

WEST VIRGINIA LEGISLATURE
Joint Committee on Government and Finance

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Memorandum

To: Joint Committee on Government and Finance – Post Audits Subcommittee Members

From: Stacy L. Sneed, Director, Legislative Post Audit Division *[Signature]*
Jean Ann Krebs, Acting Assistant Director, Legislative Post Audit Division *[Signature]*
Londa M. Sabatino, Legislative Post Auditor III

Date: June 10, 2008

Subject: Legislative Rules Not Promulgated for Cost Recoveries by the Department of Environmental Protection during the period July 1, 2005 – June 30, 2007

During our fieldwork of the post audit of the Department of Environmental Protection (DEP), we found the DEP has not promulgated legislative rules pertaining to cost recoveries of monies expended by the DEP to clean-up hazardous waste spills from the parties responsible for the spills. Chapter 22, Article 19, Section 5 of the West Virginia Code provides for the promulgation of rules as well as the recovery of costs incurred. Based on our analytical review, we determined that some costs incurred in clean-ups were not determined and recorded in the accounting records; further procedures pertaining to billings and collections were not consistently applied. Without legislative rules, we are unable to determine if cost recoveries were conducted in accordance with legislative intent. The initial filing date for proposed rules with the Legislative Rule-Making Review Committee and the Secretary of State's Office is July 31, 2008; therefore, we are presenting our recommendation for the DEP to promulgate rules in order to meet this deadline.

Background

The Homeland Security Emergency Response Unit (ERU) was created by DEP in 2005 from sections of the Division of Water and Waste Management and operates under the Executive Office of the DEP. The ERU is responsible for responding to any release of a hazardous waste substance. The Hazardous Waste Emergency and Response Fund generates revenues from the Hazardous Waste Assessment Fee and the Recycling Assessment Fee. Further, monies recovered as reimbursement for costs incurred by the DEP in hazardous waste spills are

deposited into this fund in accordance with the law. The Chief of the ERU oversees the cost recovery process which includes determining the amount of costs incurred, identification of responsible parties, and instructs the accounts receivable clerk when and who to bill. Also, the Chief is responsible for remitting uncollectible accounts to the DEP's legal division for further collection process.

Issues

Chapter 22, Article 19, Section 5 of the West Virginia Code, as amended, states in part:

“(c) Prior to making expenditures from the fund pursuant to subdivision (1), (2) or (3), subsection (b) of this section, the director will make reasonable efforts to secure agreements to pay the costs of cleanup and remedial actions from owners or operators of sites or other responsible persons.

(d) The director is authorized to promulgate and revise rules in compliance with chapter twenty-nine-a [29A-1-1 et seq.] of this code to implement and effectuate the powers, duties and responsibilities vested in him or her under this article. Prior to the assessment of any fees under this article, the director shall promulgate rules which account for the mixture of hazardous and nonhazardous constituents in the hazardous waste which is generated. The director may not assess a fee on the nonhazardous portion, including, but not limited to, the weight of water.

(e) The director is authorized to recover through civil action or cooperative agreements with responsible persons the full amount of any funds expended for purposes enumerated in subdivision (1), (2) or (3), subsection (b) of this section. All moneys expended from the fund which are so recovered shall be deposited in the fund. Any civil action instituted pursuant to this subsection may be brought in either Kanawha County or the county in which the hazardous waste emergency occurs or the county in which remedial action is taken. . . .”

We asked the Chief of the ERU why legislative rules had not been promulgated. The Chief stated that he has “no knowledge of why rules were not promulgated for this section of the chapter when they were put in place for others, I surmise that it was because the section of code (22-19-5(e)) that authorizes the recovery of costs does not mandate the activity. Other sections of the code clearly mandate either the promulgation of rules or the completion of certain activities or both . . . I concur that a formal procedure needs to be in place to insure that the process is consistent and timely . . .”

We noted the following inconsistencies in the cost recovery process during our review:

1. Costing Process

After the ERU responds to a potential hazardous waste spill, they record the cost of the response – based on a cost amount process that mirrors the process used by the federal government and reported on a costing form by the inspector - on a cost recovery spreadsheet. This accounting record details the reported spills and corresponding costs incurred.

Based on our review of the accounting record, the ERU did not consistently determine the cost of a spill. We noted the inconsistencies in the table below. We are unable to project costs for the “spills without recorded costs” because costs vary from spill to spill depending upon various factors. We were informed by the current Chief of the ERU that since he has been in office (January 2006), the costs are being recorded for every spill, regardless if recovery of the cost will be attempted. We were also informed by him that prior to his administration the ERU only recorded costs if they were going to attempt cost recovery.

<u>Fiscal Year</u>	<u>Total Spills Reported</u>	<u>Spills with Recorded Costs</u>	<u>Spills without Recorded Costs</u>	<u>Percentage of Spills without Recorded Costs</u>	<u>Total Costs Recorded</u>
2006	117	57	60	51.28%	\$171,253.58
2007	158	134	24	15.19%	81,045.29
Total	275	191	84	30.55%	\$252,298.87

We believe the cost determination and recording process should be set out in Legislative rule.

2. Billings & Collections

We reviewed the Cost Recovery Accounts Receivable Ledger and determined ERU was not consistent with their billing and collection procedures for cost recoveries. We noted the following issues:

- a. The ERU Does Not Invoice Some Parties Responsible for Hazardous Waste Spills

We were informed by the Chief that if either the Chief or inspectors can determine a responsible party then they will bill for the clean-up costs. However, we were also told that cost recoveries are not pursued for certain responsible parties – such as homeowners and individuals/companies who are not financially able to pay. Based on our review of the cost recovery spreadsheets and accounts receivable ledgers for fiscal years 2007 and 2006, homeowners were not invoiced for clean-up costs totaling \$32,248.22 and \$6,317.71, respectively. We also

noted the ERU did not invoice costs incurred for 1 spill in 2006 totaling \$ 156.62 and 13 spills from other responsible parties totaling \$5,396.42 for fiscal year 2007.

The tables below shows the number of spills reported, corresponding clean-up costs and amounts invoiced during our audit period.

Fiscal Year 2006

	<u>Number of Spills With Recorded Costs</u>	<u>Number of Spills Invoiced</u>	<u>Recorded Costs</u>	<u>Amounts Invoiced</u>	<u>Difference</u>
Homeowner	22	0	\$ 6,317.71	\$ 0.00	\$ 6,317.71
Other Responsible Party Identified	11	10	147,369.60	147,212.98	\$156.62
No Responsible Party Identified	<u>24</u>	<u>0</u>	<u>17,566.27</u>	<u>0.00</u>	<u>17,566.27</u>
	<u>57</u>	<u>10</u>	<u>\$171,253.58</u>	<u>\$147,212.98</u>	<u>\$24,040.60</u>

Fiscal Year 2007

	<u>Number of Spills With Recorded Costs</u>	<u>Number of Spills Invoiced</u>	<u>Recorded Costs</u>	<u>Amounts Invoiced</u>	<u>Difference</u>
Homeowner	75	0	\$32,248.22	\$ 0.00	\$32,248.22
Other Responsible Party Identified	24	11	23,778.09	18,381.67	5,396.42
No Responsible Party Identified	<u>35</u>	<u>0</u>	<u>25,018.98</u>	<u>0.00</u>	<u>25,018.98</u>
	<u>134</u>	<u>11</u>	<u>\$81,045.29</u>	<u>\$18,381.67</u>	<u>\$62,663.62</u>

ERU also does not attempt cost recovery from homeowners for ERU's assistance with potential hazardous materials. Twelve and one-half percent (12.5%) of the Recycling Assessment Fee is deposited in the Hazardous Waste Emergency Response Fund. This fee is collected by a solid waste disposal facility from the party disposing of the solid waste at the facility and submitted monthly by the facility to the WV State Tax Department. The Tax Department allocates this assessment fee to the DEP and other various agencies per §22-15A-19A of the West Virginia Code. The Chief of the ERU stated that DEP's position is that the homeowners have essentially paid in advance for this service and should not be

charged for costs incurred in a clean-up. We further noted that individuals/companies who generate over 5.5 tons of hazardous waste a year are required to pay a Hazardous Waste Assessment Fee. This fee is based on the tonnage of hazardous waste generated. This fee along with the Recycling Assessment fee is used to provide monies for responding to hazardous waste emergencies. We believe parties that pay the Hazardous Waste Assessment Fees may view the exclusion for homeowners as a double-standard because they are subject to cost recovery and homeowners are not.

In regard to responsible parties unable to pay, the Chief told us the ERU will pursue cost recovery if he determines the responsible party is financially able to “bear the costs” (i.e. the ability to pay).

Without a legislative rule, we are unable to determine if homeowners should be excluded from cost recoveries. Further, we believe legislative rules should be promulgated to address the assessment of “ability to pay”.

b. Late Billings

The ERU’s accounts receivable ledger indicated that companies were billed for clean-up anywhere from 9 to 342 days after the spill date, with an average billing date of 60 days after the spill. The Accounts Receivable Clerk only prepares an invoice when she receives the cost form from the Chief. The Accounts Receivable Clerk has one week to prepare an invoice after receipt of the cost recovery form from the ERU. The Chief stated his unit was behind on processing the cost recoveries due to workload and staffing shortages.

c. Collections

Invoices were recorded as being paid anywhere from 14 to 668 days after the invoice date, with an average payment date of 96 days after the invoice date. Furthermore, the invoices prepared by the Accounts Receivable Department for the ERU Cost Recoveries do not contain a due date. The Accounts Receivable Department took over invoicing for the ERU in January 2006. Since they have taken over, there is an average payment date of 48 days.

DEP standard operating procedures for accounts receivable of cost recoveries indicates a second notice is sent 42 days after date of original invoice. Since the Accounts Receivable Department took over the billings there were five instances where the company either did not receive a second notice per the accounts receivable ledger or the second notice was sent later than 42 days from the original invoice date. The accounts receivable clerk in charge of processing the cost recovery invoices stated that she is notified by the Chief of the ERU when to send a company a second notice. The table below shows the amounts outstanding at June 30, 2007 and each fiscal year the invoice was sent.

<u>Fiscal Year</u>	<u>Amount</u>
2004	\$ 261.20
2005	20,703.43
2006	24,442.12
2007	<u>1,249.13</u>
Total	<u>\$46,655.88</u>

Of the \$46,655.88 outstanding receivables as of June 30, 2007, \$19,188.40 was from balances left on the books after the invoices had been settled through civil action settlements. We believe these accounts receivable records should have been adjusted down to the amount of the settlement agreement; \$18,157.05 has been referred to the Enforcement Division for legal action; \$7,468.56 for which the Accounts Receivable Department had no supporting files & these invoices were not referred to the Office of Legal Services; \$1,841.87 was referred to the Office of Legal Services and as of June 9th, 2008 the Office of Legal Services has started the process of filing a complaint advising of intent to file suit.

Without legislative rules, we are unable to determine requirements for timeliness of payments or procedures to be followed when initiating legal action in collection efforts.

Recommendation

We recommend the Department of Environmental Protection promulgate rules and regulations governing the costing, invoicing and collections process of hazardous waste emergency response cost recoveries in compliance with Chapter 22, Article 19, Section 5 of the West Virginia Code.

Agency Response

On the following pages.



west virginia department of environmental protection

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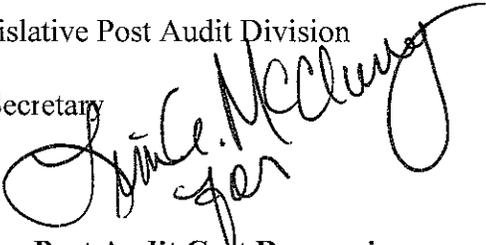
MEMORANDUM

To: Stacy L. Sneed, Director, Legislative Post Audit Division

From: Randy C. Huffman, Cabinet Secretary

Date: June 23, 2008

Subject: ***Revised Response - Legislative Post Audit Cost Recoveries
for July 1, 2005 - June 30, 2007***



The Department of Environmental Protection (DEP) concurs with the Legislative Post Audit Division that Chapter 22, Article 19 would need to be changed in order to allow us to promulgate rules for the cost recovery process. We have developed formalized procedures for the cost recovery of monies expended to clean up hazardous material spills from the parties responsible for the spill. We believe a formalized policy would best address the issues regarding the criteria and/or standards used to regulate cost recovery. A formalized policy will allow us the flexibility necessary for difficult and/or long-term projects

Page 3-4--Costing Process

In the section titled "Costing Process" there is a statement that quotes the Chief as saying "since he has been in office, the costs are being recorded for every spill..." That comment must be clarified to reflect that costs are being recorded for every spill occurring since the beginning of 2008

Page 4--Responsible parties ability to pay

In the section titled "Billings and Collections", a question was raised about how the determination is made that an individual/company is not financially able to pay. This determination is made when an individual/company is out of business, in bankruptcy, or it is otherwise apparent that payment cannot be expected.

Page 6--Timeliness of cost recovery form completion

In the same section, at Collections, subsection c, there is a discussion regarding the amount of time taken for the cost recovery form to be created and submitted to Accounts Receivable. Two issues need to be clarified for the purposes of this project. First, on long-term projects, reimbursement is not sought until the project is complete. As an example, ERU is currently involved in a cleanup of a truck accident that involves the Putnam County Public Service District (PSD). The unit must monitor the PSD's impoundment for contamination for an undetermined amount of time. When it is determined that ERU's participation is no longer needed, the responsible party will be billed for the entire amount.

The second issue is that no cost recovery invoices have been submitted in 2008. The reason for this is that the previous unit manager retired at the end of 2007, and the new manager was not hired until April 2008. Since then, cost recovery forms have been prepared and are ready to be submitted. By the end of this month, all billing will be up-to-date.

Page 6-- Absence of due date on invoice

In Billings and Collections, subsection c, the auditor's comment on the absence of a due date will be addressed by programming cost recovery invoices to reflect a statement of "Invoices are due upon receipt."

Page 6--Non issuance of second notice

In that same subsection, a point is made on the absence or tardiness of a 42-day second notice. Accounts Receivable has been reminded to adhere strictly to standard operating procedures and to delay or forgo the second notice only upon direction by Legal Services.

Page 6--Adjustment of balances due exceeding legal settlement

The auditor's believe balances remaining of \$19,188 40 after legal settlement should have been adjusted from the accounts receivable ledgers. The Controller for DEP requested an opinion from the Office of Legal Services on removing balances due the state without formal direction from the Attorney General. The opinion was "CONCLUSION: Thus, there is a nondiscretionary duty to seek the Attorney General's approval before a debt or claim may be dismissed." A copy of the legal opinion is enclosed.

The Office of Legal Services will finalize the settlements in question and future settlements by requesting permission from the Attorney General to remove balances due the state in excess of the settlement agreement. The request and response from the Attorney General will be forwarded to Accounts Receivable for further action.

Page 6--Supporting documentation of accounts receivable

Billings and Collection, subsection c, further comments that Accounts Receivable had no supporting files for invoices totaling \$7,468. Accounts Receivable has supporting files for every invoice since the billings were assumed in January 2006. Files on cost recovery prior to that do exist and remain in the ERU program office.

Page Three
June 23, 2008
Legislative Post Audit Division

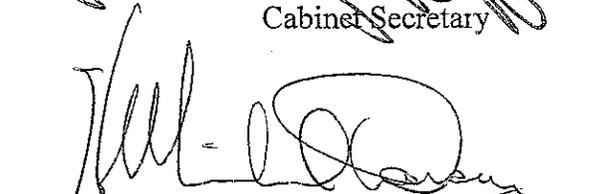
SUMMARY

With the exception of three invoices referred to Legal Services, all invoices billed by Accounts Receivable since January 2006 have been paid. All invoices billed by the Environmental Response unit from July 2005 through December 2005 have been paid or referred to Legal Services. The \$44,904.28 uncollected on the books between 1999 and 2004 will be researched and responsible parties will be invoiced accordingly. Communication between the Accounts Receivable staff and the ERU staff will be on-going to ensure invoice issues are resolved and costs are recovered in a timely manner.

Enclosures

PREPARING AND SUBMITTING COST RECOVERY
FORMS FOR THE EMERGENCY RESPONSE UNIT


Cabinet Secretary


Chief, Emergency Response Unit

6-16-08
Original Effective Date

Review Date

Index of Revisions

Procedure for Preparing and Submitting Cost Recovery Forms for the Emergency Response Unit

I. Purpose

- A. The purpose of this document is to insure a consistent and timely cost recovery effort and/or documentation for response activities of the Emergency Response Unit

II. Definitions

- A. Equipment – Non-expendable or non-disposable materiel such as detection meters or vehicles that are typically used during a response action and which has a cost associated with its use but which is not disposed of during or after the incident
- B. ERU- - The Emergency Response Unit of the Department of Environmental Protection
- C. Incident – An occurrence in which hazardous materials or other pollutants are released or have the potential to be released to the environment or a situation in which the assistance of the ERU is requested by another agency or organization to help prevent, manage or remediate a hazardous material release.
- D. Supplies – Materials which are designed to be used once and then discarded during or after a hazardous material incident such as absorbent pads, respirator filters or disposable sampling equipment.

III. Process

- A. ERU personnel shall keep track of all time spent on response and follow-up to every incident on the form developed for that purpose .
- B. ERU personnel shall keep track of all equipment used and the amount of time equipment is used on every incident on the form developed for that purpose.
- C. ERU personnel shall keep track of all supplies used or consumed on every incident on the form developed for that purpose.
- D. ERU personnel shall keep track of any other expenses incurred on every incident on the form developed for that purpose.
- E. Within 60 working days of an incident, ERU personnel shall prepare and submit to Accounts Receivable (AR) a cost recovery form which details the expenses incurred by the unit in the performance of response activities for those incidents for which cost recovery will be pursued. Decisions on whether or not to pursue cost recovery will be based on the process included as Attachment A of this document.
- F. ERU will supply AR with accurate contact information for the responsible party for cost recovery purposes.
- G. In the event that AR is unable to recover ERU's costs after two attempts, AR will notify ERU and the Chief of Homeland Security and Emergency

Response will refer the action to the Office of legal Services for further action within 30 working days.

- H.** For those incidents for which cost recovery will not be pursued, ERU will keep the prepared cost recovery form on file for five calendar years from the time of the incident.

IV. Resources

- A.** Cost Recovery Form on ERU drive.
- B.** Chapter 22 Article 19 of the West Virginia Code

Attachment A

Emergency Response Cost Recovery Decision Protocol

- Calls for assistance come in to the Emergency Response Unit (ERU) from state, county or local officials or from individual citizens.
- When the ERU responds to an accident, industrial incident or other situation where there is an obvious responsible party, an effort is made to have that party or their insurance company to perform remediation. If that party refuses, is unable to respond, or is unable to respond in a timely manner, then the ERU will take the necessary action and seek cost reimbursement from that party
- If the ERU responds to an incident at which the responsible party is unknown, the ERU will take appropriate action immediately and seek to identify the responsible party afterward. If the responsible party can be identified, cost recovery will be sought.
- If the call comes from an individual seeking assistance with a toxic or hazardous material at their home, no cost recovery will be sought because \$0.25 for each ton of solid waste disposed of in West Virginia goes to the Hazardous Waste Emergency Response Fund. ERU holds the position that these individuals have essentially paid in advance for this service.
- In incidents involving oil that contaminates water sources, reimbursement is sought under the Federal Oil Protection Act where reimbursement from a responsible party is impossible. This process is slow and does not reimburse for the full amount of the response.
- When cost recovery is possible, ERU personnel fill out a Cost Recovery Form and send it to the Accounts Receivable Unit of the Office of Administration.
- If two attempts to recover costs by the Accounts Receivable fail, the Chief of Homeland Security and Emergency Response will refer the case to the Office of Legal Services for possible legal action.
- If situations are encountered where the assistance of the United States Environmental Protection Agency is available or required, DEP will contact EPA to assist and seek to recover its costs as described above. Examples of situations that typically involve EPA are incidents that require long-term remediation and non-time critical removal actions.



west virginia department of environmental protection

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Joe Manchin III, Governor
Randy C. Huffman, Cabinet Secretary
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MEMORANDUM

TO: Ramona Dickson, Heather Connolly *Laq*
FROM: Jon Frame *jf*
DATE: June 13, 2008
RE: WVDEP's Duty Regarding Debt Collection

ISSUE:

Does WVDEP, on behalf of the WV Department of Administration, require approval of the Attorney General before dismissing, or "writing off," debts owed to WVDEP but deemed to be uncollectible?

BRIEF ANSWER:

Yes, because such consultation is required by the West Virginia Code of State Regulations.

ANALYSIS:

Pursuant to West Virginia Code § 14-1-18a, the WVDEP has the authority to refer any claim or debt that is not able to be collected within three months after trying with due diligence, to the Cabinet Secretary (referred in § 14-1-18a as the "commissioner") for consignment to a licensed and bonded debt collection agency for collection. This shall only be done if, among other things, the collection of the debt would not impose an undue, unjust, unfair or unreasonable hardship or burden upon the health or general welfare of the party owing the debt.

In any such case of undue, unjust, unfair or unreasonable hardship or burden, the Cabinet Secretary has the authority to compromise, settle or dismiss the debt or claim. However, this may be done *only* (emphasis added) after the obtaining approval from the Attorney General. W. Va. Code § 14-1-18a provides that the Cabinet Secretary “may, in his discretion, *and with the review and approval of the attorney general* (emphasis added), compromise, settle or dismiss the debt or claim.”

CONCLUSION:

Thus, there is a nondiscretionary duty to seek the Attorney General’s approval before a debt or claim may be dismissed.