k) “a schedule of fees to recover the costs of processing permit applications and permit renewals”; 82 and (l) other necessary rules

74 W. VA. CODE § 20-5E-6(a)(3). These requirements have been written so as to be identical to the requirements of RCRA. § 3002, 42 U.S.C. § 6922. This would suggest that regulations developed by EPA to implement this section of RCRA would be a useful guide to the state agencies in developing their regulations. It should be noted that the regulations with respect to generators of hazardous waste are limited to record keeping, labeling, reporting and other administrative requirements. No authority is provided to permit the regulation of the process of a generator which produces the hazardous waste. Rather, regulation extends only to how that hazardous waste must be managed once it is generated.

75 W. VA. CODE § 20-5E-6(a)(4). As was the case with generator standards, the performance standards with respect to treatment, storage and disposal facilities have been written to conform with the requirements of RCRA, in this case § 3004. The foundation is thus laid for developing state regulation on the basis of EPA’s regulations adopted under RCRA. § 3004, 42 U.S.C. § 6924. Express provision is made for developing regulations which distinguish between new facilities and those in existence on the date of promulgation of rules and regulations. The mandate of this subsection is to protect public health and safety and the environment by addressing, without limitation, requirements respecting: (1) records, (2) reporting and use of a manifest, (3) operating methods, techniques and practices, and (4) location, design and construction of facilities and others.

76 W. VA. CODE § 20-5E-6(a)(5).
77 W. VA. CODE § 20-5E-6(a)(6).
78 W. VA. CODE § 20-5E-6(a)(7).
79 W. VA. CODE § 20-5E-6(a)(8).
80 W. VA. CODE § 20-5E-6(a)(9).
81 W. VA. CODE § 20-5E-6(a)(10).
82 W. VA. CODE § 20-5E-6(a)(11).

An elaborate formula for determining the amount of an application fee was provided for in S.B. 320 (1980). The authorized application fee could have been as much as five thousand dollars depending upon size for each of in-ground storage, treatment, disposal, above-ground storage and incineration up to an overall maximum fee of fifteen thousand dollars. The matter of permit fees has now been
While the Act has obviously tried to pattern the Director's rulemaking mandate, to the extent possible, on that of RCRA, there are a number of very significant procedural limitations and safeguards which have been enacted to address the interrelationships among the Director, the EPA and other state agencies and laws. These are, of course, in addition to the usual procedural requirements which are associated with rulemaking generally. Taken together, these procedural limitations express the clear mandate of the legislature that rules and regulations promulgated under this Act are to be carefully crafted. The following review of these procedural requirements should serve to illustrate the point.

As discussed above, while the Director has overall rulemaking responsibility, he cannot regulate in an area that is within the jurisdiction and expertise of those agencies given rulemaking authority in Section 20-5E-7 of the Act. The Director's rulemaking must be done in consultation with various state agencies. Rules and regulations must be promulgated within six months of the effective date of the Act, July 10, 1981.85 promulgation of rules and regulations must be in accordance with the West Virginia Administrative Procedures Act.85 The Director must also avoid duplication to the maximum extent practicable with the appropriate provisions of a number of state acts and laws.87 In promulgating rules and regulations deferred to rulemaking where a determination must be made as to the agency's costs of processing permit applications and renewals.

83 W. VA. CODE § 20-5E-6(a). These agencies include the Department of Health, the Air Pollution Control Commission, the Office of Emergency Services, the Public Service Commission, the State Fire Marshall, the Department of Public Safety, the Department of Highways, the Department of Agriculture, the Water Resources Board and the Department of Mines Office of Oil and Gas.

84 W. VA. CODE § 20-5E-6(a). These agencies include the Department of Health, the Air Pollution Control Commission, the Office of Emergency Services, the Public Service Commission, the State Fire Marshall, the Department of Public Safety, the Department of Highways, the Department of Agriculture, the Water Resources Board and the Department of Mines Office of Oil and Gas.

85 Id.

86 W. VA. CODE Ch. 29A.

87 Id. These acts and laws include the Water Pollution Control Act, the Surface Mining and Reclamation Act, the Coal Refuse Disposal Control Act, the Air Pollution Control Act, certain oil and gas laws, certain public health laws, the
the Director must also be consistent with the rules and regulations promulgated by EPA pursuant to RCRA—the Federal Solid Waste Disposal Act. As necessary, rules and regulations must be revised within six months of the effective date of amendments to RCRA or rules and regulations promulgated pursuant to RCRA. In addition, all rules and regulations must be reviewed every three years and revised where necessary.

In a further effort to assure a carefully drafted set of regulations, the legislature provided that the program for the management of hazardous waste pursuant to this Act shall be equivalent to and consistent with the federal program established pursuant to Subtitle C of RCRA. While this provision stops short of saying that each and every rule and regulation individually must be equivalent to and consistent with its federal counterpart, the provision expresses a clear mandate that the totality of regulations comprising the state program must meet that test.

The Director’s role does not end with the promulgation of his own rules and regulations. He is also charged with the responsibility of submitting to the Legislative Rulemaking Review Committee his comments regarding all rules and regulations promulgated pursuant to the Act including those rules and regulations adopted by the agencies to be considered in the next portion of this article.

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Id. As will be discussed in some detail later in this article, not only must individual state rules and regulations be consistent with those of EPA, the Act provides that the overall state hazardous waste management program must be equivalent to and consistent with the federal program.

W. VA. CODE § 20-5E-6(b).

Id.

W. VA. CODE § 20-5E-22.

While the Act provides no clear definition of the terms “equivalent to” and “consistent with,” these same terms are used in RCRA for determining from EPA’s standpoint the acceptability of a state program.

W. VA. CODE § 20-5E-7(k). The significance of this requirement has been considerably diminished by the decision of the West Virginia Supreme Court of Appeals on June 15, 1981 in State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981), which found that the statutes, W. VA CODE §§ 29A-3-11 and -12, which empower the Legislative Rulemaking Review Committee to disapprove rules and regulations of administrative agencies, violate the separation of power doctrine as expressed in Article 5, Section 1 of the West Virginia Constitution.
D. Role of Other State Agencies

The Act empowers the Director to have overall responsibility for promulgating rules and regulations to carry out the purposes of the Act and, as will be discussed later in this article, empowers the Chief of the Division of Water Resources of the DNR [hereinafter referred to as the Chief] to have a lead responsibility with respect to permit issuance, inspections and enforcement. A number of other agencies are provided with similar powers, to be exercised in coordination with the powers of the Chief and Director, within their areas of jurisdiction and expertise. The Act gives special consideration, however, to situations involving coal mine waste and overburden and oil and gas activities. These special cases will be considered before turning to a more general discussion of the rulemaking, permit issuance, inspection and enforcement powers of these other agencies.

With respect to coal mining waste or overburden, exclusive responsibility to carry out any requirement of this article is placed in the hands of the Director, to the extent that such material is subject to a permit issued pursuant to the Surface Coal Mining and Reclamation Act of 1980. Such permits are presently administered through the Reclamation Division of the DNR and thus will not involve the Chief. A very similar provision is also contained in RCRA. Because this provision relates only to coal mining waste or overburden subject to permits, those involved with these activities will find their operations being regulated under two hazardous waste management programs—one for coal mining waste or overburden subject to such a surface mining permit and one for all other hazardous wastes.

The Act’s treatment of oil and gas activities and disposal wells is indeed special. It places jurisdiction for the regulation of oil and gas activities and disposal wells under the Act with the Administrator of the Office of Oil and Gas and the Shallow Gas-Well Review Board. Specifically, the Act provides:

To the extent that this article relates to activities with respect to oil and gas wells, liquid injection wells and waste dis-
posal wells now regulated by articles four, four-B and seven, chapter twenty-two of the code, the administrator of the office of oil and gas and the shallow gas-well review board has the jurisdiction with respect to the regulation of such activities. . . .

The Administrator of the Office of Oil and Gas and the Shallow Gas-Well Review Board are empowered to promulgate their own set of rules and regulations with respect to these oil and gas activities. They are further empowered to have the same enforcement and inspection powers granted to the Chief under specific sections of the Act. These inspection and enforcement powers are, however, in lieu of those powers conferred upon these agencies elsewhere by law with respect to hazardous waste.

1. Rulemaking

Specialized rulemaking authority is conferred upon the Commissioner of Highways, the Public Service Commission, the Board of Health, the Air Pollution Control Commission and the Water Resources Board. The specific limitations placed on the exercise of such rulemaking authority by these agencies will be discussed later. The Act does, however, establish several requirements with respect to rulemaking which apply generally to each of the agencies involved. These general requirements mandate that rules and regulations be adopted: (a) in consultation with the Director; (b) avoiding inconsistencies and avoiding duplication to the maximum extent practicable with rules and avoiding duplication to the maximum extent practicable with rules and regulations required to be promulgated pursuant to the Act by the Director or any other rulemaking authority; (c) in accordance with the provisions of Chapter 29A of the West Virginia Code; (d) consistent with the Act; (e) consistent with

100 W. VA. CODE § 20-5E-7(h) (citations omitted).
101 W. VA. CODE §§ 20-5E-11 to -17.
102 It should be noted that the Act fails to expressly state this limitation in connection with the rulemaking authority of the Board of Health. W. VA. CODE § 20-5E-7(d). However, even in absence of the express mention of West Virginia Code, Chapter 29A in the Act, that chapter itself expressly provides that:
Any rules or regulations promulgated after the effective date of this section [June 7, 1976] and any amendment promulgated hereafter to any
rules and regulations promulgated by EPA pursuant to RCRA; and (f) within six months of the effective date of the Act, July 10, 1981.

In accordance with section 20-5E-6(b) of the Act, such rules and regulations must be revised within six months of the effective date of any amendment to RCRA or the rules and regulations promulgated pursuant to RCRA and must be reviewed every three years and revised where necessary.

a. Commissioner of Highways and Public Service Commission

The Commissioner of Highways and the Public Service Commission are charged by the Act with the responsibility of promulgating regulations governing the transportation of hazardous wastes. The Commissioner of Highway's authority in this regard extends to transportation by vehicle upon the roads and highways of this state. The Public Service Commission's authority extends to transportation by railroad in this state.

Both agencies must promulgate rules and regulations which are consistent with applicable rules and regulations of the federal Department of Transportation and which govern both interstate and intrastate transportation of hazardous wastes. In addition, the required rules and regulations of these agencies must apply equally to those persons either transporting their own hazardous wastes or hazardous wastes generated by others.

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rule or regulation heretofore promulgated under the delegation of the power of the legislature or otherwise shall only be effective if promulgated in accordance with the provisions of this article.

W. VA. Code § 29A-3-3.

105 W. VA. Code § 20-5E-7(j).

106 W. VA. Code § 20-5E-7(a) and (b).

It should be noted that the Director is also given authority to promulgate rules and regulations establishing procedures for the use of a manifest during the transportation of hazardous wastes. W. VA. Code § 20-5E-6(a)(9). This authority should be compared with the limitations of Section 20-5E-6(c) of the Act, which prevent the Director from promulgating rules and regulations which are more properly within the jurisdiction and expertise of the Commissioner of Highways and Public Service Commission with respect to the transportation of hazardous waste.

107 W. VA. Code § 20-5E-7(a).

108 W. VA. Code § 20-5E-7(b).

109 W. VA. Code § 20-5E-7(a) and (b).

110 W. VA. Code § 20-5E-7(c).
Beyond these requirements, the Act also mandates that these rules and regulations establish standards to protect public health, safety and the environment including standards respecting recordkeeping, labeling, compliance with a manifest system and transportation of hazardous wastes only to the facilities designated on the manifest as having been properly permitted.\footnote{111}

b. Board of Health

The Director of Health has been empowered by the Act to enforce regulations pertaining to hazardous wastes with infectious characteristics and the permitting and licensing of facilities that treat, store or dispose of hazardous wastes with infectious characteristics.\footnote{112} However, the power to promulgate such regulations has been given to the Board of Health.\footnote{113}

In addition to the implicit limitation that such rules and regulations are to pertain to hazardous wastes with infectious characteristics, there is an expressed limitation on the rulemaking power of the Board of Health which provides that the authority of the Air Pollution Control Commission or its Director is not to be diminished or altered. The Act also provides that any permitting or licensing requirements are to be in addition to those permits required to be issued by the Chief pursuant to Section 20-5E-8 of the Act.\footnote{114}

\footnote{111} These substantive requirements are essentially identical to those contained in RCRA. § 3003, 42 U.S.C. § 6923. EPA, acting pursuant to that statutory authority, already has adopted rules and regulations relating to the transportation of hazardous waste. 40 C.F.R. Part 263 (1980).

\footnote{112} The term "infectious characteristics" is used in the definition of "hazardous waste." W. Va. Code § 20-5E-3(6). The term "infectious characteristics" has not been defined in the Act although a definition for the term "infectious wastes" had been proposed in Section 20-5E-3(10) of S.B. 330, Reg. Sess. (1980) to read as follows:

'Infectious wastes' means pathologic specimens, tissues, specimens of blood elements, excreta or secretions and disposal articles attendant thereto from humans or animals at a hospital, medical clinic, research center, veterinary institution, or pathology laboratory as well as discarded equipment, instrument, utensils and other articles used in the care of patients with suspected or diagnosed communicable disease which may harbor or transmit pathogenic organisms.

\footnote{113} W. Va. Code § 20-5E-7(d).

\footnote{114} Id.
c. Air Pollution Control Commission

The Air Pollution Control Commission is empowered with rulemaking authority to establish air pollution performance standards, and permit requirements and procedures as may be necessary to comply with the requirements of the Act.115

The rules and regulations of this agency must not only be promulgated in accordance with West Virginia Code Chapter 29A, the Administrative Procedures Act, but also West Virginia Code Chapter 16, Article 20, the Air Pollution Control Act.116

d. Water Resources Board

The Water Resources Board is empowered by the Act to 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. It is also empowered to promulgate rules and regulations governing the issuance, modification, suspension, revocation or denial of such permits relating to such discharges as may be required by the Act.117

115 W. VA. CODE § 20-5E-7(f).
116 Id. The added requirement of compliance with West Virginia Code, Chapter 16, Article 20 places an obligation on that Commission to: (1) hold at least one public hearing, (2) provide notice of that hearing at least thirty days prior thereto by Class II legal advertisement published in at least one county in each affected air quality control region, (3) file proposed rules and regulations with the Office of the Secretary of State at least sixty days prior to scheduled date of the hearing, and (4) accord all persons in attendance at the hearing with a full opportunity to be heard. W. VA. CODE § 16-20-5.

117 W. VA. CODE § 20-5E-7(f). This new rulemaking power is an extension of this Board's long-standing power to regulate, in conjunction with the Chief, the discharge of all pollutants into waters of the state. W. VA. CODE §§ 20-5-1 to -16 and 20-5A-1 to -24. The relationship between this Board and the Chief in general water pollution matters is one involving the Board serving as both the rulemaking authority, W. VA. CODE §§ 20-5-5(b), 20-5A-3(a) and -3(b), and the authority which in the first instance reviews orders, actions or omissions of the Chief, W. VA. CODE § 20-5A-15.

The Chief, on the other hand, is responsible for the issuance of permits and the day-to-day administration of water pollution matters, W. VA. CODE §§ 20-5-5(a), 20-5A-3(a), -5. This same interrelationship appears to have been carried through into the Act for application to hazardous waste management. See §§ 20-5E-8, and -19 of the Act.

The Act does not, however, specifically make reference to the Chief as being
Permit issuance, inspections and enforcement.

Elsewhere in this article a detailed discussion will be undertaken regarding the inspection and enforcement authority of the Chief. The Act goes further, however, and extends these same inspection and enforcement powers to the Commissioner of Highways, the Public Service Commission, the Director of Health, and the Director of the Air Pollution Control Commission. Permitting authority, concurrent with that of the Chief, is also given to the Director of Health and the Director of the Air Pollution Control Commission.

In the case of the Director of the Air Pollution Control Commission this inspection and enforcement power is in addition to that which he already has. As to the other three authorities, however, the Commissioner of Highways, the Public Service Commission and the Director of Health, the grant of this inspection and enforcement power is a substitute for inspection and enforcement power conferred upon them elsewhere with respect to their areas of responsibility for hazardous waste management.

the permit-issuing authority for purposes of discharges of hazardous wastes into waters of the state. Such, however, would appear to be a reasonable interpretation of the Act given the Chief's general authority in the subject matter and the relationship between the Chief and the Board as discussed above.

\[118\] W. VA. CODE § 20-5E-7(a).
\[119\] W. VA. CODE § 20-5E-7(b).
\[120\] W. VA. CODE § 20-5E-7(d).

In the case of the Commissioner of Highways the grant of the same enforcement and inspection powers as the Chief is in lieu of other powers "with respect to the transportation of hazardous waste" but not affecting powers with respect to weight enforcement. W. VA. CODE § 20-5E-7(a). The grant of such powers to the Public Service Commission is also in lieu of other powers "with respect to the transportation of hazardous waste." W. VA. CODE § 20-5E-7(b). The Director of Health's grant is in lieu of powers "with respect to hazardous waste with infectious characteristics." W. VA. CODE § 20-5E-7(d). To these extents, the
Finally, because no administrative review procedures otherwise existed with respect to all actions of the Director of Health and the Director of the Air Pollution Control Commission, the Act provides for review of actions or omissions of the Director of Health to the Board of Health,126 and of the Director of the Air Pollution Control Commission to the Air Pollution Control Commission.127

E. Permitting Requirements

1. Regulated activities

Section 20-5E-8 of the Act sets forth those activities for which a permit is required to be obtained from the Chief.128 This requirement is triggered only when the activity involves a hazardous waste which is identified or listed as such pursuant to the Act. Although many applicants will be obtaining permits from the Director of Health or the Director of the Air Pollution Control Commission pursuant to Section 20-5E-7 of the Act, it will also be necessary to obtain a permit from the Chief since, as to some aspects of this Act, the Director will be the only rule-making authority. However, the Act clearly provides that permits issued by the Chief shall not regulate those aspects of a facility which are the subject of other permitting requirements.
pursuant to the Act and which need not be regulated in order for the Chief to perform his duties under the Act.\textsuperscript{129} These positive limitations reinforce the directive discussed above that all designated agencies avoid inconsistencies and duplication to the maximum extent practicable. In effect, then, the Director will be regulating only those aspects of hazardous waste activities not more properly within the jurisdiction and expertise of those agencies with designated authority under Section 20-5E-7 of the Act.\textsuperscript{130}

Section 20-5E-8 of the Act specifies that no person may construct, modify, or store, treat or dispose of any identified or listed hazardous waste without obtaining a permit from the Chief and all other permits as required by law.\textsuperscript{131} No permit is required for transporters, although numerous regulations affecting transporters may be promulgated.

2. \textit{Permit applications}

In performing his permitting duties, the Chief will prescribe a form of application.\textsuperscript{132} The Chief may require that a plan for the closure of a facility be submitted with any such permit application.\textsuperscript{133} These plans will have to be developed to comply with rules and regulations promulgated by the Director respecting closure.\textsuperscript{134}

A great deal of compromise surrounded the provisions regarding the necessity of submitting an environmental analysis with a permit application for a facility.\textsuperscript{135} No similar provision is

\textsuperscript{129} W. VA. CODE § 20-5E-8(a).
\textsuperscript{129} W. VA. CODE § 20-5E-6(c).
\textsuperscript{130} W. VA. CODE § 20-5E-8(a). Any person undertaking such activities without a permit under section eight or seven, or violating any term or condition of a permit is subject to the enforcement procedures of this article discussed at length in later text. W. VA. CODE § 20-5E-8(e).
\textsuperscript{131} W. VA. CODE § 20-5E-8(b).
\textsuperscript{132} W. VA. CODE § 20-5E-8(c).
\textsuperscript{133} W. VA. CODE § 20-5E-6(a)(10). Such plans are subject to modification upon application by the permittee to the Chief and approval thereof. W. VA. CODE § 20-5E-8(c).
\textsuperscript{134} W. VA. CODE § 20-5E-8(d). S.B. 330, Reg. Sess. (1980), as originally introduced, contained in its § 20-5E-8(c)(5) an environmental analysis requirement that would have mandated analyses of socio-economic factors, including the expected impact of the facility on property values within the immediate area and on tax revenues. The Chief would have been authorized to impose permit conditions requiring the permittee to mitigate or compensate for such impacts.
contained in RCRA. The contents of the analysis are limited to specifically delineated environmental, technical and economic factors involved in the establishment and operation of the facility.136

It is important to note that although an applicant is required to submit information on the qualifications of the owner and operator, including a description of the applicant's prior experience in hazardous waste management operations, that prior experience cannot be used to deny permit issuance.137 The Act expressly requires that a permit shall be issued if the applicant has established that the construction, modification, operation, or closure of the particular facility or activity will not violate any provisions of the Act or any of the rules and regulations promulgated by the Director thereunder.138

The requirement to submit an environmental analysis at all is limited to "major facilities," as that term may be defined by rules and regulations promulgated by the Director.139 Furthermore, it will not apply to facilities, major or not, which were "in existence"140 on November 19, 1980, the date by which all dis-

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136 W. VA. CODE § 20-5E-8(d).
137 W. VA. CODE § 20-5E-8(d)(2)(C).
138 W. VA. CODE § 20-5E-8(a).
139 "Major facility" is defined in the proposed state regulations to mean a facility which treats, stores or disposes of a quantity of 500 tons or greater of hazardous waste in a calendar year. WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES, STATE WATER RESOURCES BOARD, PROPOSED REGULATIONS GOVERNING THE STATE HAZARDOUS WASTE MANAGEMENT ACT, W. Va. Ad. Reg., Ch. 20-5E, Series VII, § 2.00(60) (1981).
140 The term "in existence" is not defined in the state Act. The meaning of this phrase will be established by the Director by rule and regulation. However, it must be contended that this term should be defined identically with any federal interpretation.

An important reference to this phrase is found in the Conference Report, House of Representatives Report No. 96-1444, accompanying S. 1156 which amended and reauthorized the Solid Waste Disposal Act, the Solid Waste Disposal Act Amendments of 1980. The discussion on page 34 of that Report, Section 10—INTERIM STATUS, states:
The conferees intend that a facility need not actually be in operation and receiving wastes to be 'in existence.' It must, however, have obtained all necessary State, local or Federal permits and clearances, and, being justified in relying on those permits, the owner or operator must have made a financial commitment which cannot be terminated, relocated, or modified without a substantial loss. The meaning of the phrase 'in existence' can best be understood by reviewing the discussion of the
posers, storer and treaters of hazardous waste had to report such activity to the federal EPA in order to qualify for interim permit status to continue operations. This date was used rather than the effective date of the Act so that no gap would be created which would exempt any new major facilities from complying with this requirement.

3. Coal mining wastes or overburden

Special consideration is given to permitting requirements with respect to coal mining wastes or overburden. Any surface coal mining and reclamation permit covering any such wastes which has been issued or approved under the Surface Coal Mining and Reclamation Act of 1980 shall be considered to be all necessary permits required to be issued under the Act "with respect to... such wastes or overburden." Wastes which are covered by such a permit are not subject to the rules and regulations promulgated under the Act. This special treatment was written to parallel Section 3005(f) of RCRA. Section 1006(c) of RCRA gives the Secretary of the Interior exclusive responsibility for carrying out any requirement of Subtitle C of RCRA with respect to such wastes for which a permit is issued or approved under the Surface Mining Control and Reclamation Act of 1977. The Secretary of the Interior is empowered and directed to promulgate such regulations as may be necessary to carry out the purpose of integrating SMCRA with RCRA. Similar authority is granted to the Director of the DNR under Section 20-5E-7(g) of the Act.

The exact meaning of this subsection is still unclear. EPA has begun, by regulation, to explain the extent of this pseudo-exemption. 40 C.F.R. Part 261 interprets this section of RCRA to exclude only that overburden which is returned to the mine

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definition of 'commenced construction' in the report of the Committee on Environment and Public Works on the Clean Air Act Amendments of 1977 (Senate Report Number 95-127). This definition of 'in existence' also applies to other uses of the phrase in the Solid Waste Disposal Act.


W. VA. CODE § 20-5E-8(f).

W. VA. CODE §§ 20-6-1 to -42.

site. Even less clear is the meaning of "coal mining wastes." It is entirely possible that this phrase will be interpreted to mean only those wastes unique to the surface coal mining process. In that case, a surface mine owner or operator would still have to obtain a permit under section seven and/or eight of the Act as to those hazardous wastes not covered by a surface mining permit or which did not qualify as coal mining wastes or overburden.

4. Public participation

Novel and extensive public participation requirements accompany the permit-issuing process. The Act requires that, before issuing a permit for a facility, the permit-issuing authority must both publish in a newspaper of general circulation in the county in which the real estate or greater portion thereof is located and broadcast over local radio stations notice of intent to issue the permit. The authority must also transmit written notice of such intent to each unit of local government having jurisdiction over the area in which the facility will be located. Notice must also be given to each state agency having any authority under state law with respect to the construction or operation of the facility.

If, within forty-five days, the permit-issuing authority receives written notice of opposition and a request for a hearing, it is required to hold an informal public hearing on whether a permit should be issued. The authority may also hold such a hearing on its own initiative. Although such hearings are to be informal, opportunity is to be provided for the presentation of both oral and written comments. These hearings are to be held


40 C.F.R. § 260.10(a)(45) (1980), defines "mining overburden returned to the mine site" to mean: "any material overlying an economic mineral deposit which is removed to gain access to that deposit and is then used for reclamation of a surface mine."

147 W. VA. CODE § 20-5E-9.


149 W. VA. CODE § 20-5E-9(b).

150 The statute does not identify the date on which this time period starts; however, it seems reasonable to conclude that this means 45 calendar days from the first day of the required publication and broadcast.
at a location convenient to the nearest population center to the proposed facility. 151

These provisions should assure that those who might be affected by any such facility will be given adequate opportunity to make their views known to the proper agency. This subsection will be especially important as it relates to questions of local opposition to the establishment of a facility. 152

F. Transition Program For Existing Facilities

Due to the time lag expected between the effective date of the Act and the promulgation of final regulations and issuance of permits by state regulatory agencies, a transition program has been provided for facilities in existence on the effective date of the Act. 153 Consequently, any such facility shall be treated as having been issued the required permits until final administrative disposition is made with respect to an application for such permits. 154

This "interim status" is conditioned upon three requirements: (1) the facility must continue to operate in compliance with the interim requirements of the federal EPA established pursuant to Section 3005 of RCRA, 155 and (2) in such a manner as will not cause or create a substantial risk of a health hazard or public nuisance or a significant adverse effect on the environment, and (3) the owner or operator must make a timely and complete application for the required permits. 156 The second of the above requirements is not a requirement for interim status under the federal program and presents an added requirement under state law.

Failure to comply with these requirements or violation of the interim standards could result in loss of interim status and

152 The public will also have the opportunity to actively participate in the rulemaking process to establish criteria for the location of facilities under § 20-5E-6(a)(1) and (4) of the Act.
thereby leave the facility without a permit. As a consequence, facility operations could be shutdown until a new permit could be issued or the enforcement action successfully appealed.

G. Confidential Information

Information obtained by any agency under the Act is available to the public unless it has been certified as confidential. The person seeking such a certification must show that the information or parts thereof are entitled to protection as trade secrets. However, such disclosure is not limited in the case of disclosure to any officer, employee or authorized representative of the state or federal government concerned with effecting the purposes of the Act.

To give meaning to this protection, the Act imposes criminal sanctions upon any person who knowingly and willfully discloses any such information. Such disclosure constitutes a misdemeanor punishable by fine and/or imprisonment.

The Act on its face appears to give only the Chief the authority to make such confidentiality certifications. However, the Act also provides that all of the rulemaking and permit-issuing authorities are given the same enforcement and inspection powers as the Chief under sections eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen of the Act. Therefore,

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167 Although the Act does not define the term "trade secrets," one may turn to the definition as contained in the state Freedom of Information statute for guidance. "Trade secrets" as there defined:

may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.

W. VA. CODE § 29B-1-4(1).

168 Resource Conservation and Recovery Act, § 3007(b)(2), 42 U.S.C. § 6927(b)(2), contains a counterpart as to those persons not subject to the provisions of 18 U.S.C § 1905 which protects trade secrets in order to subject federal contractors to sanctions for disclosure. However, the federal Act imposes a jail sentence up to one year for violation while the state Act limits sentence to not more than six months. Both authorize a fine of not more than five thousand dollars or both fine and imprisonment. S.B. 330, Reg. Sess. (1960), contained no sanctions for disclosure.

any agency granted such powers should also be able to make such confidentiality certifications regarding any information obtained by it.

H. Inspection, Monitoring and Enforcement Provisions

1. Inspections

Any rulemaking or permit-issuing authority or any authorized representative, employee or agent thereof is empowered to make periodic inspections at every permitted facility as necessary to effectively implement and enforce the Act and the regulations and permits issued thereunder. This authority extends to any place, permitted or unpermitted, where hazardous wastes are or have been generated, treated, stored, transported, or disposed of in order to ascertain compliance by any person.

However, such inspectors must comply with several limitations on their power. Inspections must be at reasonable times, upon presentation of proper credentials and be completed with reasonable promptness. After such an inspection, a report must be prepared and a copy promptly furnished to the person in charge of the inspected place.

An authorized inspector is empowered to take samples of wastes, soils, air, surface water and ground water and samples of any containers or labelings for such wastes. This sampling power is quite broad and significantly exceeds federal authority, which limits sampling to hazardous wastes only and to any containers or labeling for such wastes. However, if any such samples are taken, an inspector must, prior to leaving the premises, leave a receipt describing the sample obtained and, if requested, a portion of the sample equal in volume or weight to the part retained. A copy of any analysis must be promptly provided to the person in charge of the premises.

Inspection authorities must be given access to all records relating to hazardous waste storage, treatment or disposal which

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W. VA. CODE § 20-5E-12(b).

W. VA. CODE § 20-5E-12(a).

W. VA. CODE § 20-5E-12(b).


W. VA. CODE § 20-5E-12(d).
are in the possession of any present or former generator, storer, treater, transporter, disposer, or other handler of hazardous waste. The inspector must be either furnished with copies of such records or given such records in order to make copies.\footnote{W. VA. CODE § 20-5E-12(e).}

The authorities are also empowered to issue subpoenas and subpoenas duces tecum in connection with an investigation or inspection concerning a violation or probable violation of the Act. This power, however, is contingent upon the observation or discovery of a violation or probable violation upon inspection, investigation or other means.\footnote{S.B. 330, Reg. Sess. (1980), did not contain such a probable cause requirement.}

\section*{2. Monitoring}

Closely related to the inspection provisions of the Act are those respecting monitoring, analysis and testing.\footnote{W. VA. CODE § 20-5E-13.} The Act's provisions apply to both active and inactive sites and facilities. These provisions are triggered by a determination of the inspection or enforcement authority, "upon receipt of any information," that the presence or release of any hazardous waste at such a site or facility "may" present a substantial hazard to human health or the environment. Upon such a determination, the authority may issue an order requiring the owner or operator to conduct such "monitoring, testing, analysis and reporting with respect to such facility or site as the [authority] deems reasonable to ascertain the nature and extent of such hazard."\footnote{W. VA. CODE § 20-5E-13(a).} Because such requirements could be very costly, it must be hoped that the agencies will not issue any such order before conducting a preliminary investigation to confirm that a real problem appears to exist. It should not act simply "upon receipt of any information."

One of the most significant provisions of the Act in this regard applies in the case of inactive sites not in operation at the time of the determination of substantial hazard. In such a case, if the current owner of the site could not reasonably be expected to have actual knowledge of the presence of hazardous waste at the site and of its potential for release, an order may be issued

\footnotesize{\begin{itemize}
  \item W. VA. CODE § 20-5E-12(e).
  \item S.B. 330, Reg. Sess. (1980), did not contain such a probable cause requirement.
  \item W. VA. CODE § 20-5E-13.
  \item W. VA. CODE § 20-5E-13(a).
\end{itemize}}
to require the most recent previous owner or operator who could reasonably be expected to have such knowledge to conduct the monitoring and analysis. 170

In either case, the person to whom the order is issued has thirty days from its issuance to submit a proposal to carry out the required monitoring. An opportunity must be afforded for such persons to confer with the authority regarding the proposal. Thereafter, the person may be required to carry out the proposal or a modified version thereof. 171

In appropriate circumstances, the authority is empowered to conduct its own monitoring and testing or to authorize a state or local authority to do the same. Significantly, under these circumstances, the authority may order the owner or operator identified to reimburse the authority for the costs of these activities. However, no order for reimbursement can be issued where the authority's testing confirms the results of the testing done by the identified owner or operator. 172

The sanction for failure to comply with such orders is substantial, but must be recovered by a civil action commenced by the order-issuing authority. A civil penalty not to exceed five thousand dollars for each day of failure or refusal to comply may be imposed by the court. 173

I. Enforcement Orders, Penalties and Procedures

The Act contains a virtual "shopping bag" of potential en-

171 W. Va. Code § 20-5E-13(c). The authority may make modifications in the proposal as reasonable to ascertain the nature and extent of the hazard.
172 W. Va. Code § 20-5E-13(d). Such monitoring can only be initiated by the authority if it determines that the identified owner or operator is unable to conduct the monitoring, does it unsatisfactorily, or the authority cannot initially identify an owner or operator referred to in §§ 20-5E-13(a) or (b) of the Act. Section 20-5E-13(d)(2) of the Act should restrain any authority which might deem ordered monitoring "unsatisfactory" since the state would have to pay for essentially duplicative monitoring and testing.
173 W. Va. Code § 20-5E-13(e). Although § 20-5E-16 of the Act also imposes civil penalties for violation of any order issued pursuant to the Act, the provision of § 20-5E-13(e) should constitute the only available remedy for non-compliance with section thirteen orders. This specific penalty section should supercede any more general civil penalty provisions of section sixteen. Otherwise, the defendant will be subject to duplicative penalties which could total thirty thousand dollars per day of noncompliance.
forcement mechanisms that may be selected by the relevant enforcement authority. These range from compliance and cease-and-desist orders to civil penalties, injunctions and remedial action orders, to the initiation of criminal proceedings. It may be expected that administrative enforcement orders will be by far the most commonly used enforcement tool since they are simple and require no immediate related court action.

Although some important due process and procedural safeguards are included in the Act which are not a part of RCRA, the regulated community should bear clearly in mind that the effect of a cease-and-desist order, for instance, may not be reversed in time to avert substantial economic loss or consequences. A discussion of appeals procedures follows a review of specific enforcement mechanisms.

1. Enforcement orders

If the enforcement authority discovers or learns of a violation of the Act, any permit, order or regulation issued under the Act, it may issue an enforcement order stating with reasonable specificity the nature of the violation. The order may require compliance immediately or within a specific time. Such an order may include any or all of the following: orders suspending, revoking or modifying permits, orders requiring remedial action or cease-and-desist orders.

A special, expedited review procedure is available, but only in connection with cease-and-desist orders. Any person issued a cease-and-desist order may file a notice of request for reconsideration with the enforcement authority within seven days from its issuance, not from its receipt. The authority must then conduct a hearing within ten days of the filing of such a notice. However, the filing of notice will not stay or suspend the execu-

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174 S.B. 330, Reg. Sess. (1980) had contained a thirty-day notice of violation requirement. However, the 1980 amendments to RCRA eliminated this thirty-day period, and it was likewise eliminated from H.B. 1479, Reg. Sess. (1981).

175 Resource Conservation and Recovery Act, § 3005(d), 42 U.S.C. § 6925(d), would, if literally enforced, require the Administrator to revoke a permit for non-compliance with standards applicable to owners and operators of hazardous waste facilities or with the permitting requirements. The EPA has recognized the problem of such literal application and is choosing to interpret “shall” as “may.”


177 W. Va. Code § 20-5E-14, does not require a public hearing.
tion or enforcement of the cease-and-desist order.\footnote{W. VA. CODE § 20-5E-14(b). This provision is contained in the Act over industry objection. Resource Conservation and Recovery Act, § 3008(b), 42 U.S.C. § 6928(b), implies that compliance orders may be so suspended since an order does not become final if the person named therein requests a public hearing regarding such an order.} Under such circumstances, even the delay of a few days in obtaining such a reconsideration hearing could result in severe consequences, especially to small or marginal businesses.\footnote{An analogy might be drawn here with provisions of the Surface Mining and Reclamation Act before amendments limited the circumstances under which a cease-and-desist order could be issued.} Because of this potential, the recipient of a cease-and-desist order issued by the Chief may well wish to take simultaneous advantage of the appeal procedures afforded by Section 19 of the Act.

Section 19 allows any person aggrieved or adversely affected by an order of the Chief to appeal it to the Water Resources Board. If it appears to that Board that an unjust hardship to the appellant will result if the order is not stayed or suspended pending determination of appeal, the Chief or the Board may grant a suspension of the order and fix its terms.\footnote{W. VA. CODE § 20-5E-19(a) and (b).}

A more specialized section is provided in the Act to deal with circumstances in which the handling, storage, treatment, or disposal of any hazardous waste "may" present an imminent and substantial endangerment to public health, safety, or the environment.\footnote{W. VA. CODE § 20-5E-17(b). The same argument applies to this section as applies to section thirteen, i.e., that the enforcement authority may not proceed under both section sixteen and section seventeen in the case of violation of an} In such cases, the enforcement authority may institute a court action to obtain a restraining order or other relief as may be necessary or issue its own orders as may be necessary to protect public health and the environment.

It is important to realize that this action does not require, as a prerequisite to its invocation, any violation of the Act, regulations, or any permit. Action may be taken even if the activity or facility is otherwise completely lawful. Any person who willfully violates, fails, or refuses to comply with any order issued under subsection (a) may be fined up to five thousand dollars for each day such violation or failure continues. This fine must be recovered by court action.\footnote{W. VA. CODE § 20-5E-19(a) and (b).}
2. Civil penalties and injunctive relief

The general civil enforcement remedies of the Act are broad and substantial. Any person who violates any provision of the Act, any permit or any rule, regulation or order issued pursuant to the Act is subject to a civil penalty of up to twenty-five thousand dollars for each day of violation. This penalty must be recovered in a civil action. Even though a state, such as West Virginia, achieves a final authorization from EPA to carry out a hazardous waste program under Section 3006 of RCRA, the EPA Administrator will nonetheless retain concurrent enforcement authority under Section 3008 and 7003 of RCRA. Section 7003 of RCRA is the federal counterpart of Section 20-5E-17 of the state Act dealing with imminent and substantial hazards.

If the enforcement authority seeks an injunction pursuant to the Act, the state is relieved of a number of traditional common law burdens that would otherwise apply. It is unnecessary for the authority to post bond, to allege or prove at any stage of the proceeding that irreparable damage will occur if the injunction is not issued, or to show that the remedy at law is inadequate. Furthermore, penalty or injunction may be sought and granted notwithstanding the fact that all administrative remedies available have not been exhausted. This could result in the issuance of many pro forma injunctions against alleged violators which

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order issued pursuant to the Act. The specified penalty is the only one which should be sought in connection with such specific violations. See note 173 supra.

183 W. VA. CODE § 20-5E-16.
184 W. VA. CODE § 20-5E-16. Resource Conservation and Recovery Act, § 3008, 42 U.S.C. § 6928, refers to both penalties recovered by civil action and administratively assessed penalties that may be included in any compliance order issued under that section. The amount of such a penalty is limited only by the test that it must "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." The state Act does not permit administrative assessment of civil penalties.
185 § 3008(a)(2), 42 U.S.C. § 6928(a)(2), provides that:
In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under Section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.
186 If the Administrator intends to commence action under Resource Conservation and Recovery Act, § 7003, 42 U.S.C. § 6973, by either suit or order, notice must be provided to the affected State of any such suit or action.
would carry the additional sanction of contempt of court for failure to comply with any such court order.

Furthermore, in such an action the state, or any agency of the state which prevails, may be awarded costs and reasonable attorney's fees. If the state or agency does not prevail, the defendant is not similarly entitled.

3. **Criminal penalties**

The criminal penalties provisions of the Act were substantially rewritten by the House Judiciary Committee from their form as introduced in H.B. 1479. However, many of the substantive provisions are the same as those found in the federal Act, albeit in different form.

The criminal penalties section is much narrower than any of the civil remedy sections and is meant to be used and interpreted strictly. To constitute criminal conduct, any violation must be committed knowingly; the sanctions generally apply only to conduct affecting material requirements of the Act.

Criminal conduct falls into three basic categories of offense. It is a felony to knowingly (1) transport any identified or listed hazardous waste to an unpermitted hazardous waste facility, (2) treat, store or dispose of any such hazardous waste without having obtained the required permit, or (3) treat, store or dispose of any such hazardous waste in knowing violation of a material condition or requirement of such a permit. Upon conviction, a fine of up to fifty thousand dollars for each day of violation will be imposed. In addition, imprisonment in the penitentiary for not less than one nor more than two years may result. In the discretion of the court, one might alternatively be confined in jail not more than one year in addition to any fine.

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167 W. VA. CODE § 20-5E-16.
168 The criminal provisions of S.B. 330, Reg. Sess. (1980), were broad and essentially covered the same infractions that would trigger civil penalties except that the violation had to be "knowing." Minimum penalties were also mandated. These provisions were strongly opposed and were withdrawn from H.B. 1479, Reg. Sess. (1981), before introduction.
169 W. VA. CODE § 20-5E-15(a). The imprisonment section was rewritten by the House Judiciary Committee to prevent confinement in a county jail for any period exceeding one year.
It is a misdemeanor to (1) knowingly make any false material statement or representation in any document filed, maintained or used for purposes of compliance with the Act, or (2) to knowingly destroy, alter or conceal any record required to be maintained by regulations promulgated pursuant to the Act. This latter prohibition applies to any person who generates, stores, treats, transports, disposes of, or otherwise handles any identified or listed hazardous waste, whether such activity took place before or after the effective date of the Act. It is, therefore, important that any persons who used to be involved in hazardous waste activities also carefully preserve records until the rules and regulations are in place regarding recordkeeping requirements.

Upon conviction of such a misdemeanor, the defendant will be fined not more than twenty-five thousand dollars. Because this particular penalty is not authorized per day of violation, it would appear that such a fine could only be imposed on a per offense basis.190

Subsequent violations of Sections 20-5E-15(a) or (b) of the Act are punishable as felonies and will result in a fine of up to fifty thousand dollars per day of violation and/or confinement in the penitentiary not less than one nor more than three years.191

The most controversial criminal provision found in the Act is known as the “knowing endangerment” offense in the context of RCRA.192 The elements of such an offense as included in H.B. 1479 were originally identical to those in Section 3008 of RCRA. However, much of the language explaining and defining the elements of such an offense was deleted by the House Judiciary Committee.

190 W. VA. CODE § 20-5D-15(b). This section contains no imprisonment penalty, unlike RCRA § 3008(d)(4), 42 U.S.C. § 6928(d)(4), of the federal Act which authorizes confinement not to exceed one year in such cases.

191 W. VA. CODE § 20-5E-15(c). This minimum imprisonment sentence provision does not exist in RCRA, nor is the maximum sentence as long. § 3008(d)(4), 42 U.S.C. § 6928(d)(4), limits a sentence for subsequent offenses to no more than two years. Section 20-5E-15(c) and (d) of the Act are the only two subsections in the state Act which impose minimum penalty requirements. No such minimum penalty provisions exist in RCRA. The Act provisions resulted from House Judiciary Committee amendments to H.B. 1479, Reg. Sess. (1981). Minimum penalty provisions were consistently opposed by industry and supported by the administrative agencies.

192 W. VA. CODE § 20-5E-15(d).
The knowing endangerment provisions of RCRA identify two "tiers" of offense: (1) unjustified and inexcusable disregard for human life, or (2) extreme indifference for human life. The "tier" of misconduct manifested determines the potential penalty.\textsuperscript{193}

The state Act provision states that:

Any person who knowingly transports, treats, stores or disposes of any hazardous waste identified or listed pursuant to this article in violation of subsection (a) of this section, or having applied for a permit pursuant to sections seven and eight of this article, and knowingly either (1) fails to include in a permit application any material information required pursuant to this article, or rules and regulations promulgated hereunder, or (2) fails to comply with applicable interim status requirements as provided in section ten of this article and who thereby exhibits an unjustified and inexcusable disregard for human life or the safety of others and he thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two hundred fifty thousand dollars [$250,000] or imprisoned not less than one year nor more than four years or both such fine and imprisonment.\textsuperscript{194}

Needless to say, because of the knowing and conjunctive elements of this crime, it is not that easy to commit. Indeed, it is narrowly drawn to apply only in instances of the most egregious misconduct. Congress emphasized this intent in adding this new crime to RCRA in 1980 by stating in its Conference Report that:

the purpose of this new section is to provide enhanced felony penalties for certain life-threatening conduct. At the same time, the new offense is drafted in a way intended to assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter.\textsuperscript{195}

This section is intended to reach persons such as the "midnight dumper" who intentionally spreads highly toxic hazardous wastes along the side of a public road, or pours such wastes down a city sewer system. However, it also is intended to reach

\textsuperscript{193} These two "tiers" do not exist in the state Act as the result of an amendment by the House Judiciary Committee.

\textsuperscript{194} W. VA. CODE § 20-5E-15(d) (emphasis added).

those who flagrantly fail to comply with the requirements of law and thereby knowingly endanger others without any justification.

Congress was so concerned with this particular crime that it took great pains in 1980 to draft what are now two lengthy subsections of Section 3008 of RCRA. This becomes most important when one compares it to Section 20-5E-15(d) and (e) of the Act. As previously noted, the Act provisions were substantially revised by the House Judiciary Committee before passage. The most important change was the deletion of an entire subsection which contained special rules to be applied in connection with the crime of knowing endangerment. These special rules, included in RCRA, attempt to delineate the required state of mind, evidentiary rules and general and affirmative defenses to the crime. They also make it clear that the courts are free to develop concepts of justification and excuse for such an offense.\footnote{Because of the importance of these rules, Resource Conservation and Recovery Act, § 3008(f), 42 U.S.C. § 6928(f) is set forth in pertinent part as follows:}

\footnote{Special rules.—For the purposes of subsection (e) of this section—
(1) A person’s state of mind is knowing with respect to—
\hspace{1em} (A) his conduct, if he is aware of the nature of his conduct;
\hspace{1em} (B) an existing circumstance, if he is aware or believes that the circumstance exists; or
\hspace{1em} (C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—
\hspace{1em} (A) the person is responsible only for actual awareness or actual belief that he possessed; and
\hspace{1em} (B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

\textit{Provided}, That in proving the defendant’s possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—
\hspace{1em} (A) an occupation, a business, or a profession; or
\hspace{1em} (B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such}
The deletion of these special rules from the Act should not be thought to render the special rules meaningless. The special rules as they appear in RCRA may nevertheless be instructive to a court in interpreting the elements of this crime even if they would not be controlling authority.

Also significant is the fact that, under the state Act, penalties for the crime of knowing endangerment are the same for any person convicted of the crime. RCRA, however, imposes a higher fine of up to one million dollars for a defendant that is an "organization." This discrimination was eliminated by House Judiciary Committee amendment.

4. Citizen enforcement, intervention and petitions for rulemaking

State and federal enforcement agencies are not the only entities with statutory power to commence civil enforcement actions against alleged violators. The Act authorizes "any person" to commence a civil action on his own behalf against any person alleged to be in violation of the state Act or any condition of a permit issued or rules and regulations promulgated under the Act. It does not, however, apply to violations of orders issued pursuant to the Act. Any person may also commence a civil action against the appropriate authority where there is an alleged other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

Resource Conservation and Recovery Act, § 3008(e)(2)(B), 42 U.S.C. § 6928(e)(2)(B), and § 3008(f)(5), 42 U.S.C. § 6928(f)(5), define the term "organization" to mean "a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons."

See U.S. CONST. amend V and XIV; W. VA. CONST., art III, §§ 5, 10 & 14.

W. VA. CODE § 20-5E-18(a).
failure of the authority to perform any nondiscretionary duty or act.\textsuperscript{200}

Actions against alleged violators cannot be commenced prior to sixty days after the plaintiff has given notice to the appropriate enforcement, permit-issuing or rule-making authority and to the person against whom the action will be brought. No action can be commenced if the state has commenced and is diligently prosecuting a civil or criminal action under the Act for the same conduct. However, a civil action may commence immediately upon notification in a case against a state authority for failure to perform a nondiscretionary duty or act.

Any enforcement, permit-issuing, or rulemaking authority may intervene as a matter of right in any such citizen suit.\textsuperscript{201} Any person may intervene as a matter of right in any civil action or administrative action instituted under the Act, but this right does not extend to involvement in the prosecution of criminal actions.\textsuperscript{202}

Two essentially redundant provisions of the Act preserve the rights of any person or class of persons under statute or common law.\textsuperscript{203} Specific treatment, however, is given to preserving the right of a person to maintain a nuisance action or seek damages if otherwise entitled by law, as if the Act were not enacted.\textsuperscript{204}

In an action brought under this section of the Act the court may award costs, including reasonable attorney's fees and expert witnesses' fees, to any party whenever the court determines such award to be appropriate.\textsuperscript{205} This is, however, not limited

\textsuperscript{200} W. VA. CODE § 20-5E-18(b).
\textsuperscript{201} W. VA. CODE § 20-5E-18(f).
\textsuperscript{202} W. VA. CODE § 20-5E-18(g). Resource Conservation and Recovery Act, § 7002(b)(2), 42 U.S.C. § 6972(b)(2), seems to suggest that any person may intervene as a matter of right even in criminal actions.
\textsuperscript{203} W. VA. CODE §§ 20-5E-18(d) and (h). The latter of these subsections was added by amendment by the House Judiciary Committee. It is interesting to note that S.B. 330, Reg. Sess. (1980), actually contained a provision that made noncompliance prima facie evidence of a public nuisance. It also contained a requirement that a violator who contaminated the water supply of an owner of real property would have to replace that water supply. Both provisions were eliminated in H.B. 1479, Reg. Sess. (1981).
\textsuperscript{204} W. VA. CODE § 20-5E-18(h).
\textsuperscript{205} W. VA. CODE § 20-5E-18(e).
to awards to the prevailing party; so, it is at least conceivable that a defendant, even if exonerated, could be required to pay the costs of litigation for one or more other parties if the court found it appropriate.

As a means of providing a continuous mechanism of access to rulemaking authorities regarding regulatory issues, the Act allows any person the opportunity to submit a petition for rulemaking to the appropriate authority. The authority may then either commence rulemaking activities or refuse to do so. A refusal must be set forth in writing with substantial reasons for refusing.

J. Appeal Procedures

The appeals procedures involving actions of the Director of Health and the Director of the Air Pollution Control Commission were considered earlier in this article. A specific appeal procedure is also provided respecting actions of the Chief. In such cases, the Water Resources Board serves as the appellate body. The Board is empowered, after hearing and consideration, to (1) enter an order affirming, modifying or vacating the order of the Chief, (2) enter an order such as the Chief should have ordered, (3) enter an order approving or modifying the terms and conditions of any permit issued, or (4) enter an order taking such action as the Chief should have taken.

Appeals may only be brought by a person aggrieved or adversely affected by an action of the Chief. Also, only those persons affected by the activity at issue may by petition intervene in such appeals. Intervention must be with the consent of the Board and upon such terms and conditions as it may prescribe.

The appeals procedure itself requires that an appellant file a

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204 W. VA. CODE § 20-5E-18(c).
207 See Notes 126-27 supra and accompanying text.
208 W. VA. CODE § 20-5E-19.
209 W. VA. CODE § 20-5E-19(c). This provision appears to conflict with § 20-5E-18(g) of the Act which provides that any person may intervene as a matter of right in any civil action or administrative action instituted under the Act. They could, however, be reconciled if an appeal of an action of the chief is recognized not to be an "administrative action instituted" under the Act, but rather, an intermediate step in the appeals process, in which context reasonable limitations could apply.
notice of appeal on the Board's form within thirty days after the
date upon which the appellant received the copy of the permit
or order at issue. A copy of the notice of appeal must then be
filed by the Board with the Chief within three days after the ap-
peal is filed. The Chief, within seven days, must prepare and
certify a complete record of the issue to the Board. A de novo
hearing must be held within twenty days after the Board
receives the notice of appeal unless there is a postponement or
continuance.

Here, as with requests for reconsideration of cease-and-desist
orders, the filing of a notice of appeal does not automatically
stay or suspend the execution of the appealed order or action.
However, upon application, the Board may determine that an un-
just hardship will result and may grant a suspension of such an
order and fix its terms pending determination of the appeal.

The hearing and the administrative procedures in connection
with and following the hearing are governed by the state Ad-
ministrative Procedures Act. Certain other procedural re-
quirements are also applicable: (1) all appeal hearings are held
in Charleston, West Virginia, unless the Board directs other-
wise; (2) all testimony of such hearings must be recorded and
transcribed; (3) such hearings are to be conducted by a quorum
of the Board unless the parties agree by stipulation to take evi-
dence before a Board hearing examiner. Any member of the
Board or the secretary of the Board may issue subpoenas and
subpoenas duces tecum in connection with such hearings.

The Board's final order following an appeal must be accom-
panied by findings of fact and conclusions of law. A notice must
be served with the copy of the final order to all parties advising

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210 The statutory language does not impose any such time limit on appeals
protesting the failure or refusal of the chief to act within a reasonable time on an
application for a permit. Presumably, one so aggrieved could appeal during any

211 W. VA. CODE § 20-5E-19(b).
212 W. VA. CODE § 20-5E-19(c).
213 W. VA. CODE § 20-5E-19(d). The Board can postpone or continue any hear-
ing on its own motion or upon application by any party for good cause shown.
214 W. VA. CODE § 29-5E-19(b). There is no comparable federal provision.
215 W. VA. CODE §§ 29A-5-1 to -5.
216 W. VA. CODE §§ 20-5E-19(d) and (e).
217 W. VA. CODE § 20-5E-19(h).
them of their right to judicial review. The order is final unless vacated or modified upon judicial review.\textsuperscript{118}

K. Significant Real Estate Implications—Disclosures in Deeds and Leases

The new statute establishes at least two important disclosure requirements involving real estate transactions.\textsuperscript{219} The first of these important disclosure requirements relates to a grantor or lessor who (1) owned or had an interest in the real estate at the time it was used for the purpose of treatment, storage, or disposal of hazardous waste, or (2) has actual knowledge of such use at anytime prior to his ownership. Such grantor or lessor must disclose in a deed, lease, or other instrument of conveyance the fact that the property was used for the storage, treatment, or disposal of hazardous waste. It should be emphasized that disclosure must be contained within the deed, lease, or other instrument involved in the conveyance.

The second important disclosure obligation requires the grantee or lessee to disclose in writing, presumably to the grantor, at the time of conveyance or lease or within thirty days prior thereto his intent to use the real estate for the purpose of storing, treating, or disposing of hazardous waste. The statute sets out specific information which must be included within any such disclosure. There does not appear to be any requirement that this notice be included within the deed or lease itself. This provision speaks in terms of the intention of the grantee or lessee at the time of conveyance or within thirty days immediately prior thereto. There does not appear to be any ongoing

\textsuperscript{118} W. VA. CODE § 20-5E-19(i).

\textsuperscript{219} W. VA. CODE § 20-5E-20. This section was added to the Act by the House Judiciary Committee. Although H.B. 1479, Reg. Sess. (1981), as introduced contained no such provisions, it was contemplated that some form of disclosure requirement would be developed through rulemaking, as with the federal program. S.B. 330, Reg. Sess. (1980), contained a provision which would have required all of the owners of land used as a hazardous waste facility to execute and record a restrictive covenant that would have prohibited building, earthmoving, or mineral recovery on any such land without the authorization of the Chief.

At that time, industry representatives urged that such a requirement be limited to in-ground disposal facilities. H.B. 1479 was, however, amended by the House Judiciary Committee without any prior discussion as to the limits or necessity for such disclosure requirements. As a result, this disclosure requirement applies even to the storage of hazardous waste which has no permanent consequences to real property.
obligation of the grantee or lessee to notify the grantor of this intention after the time of conveyance or lease.

The definitions of the terms "hazardous waste," "disposal," "storage" and "treatment" are critical in applying this section. Some confusion is created on first reading in trying to determine what constitutes a hazardous waste for purposes of this disclosure requirement. This confusion is created by the fact that this section refers to all hazardous wastes. Most other parts of the Act relate only to those hazardous wastes which are identified or listed by the Director. Even so, the Director's authority to promulgate rules and regulations seems to indicate that it is only those hazardous wastes identified pursuant to regulation which are subject to the provisions of this Act.

Specifically, the Act empowers the Director to promulgate "[r]ules and regulations establishing criteria for identifying the characteristics of hazardous waste, identifying the characteristics of hazardous waste and listing particular hazardous wastes which are subject to the provisions of this article. . . ."221

The Act does not specifically discuss the significance of failure to provide such disclosure. For example, there is no provision indicating that the conveyance itself would thereby be defective. However, as discussed above, the Act does provide for civil penalties in the case of violations of "any provision of this article."222

L. Relationship of the Act to Other State Acts

A special provision has been included in the Act in an attempt to clarify the relationship of the Hazardous Waste Act to other state acts.223 This special provision states the legislature's

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220 W. VA. CODE § 20-5E-3.
221 W. VA. CODE § 20-5E-6(a)(2) (emphasis added).

It should be noted that on July 8, 1981, the Director filed emergency regulations, effective July 10, 1981, which defined "hazardous waste" for purposes of §§ 20-5E-5(e) and (f), -12, -13, -17 and -20 of the Act. These regulations defined "hazardous waste" for purposes of the disclosure requirement as those wastes identified or listed by EPA in 40 C.F.R. § 261.3 (1980), and applying only to those persons who would be required to have a permit for such an activity. The regulatory exclusions from the permitting requirement listed in 40 C.F.R. § 122.21 (1980) were also incorporated.

222 W. VA. CODE § 20-5E-16.
223 W. VA. CODE § 20-5E-23.
intent that the act supplement existing law, and not repeal, either expressly or by implication, any other code provisions. Nonetheless, in cases where it is impossible to reconcile other provisions with the Act, the provisions of the Act are to control.

Furthermore, no duplicative enforcement proceedings may be commenced under some other statute with respect to the same event unless "such subsequent proceeding involves the violation of a permit or permitting requirement of such other article." However, the same conduct which violates the Act may easily violate a permit issued under another act, as where a non-hazardous waste water treatment facility experiences a toxic spill due to negligent operation of a nearby facility owned by the same permittee. So, the potential for duplicate penalties for the same conduct is not eliminated by this provision although it is somewhat circumscribed.

M. The Hazardous Waste Management Fund

A rather unique funding mechanism exists in the Act to defray the costs of administering this program. The constitution requires that the net proceeds of all fines, penalties and bond forfeitures be appropriated to the School Fund. However, the Act defines net proceeds as those funds remaining after deducting the amount appropriated by the legislature for defraying the cost of administering the Act. All permit application fees are to be paid into the state treasury into a special Hazardous Waste Management Fund. The legislature must first take into account the amount in that Fund when making appropriations prior to deducting any sums needed from the fines, penalties and forfeitures collected.

Although this funding mechanism may not render the program financially self-sufficient, it can be anticipated that it should supply a respectable pool of funds to defray the administrative costs of the hazardous waste management program. In any case, before and upon full authorization of the state program by EPA, West Virginia will continue to be eligible for significant federal funds for the same purpose.

235 W. VA. Const., art. XII, § 5.
N. Preemption of Local Authority

The Act contains no expressed provisions preempting law, actions, ordinances, or regulations of county, municipal, or other political subdivisions, even though such a provision was included in the Act as introduced in the Regular Session of the 1981 Legislature. The Act does establish a comprehensive program for the management of hazardous wastes in the state, raising the question whether the Act, by implication, preempts local authority. In examining this question we will first consider the general preemption rule, then turn to West Virginia statutes and case law and finally consider various state decisions that have dealt extensively with this topic.

The general rule is that a local ordinance in conflict with state legislation must yield to that state legislation. It is fundamental that municipal ordinances are inferior in status and subordinate to the laws of the state. "In any conflict between an ordinance and a statute the latter must prevail, unless under the statutes or law of the state the ordinance plainly and specifically is given predominance in a particular instance or as to a particular subject matter."[229]

The test to determine the validity of a zoning regulation and whether the state has preempted the right of the municipality to legislate in a particular area is that:

[M]unicipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of state law or are repugnant to the general policy of the state. . . . [I]n determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.[230]

In other words:

Where the state legislation is such as to show an intention to permit the land use or to require that the activity be carried

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227 H.B. 1479, Reg. Sess. (1981). The provisions relating to express preemption were deleted by amendments made by the House Judiciary Committee.
on in furtherance of the welfare of the general public, the local legislators cannot prohibit it by means of a zoning ordinance. . . .

[T]he broad powers conferred on municipalities do not extend to matters inherently in need of uniform treatment or to matters of general public interest and applicability which necessarily require an exclusive state policy.\(^{231}\)

This concept is further extended to waste:

Landfill operations and other operations for the disposal of solid waste or sludge have been held to be an activity so fully affected with the public interest and related to the health, safety, and welfare of regional interests that they cannot be restricted by local ordinances. . . . [L]ocal regulations may not result in excluding what the state has permitted.\(^{232}\)

Even though an expressed preemption provision is not included in the Act, an examination of the current West Virginia law on the preemptory power of state law over local rules and ordinances, and a discussion of the methods by which other states have handled similar situations suggests that the Act, as adopted, may nevertheless preempt local zoning laws. A majority of the courts follow the "general principle that municipalities may only exercise powers not in conflict with general law, unless the power to do so is plainly and specifically granted."\(^{233}\)

In 1936, the state of West Virginia adopted an amendment to the State Constitution known as the Municipal Home Rule Amendment.\(^{234}\) Under the provisions of the amendment, each municipal corporation of more than 2,000 citizens has:

the power and authority to frame, adopt, and amend their charter . . . through their local governing body, to pass all laws and ordinances relating to their own municipal affairs, except to the extent that any such law or ordinance so adopted is inconsistent or in conflict with the constitution or the general law of the state.\(^{235}\)

The West Virginia Supreme Court of Appeals interpreted the Home Rule Amendment to mean that municipalities may only

\(^{231}\) Rathkoff, supra note 228, at § 31.01.

\(^{232}\) Id.

\(^{233}\) Brackman's Inc. v. City of Huntington, 126 W. Va. 21, 24, 27 S.E.2d 71, 73 (1943).

\(^{234}\) W. VA. CONST., art. VI, § 39(a).

exercise powers granted to them by the legislature and further
held that "[a]ttached to every statute, every charter, every ordi-
nance or resolution affecting, or adopted by, a municipality, is
the implied condition that the same must yield to the predomi-
nant power of the state, when that power has been exercised."236

Considering this interpretation, the preemption question is two-
fold: (1) whether the Act qualifies as a general law, and (2) if so,
whether the Act plainly and specifically allows municipalities to
pass a zoning ordinance that would conflict with the permit
issued under the Act. These are the standards set forth in
Brackman's, Inc. v. City of Huntington.

Twenty years after the Brackman's Inc. decision, the court
renewed its position on the supremacy of state law. In State ex
rel. Plymale v. City of Huntington,237 the court stated, "[I]t is
clearly the weight of authority, and it is expressly provided in
our Constitution, that in the event of an inconsistency or conflict
between a charter provision and a general law, the latter will
prevail." The Supreme Court also provided a definition for a
general law. It was the court's view that a general law is one
that "operates uniformly upon and is applicable to, without ex-
ception, all cities in the State."238

The Act would qualify under this definition, since it is equal-
ly applicable to localities throughout the state. Furthermore, the
preamble of the Act states that the legislation represents a de-
claration of state policy.239

If the Act would be interpreted as a general law, under the
court's definition, plain and specific language must appear with-
in the Act in order to give a local ordinance predominance over
the state Act.240 The Act, dealing with conflicting provisions,
provides, however, that, "[i]n the event that some provision
herein is inconsistent with any other provisions of the Code,
making it impossible to comply with both, the provisions of this

236 Brackman's Inc. v. City of Huntington, 126 W. Va. at 35, 27 S.E.2d at 78.
237 Id. at 733, 131 S.E.2d at 164. See also State ex rel. Taxpayer's Protective
which states, "a statute is a valid general law when it operates uniformly on all
persons and things of a class as long as such classification is natural, reasonable
and appropriate to the object sought to be accomplished."
238 W. VA. CODE § 20-5E-2.
240 Brackman's, Inc. v. City of Huntington, 126 W. Va. at 24, 27 S.E.2d at 73.
article shall control. . . .” Assuming, arguendo, that local municipalities utilized their zoning powers to deny waste disposal siting within their corporate limits and that an entity had obtained a permit from the state, under Section 20-5E-8 of the Act to construct such a site, an inconsistency such as that envisioned by Section 20-5E-23 would occur. Under that section, the state law would have to prevail.

The merits of this result are reinforced by the position taken by the West Virginia Division of Water Resources Ground Water/Hazardous Waste Section. As stated in its State Solid Waste Management Plan of 1981, “[t]he process of site selection should not be hampered by blanket local vetos. No community should be able to remove itself from consideration on political grounds alone.”

The majority of the states follow the general preemption rule found in Plymale and Brackman’s, Inc. One can find this rule applied, for example, in Kentucky and Michigan. A Kentucky case, Boyle v. Campbell restated the principle that “a municipal ordinance is invalid if it conflicts with a state statute.” Boyle also held that even where the state had merely “occupied the field of prohibitory legislation on a particular subject, a municipality lacks authority to legislate with respect thereto.”

A Michigan decision, Oppenhuizen v. City of Zeeland, outlines an excellent example of the logic most states use in examining preemption:

First, where the state law expressly provides that the state’s authority to regulate in a specific area of the law is to be exclusive, there is no doubt that municipal regulation is preempted. . . . Second, preemption of a field of regulation may be implied upon an examination of legislative history. . . . Third, the pervasive- ness of the state regulatory scheme may support a finding of preemption. . . . Fourth, the nature of the required subject matter may demand exclusive state regulation to achieve the uni-

244 240 S.W.2d at 267.
formity necessary to serve the state's purpose or interest.\textsuperscript{43}

In fulfilling any one of these criteria, preemption may be found.

The application of these criteria to the Act suggests that there may be an implied preemption of local hazardous waste siting ordinances even though the Act is silent on this topic. Since there is no express preemption in the Act and since there is no written West Virginia legislative history to explain why the provision was deleted, one must turn to the third and fourth criteria as set forth in \textit{Oppenhuizen}—the pervasiveness of the state regulatory scheme or the nature of the subject matter involved—to determine if implied preemption can be established. Cases applying these criteria to the siting of waste facilities are, at this time, nonexistent in West Virginia; the direction this state's courts will follow in settling this issue is uncertain. Nevertheless, one can look to other jurisdictions for guidance in the application of the pervasiveness and subject matter principles and then apply such principles to the Act.

Turning to the specific topic of hazardous waste and applying general principles of preemption to this topic, it is evident that state governments have begun to recognize that the proper disposition of hazardous waste is a matter of state-wide importance. In response to this recognition, numerous state legislatures have enacted statutes which generally require that the entities proposing to establish waste disposal facilities obtain a license or permit from a state agency created for the purpose of overseeing waste disposal operations.

In \textit{O'Connor v. Rockford},\textsuperscript{44} an Illinois case, the requirement of state approval inherent in a statute of this type was deemed to have a preemptive effect upon the field of waste disposal facility site location. This obviated the need for local approval of a particular site and thus rendered it unnecessary for a governmental entity to comply with local zoning regulations in connection with the establishment of a facility on that site.\textsuperscript{45} The court noted that the statute authorized the agency to promulgate regulations prescribing standards for the location, design, construction, operation and maintenance of waste disposal

\textsuperscript{44} 52 Ill. 2d 360, 288 N.E.2d 432 (1972).
\textsuperscript{45} See also Annot., 59 A.L.R.3d 1244 (1975).
facilities. The court opined that if an entity which had already obtained a permit under the statute was, nevertheless, subject to the county zoning ordinance, then such an ordinance would contravene the clearly expressed legislative intent that such operations be conducted only upon issuance of a permit from the EPA. The Illinois General Assembly had expressly declared the need for "a unified state-wide program" and had provided the means for issuance of appropriate permits under regulations promulgated after taking into account the possibility of the type of conflict involved here.

Another decision following this same rationale arose from a similar set of facts, where a corporation had obtained a permit from the state department of environmental protection to dump and dispose of waste contrary to a town's regulation banning disposal within its limits. In *Town of Colchester v. Reduction Associates, Inc.*, the Connecticut Court of Common Pleas held that the town's zoning regulation conflicted with the general law of the state and was void because the Connecticut General Assembly had enacted a comprehensive, state-wide solid waste management program to be administered by the commissioner of environmental protection. The court recognized that solid waste management was a problem of state-wide magnitude and a field exclusively for state regulation.

In both of the preceding decisions, the states involved functioned under statutes identical or similar to the Act. The Act states that "[t]he problem of managing hazardous waste has become a matter of statewide concern," and the Act also provides for the promulgation of rules and regulations by a director, as in *O'Connor*, and goes even further by declaring that one of the purposes of the act is "[t]o assume regulatory primacy through Subtitle C of the federal

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See W. VA. CODE § 20-5E-2, which also establishes "a program of regulation over the storage, transportation, treatment and disposal of hazardous waste," and W. VA. CODE § 20-5E-6(a)(4)(D), empowering the director to promulgate rules and regulations respecting "the location, design and construction of such hazardous waste treatment, disposal or storage facilities."

O'Connor v. Rockford, 42 Ill. 2d at 367-68, 288 N.E.2d at 436.

*Id.*


383 A.2d at 1336.

W. VA. CODE § 20-5E-2(a)(5).

W. VA. CODE § 20-5E-6.
Solid Waste Disposal Act..." thus establishing facts which conclusively persuaded the Illinois and Connecticut courts, in their respective decisions, that implied preemption must follow.

There are various other examples of state preemption of local siting authority. In a Louisiana case, Rollins Environmental Services v. Iberville Parish, a parish sought to ban local disposal of hazardous waste through an ordinance enacted by a police jury, a board of officers in a parish corresponding to county commissioners in other states. The court reasoned that the regulation of hazardous waste is a matter of broad national and state concern and that if Iberville Parish was permitted to prohibit the disposal of hazardous waste within its borders there would be similar ordinances in every parish, thus contradicting the state policy of uniformity.

The court proceeded to trace the history of hazardous waste standards, beginning with the congressional policy of a uniform state-wide regulatory scheme to compliment the federal regulations, and concluded that the ordinances of the parish of Iberville could not contravene this plan of uniformity. In addition, upon looking at the parish's ordinance and its definition of hazardous waste, the court found it apparent that substances the state had chosen to regulate were the same substances prohibited in the ordinance, and thus held there was state preemption due simply to the parish's legislation on the same subject matter.

There are other examples of state preemption of local waste siting authority, all based on different theories. A Pennsylvania decision contained the clear implication that, given the existence of preemptive state legislation in the field of waste disposal, a municipality may not invoke its zoning regulations to preclude the dumping of waste by a governmental entity licensed to do so.

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256 371 So.2d 1127 (La. 1979).
257 Id. at 1132.
259 371 So.2d at 1133.
260 West Virginia's definition of "hazardous waste" in the Hazardous Waste Management Act is identical to Louisiana's. Compare W. Va. Code § 20-5E-3(6), with 30 LA. REV. STAT. ANN. § 1102(3) (West).
261 Rollins Environmental Service v. Iberville Parish, 371 So.2d at 1134.
by the appropriate state agency.262

The Minnesota Supreme Court applied a balancing test finding that, while an alleged threat of pollution involved a public interest consideration for the city, approval by the state pollution control agency, coupled with the agency's duty to regulate the operation of a landfill, adequately safeguarded the public interest involved and thus preempted the city's ordinance.263 Even Alabama's Attorney General became involved in the siting issue when he published an opinion stating that a city cannot ban the disposal of hazardous wastes within its boundaries because Alabama's Hazardous Waste Management Act of 1978264 gave the state board of health regulatory authority over all hazardous waste transporting, storage, treatment and disposal in the state.265

In Ringlieb v. Township of Parsippany-Troy Hills,266 the Supreme Court of New Jersey found that the state had preempted the field of solid waste management, absent express preemption. The court drew upon the well-established principle that municipalities have no power other than those delegated to them by the legislature and by the state constitution.267 The court discussed New Jersey's home rule for municipalities, which is similar to West Virginia's home rule.268 It recognized that local governments have powers to manage and operate their affairs, but concluded that varying local applications would render functioning under the state's charter impracticable. The result of conflicting ordinances and the requirements of separate municipalities would bring sanitary landfill operations to a complete halt.269

263 Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972).
264 ALA CODE § 22-30-1 to -24 (1975).
265 Hazardous Waste Report, Vol. 1, No. 13 (January 28, 1980) at 7. W. VA. Code § 20-5E-6, also grants these exact powers to the Director of the Department of Natural Resources.
267 Id. at 350, 283 A.2d at 99. See also State ex rel. Plymale v. City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963).
268 W. VA. CONST., art. VI, § 39(a).
269 Ringlieb v. Township of Parsippany—Troy Hills, 59 N.J. at 352, 283 A.2d at 100.
Ringlieb was cited in a later New Jersey case, Township of Logan v. Rollins Environmental Services,\textsuperscript{270} which also dealt with solid wastes. The issue before the court was whether the New Jersey legislature had preempted the field of solid waste disposal by its enactment of the Solid Waste Management Act, thereby precluding a municipality from closing a solid waste disposal facility. The court concluded there was preemption based solely on the policy declared by New Jersey's Solid Waste Management Act, which stated that the Act's policy was to "establish a statutory framework within which all solid waste collection, disposal and utilization activity in the state may be coordinated."\textsuperscript{271} The New Jersey court followed the view expressed in Ringlieb that to allow local control over such a complex field as chemical disposal would cause chaos and would be contrary to the legislative policy.\textsuperscript{272}

These same principles apply equally to the West Virginia Hazardous Waste Management Act, in view of its declaration of policy that the problem of managing hazardous waste is a matter of state-wide concern.\textsuperscript{273} One can also see that the regulatory scheme of the Act is quite pervasive. It gives the Director the overall responsibility for the promulgation of rules and regulations, the implementation of the Act, and delegates to several other state agencies jurisdiction over specialized aspects of the regulation of hazardous waste management.\textsuperscript{274} All permits to construct or operate any facility or site for the treatment, storage or disposal of hazardous waste must be obtained from the Chief and other designed state agencies.\textsuperscript{275}

Taken together, these provisions may be interpreted as so pervasive as to support a finding of implied preemption, particularly because West Virginia wishes to assume regulatory primacy of a comprehensive federal program, as stated in the Act.\textsuperscript{276} Such a provision may be interpreted to mean that there is

\begin{footnotesize}
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\item \textsuperscript{270} Township of Logan v. Rollins Environmental Services, No. L-16751-77 P.W. (Super. Ct. of N.J., decided April 21, 1978).
\item \textsuperscript{271} \textit{Id.}
\item \textsuperscript{272} \textit{Id.}
\item \textsuperscript{273} W. VA. CODE § 20-5E-2.
\item \textsuperscript{274} W. VA. CODE § 20-5E-6.
\item \textsuperscript{275} W. VA. CODE § 20-5E-8.
\item \textsuperscript{276} W. VA. CODE § 20-5E-2(b)(4).
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a need for exclusive state regulation to achieve the uniformity necessary to serve their state's purpose or interest.

A minority of the courts which have addressed this question follow the view that if both state statutes and local ordinances can stand together, the courts are obliged to harmonize them, rather than to nullify the ordinance. Other courts extend this further by deferring to local zoning and home rule authority. In *Hulligan v. Board of Zoning Appeals,* the Ohio EPA had approved a sanitary landfill site. The township zoning inspector denied a certificate and the board of zoning appeals denied a use variance. In upholding a local zoning decision, the court found no conflict, announcing that the purpose of township zoning was inherently different than that of the EPA, and adding that Ohio EPA's regulation of landfill operations "does not preempt the field so far as local zoning is concerned."

Illinois also upheld local home rule authority where the Illinois EPA issued a permit for the operation of a sanitary landfill subject to local approval. The court said that the state EPA lacked the expertise and experience in land use problems that local zoning possessed and considered the determination as to where garbage should be disposed of as too mundane to preempt local authority.

Wisconsin followed Ohio and Illinois in finding that solid waste disposal, although of state-wide importance, did not justify automatically preempting local policy determinations of local zoning authorities. The Wisconsin Supreme Court found that the department of natural resources had preemptive power to license and supervise facility operations, but that its power stopped short of local zoning authority.

It should be noted that the three cases discussed above from

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277 Board of Supervisors of Loudoun County v. Pumphrey, 269 S.E.2d 361 (Va. 1980).
279 *Id.* at 108.
281 *Id.* at 253, 377 N.E.2d at 1144. The dissent, by presiding Justice Jiganti, relied on the *O'Connor* case, reiterating that sanitary landfills are matters of state-wide concern.
282 Nelson v. Department of Natural Resources, 276 N.W.2d 302 (Wis. 1979).
283 *Id.*
Ohio, Illinois and Wisconsin focus on state/local conflicts in terms of solid waste, as the majority of the case law does to date. It is quite possible that these courts would reach a different conclusion where the issue involves hazardous rather than just solid waste facilities.

The only section within the Act that could possibly be construed to follow the minority view of the courts discussed above is Section 20-5E-18(d), which states, "[n]othing in this article may be construed to restrict any rights of any person or class of persons under statute or common law." W. VA. CODE § 20-5E-18(d). "Person" is defined as "any individual . . . municipality, county commission or any other political subdivision of a state or any interstate body. . . ." In combining these two provisions, it could be interpreted that the power to zone cannot be restricted by the Act.

In conclusion, it is difficult to determine which theory West Virginia courts might utilize in deciding whether the Act preempts local siting. Some states have tried to resolve the state/local conflict on their own without waiting for a case or controversy requiring assistance from the courts. Michigan and New York have recently established siting boards composed of state and local representatives who will decide the location of facilities. Massachusetts dealt with this conflict by passing a comprehensive hazardous waste facility siting law based on community compensation. This legislation includes a provision allowing local permits of a narrowly defined scope, with reasonable local control over facility siting. Zoning provisions were amended to allow hazardous waste facilities to be built "by right" on industrial land, despite any local zoning provisions, and to prohibit the application of the usual two-thirds community council override vote after a notice of intent to use the site is issued by the developer.

With the availability of such solutions and the cases of Iberville and O'Connor, it might now be easier for a court to find that a state law or regulation has, in fact, preempted local au-

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284 W. VA. CODE § 20-5E-18(d).
285 W. VA. CODE § 20-5E-3(9).
289 Id.
authority. The state legislature would still be free to amend or supplement the state Act to address such local concerns if deemed necessary by it.

V. CONCLUSION

Having reviewed the Act and its background in some detail, it should be apparent that the management of hazardous wastes in West Virginia will be a complex process. West Virginia’s lack of a single agency which could be empowered with all aspects of hazardous waste management makes this process particularly difficult.

There is ample evidence in the act to indicate that the legislature recognized the problems which would be associated with the complexities of this process. For the most part, however, the Act does not directly provide answers to these problems; rather it establishes a regulatory framework within which they may be addressed.

One of the most significant directives which the legislature has established is the requirement that the state program be “equivalent to and consistent with” the federal program. This directive was considered to some extent earlier in this article. Because the directive is so critical to the development of the state program, a few closing remarks on the meaning and significance of the directive are desirable.

Even though neither RCRA nor the Act provide any clear guidance to the meaning of this requirement, the federal legislative history offers some enlightening comment regarding minimum program standards and the purpose for having such. This language corresponds to the House Report which states in pertinent part:

The general purpose of having federal minimum standards for hazardous waste disposal, with the option of state implementation of state programs equivalent to the federal program, is (1) it provides uniformity among the states as to how hazardous wastes are regulated, (2) it provides industry and commercial establishments that generate such wastes uniformity among states, (3) by providing such uniformity a state with environmentally sound laws does not drive business out of a state.

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290 U.S. Code Cong & Ad News, at 6267-68.
to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes, and (4) by permitting states to develop and implement hazardous waste programs equivalent to the federal program, the police power of the states are utilized rather than the creation of another federal bureaucracy to implement this act.

In addition to the above reasons... federal minimum standards are necessary if the hazardous waste problem is to be understood and solutions are to be found. Waiting for states to solve this problem without federal assistance is not likely since each state would take a different approach and there would be too many gaps in both the receiving of information and enforcement.\(^{91}\)

Except in certain well defined circumstances, the legislature, through the Act, has made it clear that the state program should achieve a high level of uniformity with the federal program. The fact that the legislature spoke of equivalency and consistency of "programs," as opposed to individual regulations, does, however, suggest that there may be variations among individual requirements, provided the overall impact of the state program is equivalent to and consistent with the federal program.

It is within this statutory framework that the affected state agencies must promulgate the regulations necessary to develop a hazardous waste management program. The mandate of the Act is that this should be done within six months of the effective date of the Act, July 10, 1981. Obviously six months is very little time within which to promulgate such a complex and extensive set of regulations. Not only do the rulemaking agencies need adequate time to propose regulations, review public comment and adopt final regulations, the regulated industry and interested public also need adequate time to review the regulations and prepare intelligent comment. This rulemaking process cannot and should not be sacrificed if substantive concerns of the legislature are to be satisfied.

A formidable task clearly confronts all segments of the state involved in hazardous waste management. The Act has identified the objective of hazardous waste management. The manner in which that objective is attained, however, now rests with the

\(^{91}\) H.R. No. 94-1491, Part I, p. 30.
regulatory agencies. It is only through enlightened action on the part of state government, the regulated business and industry and the public that the purposes and intent of the Act can be achieved.
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