

RESPONSE TO COMMENTS
38CSR2F
Groundwater Protection Rules for Coal Mining

The WV Department of Environmental Protection (DEP), Division of Mining and Reclamation (DMR) commenced the public comment period for proposed legislative rule 38C.S.R. 2F on June 7, 2019. The public comment period concluded on July 9, 2019 after satisfying the minimum 30-day period. A public hearing was held at the DEP Headquarters located at 601 57th Street SE, Charleston WV in the Coopers Rock Conference Room on July 8, 2019 to accept oral and written comments regarding the proposed revisions to legislative rule 38 C.S.R. 2F. Any comments received after this time are considered *ex parte* communications and cannot be considered in accordance with WV Code Chapter 29A Article 3.

Written comments were received regarding proposed revisions to rule 38 C.S.R. 2F. Some of attendees present at the public hearing provided verbal comments. The full comment can be found in the public hearing transcript, also part of the formal rulemaking record. The DEP filed an initial comment response earlier this year, but neglected to address a comment from the West Virginia Coal Association. That response is provided below.

There were no changes made to 38 C.S.R. 2F as a result of the comments.

SB 635 amended W. Va. Code §22-30-24 by adding subsection (g) which states “ The secretary shall promulgate for review and consideration by the West Virginia Legislature in the regular session of the Legislature, 2020, legislative rules to incorporate the relevant provisions of this article in the Groundwater Protection Rules for Coal Mining, 38 CSR 2F, for tanks and devices located at coal mining operations”. Therefore, the DEP is proposing to incorporate the relevant provisions of §22-30 by making the following changes to 38-2F-3.1

38-2F-3. Groundwater Protection Plans and Practices for Coal Mining Operations.

3.1. Hydrologic and water quality protection practices established under the authority of W. Va. Code §22-11 or W. Va. Code §22-3 or W. Va. Code §22-30 and the legislative rules promulgated thereunder, were enacted in part to protect groundwater and are hereby incorporated by reference into this rule.

The West Virginia Rivers Coalition submitted comments on the proposed changes to 38 CSR 2F on July 8, 2019. Each comment is addressed in turn below:

Comment 1: It seems to set out that authority for overseeing compliance with ASTA would be shared between DMR and DWWM, potentially providing for additional capacity and efficiencies for oversight and enforcement — but it will require deliberate and thoughtful coordination and accountability.

Agency Response: Senate Bill 635 directs the agency to “incorporate the relative provisions of this article in the Groundwater Protection Rules for Coal Mining, 38CSR2F, for tanks and devices located at coal mining operations”. The agency incorporated the entirety of WV §22-30 into 38CSR2F-3 by reference. Due to the variety of tanks that may be located on coal mining operations this will meet SB 635 direction to “incorporate all relative provisions”. The

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agency realizes there will be a transition period of working with WV DWWM concerning required training and proper inspection procedures.

Comment 2: A full training program for DMR inspectors on ASTA requirement and procedures.

Agency Response: Division of Mining and Reclamation (DMR) has begun discussion with DWWM concerning training requirements and has begun to place personnel into initial training courses offered for AST inspectors. This will continue as appropriate.

Comment 3: Effective and timely communication systems between DMR, DWWM and the AST program.

Agency Response: DMR and DWWM have begun discussion on training, inspection, and record keeping conforming with DWWM AST procedures. DMR will continue to communicate and coordinate with DWWM concerning all aspects of the AST program.

Comment 4: Clear procedures for how violations are documented and addressed when detected by DMR staff for the AST program.

Agency Response: DMR is in discussion with DWWM on development of coordinated documentation of inspection and violation records.

Comment 5: Adequate oversight of DMR inspectors from the AST program.

Agency Response: DMR personnel have begun accompanying DWWM AST inspectors on coal mining operations to observe inspection procedures. DMR has historically conducted Multi-media Inspections with other WVDEP divisions/programs where appropriate.

Comment 6: Regular evaluation among DMR and DWWM of the all of the points listed above.

Agency Response: Evaluation by WVDEP program managers will continue and Multi-media Inspections will aid in the evaluations.

Comment 7: Technical error on the notice of filing of this rule to the Secretary of State; it stated SB 635 amended 22-30-14, but SB 635 actually amended 22-30-24.

Agency Response: The correct cite will be included in the rule package to be submitted.

The West Virginia Coal Association (“WVCA”) submitted a comment on the proposed changes to 38 CSR 2F on July 8, 2019. The WVCA wrote:

WVCA appreciates the efforts of the agency to amend the groundwater protection rules as directed by the West Virginia Legislature with the passage of Senate Bill

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635 in the 2019 Regular Session [footnote omitted]. The agency's proposed revisions to the Groundwater Protection Rules for Coal Mining is an important first step to implementing that mandate. However, we believe further changes may be necessary to the Groundwater Rules as the text of the Senate Bill 635 directed the agency [to] incorporate the relevant provisions of the Aboveground Storage Tank (AST) Act "for tanks and devices located at coal mining operations.

The WVCA also noted it is willing to work with DEP to meet that mandate and to assist in any further rulemaking.

The DEP acknowledges and appreciates the WVCA's support for the proposed changes to 38 CSR 2F. The DEP maintains that it met the requirements of SB 635 by fully incorporating the AST's groundwater protection rules into 38 CSR 2F. In order to meet the requirements of the West Virginia Legislature, the DEP's revisions to this rule incorporate all of the provisions of West Virginia Code § 22-30-1, et seq. As noted in the WVCA's comment, the DEP was directed to "incorporate the relevant provisions" of the ASTA. The DEP believes it has done so by incorporating those provisions wholesale into 38 CSR 2F.

The DEP pledges to work with the WVCA and its members (as well as other stakeholders affected by this rule change) to implement the proposed changes to 38 CSR 2F in a way that will satisfy the requirements of the applicable statutes and rules and that will meet the spirit and letter of SB 635.



WEST VIRGINIA RIVERS

July 8, 2019

WV Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street
Charleston, WV 25304
Hand-delivered at public hearing on July 8, 2019

RE: Comments on proposed changes to agency rules

38CSR2 - West Virginia Surface Mining Reclamation Rule

We have general concerns that the proposed change in 38CSR2-16.2.c.2 will limit claims for recovery only under SMCRA. We are aware there are some common law property rights, such as the right to lateral support, that are often part of subsidence claims. However, the effect of the proposed provision may prevent claimants (property owners) from being able to go after the full repair amount using such common law claims.

Under SMCRA, the choice is to be paid diminution in value of the property or to force the company to perform repairs. The change seems to be aimed at preventing a lawsuit where the property owner can compel the company to pay for repairs. The WVDEP should explain if it agrees that this is the intention of this change, and why it is taking this approach to limit surface owner rights to compensation for material damages.

38CSR2F - Groundwater Protection Rules Coal Mining Operations

The proposed change to 38CSR2F-3.1 essentially appears to incorporate all of the requirements of the Aboveground Storage Act (ASTA) into the Surface Mining Act -- thus placing DMR in a role in ASTA oversight. This move could have benefits for better protecting the environment and human health if implemented well. It seems to set out that authority for overseeing compliance with ASTA would be shared between DMR

and DWWM, potentially providing for additional capacity and efficiencies for oversight and enforcement -- but it will require deliberate and thoughtful coordination and accountability.

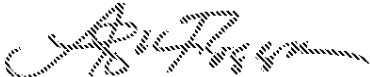
In order for this change to work effectively, at least these initial key elements need to be in place:

1. A full training program for DMR inspectors on ASTA requirement and procedures.
2. Effective and timely communication systems between DMR, DWWM and the AST program.
3. Clear procedures for how violations are documented and addressed when detected by DMR staff for the AST program.
4. Adequate oversight of DMR inspectors from the AST program.
5. Regular evaluation among DMR and DWWM of the all of the points listed above.

We also noted a technical error on the notice of filing of this rule to the Secretary of State; it stated SB 635 amended 22-30-14, but SB 635 actually amended 22-30-24.

Thank you for your consideration of these comments, we look forward to your response.

Sincerely,



Angie Rosser

Executive Director



West Virginia Coal Association

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July 8, 2019

Mr. Charles S. Sturey
Division of Mining & Reclamation
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
Submitted via electronic mail: csturey@wvdep.org

Re: Comments on Proposed Revisions to State Groundwater Protection Rules for Coal Mining Operations (38 CSR 2F)

Dear Mr. Sturey:

Pursuant to the notice published by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to the state's Groundwater Protection Rules for Coal Mining Operations (38 CSR 2F).

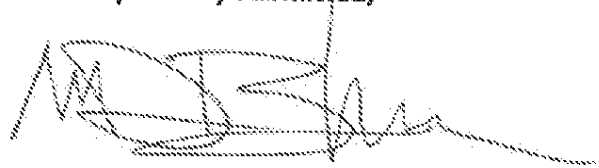
WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 98 percent of the Mountain State's underground and surface production of both thermal and metallurgical coal. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state

and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

WVCA appreciates the efforts of the agency to amend the groundwater protection rules as directed by the West Virginia Legislature with the passage of Senate Bill 635 in the 2019 Regular Session.¹ The agency's proposed revisions to the Groundwater Protection Rules for Coal Mining is an important first step to implementing that mandate. However, we believe further changes may be necessary to the Groundwater Rules as the text of Senate Bill 635 directed the agency "incorporate the relevant provisions" of the Aboveground Storage Tank (AST) Act "for tanks and devices located at coal mining operations."

WVCA looks forward to working with the agency to effectively implement the AST Act's provisions as part of the Groundwater Protection Rule and participating in any subsequent rulemaking to further amend 38 CSR 2F to narrow the scope of those provisions to those that applicable to the coal mining industry.

Respectfully Submitted,



**Jason D. Bostic
Vice-President**

¹ https://www.wvlegislature.gov/Bill_Text_HTML/2019_SESSIONS/RS/bills/SB635%20ENR.pdf