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Director David C. Callaghan
State of West Virginia
Department of Commerce, Labor and Environmental Resources
Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

Dear Director Callaghan:

The Division of Environmental Protection has submitted a request for an opinion to the Office of the Attorney General, dated August 18, 1993, regarding Senate Bill 288, enacted in the 1993 Legislative Session.

The request asks how the provisions of recently enacted SB 288, which inter alia added W. Va. Code § 20-5F-2b(e), are to be interpreted and applied, and specifically asks:

"1. As applied to any existing permitted solid waste facility which has both a landfill and composting facility;

- a. Is sewage sludge for composting counted along with solid waste for disposal in the facility's total allowable monthly tonnage?
- b. Is tonnage to be counted toward monthly maximums on a wet or a dry basis?
- c. Is all sewage sludge received to be included in total tonnage or can any departing compost or "cover material" be subtracted from the facility's total tonnage?

2. Is each type of solid waste facility enumerated in the statutory definition subject to a separate tonnage cap under other relevant provisions of the statute and regulations?

3. May this new statute legally alter permit rights retroactively?"

Our short answers to these questions are:

1.a. Yes.

b. There is no statutory basis for using a "dry ton" basis for counting tonnage toward monthly maximums; an actual tonnage basis must be used.

c. All sewage sludge received is to be included in total tonnage, excepting certain disposal fees for departing land-applied sewage sludge.

2. No.

3. The relevant provisions of SB 288 should be applied across-the-board, including to those who were handling sewage sludge prior to the bill's passage and had a "permit" that related to their sludge handling.

Our detailed reasoning and analysis are as follows:

West Virginia's current waste management scheme has been crafted by the Legislature over the past five years, and is found primarily in W. Va. Code §20-5F-1 et seq. and §20-9-1 et seq., and also scattered as needed in related statutes. This opinion will omit specific statutory citations to the numerous provisions of law underlying our initial discussion of the overall statutory scheme, focussing on the ones most germane to the request.

A central and integral principle, purpose, and mechanism of West Virginia's solid waste management scheme is to require and impose a system of approvals, certificates, rules, limitations, fees and classifications - for the purpose of regulating, governing and limiting the tonnage of solid waste materials generated, received, transported, processed, handled and disposed in West Virginia.

Our statutory scheme recognizes the inherently attendant concerns and consequences of large tonnage solid waste operations. These concerns and consequences implicate the fundamental police and parens patriae powers of the State.

They include the environmental and infrastructure consequences of the transportation, handling and/or permanent dumping and storage of large tonnages of waste; their effect on incentives to reduce the generation of solid waste; their effect on capacities to dispose of waste on a long-term regional basis; and upon local and statewide legitimate concerns about what constitutes desirable economic development; and on matters of land use, property values, and community pride.

West Virginia's statutory scheme seeks to create a system of deliberate, rational solid waste management and planning, locally based to the extent possible, emphasizing solid waste reduction, emphasizing the need to meet local and regional needs, and giving to affected local people a voice in considering the utility and desirability of large tonnage solid waste operations.

These foregoing-described legitimate purposes, principles and mechanisms of West Virginia's statutory solid waste management scheme, including tonnage-related classifications and limitations, have been judicially approved and recognized in Wetzel County Solid Waste Authority v. DNR, 401 S.E.2d 227 (W. Va. 1990); and they were extensively, ably and successfully defended by WVDEP, in a recent case in which these purposes, principles and mechanisms were challenged by the West Virginia Landfill Association.

Germane to this opinion, W. Va. Code §20-5f-2(1993) states:

(l) "Solid waste" means any garbage, paper, litter, refuse, cans, bottles, waste processed for the express purpose of incineration; **sludge from a waste treatment plant**, water supply treatment plant or air pollution control facility; and other discarded materials including offensive or unsightly matter, solid, liquid, semisolid or contained liquid or gaseous material....

(o) "Solid waste facility" means any system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of solid waste, including landfills, transfer stations, materials recovery facilities, mixed waste processing facilities, sewage sludge processing facilities, composting facilities and other such facilities not herein specified, but not including land upon which sewage sludge is applied in accordance with subsection (b), section two-b of this article.

(f) "Commercial solid waste facility" means any solid waste facility which **accepts solid waste** generated by sources other than the owner or operator of the facility and shall not include an approved solid waste facility owned and operated by a person for the sole purpose of disposing of solid wastes created by that person or such person and other persons on a cost-sharing or nonprofit basis and shall not include land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation and similar applications.

W. Va. Code § 20-5F-2(p) defines a "Class A facility" as one which "handles" an aggregate of between ten to thirty thousand tons

of solid waste per month. W. Va. Code § 20-5F-4c prohibits the operation of any commercial solid waste facility "handling" between ten and thirty thousand tons of solid waste per month without appropriate approvals. W. Va. Code §20-9-12c requires certain approvals for facilities "handling" Class A solid waste tonnage. This is not an exhaustive compilation; the word "handle" is the consistently operative term in the statutes setting forth tonnage-based classifications and limitations.

Title 47, Legislative Rules of the Department of Natural Resources Series 38, defines a Class B solid waste facility as one which "receives or is expected to receive" on average less than ten thousand tons of solid waste per month.

It is apparent from the foregoing that the West Virginia scheme's classifying and regulating by tonnage is (and was prior to the passage of SB 288) based on the tonnage of all solid waste received and/or handled or processed in any fashion. These statutes unambiguously reflect the legislative purpose that all solid waste tonnage received and/or handled in any fashion be included in tonnage calculations.

In the Legislative Session that produced Senate Bill 288, resolutions were passed in both the House of Delegates and the State Senate.

The resolutions stated that "applications and contracts for large scale use of sewage sludge for composting purposes are being considered in a number of counties in the state"; and that "sewage sludge is being accepted at state landfills without payment of landfill tipping fees, without regard to annual tonnage limits placed on landfills and without adequate quality standards and regulations having been established".

The Governor was requested to introduce a bill, which he did, and which ultimately became SB 288.

We are mindful of the opinion request letter's statements of how some sewage sludge was being treated at some solid waste facilities, prior to the enactment of Senate Bill 288. The Senate and House resolutions report similar circumstances.

We have also reviewed pleadings in a motion requesting a rule to show cause, in the above-cited Wetzel County Solid Waste Authority case, filed on March 3, 1993 in the West Virginia Supreme Court. That motion was refused without prejudice to be refiled in a lower court.

In that motion it was alleged inter alia that a commercial solid waste business subject to Class B tonnage limitations was importing, receiving and handling large quantities of sewage sludge, and not counting that sludge against its applicable tonnage

limitations, nor paying applicable fees; and claiming a "recycling" exemption from such tonnage limitations and fees.

SB 288 required and set minimum standards for the development of a comprehensive program for the management of sewage sludge, and at W. Va. Code § 20-5F-2b(e) provided that:

"All sewage sludge placed in, or upon, or used by a solid waste facility or processed or handled, pursuant to a permit issued by the division of environmental protection, shall be subject to the same tipping and other fees levied by this chapter on the disposal of solid waste and shall be included in said facility's total tonnage, subject to the limitations established in this article and the provisions of article nine of this chapter...."

SB 288 also amended W. Va. Code 20-5F-2(f), the definition of a "commercial solid waste facility", to its above-quoted form. This definition formerly read at its end: "and shall not include the legitimate reuse and recycling of materials for structural fill, road base, mine reclamation, and similar applications."

SB 288 substituted: "and shall not include land upon which reused or recycled materials are legitimately applied for structural fill, road base, mine reclamation and similar applications."

SB 288 also deleted from the definition of "solid waste" at W. Va. Code § 20-5F-2(1) the phrase: "Solid waste shall not include materials which are recycled by being used or reused to make a product, as an effective substitute for commercial products, or are returned to the original process as a substitute for raw material feedstock."

SB 288 also enacted, at W. Va. Code § 20-5F-2(o), (u), and (v)-(ee), other related definitional language regarding sewage sludge, sewage sludge processing facilities, recycling facilities, composting facilities, etc.

While SB 288's requirement that the state implement a comprehensive sewage sludge management program, and many of the substantive features required of that program, were new; it is our opinion that SB 288's language regarding the inclusion of all sewage sludge received and handled in tonnage calculations was duplicitous of existing law.

Before SB 288, sewage sludge was specifically included in the definition of solid waste, W. Va. Code § 20-5F-2(1)(1992). Any "...system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for

processing, recycling or disposal of solid waste...." were within the regulatory sweep of being treated as a solid waste facility, W. Va. Code § 20-5F-2(o)(1992). A commercial solid waste facility was one which "accepts" solid waste from outside sources, W. Va. Code § 20-5F-2(f)(1992). And as detailed above, "handling" and receiving and accepting solid waste was and is the basis of the waste's inclusion in tonnage-based calculations and limitations.

The above-quoted pre-SB 288 "recycling exemption" language was clearly intended to exempt from the requirement of permitting as a "commercial solid waste facility," locations such as mining reclamation sites or road fills, where certain re-used or recycled waste materials were being incidentally used or applied.

In our opinion, the pre-SB 288 "recycling exemption" language cannot be reasonably read to have excluded sewage sludge from its specific statutory inclusion as solid waste; nor to have excluded from solid waste regulation, commercial operations which were importing, handling, receiving and processing large quantities of sewage sludge solid waste. This would be an absurd and impermissible construction.

That is, prior to the passage of SB 288, the "recycling exemption" could not legitimately serve as a massive loophole, through which might pour unlimited amounts of unregulated sewage sludge.

In our opinion, therefore, the language of SB 288 stating that all sewage sludge solid waste received and handled counts toward tonnage caps, and that sludge-importing and processing operations are to be regulated like all other commercial solid waste facilities, reiterated existing law, in a more detailed and explicit fashion; but made no changes.

In any event, West Virginia's current law requires that all sewage sludge be counted both for tonnage maximums and for fees; unless, as the opinion request letter notes and SB 288, W. Va. Code § 20-5F-2B(e) provides, a specific statutory limitation provides an exemption.

Our review of the statutes reveals **no exemptions** from inclusion in **tonnage** maximum calculations for all sewage sludge received and handled - whether the sludge is composted or not; whether it is ultimately disposed of within a solid waste facility or otherwise; and whether or not, as part of such disposal, it is denominated "cover material" for other waste.

However, there appears to be an exemption of certain sewage sludge solid waste from **disposal fees**. W. Va. Code § 20-5F-5a; §20-5N-4; §20-11-5a; §20-11-5b; and §20-9-13 assess fees upon the disposal of waste. But SB 288, W. Va. Code §20-5F-2b(e)(1993) exempts from such fees sewage sludge which is land applied outside

a solid waste facility:

"....Provided, however, That no such fees [levied by Chapter 20], excepting assessment fees provided for in subdivision (12), subsection (b) of this section [land application fees for sewage sludge] shall be levied upon the application of sewage sludge to land outside a solid waste facility in accordance with this section." Id.

This statutory provision appears to require a credit or refund of the disposal fees assessed for sewage sludge received and handled at a solid waste facility, if the sewage sludge actually leaves the facility for land application outside of a solid waste facility according to applicable standards.

In light of the foregoing discussion, it is our opinion that the answer to the opinion request letter's question number 1.a. is "yes"; and the answer to question number 1.c. is that "all sewage sludge received and/or handled is to be included in tonnage calculations, except for the above-discussed disposal fee credit."

With respect to the opinion request letter's question 1.b., we have reviewed a letter from the West Virginia Secretary of State dated August 11, 1993, rejecting certain proposed DEP emergency rules. The Secretary's letter stated the opinion that "the statute does not allow for ... an exception" allowing disposal fees to be calculated on a "dry" tonnage basis, as opposed to actual or "wet" tonnage.

The concept of "dry" tonnage is found in our review only in W. Va. Code § 20-5F-2b(7), relating to permissible rates of land application. It otherwise appears that the terms "ton" or "per ton," (such as for fee and tonnage limitation calculation purposes), are unqualified everywhere else in the relevant statutes.

Also, W. Va. Code § 20-5F-2b(b)(1)(ii) requires the reporting of the "amount of sewage sludge **actually** generated or imported."

It is also our understanding that in fact tonnage for all waste materials other than sewage sludge is calculated on an actual-tonnage-received basis, without adjustment for the waste's moisture content.

The Legislature has found at W. Va. Code §20-5F-5a that: "The costs of maintaining and policing the streets and highways of the state and its communities are increased by long distance transportation of large volumes of solid waste." A dry-tonnage-based fivefold increase in actual tonnage transported would appear to undermine at the very least the infrastructure and transportation concerns reflected in West Virginia's tonnage-based scheme.

The legislature clearly knew what a "dry" ton is, and chose not to use such a qualifier in its recent enactments regarding sewage sludge, in any area except land application rates. It is our opinion in response to the opinion request letter's question number 1.b., that an actual tonnage basis for sewage sludge must be used to calculate fees and for tonnage limitation calculations.

With respect to the opinion request letter's question number 2, regarding "separate tonnage caps", W. Va. Code § 20-5F-2 lists a number of different types of activity which may require an operation to be regulated as a solid waste facility, but the list is not exclusive. The statute identifies landfills, transfer stations, materials recovery facilities, mixed waste processing facilities, sewage sludge processing facilities, and composting facilities as kinds of operations or activities which may require that an activity be treated as a "solid waste facility".

Senate Bill 288, W. Va. Code § 20-5F-2b(d), requires that any solid waste facility which seeks to land apply, compost, incinerate or recycle sewage sludge must obtain an appropriate permit from the division for such operations; and SB 288 also sets forth more specific definitions, describing what activity constitutes a composting, mixed waste processing, or other type of solid waste facility.

The opinion request letter questions whether the requirement of a obtaining a sludge-handling permit, or the separate statutory definitions describing types of solid waste facility, authorize a separate and additional tonnage cap for each separately named type of activity or facility.

Our foregoing discussion of tonnage limitations and their role in West Virginia's solid waste management scheme is relevant to this inquiry. For example, W. Va. Code § 20-5F-4c, makes it unlawful to **handle** certain tonnages of waste, absent certain approvals, without regard to the method(s) of handling waste, or types of waste handled.

Had the Legislature wanted to authorize the "stacking" of separate tonnage caps, for each type of processing or handling of solid waste received at a commercial solid waste operation, it could have easily done so in a forthright fashion. Nothing in SB 288, including the bill's added definitional statements or sludge-permit requirements, evidences a legislative intent to implement or authorize a "separate tonnage cap" system, that would dramatically alter the significance and effect of the strict tonnage-based approval requirements, limitations and caps set by the statutes.

Our answer to the opinion request letter's question number 2 is therefore "no".

The opinion request letter's question number 3 asks whether Senate Bill 288 generally may "legally alter permit rights retroactively".

First, as discussed above, we do not believe that SB 288's provisions respecting the inclusion of all sewage sludge on an actual tonnage basis for fee and tonnage calculations, under one tonnage cap, were a retroactive change in the law.

Second, the generic question which is asked cannot be fully answered in the abstract, as to all possible "permit rights"; the term used is simply too broad and uncertain. It should be noted that no "permit right" which contravened applicable law would in any event be legitimate or enforceable.

Third, with the above caveats, in response to the opinion request letter's question number 3, it is our opinion that the relevant provisions of SB 288 are intended to and should be applied across-the-board, including to those who were handling sewage sludge prior to the bill's passage, and who had some sort of "permit" that related to their sludge handling.

SB 288 calls for a "**comprehensive**" program for the **management of sewage sludge**, not just "some" sewage sludge. Permits are authorized for "**all**" facilities which handle sewage sludge **in any way**. Reporting is required by entities "**producing**" or "**importing**" sludge. Monitoring is required for "**all sewage sludge related activities**." "**No person or entity**" may be allowed to exceed contaminant levels. "**All**" facilities must meet design specifications. **Existing POTWs** must obtain permits, and "**any facility**" seeking to land apply, etc. sludge must obtain a sludge permit. And "**all sludge**" handled pursuant to any DEP permit is subject to disposal fees and tonnage calculation inclusion. (Specific citations omitted).

The bill's language is broadly inclusive. And while explicit provisions for "grandfathering" appear in West Virginia solid waste management statutes, no such explicit grandfathering is evident in SB 288, in relation to "permit rights" or otherwise.

Thus, in our opinion, SB 288's language does not authorize "grandfathering" existing sludge-related operations from relevant tonnage-related requirements and standards, permitting, other solid waste regulations and approvals, applicable fees, substantive environmental protection standards, and other provisions of the law.

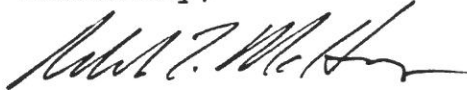
Fourth, even actual, clear and substantive "retroactive" effects of governmental regulation are not inherently fatal to such regulation, see Shell v. Metropolitan Life Ins. Co., 380 S.E.2d 183 (W. Va. 1989); and see Keystone Bituminous Coal Assn. v

DeBenedictis, 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232 (1987).

The intended inclusive application of SB 288 does not facially seem constitutionally or otherwise infirm to us, in light of the principles enunciated in these and similar cases. In any event, such considerations are basically outside of the agency's mandate, which is ordinarily to apply the statute as written.

Thank you for the opportunity to provide this opinion.

Sincerely,



DEBORAH L. MCHENRY
Managing Deputy Attorney General