

Form #6

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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Director

West Virginia Administrative Regulations
Department of Natural Resources
Series 30
WV/NPDES Regulations for Coal Mining Facilities
Legislative Rules

Section 1. GENERAL.

1.1. **Scope and Purpose.** These regulations establish requirements implementing the powers, duties and responsibilities of Article 5A of Chapter 20 with respect to all coal mines, preparation plants and all refuse and waste therefrom in the State which are vested in the director pursuant to W. Va. Code §20-6-43.

1.2. **Authority.** These regulations are promulgated by the director under the authority of Chapter 20, Article 1, Section 7(30) of the West Virginia Code.

1.3. **Effective Date.** --

1.4. **Filing Date.** --

1.5. **Applicability.** These regulations shall apply to all coal mines, preparation plants and refuse and waste therefrom as defined herein. These regulations also establish a transition program for those pending Article 5A/NPDES applications for which a draft permit has been prepared.

1.6. **Invalidity.** If any provision of these regulations or the application thereof to any person or circumstance is held invalid, then such invalidity shall not affect other provisions or applications of these regulations.

1.7. **Incorporation by Reference.** Whenever federal statutes or regulations are incorporated into these regulations, the reference is to the statute or regulation in effect on ~~April 24, 1986~~ May 29, 1987.

1.8. **Promulgation History.** The regulations in this section originally became effective on the 30th day of May, 1985, that being the date on which the Governor issued a proclamation stating that final approval of the partial transfer of the National Pollutant Discharge Elimination System (NPDES) established under the federal Clean Water Act contemplated by W. Va. Code §20-6-43 has been given by the Administrator of the United States Environmental Protection Agency. The original effective date of these regulations as repromulgated pursuant to Legislative authorization (1986 Legislative Session; SB 434) was April 24, 1986.

1.9. **Conflict of Interest.** The director or his authorized representative who has or shares authority to approve all or portions of permits, either in the first instance or as modified and reissued, shall not be a person who receives or has during the previous two (2) years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

1.9.1. For the purposes of this paragraph:

1.9.1.a. "Significant portion of income" means five thousand dollars (\$5,000) or ten percent or more of gross personal income for a calendar year, whichever is less, except that it means fifty percent or more of gross personal income for a calendar year if the recipient is over sixty (60) years of age and is receiving that portion under retirement, pension, or similar arrangement.

1.9.1.b. "Permit holders or applicants for a permit" does not include any department or agency of the State.

1.9.1.c. "Income" includes retirement benefits, consultant fees, and stock dividends.

1.9.1.d. Income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identify of the primary sources of income.

Section 2. DEFINITIONS.

The definitions set forth in Chapter 20, Article 5A, Section 2 of the West Virginia Code shall apply to these regulations along with the following definitions, unless the context clearly indicates otherwise.

2.1. "Administrator" means the administrator of the United States Environmental Protection Agency, or an authorized representative.

2.2. "Applicable Standards and Limitations" means all State, interstate, and federal standards and limitations to which a discharge or a related activity is subject under the Clean Water Act (CWA) Sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 and Article 5A, including effluent limitations, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, and pretreatment standards.

2.3. "Application" means a WV/NPDES application as defined in Section 2.48 of these regulations.

2.4. "Article 5A" means the West Virginia Water Pollution Control Act, Article 5A, Section 1 et seq. of Chapter 20 of the West Virginia Code.

2.5. "Average Monthly Discharge Limitation" means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

2.6. "Best Management Practices" or "BMPs" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the State. BMPs may include treatment requirements, operating procedures, and practices to control plant site runoff,

spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

2.7. "Clean Water Act" or "CWA" means Public Law 92-500, as amended by Public Law 95-217 Public Law 95-576; 33 U.S.C. §1251 et seq. (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972).

2.8. "Continuous Discharge" means a discharge which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

2.9. "Coal Mines, Preparation Plants, and All Refuse and Waste Therefrom" means any point source covered under 40 C.F.R. Part 434 and any coal mine, coal preparation plant, coal preparation plant associated areas, refuse pile, coal waste pile, or other related activity including any related sewage treatment facilities and bath houses required to have a permit under CWA or Article 5A, but excluding dredging operations or the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of minerals removed for purposes of commercial use or sale.

2.10. "Coal Mine" or "Mine" means the area, and any related structures, on and beneath land, used or disturbed in activity related to the extraction, removal or recovery of coal.

2.11. "Coal Preparation Plant" means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and is loaded for transit to a consuming facility.

2.12. "Coal Preparation Plant Associated Areas" means the coal preparation plant yards, immediate access roads, coal refuse piles, tipples, loadouts, and coal storage piles and facilities.

2.13. "Daily Discharge" means the discharge of a pollutant measured during a calendar day or within any specified period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

2.14. "Discharge" when used without qualification means the discharge of a pollutant.

2.15. "Discharge of a Pollutant" means:

2.15.1. Any addition of any pollutant or combination of pollutants to waters of the State from any point source; and

2.15.2. This definition includes additions of pollutants into waters

of the State from: surface runoff which is collected or channelled by man; discharges through pipes, other conveyances owned by a person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works. This term does not include an addition of pollutants by any indirect discharger.

2.16. "Discharge Monitoring Report" or "DMR" means the form(s) prescribed by the director and approved by EPA for the reporting of self-monitoring results by permittees under WV/NPDES.

2.17. "Draft Permit" means a document prepared under Section 10.1 of these regulations indicating the director's tentative decision to issue, modify, reissue, suspend or revoke a permit.

2.18. "Effluent Limitation" means any restriction established under State or federal law on quantities, discharge rates and concentrations of pollutants which are discharged from point sources into waters of the State.

2.19. "Effluent Limitations Guidelines" means a regulation published by the Administrator under CWA Section 304(b) or CWA Section 301(b)(1)(B) to adopt or revise effluent limitations or levels of effluent quality attainable through the application of secondary or equivalent treatment. For the coal industry these regulations are published at 40 C.F.R. Parts 434 and 133.

2.20. "Environmental Protection Agency" or "EPA" means the United States Environmental Protection Agency.

2.21. "Existing Source" means any coal mine, preparation plant and all refuse or waste therefrom:

2.21.1. From which there is or may be a discharge of pollutants which commenced prior to September 19, 1977; and

2.21.2. Which is not a new source.

2.22. "Facility" or "Activity" means any coal mine, preparation plant and all refuse and waste therefrom or any other facility or activity (including land or appurtenances thereto) that is subject to the provisions of these regulations.

2.23. "General Permit" means a WV/NPDES permit authorizing a category of discharges within a geographical area.

2.24. "Hazardous Substance" means any substance designated under 40 C.F.R. Part 116 pursuant to CWA Section 311.

2.25. "Indirect Discharger" means a nondomestic discharger introducing pollutants to publicly owned treatment works.

2.26. "Interstate Agency" means an agency of two or more states, including West Virginia, established on or under an agreement or compact approved by the Congress, or any other agency of two or more

states including West Virginia, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under CWA and regulations.

2.27. "Major Facility" means any WV/NPDES facility or activity classified as such by the director or by the Regional Administrator in conjunction with the director.

2.28. "Maximum Daily Discharge Limitation" means the highest allowable daily discharge.

2.29. "National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, denying, modifying, revoking and reissuing, suspending, revoking, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements under CWA Sections 307, 318, 402, and 405, including any approved State program.

2.30. "New Source" means any coal mining facility covered under 40 C.F.R. Part 434, including an abandoned mine which is being remined, the construction of which is commenced after the date of promulgation of a new source performance standard (NSPS) or of the proposal of a NSPS which is subsequently promulgated in accordance with Section 306 of CWA or which is determined to constitute a major alteration.

2.30.1. In making the determination of major alteration the director shall take into account whether one or more of the following events resulted in a new, altered, or increased discharge of pollutants after the date of a new source performance standard or of the proposal of a new source performance standard subsequently promulgated in accordance with Section 306 of CWA in connection with the facility covered under 40 C.F.R. Part 434 for which the WV/NPDES permit is being considered:

2.30.1.a. Extraction of a coal seam not previously extracted by that mine;

2.30.1.b. Discharge into a drainage area not previously affected by wastewater discharge from the facility covered under 40 C.F.R. Part 434;

2.30.1.c. Extensive new surface disruption at the mining operation;

2.30.1.d. A construction of a new shaft, slope, or drift.

2.30.2. For a preparation plant or associated areas under 40 C.F.R. Part 434, a new source shall be a preparation plant or associated area, the construction of which is commenced after the date of promulgation of a new source performance standard (NSPS) or of the proposal of a NSPS which is subsequently promulgated in accordance with Section 306 of CWA, and which meets the criteria of Section 12.3 of these regulations.

2.30.3. No provision in this definition shall be deemed to affect the classification of a facility as a new source which was so classified under previous EPA regulations, but would not be classified as a new source under this definition. Nor shall any provision in this

definition be deemed to affect the standards applicable to such facilities, except as provided in Section 12.3 of these regulations.

1 2.31. "Operator" means any person, firm, or company who is granted or who should obtain a WV/NPDES permit.

2.32. "Owner" means the owner of the facility subject to regulation.

2.33. "Point Source" means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

2.34. "Privately Owned Treatment Works" means any device or system which is used to treat wastes other than the owner's wastes and is not a POTW.

2.35. "Process Wastewater" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

2.36. "Proposed Permit" means a WV/NPDES permit prepared after the close of the comment period (and, when applicable, any public hearing) and which is sent to EPA (pursuant to the Memorandum of Agreement) for review before final issuance by the director.

2.37. "Publicly Owned Treatment Works" or "POTW" means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality, public service district, sanitary district, or other public body. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

2.38. "Recommencing Discharger" means a source which recommences discharge after terminating operations.

2.39. "Regional Administrator" means the Regional Administrator of Regional Office (Region III) of the Environmental Protection Agency, or an authorized representative.

2.40. "Reissuance" means the issuance of a permit to a facility which has a previously issued effective permit and includes automatic revocation of the previously issued permit.

2.41. "Schedule of Compliance" means a schedule of remedial measures in a WV/NPDES permit, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with CWA, Article 5A, and their regulations.

2.42. "Secretary" means the Secretary of the Army acting through his Chief of Engineers.

2.43. "Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

2.44. "State" means the State of West Virginia.

2.45. "Total Dissolved Solids" means the total dissolved (filterable) solids as determined by the use of the method specified in 40 C.F.R. Part 136.

2.46. "Toxic Pollutant" means any pollutant listed as a toxic under CWA Section 307(a)(1) (see Appendix A of these regulations).

2.47. "Variance" means any mechanism or provision under CWA Sections 301 or 316 or under 40 C.F.R. Part 125 or in the applicable effluent limitations guidelines which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on CWA Sections 301(c), 301(g), 301(i), 302(b)(2), and 316(a) where appropriate.

2.48. "WV/NPDES Application" means the forms prescribed by the director and approved by the EPA for applying for a permit or permit modification, including any additions, revisions or modifications to the WV/NPDES forms.

2.49. "WV/NPDES Permit" or "Permit" means an authorization issued by the director to implement the requirements of Article 5A including modifications to permits.

2.50. "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Section 3. PERMITS.

3.1. Permit Requirement; Exemptions; Prohibitions.

3.1.1. Except as authorized by a WV/NPDES permit no person shall:

3.1.1.a. Discharge pollutants from a point source associated with any coal mine, preparation plant and all refuse and waste therefrom;

3.1.1.b. Make, cause, or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet from a facility for the discharge of pollutants or the effluent therefrom into the waters of the State;

3.1.1.c. Acquire, construct, install, modify, or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated waste or effluent from any facility into the waters of the State, or any extension to or addition to such disposal

system;

3.1.1.d. Extend, modify, add to or increase in volume or concentration any pollutants or effluent from any point source associated with any facility in excess of the discharges or disposition specified or permitted under any existing permit;

3.1.1.e. Construct, install, modify, open, reopen, operate, or abandon any coal mine, coal preparation plant, or coal preparation plant associated areas whenever such facilities have associated with them or might reasonably be expected to have associated with them a discharge into or pollution of waters of the State except that a WV/NPDES permit shall be required for any coal preparation plant regardless of whether it has, may have or might reasonably be expected to have a discharge.

3.1.2. A WV/NPDES permit issued pursuant to Section 3 of these regulations shall be deemed to be a permit issued in accordance with Article 5A and CWA.

3.1.3. A WV/NPDES permit shall not be required for activities conducted under and in conformity with Section 9C.

3.2. Prohibition Against Issuing a WV/NPDES Permit.

3.2.1. A WV/NPDES permit may not be issued:

3.2.1.a. When the conditions of the permit do not provide for compliance with the applicable requirements of CWA and Article 5A;

3.2.1.b. By the director where the Regional Administrator has objected to issuance of the WV/NPDES permit;

3.2.1.c. When in the judgment of the Secretary anchorage and navigation in or on any waters of the State would be substantially impaired by the discharge;

3.2.1.d. For the discharge of any radiological, chemical, or biological warfare agent or high level radioactive waste;

3.2.1.e. For any discharge inconsistent with a plan or plan amendment approved under CWA Section 208(b);

3.2.1.f. To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards unless the applicant has met the requirements of Section 4.5.5 of these regulations or has met the requirements for a variance under Section 4.5.6 of these regulations;

3.2.1.g. When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or

3.2.1.h. To any facility which is an indirect discharger.

3.3. Denial of Permits. WV/NPDES permits may be denied for

noncompliance with Article 5A or these regulations including the reasons specified in Section 8.4 of these regulations or when a surface mining permit under Article 6 has been denied. In the case of an application for reissuance an outstanding violation of an existing permit is grounds for denial. Any denial of the WV/NPDES permit is appealable to the Water Resources Board pursuant to W. Va. Code §20-6-43(d) and in accordance with the procedures and authority of W. Va. Code §20-5A-15.

3.4. Effect of a Permit.

3.4.1. Except for any toxic effluent standards and prohibitions imposed under CWA Section 307, compliance with a permit during its term constitutes compliance, for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 5A. However, a permit may be modified, reissued or revoked during its term for cause as set forth in Section 8 of these regulations.

3.4.2. Issuance of a WV/NPDES permit does not convey any property rights of any sort, or any exclusive privilege.

3.5. Duration and Transferability of Permits.

3.5.1. **Duration.** WV/NPDES permits shall be effective for a fixed term not to exceed five (5) years. The director may shorten the term of a WV/NPDES permit to ensure that expiration dates of the WV/NPDES permit and the Article 6 surface mining permit coincide, but a WV/NPDES permit may not be shortened to less than three and one-half years for the sole purpose of reconciling expiration dates of Article 6 and WV/NPDES permits unless the permittee agrees.

3.5.2. **Extension.** A WV/NPDES permit may be extended by the director for a period not to exceed eighteen (18) months beyond its expiration date if the applicant has made a timely and complete application for permit reissuance. Timeliness of an application for permit reissuance is governed by Section 4.4 of these regulations. A complete application for the purpose of this extension shall mean that the required number of copies of the application were submitted, including the filing fee of fifty dollars (\$50.00), the application questions are sufficiently answered except those required by Sections 4.5.2.f, 4.5.2.g, and 4.5.2.i of these regulations, and the application forms were signed as required under Section 4.7 of these regulations. A determination of the application's completeness as set forth in Section 4.3 of these regulations shall not preclude the director from requesting additional information from the applicant during the subsequent substantive review. Permits extended under Section 3.5.2 of these regulations remain fully effective and enforceable. When a WV/NPDES permit is reissued the existing permit is automatically void.

3.5.3. **Transfer of Permits.** Permits may be transferred from a permittee to a new operator by either modifying an existing permit pursuant to Section 8.2.3.a.4 of these regulations, reissuing the permit under Section 8.3.3.c of these regulations or by an automatic transfer under Section 3.5.4 of these regulations. In transferring a permit from a permittee to a new operator, the director shall

determine that the proposed permittee has all necessary permit responsibility.

3.5.4. Automatic Transfer of Permits. Any permit may be automatically transferred to a new permittee if:

3.5.4.a. The current permittee notifies the director, on the forms prescribed (DR-19A), at least thirty (30) days in advance of the proposed transfer date; and

3.5.4.b. The notice includes a written agreement between the existing and proposed permittee containing a proposed date for transfer of the permit and explaining the extent of permit responsibility, coverage, and liability between them; and

3.5.4.c. The proposed permittee complies with Section 3.10.4 and 3.10.5 of these regulations.

3.5.4.c.1. To deny the transfer request, or

3.5.4.c.2. To require the transfer through permit modification, or

3.5.4.c.3. To require the transfer through reissuance and require a new application be filed rather than approving the transfer; and

3.5.4.c.4. Notification is not received by the permittee and proposed new permittee within thirty (30) days after receipt of proof of publication when the transfer is effective on the date specified in the agreement required by Section 3.5.4.b of these regulations.

3.6. NPDES Permits Issued by EPA and the Chief of the Division of Water Resources.

3.6.1. The director shall administer and enforce all WV/NPDES or Article 5A permits relating to coal mines, preparation plants and all refuse and waste therefrom issued by the chief.

3.6.2. The director shall administer and enforce all NPDES permits relating to coal mines, preparation plants, and all refuse and waste therefrom that have been adopted by the chief prior to the effective date of this section, provided that in the event of a conflict between an adopted NPDES permit and a WV/NPDES permit or Article 5A permit the more stringent provisions shall apply.

3.6.3. The director may adopt as WV/NPDES permits all NPDES permits relating to coal mines, preparation plants and all refuse and waste therefrom issued by the Regional Administrator which are transferred by the Regional Administrator and accepted by the director. Acceptance of an NPDES permit from the Regional Administrator shall not supercede any permit previously issued under Article 5A. All provisions of both permits shall be in force, except that, in the event of a conflict, the more stringent provisions shall apply. All permits relating to the same facility shall be deemed consolidated and considered as a single permit for the purposes of reporting, administration and enforcement.

3.6.4. Unexpired permits previously issued under Article 5A shall be void whenever a new WV/NPDES permit is issued for the same facility. Any unexpired NPDES permit issued by the EPA shall not be enforceable by the director upon the issuance of a new WV/NPDES permit for the same facility.

3.7. Transition and Consolidation Program for WV/NPDES and Article 6 Permits.

3.7.1. Transition. Any WV/NPDES or Article 5A permit already in public notice pursuant to Article 5A on the effective date of these regulations shall continue to be processed by the Division of Water Resources; however, the director will be the permit issuing authority for any such permit recommended to be issued by the chief of the Division of Water Resources.

3.7.2. Consolidation of Permit Processing.

3.7.2.a. Whenever a facility requires a permit under both Article 6 and Article 5A, processing of two or more applications for those permit may be consolidated.

3.7.2.b. Whenever the permits are jointly noticed, the public hearings under Section 9 of these regulations and informal conferences under W. Va. Code §20-6-20 may be held on the same day.

3.7.2.c. The final permits may be issued together. They need not be issued together if, in the judgment of the director, joint issuance would result in unreasonable delay in the issuance of one or more of the permit.

3.7.2.d. Whenever a facility or activity requires additional permits under both of the statutes covered by these regulations, the director may coordinate the expiration date(s) of the new permit(s) with the expiration date(s) of the existing permit(s) so that all permits expire simultaneously subject to the provision of Section 3.5.1 of these regulations. Processing of the subsequent applications for renewal permits may then be consolidated.

3.7.2.e. Any permittee who has either an NPDES, WV/NPDES, or Article 5A permit must apply for reissuance in accordance with Section 4.4.1 of these regulations. If such permit expires within eighteen (18) months of the expiration of the Article 6 permit then such permit will automatically be given an extension to the expiration date of the surface mining permit provided the permittee complies with Section 3.5.2 of these regulations.

3.7.2.f. Any permittee who has either an NPDES, WV/NPDES, or Article 5A permit which will expire within eighteen (18) months after the expiration of an Article 6 permit for that facility must apply for the reissuance of the NPDES, WV/NPDES, or Article 5A permit when requesting renewal of the surface mining permit pursuant to Section 3M.

Section 4. APPLICATION FOR PERMITS.

4.1. **Duty to Apply.** Any person who discharges or proposes to discharge pollutants, or who proposes to undertake any activity listed in Section 3.1.1 of these regulations, and who does not have an effective permit for such discharge or activity, except persons covered by general permits or those covered by Section 3.1.3 of these regulations, shall submit a complete application in the manner and form prescribed by the director and in accordance with the applicable subsections of Section 4 of these regulations.

4.2. **Responsible Party Applies.** When a facility or activity is owned by one person but is operated by another the operator shall be the applicant. The director may require documentation of the WV/NPDES permit responsibility and liability of the owner and operator and may propose and issue the WV/NPDES permit to the responsible person(s), but only after notice to the responsible person(s), or the director may refuse to issue the WV/NPDES permit until the responsible person applies for the WV/NPDES permit.

4.3. **Completeness.** Any person who requires a WV/NPDES permit shall complete, sign, and submit to the director a WV/NPDES application. An application for a permit is complete when the director receives an application form and any supplemental information including maps, plans, designs, and other application materials which are completed to the director's satisfaction. The completeness of any application for a WV/NPDES permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. The director shall not begin the processing of a permit until the applicant has fully complied with the application requirements.

4.4. Time to Apply.

4.4.1. **Reissuance.** Any person with an existing WV/NPDES permit shall submit an application for reissuance of such permit at least one hundred and twenty (120) days before the expiration date of the existing WV/NPDES, NPDES, or Article 5A permit.

4.4.2. **Permit to Abandon.** Any person proposing to abandon a deep mine facility under W. Va. Code §20-5A-5(b)(6) and Section 3.1.1.e of these regulations shall apply for an abandonment permit at least one hundred and eighty (180) days prior to sealing of the deep mine. Any person proposing to abandon a surface mine facility under W. Va. Code §20-5A-5(b)(6) and Section 3.1.1.e of these regulations shall apply for an abandonment permit with a request for Phase II bond release under Section 4I.

4.5. Information Required from Applicants.

4.5.1. **Information Required from All Applicants.** All applicants for WV/NPDES permits shall provide the director with a complete application in the manner and on a form prescribed by the director. The form may require information in addition to that specified in Section 4.5 of these regulations.

4.5.1.a. The activities conducted by the applicant which require it to obtain a permit.

4.5.1.b. Name, mailing address, and location of the facility for which the application is submitted.

4.5.1.c. Up to four Standard Industrial Classification (SIC) codes which best reflect the principal products or services provided by the facility.

4.5.1.d. The operator's name, address, telephone number, ownership status, including the name and address of the owner if different, and status as federal, state, private, public, or other entity.

4.5.1.e. Other relevant environmental permits necessary for the construction or operation or both of this facility such as dredge and fill permits under CWA Section 404 and Article 6 permits.

4.5.1.f. A topographic map drawn to a reasonable scale and extending at least one thousand (1000) feet beyond the site depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage or disposal facilities; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

4.5.2. Information Required from Existing Sources. All applicants (including all applicants for reissuance) for WV/NPDES permits whose facilities are existing sources shall also provide the following information to the director:

4.5.2.a. **Outlet Location.** For each point source, the latitude and longitude to the nearest second and the name of the immediate receiving water and river mile point. For haulroads and on-bench drainage control, the outlet location shall be considered to be the lowest downstream discharge point where water leaving the permit area enters the stream.

4.5.2.b. **Line Drawing.** A line drawing of the water flow through the facility with a water balance, showing operations contributing influent to the treatment units and effluent. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under Section 4.5.2.c of these regulations. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined the applicant may instead provide a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

4.5.2.c. **Average Flows and Treatment.** A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outlet, including process wastewater and storm water runoff (including material storage area runoff), the average flow each process contributes and a description of the treatment, if any, the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations, or production areas may be

described in general terms.

4.5.2.d. **Intermittent Flows.** If any of the discharges described in Section 4.5.2.c of these regulations are intermittent or seasonal, a description of the frequency, duration, and flow rate of each discharge occurrence (except for storm water runoff, spillage, or leaks).

4.5.2.e. **Improvements.** If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement project, and a listing of the required and projected final compliance dates.

4.5.2.f. **Effluent Characteristics.** Information on the discharge of pollutants is specified in Sections 4.5.2.f.1 through 4.5.2.f.6 of these regulations. When "quantitative data" (concentration and mass) for a pollutant is required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 C.F.R. Part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. Grab samples must be used for pH, temperature, cyanide, total phenols, total residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. However, a minimum of one (1) grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than twenty-four (24) hours, and a minimum of one (1) to four (4) grab samples may be taken for storm water discharges depending on the duration of the discharge. One grab sample shall be taken in the first hour (or less) of discharge with one additional grab sample taken in each succeeding hour of discharge up to a minimum of four (4) grab samples for discharges lasting four or more hours. In addition, the director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged. When an applicant has two or more outlets with substantially identical effluents the director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outlet.

4.5.2.f.1. **Mandatory Testing.**

4.5.2.f.1.A. Every applicant must report quantitative data for every outlet for the following pollutants. All levels must be reported as concentration and as total mass except for temperature, pH, and flow.

4.5.2.f.1.A.i. Biochemical Oxygen Demand

4.5.2.f.1.A.ii. Chemical Oxygen Demand (COD)

4.5.2.f.1.A.iii. Total Organic Carbon (TOC)

4.5.2.f.1.A.iv. Total Suspended Solids

4.5.2.f.1.A.v. Ammonia (as N)

4.5.2.f.1.A.vi. Temperature (both winter and summer)

4.5.2.f.1.A.vii. pH

4.5.2.f.1.A.viii. Discharge Flow.

4.5.2.f.1.A.ix. Fecal Coliform (if believed present or if sanitary waste is or will be discharged).

4.5.2.f.1.A.x. Total Residual Chlorine (if chlorine is used).

4.5.2.f.1.A.xi. Oil and Grease.

4.5.2.f.1.B. The-reporting-requirements-for-biochemical-oxygen-demand, COD,--TOC,--and-ammonia-are-waived-if-sewage-or-bath-house-waste-is-not a-part-of-the-effluent. The director may waive the testing and reporting requirements for any of the pollutants or flow listed in Section 4.5.2.f.1.A of these regulations if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements.

4.5.2.f.2. Each applicant contributing to a discharge must report quantitative data for the pollutants listed in Appendix B of these regulations in each outlet.

4.5.2.f.3. Potentially Required Testing. Each applicant must indicate whether the applicant knows or has reason to believe that the pollutant is discharged from the outlet (see Section 4.5.2.f.6 of these regulations) and must report for each outlet quantitative data for the following pollutants:

4.5.2.f.3.A. All pollutants listed in Appendix B or Appendix C of these regulations for which quantitative data is not otherwise required under Section 4.5.2.f.2 of these regulations unless the applicant qualifies for a small business exemption under Section 4.5.2.g of these regulations.

4.5.2.f.3.B. All pollutants in Appendix D of these regulations.

4.5.2.f.4. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Appendix E of these regulations are discharged from each outlet (see Section 4.5.2.f.5 of these regulations). For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

4.5.2.f.5. Each applicant must report qualitative data generated using a screening procedure not calibrated with analytical standards, for TCDD (2,3,7,8-tetrachlorodibenzo-p-dioxin) if:

4.5.2.f.5.A. He uses or manufactures 2, 4, 5, T (2,4,5-trichloro-

phenoxy acetic acid); Silvex, 2, 4, 5, TP (2-(2,4,5-trichloro- phenoxy propanoic acid); Erbon (2-(2,4,5-trichloro-phenoxy) ethyl, 2, 2-dichloropropionate); Ronnel (0, 0-dimethyl 0-(2, 4, 5-trichlorophenyl) phosphorothioate); TCP (2, 4,5-trichloro- phenol); or HCP (hexachlorophene); or

4.5.2.f.5.B. He knows or has reason to believe that TCDD is or may be present in an effluent.

4.5.2.f.6. The requirements in Sections 4.5.2.f.3 and 4.5.2.f.4 of these regulations that an applicant must provide quantitative data for certain pollutants known or believed to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant.

4.5.2.g. **Small Business Exemption.** Coal mines or preparation plants with a probable total annual production of less than one hundred thousand (100,000) tons per year per mine or plant are exempt from the requirements in Section 4.5.2.f.3.A of these regulations to submit quantitative data for the pollutants listed in Appendix C of these regulations.

4.5.2.h. **Used or Manufactured Toxics.** A listing of any toxic pollutant which the applicant does or expects to use or manufacture as an intermediate or final product or by-product during the next five (5) years.

4.5.2.i. **Biological Toxicity Tests.** An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last three (3) years on any of the applicant's discharges or on a receiving water in relation to a discharge.

4.5.2.j. **Contract Analyses.** If a contract laboratory or consulting firm performed any of the analyses required by Section 4.5.2.f of these regulations, the identity of each laboratory or firm and the analyses performed.

4.5.2.k. **Plan for Abandonment.** The information required in a plan for abandonment pursuant to Section 4.5.4 of these regulations.

4.5.2.l. **Discharges into Noncomplying Waters.** Compliance with Section 4.5.5 of these regulations.

4.5.2.m. **Variances.** Compliance with Sections 4.5.6 and 4.5.7 of these regulations if applicable.

4.5.2.n. **Delayed Submission.** In case of reissuance applications, the director may grant permission to submit the information required by Sections 4.5.2.f, 4.5.2.h, and 4.5.2.i of these regulations after the permit expiration date.

4.5.2.o. **Additional Information.** In addition to the information reported on the application form, applicants shall provide to the director, at his or her request, such other information as the director may reasonably require to assess the facility and discharges from the facility and to determine whether to issue a WV/NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity to aquatic life of the discharges and requirements to determine the cause of the toxicity.

4.5.3. Information Required for New Sources.

4.5.3.a. All applicants for WV/NPDES permits whose facilities are new sources must submit a complete application for a surface mining permit under Article 6 (Sections 3A through 3L) and the information required by Sections 4.5.1 and 4.5.2 of these regulations. Incorporation by reference of material supplied in the Article 6 application is permissible.

4.5.3.b. Any new source which is applying for a reissuance permit must submit an application consisting of the material required by Sections 4.5.1 and 4.5.2 of these regulations.

4.5.4. Plan for Abandonment and Application to Abandon a Mine.

4.5.4.a. **Deep Mines.** The plan for abandonment may incorporate information contained in the surface mining permit under Article 6 (see Section 7A.04). Unless waived in writing in whole or in part by the director, an applicant for a deep mine under either Section 4.5.2 or 4.5.3 of these regulations shall provide a plan for abandonment which contains the following information:

4.5.4.a.1. A mine map to scale showing among other things:

4.5.4.a.1.A. The proposed mine boundary for the initial five (5) years of the mine and the proposed final limits of mining (to be shown in different colors); thickness of barriers against outcrop;

4.5.4.a.1.B. Any adjacent deep and strip mines and auger holes and the thickness of barriers between the proposed mine and adjacent mine or auger holes;

4.5.4.a.1.C. Predicted final water elevation in the proposed mine;

4.5.4.a.1.D. Water level and its elevation in any adjacent mines;

4.5.4.a.1.E. Seam structural contours at ten (10) feet intervals and surface elevation contours at an interval not to exceed those available on the latest U.S.G.S. 7.5-minute quadrangle, fault plane or weak plane;

4.5.4.a.1.F. Proposed location of all mine seals and sectional dams if any;

4.5.4.a.1.G. All proposed mine portals and boreholes;

4.5.4.a.1.H. Surface and seam elevations of all mine openings;

4.5.4.a.1.I. The north line;

4.5.4.a.1.J. General strike and dip direction of the mineral bed and the average dip.

4.5.4.a.2. If there are mine workings either below or above the mine workings to be abandoned, information on whether they are active, inactive or abandoned; the final limits of mining (to be shown in different colors on the mine map in Section 4.5.4.a.1.A of these regulations); elevation of water pools in these mines; the thickness and nature of parting between the workings; whether water from the mine to be abandoned will flow through the adjacent mines or the mines above or below; and whether water from adjacent mines or mines below or above will flow through the mine to be abandoned and, if it will, the quality of the water.

4.5.4.a.3. The type and number of permanent seals proposed, their design details and drawings and the materials to be used for construction.

4.5.4.a.4. Whether there will or might reasonably be expected to be a discharge from the mine after abandonment; the maximum rate of discharge expected; whether the discharge, if any, will need treatment; if treatment is required the type of treatment proposed and its details and if treatment will not be required, the reasons for assuming so.

4.5.4.a.5. Provisions that shall be made for assuring acceptable water quality from any discharges after abandonment of the mine. Should the mine become filled with water, the effect on groundwater quality and plans to eliminate or minimize the adverse effects if any on groundwater quality.

4.5.4.a.6. Any other information which the director may deem necessary to evaluate the water pollution potential of the facility.

4.5.4.a.7. The information required in 7A.04.

4.5.4.b. Other Facilities Requiring Plans for Abandonment. For all coal mines other than deep mines, preparation plants, and preparation plant associated areas, the reclamation plan required under Article 6 shall be the plan for abandonment.

4.5.4.c. Plan for Abandonment; Reissuance. Unless waived in writing in whole or in part by the director, in addition to the information required by Sections 4.5.1 and 4.5.2 of these regulations, an applicant for the reissuance of a WV/NPDES permit shall provide information to update or add to the information required in Sections 4.5.4.a and 4.5.4.b of these regulations.

4.5.4.d. Application for Permit to Abandon.

4.5.4.d.1. For Deep Mines. An application for a permit to abandon

shall contain the information requested under Sections 4.5.4.a and 4.5.4.b of these regulations updated to show final determinations which reflects current knowledge on each item, provided that where the information submitted under Sections 4.5.4.a and 4.5.4.b of these regulations has not significantly changed further updating will not be required, and the following:

4.5.4.d.1.a. A statement from the applicant which predicts the likelihood of a discharge from the abandoned mine.

4.5.4.d.1.b. At least one representative cross section map across the coal seam and overburden along a line parallel to the dip of the mineral bed showing the name and thickness of each strata above and the immediate strata below the mineral bed, the position of the water table and the direction of the flow of water, the final likely level of water in the mineral bed on abandonment, and the likely extent of fracturing in the overburden due to mining. The line of cross section shall be shown on the mine map submitted under Section 4.5.4.a of these regulations.

4.5.4.d.1.c. A report on the quality of water being discharged from the mine during the past two (2) years or, if such data is unavailable, then an analysis of current discharge quality and a prediction of expected discharge quality should a discharge occur.

4.5.4.d.2. For facilities other than deep mines, the application for a permit to abandon shall be the application for a Phase II bond release.

4.5.5. Discharges into Noncomplying Waters. The owner or operator of a facility proposing to discharge into a water segment which does not meet applicable water quality standards for the pollutants to be discharged or is not expected to meet those standards even after the application of effluent limitations required by CWA Sections 301(b)(2)(A)2, 301(b)(2)(E), or 306, and for which the State has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate before the close of the comment period that either:

4.5.5.a. There are sufficient remaining pollutant load allocations to allow for the discharge; and

4.5.5.b. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards; or

4.5.5.c. That the applicant qualifies for an alternate water quality based effluent limitation by making an adequate demonstration to the director pursuant to West Virginia Administrative Regulations, Water Resources Board, Series 1, Section 8.

4.5.6. Variance Requests. A facility may request a variance from effluent limitations under any of the following statutory or regulatory provisions within the times specified. Requests must explain how the requirements of EPA variance regulations have been

met. EPA regulations governing the variances under Sections 4.5.6.a through 4.5.6.d of these regulations are promulgated at 40 C.F.R. Part 125.

4.5.6.a. Fundamentally Different Factors. A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be made by the close of the public comment period under Section 10.2 of these regulations. The request shall explain how the requirements of 40 C.F.R. Part 125, Subpart D have been met.

4.5.6.b. Nonconventional Pollutants. A request for a variance from the BAT requirements for CWA Section 301(b)(2)(F) pollutants (commonly called "nonconventional" pollutants) pursuant to CWA Section 301(c) because of the economic capability of the owner or operator, or pursuant to CWA Section 301(g) because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:

4.5.6.b.1. Submitting an initial request to the Regional Administrator, as well as to the director, stating the name of discharger, the permit number, the outlet number(s), the applicable effluent guideline, and whether the discharger is requesting a CWA Section 301(c) modification or a CWA Section 301(g) modification or both. This request must have been filed not later than two hundred and seventy (270) days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; or

4.5.6.b.2. Submitting a completed request no later than the close of the public comment period under Section 10.2 of these regulations demonstrating that the applicable requirements of 40 C.F.R. Part 125 have been met, unless an extension is granted under Section 4.5.7.b of these regulations.

4.5.6.b.3. Requests for variance from effluent limitations not based on effluent limitation guidelines need only comply with Section 4.5.6.b.2 of these regulations and need not be preceded by an initial request under Section 4.5.6.b.1 of these regulations.

4.5.6.c. Innovative Technology. An extension under CWA Section 301(k) from the statutory deadline of July 1, 1984 under CWA Section 301(b)(2)(A) for best available technology based on the use of innovative technology may be requested no later than the close of the public comment period under Section 10.2 of these regulations for the discharger's initial permit requiring compliance with CWA Section 301(b)(2)(A). The request shall demonstrate that the requirements of 40 C.F.R. §124.13 and Part 125, Subpart C have been met.

4.5.6.d. Water Quality Related Effluent Limitations. A modification to any water quality related effluent limitation under CWA Section 302(b)(2) of requirements under CWA Section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under Section 10.2 of these regulations on the permit from which the modification is sought.

4.5.7. Expedited Variance Procedures and Time Extensions.

4.5.7.a. Notwithstanding the time requirements in Section 4.5.6 of these regulations, the director may notify a permit applicant before a draft permit is issued that the draft permit will likely contain limitations which are eligible for variance. In the notice the director may require the applicant as a condition of consideration of any potential variance request to submit information explaining how the requirements applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

4.5.7.b. A discharger who cannot file a complete request required under Section 4.5.6.b.2 of these regulations may request an extension. The extension may be granted or denied at the discretion of the director. Extensions shall be no more than six (6) months in duration.

4.6. Record Keeping by Applicant. Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted for a period of at least three (3) years from the date the application is signed.

4.7. Signatories to Permit Applications and Reports.

4.7.1. Applications. All permit applications shall be signed as follows:

4.7.1.a. For a corporation: by a responsible corporate officer. For the purpose of Section 4.7 of these regulations, a responsible corporate officer means:

4.7.1.a.1. A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or

4.7.1.a.2. The manager of one or more manufacturing, production, or operating facilities employing more than two hundred and fifty (250) persons or having gross annual sales or expenditures exceeding twenty-five million dollars (\$25,000,000 in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

4.7.1.b. For a partnership or sole proprietorship: by a general partner or the proprietor.

4.7.2. Reports. All reports required by WV/NPDES permits, and other information requested by the director for compliance with Article 5A, shall be signed by a person described in Section 4.7.1 of these regulations, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

4.7.2.a. The authorization is made in writing by a person described in Section 4.7.1 of these regulations;

4.7.2.b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, superintendent, an individual or position having overall responsibility for environmental matters for the company, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

4.7.2.c. The written authorization is submitted to the director.

4.7.3. **Changes to Authorization.** If an authorization under Section 4.7.2 of these regulations is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Section 4.7.2 of these regulations must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.

4.7.4. **Certification.** Any person signing a document under Section 4.7.1 or 4.7.2 of these regulations shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

4.8. **Filing Fee.** A filing fee of \$50 shall be required with all WV/NPDES applications and shall be deposited with the State Treasurer to the credit of the operating permit Fees Fund in accordance with 20-6-9(f) of the State Act.

Section 5. CONDITIONS APPLICABLE TO ALL PERMITS.

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit.

5.1. Duty to Comply; Penalties.

5.1.1. The permittee must comply with all conditions of a WV/NPDES permit. Permit noncompliance constitutes a violation of CWA, Article 5A, and Article 6 and is grounds for enforcement action; for WV/NPDES permit modification, suspension or revocation; or for denial of a

WV/NPDES permit reissuance application.

5.1.2. The permittee shall comply with all effluent standards or prohibitions established under CWA Section 307(a) for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

5.1.3. The Clean Water Act and Article 5A provide that any person who violates a permit condition implementing CWA Sections 301, 302, 306, 307, 308, 318 or 405, or any provision of a WV/NPDES permit, or any rule or regulation promulgated under Article 5A, is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) per day of such violation. Any person who willfully or negligently violates permit conditions implementing CWA Sections 301, 302, 306, 307, or 308, or any provision of Article 5A, or a WV/NPDES permit, is subject to a fine of not less than two thousand and five hundred dollars (\$2,500) per day of violation nor more than twenty-five thousand dollars (\$25,000) per day of violation, or by imprisonment for not more than one (1) year, or both.

5.1.4. Any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under a WV/NPDES permit shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000) per violation, or by imprisonment for not more than six (6) months per violation, or both.

5.1.5. The Clean Water Act and Article 5A provide that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000) per violation, or by imprisonment for not more than six (6) months per violation, or by both.

5.1.6. The effluent or effluents covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the State Water Resources Board. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein.

5.1.7. Nothing in Section 5.1 of these regulations shall be construed to limit or prohibit any other authority the director may have under Article 5A or Article 6 of the West Virginia Code, or to relieve the permittee from any responsibilities, liabilities or penalties for not complying with West Virginia Administrative Regulations, Water Resources Board, Series 1 and 3.

5.2. Duty to Reapply. If the permittee wishes to continue an activity regulated by the WV/NPDES permit after the expiration date of the permit, the permittee must apply for a new permit at least one hundred and twenty (120) days prior to expiration of the permit.

5.3. **Duty to Halt or Reduce Activity Not A Defense.** Upon reduction, loss, or failure of the treatment facility the permittee shall, to the extent necessary to maintain compliance with the WV/NPDES permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power to the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

5.4. **Duty to Mitigate.** The permittee shall take all reasonable steps to minimize, correct, or prevent any discharge in violation of the WV/NPDES permit which has a reasonable likelihood of adversely affecting human health or the environment.

5.5. **Proper Operation and Maintenance.** The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the WV/NPDES permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of backup auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

5.6. **Permit Actions.** The WV/NPDES permit may be modified, reissued, suspended, or revoked for cause (see Section 8 of these regulations). The filing of a request by the permittee for a permit modification, reissuance, termination or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

5.7. **Transfer.** The WV/NPDES permit is not transferable to any person except after notice to the director and by following one of the procedures listed in Section 3.5.3 of these regulations.

5.8. **Property Rights.** The WV/NPDES permit does not convey any property rights of any sort nor any exclusive privilege.

5.9. **Duty to Provide Information.** The permittee shall furnish to the director, within a specified time, any information which the director may request to determine whether cause exists for modifying reissuing, suspending, or revoking the WV/NPDES permit, or to determine compliance with the permit. The permittee shall also furnish to the director, upon request, copies of records required to be kept by the permit.

5.10. **Inspection and Entry.** The permittee shall allow the director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

5.10.1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the WV/NPDES permit;

5.10.2. Have access to and copy at reasonable times, any records that must be kept under the conditions of the permit;

5.10.3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and

5.10.4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by Article 6 or Article 5A, any substances or parameters at any location.

5.11. Monitoring and Records.

5.11.1. Monitoring must be conducted according to test procedures approved under 40 C.F.R. Part 136, unless other test procedures have been specified in the WV/NPDES permit.

5.11.2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

5.11.3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original chart recording for continuous monitoring instrumentation, copies of all reports required by the WV/NPDES permit, and records of all data used to complete the application for the permit, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the director at any time.

5.11.4. Records of monitoring information shall include:

5.11.4.a. The date, exact place, and time of sampling or measurements;

5.11.4.b. The individual(s) who performed the sampling or measurements;

5.11.4.c. The date(s) analyses were performed;

5.11.4.d. The individual(s) who performed the analyses; if a commercial laboratory is used, the name and address of the laboratory;

5.11.4.e. The analytical techniques or methods used; and

5.11.4.f. The results of such analyses.

5.11.4.g. This information need not be submitted to the director, unless requested, but should be retained in accordance with Section 5.11.3 of these regulations.

5.11.5. Monitoring results shall be reported on DMRs and at the intervals specified in the permit. DMR's should be sent to the Reclamation Chief so that they are received no later than twenty (20) days following the end of the reporting period.

5.11.6. If the permittee monitors any pollutant at any monitoring

point specified in the permit more frequently than required by the permit, using approved test procedures under 40 C.F.R. Part 136 or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased frequency shall also be indicated.

5.11.7. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the director in the permit.

5.12. **Signatory Requirement.** All applications, reports, or information submitted to the director shall be signed and certified as required in Section 4.7 of these regulations.

5.13. Reporting Requirements.

5.13.1. **Planned Changes.** The permittee shall give notice to the director as soon as possible but not later than thirty (30) days prior to any planned physical alterations or additions to the permitted facility and of any planned changes in the method of operating the facility which may affect the nature of quantity of the discharge, or qualify that facility for designation as a new source under Section 2.29 of these regulations.

5.13.2. **Anticipated Noncompliance.** The permittee shall give advance notice to the director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

5.13.3. **Compliance Schedules.** Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit shall be submitted no later than fourteen (14) days following each schedule date.

5.13.4. Immediate Reporting.

5.13.4.a. The permittee shall report any noncompliance with the WV/NPDES permit or Article 5A which may endanger health or the environment immediately but not later than twenty-four (24) hours after becoming aware of the circumstances by using the Division of Water Resources' Emergency Notification Number 1-800-642-3074. The written submission shall be provided to the Reclamation Chief within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time the noncompliance is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

5.13.4.b. The following shall also be reported immediately but not later than twenty-four (24) hours after:

5.13.4.b.1. Any unanticipated bypass (see Section 5.14.1 of these regulations) which exceeds any effluent limitation in the permit;

5.13.4.b.2. Any spill or accidental discharge (upset), as defined in Section 5.15 of these regulations, shall be reported to the director via the Division of Water Resources' Emergency Notification Number 1-800-642-3074. Such notification shall set forth the time and place of such spill or discharge, type and quantities of pollutants, any actions taken to stop or mitigate the spill or accidental discharge, and any other information as may be requested. A written verification of such notification shall be submitted upon request of the Reclamation Chief.

5.13.4.b.3. Violation of a maximum daily discharge limitation for any of the pollutants which the director has required in the permit to be reported immediately.

5.13.4.c. The director may waive the written report required under Section 5.13.4.b of these regulations on a case-by-case basis if the oral report has been received in accordance with the above.

5.13.4.d. Notification Levels. The permittee must notify the director in writing as soon as they know or have reason to believe:

5.13.4.d.1. That any activity has occurred or will occur which would result in the discharge, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

5.13.4.d.1.A. One hundred micrograms per liter (100 ug/l);

5.13.4.d.1.B. Two hundred micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug/l) for 2,4-dinitrophenol and for 2-methyl-4, 6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

5.13.4.d.1.C. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with Section 4.5.2.f of these regulations; and

5.13.4.d.1.D. The level established by the director in accordance with Section 6.2.8 of these regulations.

5.13.4.d.2. That they have begun or expect to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant which was not reported in the permit application under Section 4.5.2.h of these regulations.

5.13.5. Other Noncompliance. The permittee shall report all instances of noncompliance not reported under Sections 5.11.5, 5.11.6, 5.11.7, 5.13.3, and 5.13.4 of these regulations at the time monitoring reports are submitted. The reports shall contain the information listed in Section 5.13.4.a of these regulations.

5.13.6. Net Limitations. If net limitations are established, then the permittee shall notify the director if eligibility for such limitations has been altered or no longer exists.

5.13.7. Other Information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the director, it shall promptly submit such facts or information.

5.14. Bypass.

5.14.1. Definitions.

5.14.1.a. "Bypass" means the intentional temporary diversion of waste streams from any portion of a treatment facility; and

5.14.1.b. "Severe Property Damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

5.14.2. Bypass Not Exceeding Limitations. The permittee may allow any bypass to occur, for reasons other than sediment control, which does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Sections 5.14.3 and 5.14.4 of these regulations.

5.14.3. Notice.

5.14.3.a. Anticipated Bypass. If the permittee knows in advance of the need for a bypass, he or she shall submit prior written notice, if possible, at least ten (10) days before the date of the bypass;

5.14.3.b. Unanticipated Bypass. If the permittee does not know in advance of the need for a bypass, notice shall be submitted as required in Section 5.13.4 of these regulations.

5.14.4. Prohibition of Bypass Exceeding Limitations.

5.14.4.a. Bypass exceeding limitations is permitted only under the following conditions, and the director may take enforcement action against a permittee for bypass, unless:

5.14.4.a.1. Bypass exceeding limitations was unavoidable to prevent loss of life, personal injury, or severe property damage;

5.14.4.a.2. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

5.14.4.a.3. The permittee submitted notices as required under Section

5.14.3 of these regulations.

5.14.5. **Approval of Bypass Exceeding Limitations.** The director may approve an anticipated bypass exceeding limitations, after considering its adverse effects, if the director determines that it will meet the three conditions listed in Section 5.14.4.a of these regulations.

5.15. Upset.

5.15.1. **Definition.** "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

5.15.2. **Effect of an Upset.** An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of Section 5.15.3 of these regulations are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

5.15.3. **Conditions Necessary for a Demonstration of Upset.** A permittee who wishes to establish the affirmative defense of upset shall demonstrate through properly signed, contemporaneous operating logs or other relevant evidence that:

5.15.3.a. An upset occurred and that the permittee can identify the cause(s) of the upset;

5.15.3.b. The permitted facility was at the time being properly operated;

5.15.3.c. The permittee submitted notice of the upset as required in Section 5.13.4.b.2 of these regulations; and

5.15.3.d. The permittee complied with any remedial measures required under Section 5.4 of these regulations.

5.15.4. **Burden of Proof.** In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5.16. **Reopener Clause.** In accordance with W. Va. Code §20-5A-14, the director may reopen the WV/NPDES permit through modification or by reissuance to incorporate an applicable effluent standard or limitation under CWA Sections 301(b)(2)(C) and W. Va. Code §20-5A-7(b) (Water Quality Based Effluent Limitations and Standards), CWA Section 301(b)(2)(D) (Toxics), CWA Section 304(b)(2) (Best Available Treatment) and CWA Section 307(a)(2) (Toxics), which is promulgated or approved after the WV/NPDES permit is issued if that effluent standard or limitation is more stringent than any effluent

limitation in the permit or controls a pollutant not limited in the permit.

5.17. **Removed Substances.** Where removed substances are not otherwise covered by the terms and conditions of the WV/NPDES permit or other existing permit issued by the Department, any solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters and which are intended for disposal within the State shall be disposed of only in a manner and at a site subject to the approval by the Department. If such substances are intended for disposal outside the State or for reuse (that is, as a material used for making another product, which in turn has another use), the permittee shall notify the Department in writing of the proposed disposal or use of such substances, the identity of the prospective disposer or users, the intended place of disposal or use, as appropriate, and shall take reasonable measures to ensure that the use does not cause pollution of the waters of the State.

5.18. **New Sources.**

5.18.1. The owner or operator of a new source or a recommencing discharger shall install and have in operating condition, and shall "start up" all pollution control equipment required to meet the conditions of the WV/NPDES permit before beginning to discharge.

5.18.2. After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

5.18.3. Any new source classified as such under previous EPA regulations may, notwithstanding Section 8 of these regulations, apply to have the WV/NPDES permit modified to incorporate the revised new source performance standards.

5.18.4. When a WV/NPDES permit is issued to a new source, the protection period of Section 12.2.1 of these regulations shall apply. After expiration of such protection period, the permittee must immediately comply with any more stringent technology-based limitations promulgated under CWA Section 301. If, however, the more stringent technology-based limitations are promulgated less than three (3) years before the expiration of the WV/NPDES permit, then the permittee has three (3) years from the date of their promulgation to comply with such stricter limits.

5.19. **Definitions.** When used in WV/NPDES permits, the definitions of Section 2 of these regulations shall apply and the following terms shall mean:

5.19.1. "Daily Average Fecal Coliform Bacteria" means the geometric average of all samples collected during the month.

5.19.2. "Measured Flow" means any method of liquid volume measurement, the accuracy of which has been previously demonstrated in engineering practice, or for which a relationship to absolute volume has been

obtained.

5.19.3. "Composite Sample" means a combination of individual samples obtained at regular intervals over a time period. Either the volume of each individual sample is proportional to discharge flow rates or the sampling interval (for constant volume samples) is proportional to the flow rates over the time period used to produce the composite. The maximum time period between individual samples shall be two (2) hours.

5.19.4. "Grab Sample" means an individual sample collected in less than fifteen (15) minutes.

Section 6. ESTABLISHING WV/NPDES PERMIT CONDITIONS.

6.1. **General.** In addition to conditions required in all WV/NPDES permits, the director shall establish conditions in WV/NPDES permits, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of CWA, Article 5A, and Section 6 of these regulations.

6.1.1. An applicable requirement is a State or federal or interstate compact, statutory, or regulatory requirement which takes effect prior to final administrative disposition of a permit, or is any requirement which takes effect prior to final administrative disposition and is also any requirement which takes effect prior to the modification or reissuance of a permit. Section 10.2.2 of these regulations provides a means for reopening a WV/NPDES permit proceeding at the discretion of the director where new requirements become effective during the permitting process. An applicable requirement is also any requirement which takes effect prior to a modification or reissuance of a permit.

6.2. **Effluent Limitations.** Each WV/NPDES permit shall include conditions meeting the following requirements when applicable:

6.2.1. **Technology Based Effluent Limitations and Standards** for existing sources based on effluent limitations and standards under CWA Section 301 or new source performance standards promulgated under CWA Section 306, or case-by-case effluent limitations determined under CWA Section 402(a)(1) (Best Professional Judgment or BPJ), or a combination of the two in accordance with 40 C.F.R. Part 125. For new sources or new discharges, these technology-based limitations and standards are subject to the provisions of Section 12 of these regulations (Protection Period).

6.2.2. **Other Effluent Limitations and Standards** under CWA Sections 301, 302, 303, 307, and 318. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under CWA Section 307(a) for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the director shall institute proceedings under these regulations to modify or reissue the permit to conform to the toxic effluent standard or prohibition.

6.2.3. **Water Quality Standards.** Any more stringent requirements

necessary to achieve water quality standards established pursuant to CWA or Article 5A or regulations, including requirements of other affected states; or to attain or maintain a specified water quality related effluent limit established under CWA Section 302.

6.2.4. Reopener Clause. Any WV/NPDES permit issued shall include effluent limitations to meet the requirements of CWA Sections 301(b)(2)(A), 301(b)(2)(C), 301(b)(2)(D), 301(b)(2)(E), and 301(b)(2)(F), whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits shall also include a reopener condition (see Section 5.16 of these regulations) stating that, if an applicable standard or limitation is promulgated under CWA Sections 301(b)(2)(C), 301(b)(2)(D), 304(b)(2), and 307(a)(2) and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit, the permit may be modified or revoked and reissued to conform to that effluent standard or limitation.

6.2.5. Water Quality Management Plans. Any requirements necessary to ensure consistency with the requirements of a water quality management plan approved by EPA under CWA Section 208(b).

6.2.6. Alternate Limits that incorporate alternate effluent limitations or standards where warranted by "fundamentally different factors" under 40 C.F.R. Part 125, Subpart D (see Section 4.5.6 of these regulations).

6.2.7. Toxic Pollutants Limitations established under Sections 6.2.1, 6.2.2, or 6.2.3 of these regulations, to control pollutants meeting the criteria listed in Section 6.2.7.a of these regulations. Limitations will be established in accordance with Section 6.2.7.b of these regulations. An explanation of the development of these limitations shall be included in the fact sheet.

6.2.7.a. Limitations must control all toxic pollutants which:

6.2.7.a.1. The director determines, based on information reported in a permit application under Sections 4.5.2.f and 4.5.2.h of these regulations or in a notification under Section 5.13.4.d of these regulations or on other information, are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee; or

6.2.7.a.2. The discharger does or may use or manufacture as an intermediate, final product, or by-product.

6.2.7.b. The requirement that the limitations control the pollutants meeting the criteria of Section 6.2.7.a of these regulations will be satisfied by:

6.2.7.b.1. Limitations on those pollutants; or

6.2.7.b.2. Limitations on other pollutants which, in the judgment of

the director, will provide the necessary treatment of the pollutants.

6.2.8. Notification Level. A "notification level" which exceeds the notification level of Section 5.13.4.d of these regulations, upon a petition from the permittee or on the director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee.

6.2.9. Immediate Reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under Section 5.13.4.b.3 of these regulations shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or a pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

6.2.10. Monitoring Requirements. In addition to the requirements of Section 5.11 of these regulations, all WV/NPDES permits shall specify:

6.2.10.a. Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods);

6.2.10.b. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

6.2.10.c. Applicable reporting requirements based upon the impact of the regulated activity and as specified in Section 6.2.10.d of these regulations. Reporting shall be no less frequent than specified in the Section 6.2.10.e of these regulations.

6.2.10.d. To assure compliance with permit limitations, requirements to monitor:

6.2.10.d.1. The volume of effluent discharged from each outlet;

6.2.10.d.2. Other measurements as appropriate, including pollutants in internal waste streams under Section 7.8 of these regulations; pollutants in intake water for net limitations under Section 7.7 of these regulations; frequency rate of discharge for noncontinuous dischargers under Section 7.4 of these regulations; and pollutants subject to notification requirements under Section 5.13.4.d of these regulations.

6.2.10.e. Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

6.2.11. Best Management Practices to control or abate the discharge of pollutants when:

6.2.11.a. Authorized under CWA Section 304(e) for the control of toxic pollutants and hazardous substances from ancillary activities; or

6.2.11.b. Numeric effluent limitations are infeasible; or

6.2.11.c. The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of CWA.

6.2.12. Reissued Permits.

6.2.12.a. Except as provided in Section 6.2.12.b of these regulations, when a permit is reissued, interim limitations, standards, or conditions shall be set which are at least as stringent as the final limitations, standards, or conditions in the previous permit unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance.

6.2.12.b. When effluent limitations were imposed under CWA Section 402 (a)(1) in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, the provisions of Section 6.2.12.a of these regulations shall apply unless:

6.2.12.b.1. The discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by the subsequently promulgated effluent limitation guidelines);

6.2.12.b.2. The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (CWA Section 301(b)(2)(E));

6.2.12.b.3. The circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance; or

6.2.12.b.4. There is increased production at the facility which results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

6.2.13. Navigation. Any conditions that the Secretary considers necessary to ensure that navigation and anchorage will not be substantially impaired.

6.2.14. Schedules of Compliance. The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and Article 5A and regulations.

6.2.14.a. Any schedules of compliance for existing sources shall require compliance as soon as possible, but in no case later than the applicable statutory deadline: July 1, 1984 for technology-based limits under CWA Section 301(b)(1)(B); July 1, 1977 for water quality based effluent limits under CWA Section 301 (b)(1)(C); or July 1, 1987 or three (3) years after promulgation for control of a toxic pollutant under CWA Section 307(a)).

6.2.14.b. The first WV/NPDES permit issued to a new source or a recommencing discharger may contain a schedule of compliance under the provisions of Section 6.2.14 of these regulations. Any first time WV/NPDES permit issued to a new source or recommencing discharge shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.

6.2.14.c. **Interim Dates.** Any permit may contain a schedule of compliance for completion of interim requirements and require submission of reports detailing progress toward completion of such interim requirements. If a permit establishes a schedule of compliance which exceeds one (1) year from the date of permit issuance, the schedule shall set forth interim requirements (for example, actions, operations, or milestone events) and the dates for their achievement, but the time between interim dates shall not exceed one (1) year.

6.2.14.d. If the time necessary for completion of any interim requirement is more than one (1) year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

6.2.14.e. **Reporting.** The permit shall be written to require that no later than fourteen (14) days following each interim date and the final compliance date, the permittee shall notify the director in writing of its compliance or noncompliance with the interim or final requirements or submit progress reports if the provisions of Section 6.2.4 of these regulations are applicable.

Section 7. CALCULATING WV/NPDES CONDITIONS.

7.1. **Outlets and Discharge Points.** All permit effluent limitations, standards, and prohibitions shall be established for each outlet or discharge point of the permitted facility, except as otherwise provided under Section 6.3.11.b and Section 7.8 of these regulations. Where a person has a number of outlets emerging into the waters of this State in close proximity to one another, such outlets may be treated as a unit for the purposes of Section 7 of these regulations.

7.2. **Metals.** All permit effluent limitations, standards, or

prohibitions for a metal shall be expressed in terms of the total metal (that is, the sum of the dissolved and suspended fractions of the metal) unless:

7.2.1. An applicable effluent standard or limitation has been promulgated under CWA and specifies the limitation for the metal in the dissolved or valent form;

7.2.2. In establishing permit limitations on a case-by-case basis, it is necessary to express the limitation on the metal in the dissolved or valent form in order to carry out the provisions of CWA; or

7.2.3. All approved analytical methods for the metal inherently measures its dissolved form.

7.3. Continuous Discharges. For all continuous discharges, all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall be stated as maximum daily and average monthly discharge limitations.

7.4. Noncontinuous Discharges. Discharges which are not continuous shall be particularly described and limited, considering the following factors, as appropriate:

7.4.1. Frequency;

7.4.2. Total mass;

7.4.3. Maximum rate of discharge of pollutants during the discharge;

7.4.4. Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure.

7.5. Mass Limitations. Any pollutants limited in terms of mass additionally may be limited in terms of other units of measurement and the permit shall require the permittee to comply with both limitations.

7.6. Pollutants in Intake Water. Except as provided in Section 7.7 of these regulations, effluent limitations imposed in permits shall not be adjusted for pollutants in the intake water.

7.7. Net Limitations.

7.7.1. Upon request of the permittee, effluent limitations or standards imposed in a permit shall be calculated on a "net" basis; that is, adjusted to reflect credit for pollutants in the permittee's intake water, if the permittee demonstrates that its intake water is drawn from the same body of water into which its discharge is made and if:

7.7.1.a.1. The applicable effluent limitations and standards specifically provide that they shall be applied on a net basis; or

7.7.1.a.2. The permittee demonstrates that pollutants present in the

intake water will not be entirely removed by its treatment systems operated by the permittee; and

7.7.1.b. The permit contains conditions requiring the permittee to conduct additional monitoring as necessary to determine continued eligibility for and compliance with any such adjustments.

7.7.2. The permittee shall notify the director if eligibility for an adjustment under this section has been altered or no longer exists. In such case, the permit may be modified or reissued.

7.7.3. Permit effluent limitations or standards adjusted under this subsection shall be calculated on the basis of the amount of pollutants present after any treatment steps have been performed on the intake water by or for the permittee. Adjustments under this subsection shall be given only to the extent that pollutants in the intake water which are limited in the permit are not removed by the treatment technology employed by the permittee.

In addition, effluent limitations or standards shall not be adjusted to the extent that the pollutants in the intake water vary physically, chemically, or biologically from the pollutants limited in the permit. Nor may effluent limitations or standards be adjusted to the extent that the permittee significantly increases concentrations of pollutants in the intake water, even though the total amount of pollutants might remain the same. Nor shall effluent limitations or standards be calculated on a "net" basis for permittees whose intake water comes from underground water systems.

7.8. Internal Waste Streams.

7.8.1. When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances the monitoring requirements under Section 5.11 of these regulations shall also be applied to the internal waste streams.

7.8.2. Limits on internal waste streams will be imposed only when the fact sheet under Section 11 of these regulations sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible (for example, a point that is beneath ten meters of water), the wastes at the point of discharge are so diluted as to make monitoring impractical, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

7.9. Disposal of Pollutants into Wells, Underground Mines, or by Land Application.

7.9.1. Calculations of Effluent Limitations (General). When part of a discharger's process wastewater is not being discharged into surface waters of the State because it is disposed into a well, underground mine or by land application thereby reducing the flow or level of

pollutants being discharged into surface waters of the State, the director may establish limits on the concentration and quantity of such discharge and applicable effluent standards and the limitations for the surface discharge in a WV/NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal.

7.9.2. **Calculations of Effluent Limitations (Specified).** The provisions of Section 7.9.1 of these regulations shall not apply to the extent that promulgated effluent limitations guidelines specify a different specific technique for adjusting effluent limitations to account for well injection underground, mine disposal, or land application.

7.9.3. The provisions of Section 7.9.1 of these regulations do not alter a discharger's obligation to meet any more stringent requirements established under Section 5 or 6 of these regulations.

Section 8. MODIFICATION, REISSUANCE, SUSPENSION, AND REVOCATION OF PERMITS.

8.1. General.

8.1.1. WV/NPDES permits may be modified, reissued, suspended, or revoked either at the request of any interested person (including the permittee) or upon the director's initiative. However, permits may be modified, reissued, suspended, or revoked only for the reasons specified in Section 8 of these regulations. All requests shall be submitted to the director in writing and shall contain facts or reasons supporting the request. The director may require additional information, and in the case of a major modification, may require submission of an updated permit application.

8.1.2. If the director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, suspension, or revocation are not subject to public notice, comment, or hearings.

8.2. Modifications.

8.2.1. **General.** All requests for modification shall be submitted in writing to the director citing facts or reasons supporting the request for modification and indicating under which section of these regulations the request is made. The director may request additional information and may require the submission of an updated permit application. When a permit modification is requested, only the conditions subject to modification are reopened. All other conditions of the permit shall remain in effect for the duration of the permit.

8.2.2. If the director tentatively decides to modify a permit and the modification is made under Section 8.2.3.b of these regulations, he or she shall prepare a draft permit under Section 10.1 of these regulations, follow the public notice procedures in Section 10.2 of these regulations, and shall follow the procedural requirements in Section 8 of Article 5A. The draft permit shall fulfill the requirement of notice under Section 8 of Article 5A. When a draft

permit is prepared for the modification, only those conditions to be modified shall be reopened when a new draft permit is prepared.

8.2.3. Causes for Modification.

8.2.3.a. Minor Modifications. Upon the consent of the permittee, the director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in Sections 8.2.3.a.1 through 8.2.3.a.10 of these regulations without preparing a draft permit under Section 10.1 of these regulations, or following the procedures of Section 10 or 11 of these regulations or the procedures in Section 8 of Article 5A. Minor modifications may:

8.2.3.a.1. Correct typographical errors.

8.2.3.a.2. Require more frequent monitoring or reporting by the permittee.

8.2.3.a.3. Change an interim compliance date in a schedule of compliance, provided the new date is not more than one hundred and twenty (120) days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement.

8.2.3.a.4. Allow for a change in ownership or operational control of a facility where the director determines that no other change in the permit is necessary, provided that any forms prescribed by the director, including a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees, have been submitted to the director.

8.2.3.a.5. Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge.

8.2.3.a.6. Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.

8.2.3.a.7. Allow disposal system equipment substitution when the substituted equipment would not alter the degree of treatment required by the permit.

8.2.3.a.8. Allow rerouting of discharging lines when the rerouted line would not discharge to a different receiving stream and would not require new or different permit conditions.

8.2.3.a.9. Allow relocation of elements of treatment facilities or disposal systems, due to topography or equipment failures.

8.2.3.a.10. When the WV/NPDES or NPDES permit becomes final and effective after March 9, 1982, conform to changes regarding Sections 5.13.4.b and 5.15.3.a of these regulations.

8.2.3.b. Major Modifications. The following are causes for major modification, but not reissuance of a permit unless the permittee requests or agrees, and require the preparation of a draft permit under Section 10.1 of these regulations and the public notice procedures of Section 10.2 of these regulations. If the permittee requests or agrees, then the following causes can be reason for a permit reissuance which will open the entire permit for comment and change:

8.2.3.b.1. Alterations. There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

Note: Certain reconstruction activities may cause the new source provisions of 40 C.F.R. §122.29 and Part 434 to be applicable. See also Sections 2.29 and 12 of these regulations.

8.2.3.b.2. Information. The director has received new information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. This cause shall include any information indicating that cumulative effects on the environment are unacceptable.

8.2.3.b.3. New Regulations or Judicial Decision. The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

8.2.3.b.3.A. For promulgation of amended standards or regulations, when:

8.2.3.b.3.A.i. The permit condition to be modified was based on a promulgated effluent limitation guideline or water quality standards; and

8.2.3.b.3.A.ii. The EPA or State has revised, withdrawn, or modified that portion of the effluent limitation guideline or water quality standard on which the permit condition was based; and

8.2.3.b.3.A.iii. If a modification request is made by the permittee, such request is within ninety (90) days of Federal Register or State Register notice of the action on which the request is based.

8.2.3.b.3.B. For judicial decisions, when a court of competent jurisdiction has remanded and stayed State or federal promulgated regulations, if the remand and stay concern that portion of the regulations on which the permit condition was based and if the permittee is requesting the change, the request is filed by the permittee within ninety (90) days of judicial remand.

8.2.3.b.4. Compliance Schedules. The director determines good cause

exists for modification of a compliance schedule such as an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case shall a compliance schedule be modified to extend beyond an applicable CWA statutory deadline: July 1, 1984 for technology-based effluent limits under CWA Section 301(b)(1)(B) or July 1, 1977 for water quality based effluent limits under CWA Section 301(b)(1)(C).

8.2.3.b.5. **Variances.** When the permittee has filed a timely request for a variance under CWA Sections 301(c), 301(g), 301(h), 301(i), 301(k), 302(b)(2), or 316(a), or for "fundamentally different factors" under Section 4.5.6.a of these regulations.

8.2.3.b.6. **Toxics.** When required to incorporate an applicable CWA Section 307(a) toxic effluent standard or prohibition.

8.2.3.b.7. **Reopener.** When required by the "reopener" conditions in a permit, which are established in the permit under Section 6.2.4 of these regulations.

8.2.3.b.8. **Net Limitations.** Upon request of a permittee who qualifies for effluent limitations on a net basis, or when a discharger is no longer eligible for net limitations, as provided in Section 7.7 of these regulations.

8.2.3.b.9. **Non-Limited Pollutants.** When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee.

8.2.3.b.10. **Use or Maintenance of Toxics.** When the permittee begins or expects to begin to use or manufacture as an intermediate, final product, or by-product any toxic pollutant which was not reported in the permit application.

8.2.3.b.11. **Notification Levels.** To establish a "notification level" as provided in Section 5.13.4.d of these regulations.

8.2.3.b.12. **Failure to Notify Affected State.** Upon failure of the director to notify another state as required by Section 10.2.4 of these regulations whose waters may be affected by a discharge from this state and different permit conditions are required to comply with the other states water quality standards.

8.2.3.b.13. **Correction of Mistakes.** To correct technical mistakes, such as errors in calculation or mistaken interpretations of law made in determining permit conditions.

8.2.3.b.14. **Unable to Meet BPJ Limits.** When the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under CWA Section 402(a)(1) and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of

pollutant control actually achieved but shall not be less stringent than required by a subsequently promulgated effluent guideline.

8.2.3.b.15. **BPJ Limits Too Costly.** When the permittee's effluent limitations were imposed under CWA Section 402(a)(1) and the permittee demonstrates operation and maintenance costs that are totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline, but in no case may the limitation be less stringent than the subsequent guideline.

8.3. Reissuance.

8.3.1. General.

8.3.1.a. The director may reissue WV/NPDES permits prior to their expiration date for any cause specified in Section 8.3 of these regulations. When a permit is to be reissued the entire permit is reopened and the director shall require submission of a new permit application.

8.3.1.b. During any reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is issued. Reissuance requires a draft permit under Section 10.1 of these regulations and the public notice procedures of Section 10.2 of these regulations. Processing of a reissuance application does not exempt the permittee from compliance with any permit term or condition.

8.3.2. **Reissuance Based on Permittee Request or Agreement.** The following are causes for reissuance of a permit when the permittee requests or agrees:

8.3.2.a. All causes for modification listed under Section 8.2.3.b of these regulations.

8.3.2.b. The WV/NPDES permit will expire within eighteen (18) months and the permittee has submitted an application for reissuance which is approvable.

8.3.3. **Reissuance Without Permittee Request or Agreement.** The following are causes for reissuance of a permit:

8.3.3.a. Cause exists for suspension or revocation of the WV/NPDES permit under Section 8.4 of these regulations and the director determines reissuance is appropriate.

8.3.3.b. The facility has an Article 5A permit which was issued prior to July 1, 1974 which does not have an expiration date.

8.3.3.c. The director has received notification of a proposed transfer of the permit and has determined to reissue both the WV/NPDES permit and surface mining permit.

8.3.3.d. Conditions exist which allow reopening and reissuance of the

permit under Section 5.16 of these regulations.

8.4. Suspension and Revocation of Permits. Permits may be suspended or revoked in whole or in part. When suspending or revoking a permit the director shall follow the procedures of Sections 10 and 11 of these regulations. A notice of intent to revoke a permit is a type of draft permit which follows the same procedures as any draft permit under Section 10.1 of these regulations. The following may be causes for revocation or suspension of a permit during its term, or for denying a permit reissuance application:

8.4.1. Noncompliance by the permittee with any condition of the WV/NPDES permit or Article 5A; or

8.4.2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

8.4.3. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation; or

8.4.4. A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

8.4.5. Revocation of a permit issued under Article 6.

Section 9. PERMITS FOR MAJOR FACILITIES.

9.1. Designation of Major Facilities.

9.1.1. Because of their size of discharge, location in an environmentally sensitive area, or for other reasons, certain facilities have been classified as major facilities by the EPA Regional Administrator. All such major facilities are facilities for which EPA has not waived the right to review, object to, or comment upon pursuant to the Memorandum of Agreement. In addition, the director may make additional designations of major facility status of facilities not already classified as such.

9.1.2. Facilities designated as major will be informed at the time of permit issuance.

9.1.3. Such facilities will be subject to special requirements as set forth in Section 9.2 of these regulations.

9.2. Special Requirements for Major Facilities.

9.2.1. All facilities designated as major facilities by the Regional Administrator in conjunction with the director:

9.2.1.a. Will have a fact sheet prepared on them pursuant to Section 11 of these regulations whenever a draft permit is issued for them;

9.2.1.b. Must submit all discharge monitoring reports and reports of noncompliance required by their WV/NPDES or NPDES permit or under Section 5.11 of these regulations to both the director and the Regional Administrator;

9.2.1.c. Will be annually subject to either a Compliance Sampling Inspection (CSI), Compliance Evaluation Inspection (CEI) or Performance Audit Inspection (PAI);

9.2.1.d. Will have copies of compliance inspection reports and correspondence regarding noncompliance forwarded to EPA.

9.2.2. All facilities classified as major solely by the director will be subject to an annual inspection under Section 9.2.1.c of these regulations.

Section 10. PROCEDURE FOR PERMIT ISSUANCE.

10.1. General.

10.1.1. Once an application is complete, the director shall tentatively decide whether to prepare a draft permit or to deny the application.

10.1.2. If the director decides to prepare a draft permit, it shall contain the following information:

10.1.2.a. All applicable conditions under Sections 5 and 6 of these regulations;

10.1.2.b. All monitoring requirements; and

10.1.2.c. Effluent limitations, standards, prohibitions and conditions and all variances under Section 14 of these regulations that are to be included.

10.1.3. All draft permits shall be accompanied by a fact sheet if required under Section 11 of these regulations and shall be publicly noticed and available for public comment in accordance with Section 10.2 of these regulations.

10.2. Public Notice, Comment, and Hearings.

10.2.1. Public Notice.

10.2.1.a. Scope.

10.2.1.a.1. Public notice shall be given that a draft permit has been prepared.

10.2.1.a.2. Public notices may describe more than one permit or permit action.

10.2.1.a.3. Public notice shall be given of any hearing granted under Section 10.3 of these regulations.

10.2.1.b. Timing.

10.2.1.b.1. Public notice of the preparation of a draft permit shall allow at least thirty (30) days for public comment. Extra time may be allowed if requested.

10.2.1.b.2. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

10.2.2. Reopening of the Public Comment Period. If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the director may reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted. The director may also extend the comment period for good cause.

10.2.3. Proof of Publication. The applicant shall be responsible for publication of a legal advertisement in a qualified newspaper of general circulation in the location of the proposed permit area. Before the expiration of the WV/NPDES notice period in 10.2.1.b.1 of these regulations, the applicant shall send the director a copy of the advertisement and proof of publishing along with an affidavit certifying that the notice, and a fact sheet, if required, was sent to all persons listed in Sections 10.2.4.a.1 and 10.2.4.a.2 of these regulations. A WV/NPDES permit may not be issued until such affidavit is received.

10.2.4. Methods. In addition to the requirements of Section 10.2.3 of these regulations, public notice of the draft permit shall be given by the following methods:

10.2.4.a. By the applicant mailing a copy of a notice to the following persons: (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

10.2.4.a.1. Federal, State, and interstate agencies with jurisdiction over fish and wildlife resources including the United States Fish and Wildlife Service and the Division of Wildlife Resources of the West Virginia Department of Natural Resources; United States Army Corps of Engineers; the Historic Preservation Unit of the West Virginia Department of Culture and History; the Advisory Council on Historic Preservation; and other appropriate government authorities, including any affected states.

10.2.4.a.2. The Division of Water Resources, Attn: Public Information Office.

10.2.4.a.3. Any other State or federal agency which the director knows has issued or is required to issue a permit for the same facility or activity under any of the following federal programs: RCRA, UIC, 404, and PSD. For RCRA, and UIC these are: The Division of Water

Resources, Hazardous Waste/Groundwater Branch and the West Virginia Air Pollution Control Commission; for UIC, the Division of Water Resources, Hazardous Waste/Groundwater Branch and the Commission of Oil and Gas; for 404, the United States Army Corps of Engineers, Pittsburgh District or Huntington District; for PSD, the West Virginia Air Pollution Control Commission.

10.2.4.a.4. To any unit of local government having jurisdiction over the area where the facility is proposed to be located;

10.2.4.a.5. Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

10.2.4.b. After receipt of its copy of the public notice, the Division of Water Resources shall send the public notice to persons on a mailing list which is developed by:

10.2.4.b.1. Including those who request in writing to be on the list;

10.2.4.b.2. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

10.2.4.b.3. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters or environmental bulletins. The list may be updated from time to time by requesting written indication of continued interest from those listed. Persons may be deleted from the list if they fail to respond to such a request.

10.2.4.c. In addition to the general public notice described in Section 10.2.5 of these regulations, all persons identified in Sections 10.2.4.a.1 and 10.2.4.a.2 of these regulations shall be mailed a copy of the fact sheet, if any, and the draft permit and application unless such person requests, in writing, that these documents not be sent.

10.2.5. Contents.

10.2.5.a. All Public Notices. All public notices issued under Section 10.2 of these regulations shall contain the following minimum information:

10.2.5.a.1. Name and address of the office processing the permit action for which notice is being given;

10.2.5.a.2. Name and address of the permittee or permit applicant and a location map of the proposed area, except in the case of general permits;

10.2.5.a.3. A brief description of the business conducted at the facility or activity described in the permit application or in the draft permit, except in the case of general permits;

10.2.5.a.4. Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, fact sheet, and the application;

10.2.5.a.5. A brief description of the comment procedures required and the time and place of any hearing that will be held, including a statement of procedures to request a hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and

10.2.5.a.6. A general description and map of the location of the facility and the name of the receiving water(s). For draft general permits, this requirement will be satisfied by a map or description of the permit area.

10.2.5.a.7. Any other information considered necessary or proper.

10.2.5.b. **Public Notices for Hearings.** In addition to the general public notice requirements of Section 10.2.5.a of these regulations, a public notice of a public hearing shall contain the following information:

10.2.5.b.1. Reference to the date of previous public notices relating to the permit;

10.2.5.b.2. Date, time, and place of the hearing; and

10.2.5.b.3. A brief description of the nature and purpose of the hearing, including applicable rules and procedures.

10.2.6. **Public Comments and Requests for Public Hearings.** During the public comment period provided under Section 10.2.1 of these regulations, any interested person may submit written comments on the draft permit and may request a public hearing, if a public hearing has not been already scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in Section 10.4 of these regulations.

10.3. **Public Hearings.**

10.3.1. The director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The director also may hold a public hearing at his or her discretion whenever such a hearing might clarify one or more issues involved in the permit decision.

10.3.2. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under Section

10.2.1.b.1 of these regulations shall automatically be extended to the close of any public hearing held under the provisions of Section 10.3 of these regulations.

10.3.3. A tape recording or written transcript of the hearing shall be made available to the public, upon request.

10.4. Response to Comments.

10.4.1. At the time that any final permit is issued, the director shall issue a response to comments. This response shall:

10.4.1.a. Specify which provisions of the draft permit have been changed in the final permit decision and the reasons for the change; and

10.4.1.b. Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing.

10.4.2. The response to comments shall be available to the public.

10.5. Public Comment by Government Agencies.

10.5.1. If during the comment period for a draft permit, the District Engineer of the U.S. Army Corps of Engineers advises the director in writing that anchorage and navigation of any of the waters of the State would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advises the director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the director shall include the specified conditions in the permit. Review or appeal of denial of a permit under Section 10 of these regulations or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers and may not be made under the provisions of this part. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall be stayed in the WV/NPDES permit for the duration of that stay.

10.5.2. If during the comment period, any other State or federal agency with jurisdiction over fish, wildlife, or public health advises the director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial risk to public health or impairment of fish, shellfish, or wildlife resources, the director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of CWA and Article 5A.

10.5.3. In appropriate cases the director may consult with one or more of the agencies referred to in Section 10 of these regulations before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

10.6. Public Access to Information. Public access to information shall be governed by the Freedom of Information Act, Chapter 29B of the West Virginia Code.

Section 11. FACT SHEET.

11.1. Fact Sheet Preparation. A fact sheet shall be prepared for every draft permit for:

11.1.1. A major facility or activity;

11.1.2. Every general permit;

11.1.3. Every draft permit that incorporates a variance; and

11.1.4. Every draft permit which the director finds is the subject of widespread public interest or raises major issues.

11.1.5. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The director shall send this fact sheet to the applicant, to the Division of Water Resources and, on request, to any other person.

11.2. Fact Sheet Contents. The fact sheet shall include, when applicable:

11.2.1. A brief description of the type of facility or activity which is the subject of the draft permit.

11.2.2. The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being discharged.

11.2.3. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions.

11.2.4. Reasons why any requested variances or alternatives to required standards do or do not appear justified.

11.2.5. A description of the procedures for reaching a final decision on the draft permit including:

11.2.5.a. The beginning and ending dates of the comment period under Section 10.2 of these regulations and the address where comments will be received;

11.2.5.b. Procedures for requesting a hearing and the nature of that hearing; and

11.2.5.c. Any other procedures by which the public may participate in the final decision.

11.2.6. Name and phone number of a person to contact for additional information.

11.2.7. Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard provisions and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

11.2.8. When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:

11.2.8.a. Limitations to control toxic pollutants under Section 6.2.7 of these regulations;

11.2.8.b. Limitations on internal waste streams under Section 7.8 of these regulations; or

11.2.8.c. Limitations on indicator pollutants under 40 C.F.R. §125.3(g).

11.2.8.d. When appropriate, a sketch or detailed description of the location of the discharge described in the application.

Section 12. NEW SOURCES.

12.1. Definitions. For the purpose of Sections 12 of these regulations:

12.1.1. "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

12.1.2. "Facilities" or "Equipment" means buildings, structures, or process or production equipment or machinery which form a permanent part of the new source and which will be used in its operation if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

12.2. Effect of Compliance With New Source Performance Standards.

12.2.1. Except as provided in Section 12.2.2 of these regulations, any new source which meets the applicable new source performance standards promulgated before the commencement of discharge may not be subject to any more stringent new source performance standards or to any more stringent technology-based standards under CWA Section 301(b)(2) for the shortest of the following periods:

12.2.1.a. Ten (10) years from the date that construction is completed;
or

12.2.1.b. Ten (10) years from the date the source begins to discharge process or other nonconstruction related wastewater; or

12.2.1.c. The period of depreciation or amortization of the facility for the purposes of Section 167 or Section 169 or both of the United States Internal Revenue Code of 1954.

12.2.2. The protection from more stringent standards of performance afforded by Section 12.2.3.a of these regulations does not apply to:

12.2.2.a. Additional or more stringent permit conditions which are not technology-based (for example, conditions based on water quality standards or toxic effluent standards or prohibitions under CWA Section 307(a)); or

12.2.2.b. Additional permit conditions controlling pollutants listed as toxic under CWA Section 307(a) or as hazardous substances under CWA Section 311 and which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances; or

12.2.2.c. Existing sources which modify their pollution control facilities and achieve performance standards but which are not new sources or otherwise do not meet the requirements of this paragraph.

12.2.3. When a WV/NPDES permit is issued to a source with a "protection period" under Section 12.2.1 of these regulations which will expire on or after the expiration of the protection period, such permit shall require the owner or operator of the source to comply with the requirements of CWA Section 301 and any other applicable CWA requirements immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall be allowed except when necessary to achieve compliance with requirements promulgated less than three (3) years before the expiration of the protection period.

12.2.4. The owner or operator of a new source or a recommencing discharger shall install, and have in operating condition, and shall "start up" all pollution control equipment required to meet the conditions of the WV/NPDES permit before beginning to discharge. Within the shortest feasible time, not to exceed thirty (30) days, the permittee must meet all permit conditions. The requirements of this paragraph do not apply if the owner or operator is issued a permit containing a compliance schedule under Section 6.2.14.b of these regulations.

12.2.5. After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

12.3. Criteria for New Source Determination.

12.3.1. A preparation plant or associated area, except as otherwise provided, is a "new source" if it meets the definition of "new source"

in Section 2.29 of these regulations, and

12.3.1.a. Is constructed at a site at which no other source is located; or

12.3.1.b. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

12.3.1.c. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.

12.3.2. A source meeting the requirements of Section 12.3.1.c of these regulations is a new source only if a new source performance standard is independently applicable to it.

12.3.3. Construction on a site at which an existing source is located results in a modification subject to Section 8.2.3.b of these regulations rather than in a new source if the construction does not create a new building, structure, facility, or installation meeting the criteria of Section 12.3.1.b or Section 12.3.1.c of these regulations but otherwise alters, replaces, or adds to existing process or production equipment.

12.3.4. Construction of a new source as defined under Section 2.29.3 of these regulations has commenced if the owner or operator has:

12.3.4.a. Begun or caused to begin as part of continuous on-site construction program;

12.3.4.a.1. Any placement, assembly, or installation of facilities or equipment; or

12.3.4.a.2. Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

12.3.4.b. Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time. Options to purchase or contract which can be terminated or modified without a substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under the paragraph.

12.4. Modification of NPDES Permits for New Sources. Any new source classified as such under previous EPA regulations may, notwithstanding Section 8 of these regulations, apply to have its WV/NPDES permit modified to incorporate the revised new source performance standards.

Section 13. GENERAL PERMITS.

13.1. Coverage. The director may issue a general permit in accordance with the following:

13.1.1. Area. The general permit shall may be written to cover a category of discharges described in the permit under Section 13.1.2 of these regulations, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:

13.1.1.a. Designated planning areas under CWA Sections 208 and 303;

13.1.1.b. City, county, or state political boundaries;

13.1.1.c. State highway systems;

13.1.1.d. Standard metropolitan statistical area as defined by the U.S. Office of Management and Budget;

13.1.1.e. Any other appropriate division or combination of boundaries.

13.1.2. Sources. The general permit shall be written to regulate, within the area described in Section 13.1.1 of these regulations, either:

13.1.2.a. A category of point sources from coal mines, preparation plants and refuse areas that:

13.1.2.a.1. Involve the same or substantially similar types of operations;

13.1.2.a.2. Discharge the same types of wastes;

13.1.2.a.3. Require the same effluent limitations or operating conditions;

13.1.2.a.4. Require the same or similar monitoring; and

13.1.2.a.5. In the opinion of the director, are more appropriately controlled under a general permit than under individual permits.

13.1.3. If the director tentatively decides to issue a general permit, he or she shall prepare a draft general permit under Section 10.1.1 of these regulations.

13.2. Administration.

13.2.1. General. General permits may be modified, reissued, suspended, or revoked in accordance with the applicable requirements of Section 8 of these regulations for either individual dischargers or for a category of point sources.

13.2.2. Requiring an Individual Permit. The director may require any person authorized by a general permit to apply for and obtain an individual permit. Any interested person adversely affected or aggrieved may petition the director to take action under Section 13.2

of these regulations. Cases where an individual permit may be required include the following:

13.2.2.a. The discharger is not in compliance with the conditions of the general permit;

13.2.2.b. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

13.2.2.c. Effluent limitation guidelines are promulgated for point sources covered by the general permit;

13.2.2.d. A water quality management plan containing requirements applicable to such point sources is approved;

13.2.2.e. The requirements of Section 13.1 of these regulations are not met.

Section 14. DECISION ON VARIANCES.

14.1. Actions by Director.

14.1.1. The director may grant or deny requests for the following variances:

14.1.1.a. After consultation with the Regional Administrator, extensions under CWA Section 301(k) based on the use of innovative technology; or

14.1.1.b. Variances under CWA Section 316(a) for thermal pollution.

14.1.2. The director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

14.1.2.a. A variance based on the economic capability of the applicant under CWA Section 301(c);

14.1.2.b. A variance based upon certain water quality factors under CWA Section 301(g); or

14.1.2.c. A variance based on water quality related effluent limitations under CWA Section 302(b)(2) (i.e., 40 C.F.R. Part 125, Subpart D).

14.2. Actions By EPA.

14.2.1. The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval, a request for a variance listed in Section 14.2.2 of these regulations that is forwarded by the director.

14.2.2. The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under Section

14.2.1 of these regulations. If the Deputy Assistant Administrator approves the variance, the director may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under 40 C.F.R. §124.64.

Section 15. ENFORCEMENT.

15.1. General. The provisions of this chapter may be enforced by all of the applicable provisions in Article 5A and Article 6 of the West Virginia Code, including:

15.1.1. Orders or notices issued by the director in accordance with Sections 7, 8, 10, and 12A of Article 5A;

15.1.2. Civil penalties appropriate to the violation and injunctive relief in accordance with Section 17 of Article 5A; and

15.1.3. Criminal penalties in accordance with Section 19 of Article 5A.

15.2. Citizen Participation. The director shall provide for public participation in enforcement by the following:

15.2.1. Investigating and providing a written response to all signed, written complaints from citizens;

15.2.2. Not opposing intervention by any citizen in an Article 5A proceeding when permissive intervention is authorized by statute or rule; and

15.2.3. Publishing notice in a newspaper of general circulation in the county in which the discharge is located at least thirty (30) days prior to the final settlement of any civil action under Article 5A or consent order issued by the State Water Resources Board. This notice will identify the person discharging, the specific enforcement action to be taken, and the name and address where information on the proposed settlement can be obtained. The director shall consider all comments received during the thirty-day period.