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WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

Form #3

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Division of Environmental Protection, Office of Mining and Reclamation TITLE NUMBER: 38

CITE AUTHORITY 22-4-2 (k), 22-4-11, 22-4-18

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ___

TITLE OF RULE BEING AMENDED: ___

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 2A

TITLE OF RULE BEING PROPOSED: "Rules for Mining and Restoration for Sandstone, Limestone and Sand"

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Carrie J. Chambers

Authorized Signature

$25.30

Executive Office
#10 McJunkin Road
Nitro, WV 25143-2506
Telephone: (304) 759-0515
Fax: (304) 759-0526

West Virginia Bureau of Environment

Cecil H. Underwood
Governor

Michael P. Miano
Commissioner

July 29, 1999

Ms. Judy Cooper
Director, Administrative
Law Division
Secretary of State's Office
Capitol Complex
Charleston, WV 25305

RE: 38CSR2A - "Rules for Mining and Restoration of Limestone, Sandstone, and Sand"

Dear Ms. Cooper:

This letter is to give my approval for filing of the above-referenced rule with your Office and the Legislative Rule-Making Review Committee as "Notice of an Agency-Approved Rule."

Your cooperation in this matter is very much appreciated. If you should have questions or need additional information, please call Carrie Chambers in my office at 759-0515.

Sincerely yours,

Michael P. Miano
Commissioner

MPM:cc

Attachment

cc: John Ailes
Rocky Parsons
Carrie Chambers

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 6, 1999

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Division of Environmental Protection, Office of Mining and Reclamation

#10 McJunkin Road, Nitro, WV 25143, Phone (304) 759-0515

LEGISLATIVE RULE TITLE: "Rules for Mining and Restoration for Sandstone, Limestone and Sand"

1. Authorizing statute(s) citation 22-4-2(k), 22-4-11, 22-4-18

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

June 17, 1999

b. What other notice, including advertising, did you give of the hearing?

DEP's InDEPth Newsletter; DEP's Public News Bulletin; State-Wide News Releases

c. Date of Public Hearing(s) *or* Public Comment Period ended:

July 20, 1999

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached x No comments received _____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 6, 1999

f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Carrie Chambers, Director's Office, #10 McJunkin Road, Nitro, WV 25143-2506

Phone: (304) 759-0515; Fax: (304) 759-0526; E-Mail: cchambers@mail.dep.state.wv.us.

g. ***IF DIFFERENT*** **FROM ITEM 'f', please give Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Same as (f)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a

hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

BUREAU OF ENVIRONMENT
DIVISOIN OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 38CSR2A - RULES FOR MINING AND RESTORATION OF LIMESTONE, SANDSTONE AND SAND

A. AUTHORITY: WV Code 22-4-2(k), 22-4-11, 22-4-18

B. SUMMARY OF RULE:
This is a new proposed rule to regulate only limestone, sandstone, and sand which were previously regulated under 38CSR2B. The proposed rule will regulate roads, blasting, drainage control, methods of operation, excess spoil disposal, revegetation, mapping, transfer of permits, permit renewals, revisions and incidental boundary revisions and will include provisions for restoration of lands affected by surface mining.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:
Chapter 22, Article 4 (Surface Mining and Reclamation of Minerals Other Than Coal) requires that rules be promulgated for the mining and reclamation of minerals other than coal and that separate rules be written for the mining and restoration of limestone, sandstone, and sand.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:
None

E. CONSTITUTIONAL TAKINGS DETERMINATION:
None

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:
After consultation with the DEP Advisory Council members at the meeting on June 10, 1999, Council recommended to the director that 38CSR2B be filed as amended. No other amendments were recommended. A copy of the minutes of this meeting is attached to this document.

MINUTES

ENVIRONMENTAL PROTECTION ADVISORY COUNCIL

June 10, 1999, Director's Conference Room, Nitro

The sixteenth meeting of the DEP Advisory Council was held Thursday, June 10, 1999, in the Director's Conference Room located in Nitro. Chairman Mike Miano called the meeting to order at 10:00 a.m.

ATTENDING:

Advisory Council Members:

Mike Miano, Chairman
Jacqueline Hallinan
William Raney
Rick Roberts
William Samples

Environmental Protection:

Bill Adams
Andy Gallagher
Tony Grbac
Randy Huffman
Mike Johnson
Mike Lewis
Robert Keatley
Pam Nixon
Rocky Parsons
Cap Smith
Charlie Sturey
Barbara Taylor
Karen Watson
Mike Zeto

1) Review and Approval of March 22, 1999 Minutes. Chairman Miano called the meeting to order at 10:00 a.m. The first item on the agenda was approval of the minutes of the March 22 Advisory Council; they were approved as written.

2) Discussion of Proposed Rule Amendments - 2000 Legislative Session. In accordance with WV Code §22-1-1(c), and DEP's new rule-making procedure that was implemented by Director Miano in September 1998 to involve the Advisory Council in DEP's rule-making process as early as possible to enable the Council to review, comment, and make recommendations to the Director on DEP's proposed legislative rule changes before they are filed for public hearing, the following proposed rules were brought to the Council's attention.

Chairman Miano said he would like to begin by saying he hoped all Council members had received their draft rules by E-mail without any complications and they were able to review them before the meeting. He informed the Council that due to the large number of rules being proposed for the 2000 Legislative Session, DEP's program offices would review them with the

Council as thoroughly as possible, in the allotted time frame, and try to answer any questions or concerns the Council may have.

The following Office of Air Quality's proposed rule amendments were discussed by Karen Watson, OAQ, with assistance from Richard Keatley, also from the OAQ office:

- 45CSR1 - "TO PREVENT AND CONTROL AIR POLLUTION FROM COAL REFUSE DISPOSAL AREAS"
- 45CSR2 - "TO PREVENT AND CONTROL PARTICULATE AIR POLLUTION FROM COMBUSTION OF FUEL IN INDIRECT HEAT EXCHANGERS"
- 45CSR3 - "TO PREVENT AND CONTROL AIR POLLUTION FROM THE OPERATION OF HOT MIX ASPHALT PLANTS"
- 45CSR4 - "TO PREVENT AND CONTROL THE DISCHARGE OF AIR POLLUTANTS INTO THE OPEN AIR WHICH CAUSES OR CONTRIBUTES TO AN OBJECTIONABLE ODOR OR ODORS"
- 45CSR5 - "TO PREVENT AND CONTROL AIR POLLUTION FROM THE OPERATION OF COAL PREPARATION PLANTS, COAL HANDLING OPERATIONS AND COAL REFUSE DISPOSAL AREAS"
- 45CSR6 - "TO PREVENT AND CONTROL AIR POLLUTION FROM COMBUSTION OF REFUSE"
- 45CSR7 - "TO PREVENT AND CONTROL PARTICULATE MATTER AIR POLLUTION FROM MANUFACTURING PROCESSES AND ASSOCIATED OPERATIONS"
- 45CSR10 - "TO PREVENT AND CONTROL AIR POLLUTION FROM THE EMISSION OF SULFUR OXIDES"
- 45CSR12 - "AMBIENT AIR QUALITY STANDARD FOR NITROGEN DIOXIDE"
- 45CSR16 - "STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES PURSUANT TO 40 CFR PART 60"
- 45CSR17 - "TO PREVENT AND CONTROL PARTICULATE MATTER AIR POLLUTION FROM MATERIALS HANDLING, PREPARATION, STORAGE AND OTHER SOURCES OF FUGITIVE PARTICULATE MATTER"
- 45CSR18 - "TO PREVENT AND CONTROL PARTICULATE AIR POLLUTION FROM DIRECT MEAT-FIRING DEVICES"
- 45CSR23 - "TO PREVENT AND CONTROL EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS"
- 45CSR25 - "TO PREVENT AND CONTROL AIR POLLUTION FROM HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES"
- 45CSR33 - "ACID RAIN PROVISIONS AND PERMITS"
- 45CSR34 - "EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS PURSUANT TO 40 CFR PART 63"

Karen began by bringing the Council up to date on the status of two OAQ rules that were filed during the last session (or late in the session). 45CSR8 revised the ambient air quality for sulfur oxides and particulate matter, and 45CSR9 pertained to ambient air quality standards for carbon monoxide and ozone. The DC Circuit Court of Appeals has ordered EPA to show how they arrived at the new standards - EPA may go back to the previous standards. Karen also apprised the Council on the N_{ox} State Implementation Plan. The Circuit Court stayed the implementation of that rule and there are no plans to develop any other amendments in the

immediate future. 45CSR28, which is the emissions trading rule that was filed late in the 1999 Session, was not taken up by the Legislature, but plans are to put the rule on the July agenda of the Interim Legislative Committee.

Karen explained the reason for the unusually large number of DEP rules that are being filed for the next Legislative Session. She informed the Council that several of the rules were outdated and were amended for consistency and streamlining, and are a result of months of on-going meetings with stakeholders -- involving both the regulated community and citizens. A particulate matter and sulfur oxide work group was also involved. Those rule amendments as a result of the stakeholders process include: 45CSR1 (which is being repealed and replaced with language in 45CSR5), 45CSR2, 3, 4, 5, 6, 7, 10, 12, 17, and 18 (which is being repealed since the rule is no longer deemed necessary). The amendments to the remainder of the rules, 45CSR16, 23, 25, 33, and 34 were necessary to adopt by reference definitions, clarifications, technical amendments, etc., recently adopted by US EPA.

After several minutes of discussion, the Advisory Council recommended to the Director that the following amendments be made to the OAQ rules:

Mr. Samples pointed out that 45CSR2 and 45CSR7 contain different definitions for the term "opacity." The agency responded that this discrepancy was inadvertent and the language should be as it is in 45CSR2. The agency agreed to revise 45CSR7, subsection 2.23, accordingly.

Mr. Larry Harris was unable to attend the meeting; however, he expressed the following comments on 45CSR10 and 45CSR33 by e-mail. He stated that the State's rules should be more stringent than the federal counterpart regulations, since the State's streams are being adversely impacted. The agency responded that, at this point in time, it does not possess sufficient evidence to make the written finding that is required by WV Code §22-2-3a before promulgating a rule which is more stringent than a counterpart federal regulation.

Cap Smith and Mike Zeto discussed the following Office of Waste Management proposed rule amendments:

- **33CSR2 - "Sewage Sludge Management Rule"**
- **33CSR20 - "Hazardous Waste Management Rule"**

Mike Zeto briefed the Council on the proposed amendments to 33CSR2. He stated that in 1996 the Legislature mandated DEP to perform a study on soil limitations for sewage sludge land application sites. These amendments (as a result of the study) were to be proposed by June 30, 1999. Other amendments to the rule include specifying the analytical method used for soil analysis, placing conditions on variances from the soil limits for land application sites, providing an incentive for municipalities to produce higher quality compost products, and adjusting the sewage sludge limits for four metals. Mr. Zeto told the Council these amendments are being proposed to update other related areas of the rule in an attempt to provide better management of sewage sludge within the state.

Cap Smith discussed 33CSR20 with the Council. He informed the Council that amendments are proposed in section 2 of the rule that will allow the Office of Waste Management to delist hazardous wastes, which has previously been handled by EPA. The other significant amendments that are being proposed by adoption of the Federal Register pertain to revision standards for owners and operators of closed and closing hazardous waste management facilities, post closure permit requirements, and the closure process. These amendments are referenced throughout the rule and will hopefully expedite site cleanup while maintaining environmental protection.

There were several minutes of discussion on OWM's proposed rule amendments; however, no recommendations were made to the Director concerning the amendments.

Mike Lewis, Office of Oil and Gas, discussed the following new proposed rule:

- **35CSR7 - "Well Operations - Within and Around Gas Storage Reservoirs"**

Mike informed the Council that 35CSR7 is a proposed "new" rule for the O&G Office. The rule is needed to provide protection of the environment, the public, and the state's natural gas resources. It is the intent of the proposed rule to accomplish this by addressing certain operating procedures that oil and gas and gas storage operators are to use when drilling into or through a gas storage reservoir or the gas storage reservoir protective area. In order to assure absence of leaking gas, the proposed rule requires gas storage operators to conduct monitoring and inspections of gas storage wells.

There were no questions or discussion by the Council on this proposed rule.

The following proposed rules were discussed by the Office of Mining and Reclamation:

- **38CSR2 - "Surface Mining and Reclamation Rule"**
- **38CSR2A - "Rules for Mining and Restoration for Sandstone, Limestone, and Sand"**
- **38CSR2B - "RULES FOR MINING AND RECLAMATION OF MINERALS OTHER THAN COAL"**

Ed Griffith, Office of Surface Mining, discussed the proposed amendments to the Surface Mining and Reclamation Rule. Ed told the Council that there are only minor amendments being proposed to this year's rule. The proposed definition of "woodlands" in subsection 2.136 relates to the utilization of commercial woodlands in Approximate Original Contour variance areas. This change is being proposed in order for the state to meet the federal policy that is expected to change in July 1999. The proposed amendment to change the bonding requirements of mining operations that request variances from contemporaneous reclamation to the maximum amount per acre bond ($5,000 per acre) is found in subdivision 14.15.f. All other amendments are being proposed in order to meet the requirements of the Office of Surface Mining's program amendments.

Rocky Parsons, OMR's Philippi Office, next addressed OMR's proposed rules 38CSR2A and 2B. Rocky explained to the Council members that 38CSR2B has been in place since 1983 and regulates all minerals other than coal. However, in accordance with the requirement that separate rules for limestone, sandstone, and sand are to be promulgated, DEP is proposing

38CSR2A which will regulate only those minerals - 38CSR2B will regulate all minerals other than limestone, sandstone, sand, and coal. Both proposed rules will regulate roads, blasting, drainage control, methods of operation, excess spoil disposal, revegetation, mapping, transfer of permits, permit renewals, revisions and incidental boundary revisions. 38CSR2A will provide provisions for restoration and 38CSR2B will include provisions for reclamation. Rocky gave the Council a brief history on the roadblocks the agency has encountered in the past several years in their attempt to amend the quarry statute. He said since the agency has been unsuccessful in that approach, it has become necessary to try to accomplish this through rule making. He informed the Council of a public meeting held the previous week to discuss the two proposed rules. He said the meeting was well attended and he believes the rules were well received by everyone in attendance.

The three OMR proposed rules were discussed by the Council members. Bill Raney said that although Rocky stated that the quarry rules have been well received by industry and the citizens, he is concerned about whether there has been enough time for the review of the proposed rules after they were drafted. He believes there would be a smoother transition into the rule making process, i.e., the public hearing/comment period, etc., if there had been more involvement from outside DEP during the drafting of the rules.

Mr. Larry Harris commented by e-mail 38CSR2A and 2B. His question is whether the siltation measures include silt fences where runoff might enter streams. He said it is not apparent what best management practices are for this situation, and he wonders if it needs to be spelled out. He knows of some operations in quarries where streams muddy after rainfalls, such as the Elkins and Waco quarries near Snowshoe, and he feels this is harming the streams. Do the new rules address this?

Rocky Parsons responded by saying that design criteria for drainage control structures is found in the technical handbook. Silt fences are not adequate for sediment control. The drainage system must be designed to hold .125 ac/ft of sediment for each acre of disturbed land. All runoff must pass through a drainage control structure. There is a provision for less sediment control (1/2 factor) for certain circumstances as approved by the Director. Effluent limits as established in the NPDES permit must be met.

Tony Grbac, Office of Surface Mining, addressed the following rule:

199CSR1 - "SURFACE MINING BLASTING RULE"

Tony began by briefing the Council on the history of the Surface Mining Blasting Rule. This rule is being proposed to comply with SB681 - passed during the last session. This bill created the Office of Explosives and Blasting and the Office of Coalfield Community Development, which is under the West Virginia Development Office. The proposed rule will regulate blasting laws and rules associated with all surface-mining operations. All duties currently performed by OMR related to blasting, and all rules which now regulate blasting (38CSR2C) will be transferred to this new office. Besides regulating blasting on all surface mining operations, it will also implement and oversee pre-blast survey processes; maintain and operate a system to receive and address questions, concerns and complaints relating to mining

operations; determine the qualifications for individuals and firms performing pre-blast surveys; establish the education, training, examination and certification of blasters; administer a claims process for property damage caused by blasting; and conduct a study of blasting and make recommendations regarding any appropriate rule or code changes.

Tony explained that the revenue generated by the proposed fee in 199CSR1 (one-half cent times the number of pounds of explosive material used ruing the preceding month for any purpose on the surface mining operations) would fund both the offices, as required by SB681. After one year of collection, both offices are to report to the Legislature as to whether the revenue collected is sufficient to operate both offices.

After several minutes of discussion between DEP and the Council members, Bill Raney expressed his concern in filing the rule for public hearing in the specified time frame. Mr. Raney asked if anyone outside DEP has been involved in drafting the rule. OMR answered by saying the rule was drafted by several staff within OMR. Mr. Raney replied that he believes there will be serious concerns with this rule once industry has had an opportunity to review it. He believes the rule drafting process definitely needs input from firms and individuals outside DEP, and he thinks the process will go smoother once everyone has had the opportunity to address their concerns. Mr. Raney recommended that the Director withhold this rule from the list of rules DEP proposes to file for public hearing/comment period in the coming week to give all interested parties a chance to participate in drafting the rule.

After discussion of this recommendation, Chairman Miano said he believes the best approach would be to continue with the filing of the proposed rule for public hearing, start the rule in the normal process and time frame, and in the meantime he would commit to putting together a work group of interested parties to discuss the rule. If DEP feels that more time is needed once the group begins their work on the rule, he will consider the possibility of either extending the comment period or filing for another public hearing. He said he will also decide in the near future whether DEP will file the rule as an "Emergency Rule" since HB 681 will become effective on June 11.

Council members also pointed out a typographical error in subdivision 3.9.a.3. of the rule relating to cross-references that will be corrected by DEP.

Barb Taylor and Mike Johnson, Office of Water Resources, briefed Council on the following rules:

- **47CSR57A - "Groundwater Protection Standards at Steam Electric Generating Facilities"**
- **47CSR26 - "Water Pollution Control Permit Fee Schedule"**
- **47CSR31 - "State Water Pollution Control Revolving Fund Program Rule"**

Barb described the proposed "new" rule relating to Groundwater Protection Standards at Steam Electric Generating Facilities. She noted that the rule is a result of a Notice of Intent filed on October 24, 1994, by the West Virginia Steam Electric Generation Industry, with the Director of DEP, in accordance with 47CSR57 to apply for a class variance for all West Virginia power stations and associated disposal sites. At that time, DEP provided AEP and AP with the

opportunity to conduct a four-year study to gather the necessary data to support their variance request. The objectives were met by assembling and reviewing data, estimating potential impacts to receptors, and performing an economic assessment impact analysis to the industry, commercial enterprises, and citizens at large if compliance with the Groundwater Protection Act were required without benefit of the variances. After review of the four-year study, the Director determined that granting this request for a variance at these locations would not pose adverse effects to human health or the environment. There are no human or environmental sensitive receptors between the coal storage areas or as ponds; therefore, it is unlikely there will be adverse affects. Barb gave each member a copy of the four-year study on which the Director made his determination.

Chairman Miano told Council that DEP is definitely willing to look at such cases where extensive research and study have been done by the regulated community to back up their findings before granting such variances, and believes DEP will see more studies like this in the future.

Barb next apprised the members on the proposed amendments of the Water Pollution Control Permit Fee Schedule. She stated that amendments are being proposed as a result of HB 2684, passed March 11, 1999, and effective ninety days from passage. The Director is required to implement an emergency rule to implement the fee schedule authorized by the amendments by July 1, 1999. This rule was filed as an "Emergency Rule" on June 7, 1999.

Mike Johnson, Office of Water Resources' Construction Assistance Office, briefed the Council on 47CSR31 - the Water Pollution Control Revolving Fund Program rule. The amendments to this rule are being proposed to allow the State Revolving Fund low interest terms to be extended from 20 years to 30 years for communities that qualify as "disadvantaged." There is only one other state in the country to receive such approval from EPA. Mike informed the Council that he was only recently made aware of this extension by EPA to extend the low interest loans from 20 to 30 years while attending a meeting out of state. This rule was filed as an "Emergency Rule" on May 24, 1999.

Council members unanimously agreed that Mike Johnson should be commended for gathering this information and proposing the amendment to the rule that will enable disadvantaged communities to immediately take steps toward constructing watershed projects that will provide affordable monthly sewer rates.

Open Discussion:

Chairman Miano and Council members expressed their compliments to the program offices for all their hard work, especially with the stakeholders process -- it is obvious a lot of hard work has gone into the process in order to make their efforts more productive.

Bill Raney asked a question relating to the "More or Less" Stringency statement that appears on the front of some DEP rules, but not on others, and voiced his concern if DEP is paying close attention to this, or if the same statement is appearing with all proposed rules. Carrie Chambers from the Director's Office explained that statement was once required to be included in the "General" section of each rule; however, it is now placed in the briefing document that is attached to each rule, and required by the Secretary of State's Office and the

Legislative Rule-Making Review Committee, before it is filed. She went on to explain that with the rush to get draft copies of the rules to Council members as soon as possible, some of the Briefing Documents had not been completed, but would be attached to all DEP rules before they are filed for public hearing. Chairman Miano went on to say it is his belief that all program offices are carefully scrutinizing each rule before that decision is made.

Chairman Miano thanked Council for taking time from their busy schedules to review the extensive list of DEP's proposed rules. He informed the Council that the minutes would be left open for comment until Wednesday, June 16, at which time the minutes will be attached to the rules and filed with the Secretary of State's Office and the Legislative Rule-Making Review Committee for notice of public hearing/comment period.

Before adjourning the meeting, the Council informed Chairman Miano that they would prefer beginning future meetings at 10:00 a.m., instead of the usual time of 1:00 p.m. The meeting was then adjourned at 3:30 p.m.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: **38CSR2A**
Rules for Mining and Restoration of Limestone, Sandstone, and Sand

Type of Rule: **X** Legislative _____ Interpretive _____ Procedural

Agency: **Bureau of Environment - Division of Environmental Protection**

Address: **10 McJunkin Road**
Nitro, WV 25143

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$0.00	$0.00	$0.00	$0.00	$0.00
PERSONAL SERVICES	$0.00	$0.00	$0.00	$0.00	$0.00
CURRENT EXPENSES	$0.00	$0.00	$0.00	$0.00	$0.00
REPAIRS & ALTERATIONS	$0.00	$0.00	$0.00	$0.00	$0.00
EQUIPMENT	$0.00	$0.00	$0.00	$0.00	$0.00
OTHER					

2. Explanation of above estimates:
None

3. Objectives of these rules:
This is a new proposed rule to regulate only limestone, sandstone, and sand which were previously regulated under 38CSR2B. Chapter 22, Article 4 (Surface Mining and Reclamation of Minerals Other Than Coal) requires that rules be promulgated for the mining and reclamation of minerals other than coal and that separate rules be written for the mining and restoration of limestone, sandstone, and sand. The proposed rule will regulate roads, blasting, drainage control, methods of operation, excess spoil disposal, revegetation, mapping, transfer of permits, permit renewals, revisions and incidental boundary revisions and will include provisions for restoration of lands affected by surface mining.

Rule Title: 38CSR2A - Rules for Mining and Restoration of Limestone, Sandstone and Sand

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.
None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.
None

C. Economic Impact on Citizens/Public at Large.
None

Date: 6/16/99

Signature of Agency Head or Authorized Representative

Carrie J. Hoard

TITLE 38
LEGISLATIVE RULES
BUREAU OF ENVIRONMENT
OFFICE OF MINING AND RECLAMATION

SERIES 2A
RULES FOR MINING AND RESTORATION FOR LIMESTONE, SANDSTONE, AND SAND

§38-2A-1. General.

1.1. Scope. -- This Legislative rule establishes general and specific rules for surface mining and restoration operations for limestone, sandstone, and sand including requirements for definitions, permits, preplans, haulageways or access roads, blasting, drainage system, method of operation, grading, backfilling and revegetation, public notice, permit renewals and revisions, state and federal compliance and validity of rules and exceptions.

1.2. Authority. -- WV Code §§22-1-3 and 22-4-1.

1.3. Filing Date. --

1.4. Effective Date. --

§38-2A-2. Definitions.

Unless the context in which used clearly requires a different meaning, as used in this rule or as referred to in WV Code §22-4 as amended:

2.1. Acid-producing materials shall mean mineral compounds which will, when acted upon by water and air, cause acids to form.

2.2. Acid-producing overburden or spoil shall mean material that may cause spoil which upon chemical analysis, shows a pH of 5.5 or less.

2.3. Active surface mine operation shall mean an operation where land is being disturbed or mineral is being removed or processed.

2.4. Approved person shall mean any person approved by the director in accordance with subsection 9.6. of this rule.

2.5. Approximate Original Contour shall mean that surface configuration achieved by the backfilling and grading of the disturbed areas so that the reclaimed area, including

any terracing or access roads, resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated: Provided, That water impoundments may be permitted pursuant to West Virginia Code §22-4-9: Provided, however, That minor deviations may be permitted in order to minimize erosion and sedimentation, retain moisture to assist revegetation, or to direct surface runoff.

2.6. Area surface mining shall mean open-cut or multiple-cut mining carried out on level to gently rolling topography.

2.7. Backfill shall mean to place material back into an excavation and return the area to a predetermined slope.

2.8. Base of highwall shall mean the intersection of the vertical plane with the horizontal plane at any point in the overburden, spoil or mineral.

2.9. Bench shall mean the result of surface mining being:

2.9.a. The leveled surface of an excavated area measured horizontally at any point in the overburden, spoil, or mineral between the base of the highwall and outer point of original fill bench; or

2.9.b. A working base extending from the base of a highwall on which excavating equipment may operate.

2.10. Berm shall mean a type of fill used for a specific purpose other than excess spoil disposal; such purposes may include, but not necessarily be limited to drainage control, screening for noise control, screening for aesthetic value, or safety barriers; provided however, that a berm of ten (10) vertical feet or more at any point shall be designed and the construction certified by an approved person and provided further that any berm consisting of greater than 20% fines or non-durable rock must be protected from wind and water erosion.

2.11. Completion of mining shall mean an operation where no mineral has been removed or overburden removed for a period of three (3) consecutive months without an approved inactive status, unless the operator, within thirty (30) days of receipt of the director's notification declaring completion, submits sufficient evidence that the operation is in fact not completed.

2.12. Cross-drain shall mean a ditch constructed to carry away excessive drainage from a main collecting point or ditch.

2.13. Cut shall mean an excavation made by excavating equipment to remove overburden or mineral in a single progressive line.

2.14. Cut-fill shall mean overburden removed from an elevated portion of a road or bench and deposited in a depressed portion in order to maintain a desired grade.

2.15. Deep mining or underground mining shall mean removal of the mineral being mined without the disturbance of the surface as distinguished from surface mining.

2.16. Director and/or his authorized agent shall mean the director of the Division of Environmental Protection, the chief of the Office of Mining and Reclamation, assistant chiefs of the Office of Mining and Reclamation and all duly authorized supervisors, inspector specialists, inspectors, and inspectors in training.

2.17. Diversion ditch shall mean a machine-made waterway used for collecting ground water or a ditch designed to change the actual or normal course of ground and/or surface water.

2.18. Downslope shall mean that area between the crop line or the proposed mineral seam and the valley floor.

2.19. Drainage plan or system shall mean the proposed method of collection, treatment, and discharge of all waters within the affected drainage area, as defined by the approved pre-plan.

2.20. Excess spoil shall mean overburden or waste rock placed in a permanent or temporary location other than the pit.

2.21. Field indicator shall mean any approved apparatus or equipment used in the field to measure pH, iron, turbidity or such other parameters as may be required.

2.22. Fill shall mean a man-made deposit of earth, stone, spoil, or waste materials that is raised above the natural surface of the land and usually exhibits at least one sloping face.

2.23. Fill bench shall mean that portion of a bench formed by spoil or overburden which has been deposited on or over the original slope.

2.24. Georgia Type V-Ditch shall mean a ditch for the collection and removal of ground and surface water, constructed on the solid bench area, with the opposing slopes being constructed in such a manner so as to permit the total area to be traversed by farm equipment.

2.25. Haulageway or access road shall mean any road constructed, improved, or maintained by the operator which ends at the pit or bench and which is located within the permit area. A bench may serve as a haulageway, but a haulageway cannot serve as a bench.

2.26. Highwall shall mean the vertical or near vertical wall consisting of the exposed strata after excavating operations.

2.27. Knowingly shall mean that a person or operator knew or had reason to know in authorizing, ordering, or carrying out an act or omission that such act or omission constituted a violation, failure, or refusal.

2.28. Mineral face shall mean the exposed vertical cross-section of the natural seam or deposit being mined and generally forming the base of the highwall left by excavating operations in surface mining.

2.29. Monument shall mean a permanent marker consisting of metal or wood used to identify the permit area being mined under a surface mining permit, consisting of a two inch (2") pipe driven three feet (3') into the earth with a minimum of four feet (4) exposed and a two foot (2') X three foot (3') sign affixed to the top of the pipe with company name, address, phone number and permit number permanently affixed. Any suitable equivalent substitute may be approved.

2.30. Natural drainway shall mean any water course or channel which carries water to the tributaries and rivers of the watershed. The United States Geological Survey classification of perennial or intermittent streams shall be considered as natural drainways.

2.31. Operation shall mean the permit area indicated on the approved map submitted by the operator.

2.32 Outer spoil or outer slope shall mean the disturbed area extending from the outer point of the bench to the extreme lower limit of the disturbed land.

2.33. Overburden shall mean the earth, rock and other materials lying in the natural state above a mineral deposit before or after excavation.

2.34. Pit shall mean that part of the surface mining operation from which the mineral is being actively removed.

2.35. Processing shall mean the crushing, sizing, screening, or washing of the mineral.

2.36. Protected structures shall mean for purposes of blasting, dwellings, public buildings, schools, churches, or community or institutional buildings.

2.37. Pollution shall mean any discharge in violation of the National Pollution Discharge Elimination System permit or permit standards or any other applicable water quality standards.

2.38. Reclamation shall mean complete backfilling to the approximate original

contour of the land. Including the elimination of highwalls and spoil peaks.

2.39. Regrade or grade shall mean to change the contour of any surface by the use of leveling or grading equipment.

2.40. Restoration shall mean the process of establishing a stable, usable condition to all disturbed areas of the permit.

2.41. Sand shall mean individual rock or mineral fragments having a diameter less than 2.00 mm but greater than .02 mm.

2.42. Seepage water shall mean any water entering the ground from the surface through capillary action, cracks, faults or any other natural modes of entry, and finding its way to the surface again.

2.43. Significant revision shall mean a permit revision which constitutes a significant departure from the terms and condition of the existing permit which may result in a significant impact to the health, safety or welfare of the public; the hydrologic balance; the postmining landuse; or an individual's legal right to receive notice under this article.

2.44. Slope shall mean the angle of repose from the horizontal plane of spoil banks or ridges of overburden material made in the surface mining operation; the angle of a hill or mountain. A gentle slope shall mean zero percent (0%) to ten percent (10%); moderate to steep slope shall mean ten percent (10%) to forty-five (45%); extremely steep slope shall mean forty-five (45%) and over.

2.45. Soil shall mean any earthen material excluding bedrock.

2.46. Solid bench shall mean that portion of the bench surface formed by earth or rock strata which has not been removed, as distinguished from fill bench.

2.47. Spoil shall mean material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means; or material of any kind which is separated from the mineral being mined as undesirable to the current product.

2.48. Stabilize shall mean to settle, or fix in place by mechanical or vegetative means, including the planting of trees, grasses, vines, shrubs, or legumes.

2.49. Storm water shall mean any water flowing over or through the surface of the ground caused by precipitation; generally, surface run off.

2.50. Structure shall mean any man-made structures within or outside the permit areas which include, but is not limited to: dwellings, outbuildings, commercial buildings, public buildings, community buildings, institutional buildings, gas lines, water lines,

towers, airports, underground mines, tunnels and dams. The term does not include structures owned by the operator and/or utilized for the purpose of carrying out the mining operation.

2.51. Surface water shall mean that water, from whatever source, which is flowing on the surface of the ground.

2.52. Suspension of permit shall mean an act of the director or an authorized agent of the director temporarily nullifying the validity of a permit insofar as the mining and removal of the mined minerals are concerned.

2.53. Technical Handbook shall mean "The Technical Handbook of Standards and Specifications for Erosion and Sediment Control Excess Spoil Disposal Haulageways" for mining operations in West Virginia.

2.54. Waste material or waste rock shall mean that part of the spoil which is separated from the current product as being excess or undesirable for the current product being produced.

2.55. Water analyses shall mean those water analyses performed by or for the operator using the analytical procedures set forth in the most current edition of "Standard Methods for the Examination of Water and Wastewater".

§38-2A-3. Haulageways and Transportation Facilities

3.1. General. Each permittee shall design, construct, utilize, and maintain roads, railroad loops, spurs, sidings, surface conveyor systems, chutes, aerial tramways and other transportation facilities to meet the requirements of this administrative rule and to control or minimize erosion and siltation, air and water pollution, and to prevent damage to public or private property. To the extent possible using the best technology currently available, facilities shall not cause damage to fish, wildlife, and related environmental values and shall not cause additional contributions of suspended solids in excess of limitations of state or federal law to stream flow or to run-off outside the permit area.

3.2. Plans. Typical sections showing width of road cut, fill slopes, surface material of road, a center line profile with grades, sumps, culvert pipe location and size, and other transportation facilities shall be included in the permit application. The design of haulageways shall be certified by a qualified registered professional engineer, licensed land surveyor, or approved person as being in accordance with specifications of this rule.

3.3. Location. The location of the proposed haulageway or other transportation facility shall be identified on the site by visible markings on one hundred foot (100') centers at the time the reclamation and mining plan is pre-inspected and prior to commencement of construction. Existing roads are exempt from this requirement.

3.4. Grading. -- The grading of a haulageway shall be such that:

3.4.a. No sustained grade shall exceed ten percent (10%);

3.4.b. The maximum grade shall not exceed fifteen percent (15%) for three hundred feet (300');

3.4.c. There shall not be more than three hundred feet (300') of maximum grade for each one thousand feet (1,000') of road constructed;

3.4.d. The surface shall be sloped toward the ditch line at the minimum rate of one-half inch (1/2") per foot of surface width or crowned at the minimum rate of one-half inch (1/2") per foot of surface width as measured from the center line of the haulageway; and

3.4.e. The grade on switchback curves shall be reduced to less than the approach grade and should not be greater than ten percent (10%).

3.5. Cut Slopes. -- Cut slopes should not be more than 1:1 in soils or 1/4:1 in rock.

3.6. Ditches. -- A ditch shall be provided on both sides of a through-cut and on the inside shoulder of a cut-fill section, with ditch relief cross-drains being spaced according to grade. Water shall be intercepted before reaching a switchback or large fill and led off. Water on a fill or switchback shall be released below the fill, not over it.

3.7. Culverts. -- Ditch relief culverts shall be installed according to the following provisions:

3.7.a.

Road Grade in Percent	Spacing of Culverts in Feet
0 - 5	300 - 800
6 - 10	200 - 300
11 - 15	100 - 200

3.7.b. The culvert shall cross the haulageway at a thirty (30) degree angle downgrade at a minimum grade of 3%;

3.7.c. The inlet end shall be protected by a headwall of suitable material and the outlet end shall be placed below the toe of the fill with an apron of suitable material provided for the outflow to spill on; and

3.7.d. The culvert shall be covered by compacted fill to depth of one foot (1') or half the culvert diameter, whichever is greater.

3.8. Culvert Openings. -- Culvert openings installed on haulageways should not be

less than one hundred square (100") inches in area, but, in any event, all culvert openings shall be adequate to carry storm run off the peak flow from a one (1)-year twenty-four hour precipitation event and shall receive necessary maintenance to function properly at all times.

3.9. Natural Drainway. -- Minor alterations and relocations of natural drainways as shown on the restoration plan shall be permitted if the natural drainway will not be blocked and if no damage is done to the natural drainway or to adjoining landowners.

3.10. Stream Crossings. -- Drainage structures, such as bridges, culverts, low-water crossings, or other structures designed, constructed and maintained using current prudent engineering practices, shall be required in order to cross an intermittent or perennial stream channel. They shall be such so as not to affect the flow of the stream. Consideration shall be given to the time of year the stream is crossed and length of time the stream channel is used, but in no event, and under no condition shall the flow of the stream be affected or the sediment load of the stream increased during construction and/or use. These structures shall be capable of passing the peak flow for a ten (10)-year twenty-four hour precipitation event from the contributing watershed.

3.11. Removal of Drainage Structures. -- No bridges, culverts, stream crossing, etc., necessary to provide access to the operation, may be removed until restoration is completed and approved by the director. The same precautions as to water quality are to be taken during removal of drainage structures as those taken during construction and use.

3.12. Stabilization of Slopes. -- All fill and cut slopes shall be stabilized after the construction of a haulageway.

3.13. Haulageway Surfacing. -- Access roads, haulroads, yards and parking areas shall be maintained with proper surface materials to prevent erosion. The material used to surface the haulageway shall be sufficiently durable for the anticipated volume of traffic, and the weight and speed of the vehicles using the road. Haulageways shall not be surfaced with any acid-producing or toxic material or with any material which will produce a concentration of suspended solids in surface drainage.

3.14. Tolerance. -- All grades referred to in this section shall be subject to a tolerance of two percent (2%) grade. All linear measurements referred to in this section shall be subject to a tolerance of ten percent (10%) of measurement. All angles referred to in this section shall be measured from the horizontal and shall be subject to a tolerance of five percent (5%).

3.15. Mud and Debris on Public Roads. -- The deposition of mud and debris on public roads shall be minimized to the extent possible in order to prevent public nuisance.

3.16. Water Bars. -- Water bars of the ditch and earth berm or log type shall be

installed according to the following table of spacings in terms of percent of haulageway grade prior to the abandonment of a haulageway. Percent of Haulageway Bars in Feet:

Percent of Haulageway	Spacing of Water Bars in Feet
2	250
5	135
10	80
15	60
20	45
Above 20	25

3.17. Dust Control. -- Reasonable means shall be employed to prevent loss of haulageway surface material in the form of dust.

3.18. Abandonment of Haulageway. -- Upon abandonment of a haulageway, the haulageway shall be seeded and every effort made to prevent erosion by means of culverts, water bars or other devices.

3.19. Infrequently Used Access Road. Any road that is:

3.19.a. Not used for transporting mineral or spoil; or

3.19.b. Not required for an approved post-mining land use is considered an infrequently used access road and is exempt from subsection 3.4. of this rule.

3.20. Certification. Upon completion of construction or reconstruction, all primary roads for which design criteria were approved as part of the permit shall be certified. Such certification shall affirm that construction was completed in accordance with the approved criteria except as otherwise noted in the certification statement. Where the certification statement indicates a change from the design standards or construction requirements approved in the permit, such changes shall be documented in as-built plans. If as-built plans are submitted, the certification shall describe how and to what extent the construction deviates from the proposed design, and shall explain how and certify that the road shall meet rule standards. The certification shall be on forms approved by the director and signed by a qualified registered professional engineer, licensed land surveyor or approved person with experience in design and construction of roads. All roads used for transportation of mineral or spoil, and which are constructed outside the permitted mineral extraction area, shall be certified before they are used for such transportation.

§38-2A-4. Blasting.

4.1. Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. The director is responsible for the training, examination, and certification of persons engaging in or directly responsible for blasting

or use of explosives in surface mining operations. A blaster certified by the Division of Environmental Protection shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area in accordance with the blasting plan.

4.2. Blasting Plan. Each application for a permit, where blasting is anticipated, shall include a blasting plan. The blasting plan shall explain how the applicant shall comply with the blasting requirements of the Act, this rule, and the terms and conditions of the permit. This plan shall include, at a minimum, information setting forth the limitations the operator shall meet with regard to ground vibration and airblast, the basis for those limitations, and the methods to be applied in controlling the adverse effects of blasting operations.

4.3. Written Notification. At least 10 days prior to mining operations, written notification of blasting shall be given by certified mail to all residents, owners or other persons who are within one-half (1/2) mile of any part of the blasting area. The United States Post Office Department certified receipt of notification shall be maintained with the blasting log. The notification shall contain at a minimum:

4.3.a. Name, address and telephone number of the operator;

4.3.b. Identification of the specific areas in which blasting shall take place;

4.3.c. Dates and times when explosives are to be detonated;

4.3.d. Methods to be used to control access to the blasting area; and

4.3.e. Types and patterns of audible warning and all clear signals to be used before and after blasting.

4.4. Blast Record.

4.4.a. A blasting log book formatted in a manner prescribed by the director shall be kept current daily and made available at the permit site for inspection by the director, or upon written request, by the public.

4.4.b. The blasting log shall be retained by the operator for three (3) years.

4.4.c. The blasting log shall, at a minimum, contain the following information:

4.4.c.1. Name of permittee, operator or other person conducting the blast;

4.4.c.2. Location, date and time of blast;

4.4.c.3. Name, signature and certification number of blaster-in-charge;

4.4.c.4. Identification of nearest structure not owned or leased by the operator and direction and distance, in feet, to such structure;

4.4.c.5. Weather conditions;

4.4.c.6. Type of material blasted;

4.4.c.7. Number of holes, burden and spacing;

4.4.c.8. Diameter and depth of holes;

4.4.c.9. Types of explosives used;

4.4.c.10. Weight of explosives used per hole;

4.4.c.11. Total weight of explosives used;

4.4.c.12. Maximum weight of explosives detonated within any eight (8) millisecond period;

4.4.c.13. Method of firing and type of circuit;

4.4.c.14. Type and length of stemming;

4.4.c.15. If mats or other protections were used;

4.4.c.16. Type of delay detonator used and delay periods used;

4.4.c.17. Seismograph records and air blast records shall include but not be limited to:

4.4.c.17.A. Seismograph and air blast reading, including exact location, date, and time of reading and its distance from the blast;

4.4.c.17.B. Name of person and firm taking the readings;

4.4.c.17.C. Name of person and firm analyzing the record, where analysis is necessary; and

4.4.c.17.D. Type of instrument, sensitivity and calibration signal, and certification of annual calibration;

4.4.c.18. Shot location;

4.4.c.19. Sketch of delay pattern to include the entire blast pattern and all decks; and

4.4.c.20. Reasons and conditions for unscheduled blasts.

4.5. Blasting Procedures.

4.5.a. All blasting shall be conducted during daytime hours, between sunrise and sunset; provided, that the director may specify more restrictive time periods based on public requests or other consideration, including the proximity to residential areas. No blasting shall be conducted on Sunday. Provided, however, the director may grant approval of a request for Sunday blasting if the operator demonstrates to the satisfaction of the director that the blasting is necessary and there has been an opportunity for a public hearing. Blasting shall not be conducted at times different from those announced in the blasting schedule except in emergency situations where rain, lightning or other atmospheric conditions, or operator or public safety requires unscheduled detonations. Blasting shall be conducted in such a way so as to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course channel, or availability of surface or groundwater outside the permit area.

4.5.b. Safety Precautions.

4.5.b.1. Three (3) minutes prior to blasting, a warning signal audible to a range of one-half (½) mile from the blast site shall be given. This preblast warning shall consist of three (3) short warning signals of five (5) seconds duration with five (5) seconds between each signal. One (1) long warning signal of twenty (20) seconds duration shall be the "all clear" signal. Each person in the permit area, and each person who resides or regularly works within one-half (½) mile of the permit area shall be notified of the meaning of these signals;

4.5.b.2. All approaches to the blast area shall be guarded against unauthorized entry prior to and immediately after blasting;

4.5.b.3. All charged holes shall be guarded and posted against unauthorized entry; and

4.5.b.4. Flyrock, including blasted material, shall not be cast from the blasting site more than half way to the nearest protected structure and in no case beyond the bounds of the permit area.

4.5.c. Access to the blast area shall be controlled against the entrance of livestock or unauthorized personnel during blasting and for a period thereafter until an authorized person has reasonably determined:

4.5.c.1. That no unusual circumstances exist such as imminent slides or undetonated charges, etc.; and

4.5.c.2. That access to and travel in or through the area can be safely resumed.

4.5.d. At the request of the director, the operator shall monitor air blast levels using an instrument with an upper-end flat-frequency response of at least 200 Hz.

4.5.e. Blasting Signs. If blasting is necessary to conduct surface mining operations, the following signs and markers shall be required:

4.5.e.1. Warning signs shall be conspicuously displayed at all approaches to the blasting site, along haulageways and access roads to the mining operation and at all entrances to the permit area. The sign shall at a minimum be two feet by three feet (2' x 3') reading "WARNING! Blasting Area" and explaining the blasting warning and the all clear signals; and

4.5.e.2. Where blasting operations shall be conducted within one hundred (100) feet of the outside right-of-way of a public road, signs reading "Blasting Area", shall be conspicuously placed along the perimeter of the blasting area.

4.5.f. The director may require a seismograph recording of any or all blasts based on the physical conditions of the site in order to prevent injury to persons or damage to property. At no time can the maximum ground vibration or airblast exceed the limits established in WV Code §22-4-11(1), 11(2).

4.5.g. The maximum allowable ground vibration as provided in WV Code §22-4-11(1) shall be reduced by the director, if determined necessary to provide damage protection.

4.5.h. The maximum airblast and ground-vibration limits as provided in WV Code §22-4-11(1) and 11(2) shall not apply at the following locations:

4.5.h.1. At structures owned by the permittee and not leased to another person; and

4.5.h.2. At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the director before blasting.

4.5.i. Regardless of whether the permittee chooses to use the scaled distance formula or to seismically monitor each blast, at no time, at any protected structure, may the peak particle velocity exceed the limits established for ground vibration or may the decibel level exceed that established in WV Code §22-4-11(1), 11(2).

4.5.j. No blasting within five hundred feet (500') of an underground mine not totally abandoned shall be permitted except with the concurrence of the Division of Environmental Protection, the operator of the underground mine and Mine Safety and Health Administration (MSHA). The director may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private property or the general welfare and safety of the public.

4.6. Preblast Survey.

4.6.a. All permits issued after the effective date of this rule shall comply with the following requirements for preblast surveys.

4.6.b. At least thirty (30) days prior to beginning of blasting operations, the operator shall inform in writing all residents or owners of manmade dwellings or structures located within one-half (½) mile of the proposed blast area on how to request a preblast survey. Requirements for a preblast survey shall be the following:

4.6.b.1. Upon a written request to the director by a resident or owner of a manmade dwelling or structure that is located within one-half (½) mile of the blast area, the operator shall conduct a preblast survey of the dwelling or structure and submit a report of the survey to the director. If a structure is added to or renovated subsequent to a preblast survey, a survey of such additions and/or renovation shall be performed upon written request of the resident or owner and such survey must be performed within thirty (30) days of notification of the request;

4.6.b.2. The operator shall conduct the preblast survey in such a manner which will determine the condition of the dwelling or structure, and to document any preblasting damage and to document other physical factors that could reasonably be affected by the blasting. Assessments of the preblasting condition of structures such as pipes, cables, transmission lines, wells and water systems shall be based on the exterior or ground surface conditions and other readily available data. Special attention shall be given to the preblasting condition of wells and other water systems;

4.6.b.3. A written report of the survey shall be prepared and signed by the person or persons approved by the director who conducted the survey. Copies of the report shall be provided to the person requesting the survey and to the director;

4.6.b.4. Surveys requested more than ten (10) days before the planned initiation of blasting shall be completed before blasting operations begin; and

4.6.b.5. Any person who requests a survey who disagrees with the results of the survey may submit a detailed description of the specific areas of disagreement.

4.7. Blasting Prohibited. -- The director or his authorized agent may prohibit blasting in specific areas where it is deemed necessary for the general safety of the area.

4.8. Certified Blasting Personnel. -- Each person responsible for blasting operations shall be certified. Each certified blaster shall have proof of certification either on their person or on file at the permit area during blasting operations. Certified blasters shall be familiar with the blasting plan and blasting related performance standards for the operation at which they are working.

4.9. Assessment. -- Any assessment as set forth in WV Code §22-4-11 shall be assessed by the Division of Environmental Protection (DEP) designated assessment officer and shall be paid within ten days (10) after receipt of said assessment notice.

§38-2A-5. Drainage System.

5.1. Drainage Plan. -- There shall be submitted with the application for surface mining a drainage plan which will show the proposed method of drainage on and away from the area of land to be disturbed. Said plan shall indicate the directional flow of water, constructed drainways, natural waterways used for drainage, streams or tributaries receiving or to receive this discharge, location of sediment dams and other silt retarding structures, location of all water test sites, treatment and all other data as may be required.

5.2. Natural Drainways. -- Natural drainways in the area of land disturbed by surface mining operations shall be kept free of overburden except where over-burden placement has been approved. Such drainways shall be identified on the maps submitted with the application. Overburden placement and haulageways across natural drainways shall be constructed so as not to affect the flow of the stream, or materially increase the sediment load in the stream.

5.3. Constructed Drainways.

5.3.a. Ditch Above Highwall. -- All surface water which drains into the pit shall be effectively intercepted on the uphill side of the highwall by suitable and adequate diversion ditches and conveyed by adequate channels or other suitable means of discharge to natural drainways outside the disturbed area. The director may, in the exercise of his sound discretion, when not in conflict with WV Code §22-4, as amended, waive this rule.

5.3.b. Ditch on Bench. -- Drainage ditches shall be constructed on the excavated solid bench in order to carry off storm, surface or seepage water. The breaking point for ditches on the bench shall fall at or near the midpoint between natural or constructed drainways. In no case shall water be discharged over an unprotected spoil slope. Removal of water from the bench shall be accomplished by use of adequate pipe,

a rock riprap flume, asphalt or concrete chutes, or by grading a channel to nonerosive rock.

5.3.c. Ditch Below Spoil Slope. -- All surface water draining off the spoil slopes will be intercepted by suitable and adequate diversion ditches which will carry the water to suitable treatment ponds before discharge into a natural drainway. These ditches shall be located within twenty-five feet (25') of the anticipated toe of the spoil slope. If at any time spoil material interferes with the flow of water in these ditches, that material shall be cleaned out immediately. The director may, in the exercise of his sound discretion, when not in conflict with WV Code §22-4, as amended, waive this rule.

5.4. Sediment.

5.4.a. Sediment Control. -- Embankment type sediment dams or excavated sediment ponds shall be constructed in appropriate locations in order to control sedimentation. All such impoundments shall have a minimum capacity to store .125 acre-ft./acre of disturbed area in the watershed. This disturbed area shall include all land affected by previous operations that is not presently stabilized and all land that will be affected throughout the life of the permit. Design criteria and construction specifications for embankment type sediment dams, excavated ponds and other water retarding structures will be found in the Technical Handbook. All sediment control structures shall be cleaned out to original designed storage when the sediment accumulation reaches sixty percent (60%) of design capacity.

5.4.b. The director may consider approving half factor (0.0625 acre-ft./acre of disturbed area in the watershed) for sediment control structures where the applicant has demonstrated reasonable likelihood that sediment parameters will be met.

5.5. Drainage Certification -- Prior to disturbance in a component drainage area, the operator shall complete and certify the drainage and sediment control system in accordance with the approved pre-plan. The certification shall be on forms approved by the director and signed by a qualified registered professional engineer, licensed land surveyor or an approved person. Any deviations from the approved pre-plan which result from unforeseen site specific circumstances arising during construction, shall be reflected in as-built plans submitted by the operator and approved by the director immediately following construction. The as-built plans shall indicate the original design, the extent of the changes, and reference points. If as-built plans are submitted, the certification shall describe how and to what extent the construction deviates from the proposed design and shall explain how and certify that the drainage structure will meet rule standards.

5.6. Water Quality.

5.6.a. Water Quality Control. -- All reasonable measures shall be taken to intercept all undisturbed surface water by the use of diversion, culverts and drainage ditches or other methods to prevent water from entering the pit area. All water accumulation into the pit shall be removed as rapidly as possible unless in-pit sediment control is being utilized. All water discharges from the permit area are to be monitored in accordance with the approved National Pollutant Discharge Elimination System (NPDES) permit by the operator and a written record of the testing dates and analytical data shall be kept current and made available for inspection. A compilation of the foregoing information shall be submitted to the chief of the Office of Mining and Reclamation by the 20th day of the month following the sample period. Any treatment works necessary to meet effluent limitations shall be approved by the director. Discharge from the permit area shall not in any case violate federal or state water quality standards or effluent limitations. The monitoring frequency shall be governed by the standards set forth in the National Pollutant Discharge Elimination System program under the federal Water Pollution Control Act as amended, 33 U.S.C. 1251 et. seq. and the rules and regulations promulgated thereunder. Water tests shall be taken before surface mining operations begin and the results of these tests shall be shown in the permit application. The location for these preliminary tests shall be:

5.6.a.1. On natural drainways above proposed surface mining operation;

5.6.a.2. On natural drainways below proposed surface mining operations at or near the affected drainage area boundary; and

5.6.a.3. On natural drainways upstream from the mouth of a natural drainway affected by surface mining.

5.6.b. Treatment Facilities for Drainage from Surface Mine Operations. -- The chief of the Office of Mining and Reclamation or his duly authorized agent shall conduct such investigation as it is deemed necessary and proper in order to determine whether or not any such permit should be granted or denied. In making such investigation and determination as to any such application, the chief of the Office of Mining and Reclamation shall consult with the chief of the Office of Water Resources. Such cooperation shall include, but not be limited to, a written recommendation approving or disapproving the granting of the permit and the reason or reasons for such recommendation.

5.7. Seeding of Drainage System. -- All areas disturbed in the installation of the drainage system shall be seeded and mulched after construction in accordance with section eight (8) of this rule.

5.8. Technical Handbook. -- Design criteria and construction specifications for embankment type sediment dams, excavated sediment ponds, stone check dams, log and pole structures, diversion ditches, berms, outlets and other water control structures are to be found in the Technical Handbook published by the Division of Environmental Protection.

5.9. Water Replacement Rights – Upon written notice by the director, any operator shall replace the water supply of an owner of interest in real property who obtains all or part of the owner's supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately caused by such surface-mining operation, unless waived by said owner. The director's notice to replace the water supply shall be based upon the determination of a hydrologist of the Office of Mining and Reclamation, after inspecting the quarry and the affected property and performing the necessary studies and tests. Nothing in this rule affects the rights of any person to enforce or protect, under applicable law, interest in water resources affected by a surface-mining operation.

§38-2A-6. Method Of Operation.

6.1. Operator Responsibility. -- In planning and executing surface mining operations, the operator shall have, at all times, proper regard for all requirements imposed by WV Code §22-4, as amended, all rules adopted pursuant thereto, and all provisions of the approved pre-plan and permit.

6.2. Topsoiling or Other Material Suitable for the Post Mining Land Use. -- These materials shall be removed in a separate layer and distributed over the backfilled or disturbed area, or if not utilized immediately, segregated and stockpiled in a separate location as specified in the pre-plan. Topsoil not immediately utilized shall be protected from wind and water erosion. Any material used for topsoiling must be capable of supporting and maintaining the approved post mining land use. This determination of capability shall be based on the results of appropriate chemical and physical analyses of overburden and topsoil. These analyses shall include at a minimum, depth, thickness, and areal extent of the substitute structure or soil horizon, pH, texture class, percent coarse fragments and nutrient content. A certification of analysis shall be made by a qualified laboratory stating that the substitute shall support and sustain vegetation for release of the permit.

6.3. Treatment of Toxic Material. -- Any acid-forming, toxic-forming, combustible materials, or any other waste materials that are exposed, shall be covered with a minimum of four (4) feet of nontoxic and noncombustible material; or test, treat and blend material to provide materials suitable to prevent water pollution. If necessary, this material shall be treated to neutralize toxicity in order to prevent water pollution and sustained combustion and/or to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an

adequate depth for plant growth, or to otherwise meet local conditions, the director shall specify thicker amounts of cover using non-toxic material. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

6.4. Small Depressions. -- The requirement of this section to provide positive drainage does not prohibit construction of small depressions if they are approved by the director to minimize erosion, conserve soil moisture or promote revegetation. These depressions shall be compatible with the approved post-mining land use.

6.5. Bench Surface. -- The surface of the regraded bench shall be graded so as to permit the use of machinery such as farm equipment. All available spoil material shall be used to backfill pit areas and provide positive drainage.

6.6. Final Graded Slopes. -- Final graded slopes shall be backfilled or graded to two horizontal to one vertical (2:1) or such lesser slope as is necessary to assure stability.

6.7. Grading Outer Spoil. -- All outer spoil shall be graded so as to blend into the adjoining undisturbed lands.

6.8. Regrading or Stabilizing Rills and Gullies. -- Any rills or gullies deeper than nine inches (9") inches forming in areas that have been regraded and the topsoil replaced but where vegetation has not yet been established shall be deemed unacceptable and any such rills or gullies shall be filled, graded, or otherwise stabilized and revegetated. Rills or gullies of lesser size shall also be stabilized if they will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

6.9. Inactive Status. -- Inactive operation status shall be considered for a period not to exceed one (1) year from date of approval providing that prior written approval is obtained from the director. Inspection frequency for operations with approved inactive status shall not be less than once every six (6) months.

6.10. Keeping Operation Current. -- Grading, backfilling and water management practices as approved in the plans shall be kept current as follows:

6.10.a. Should the operation include only stripping (no augering or highwall mining), the grading and backfilling shall follow the mineral removal by a period not to exceed sixty (60) days or three thousand (3,000) linear feet;

6.10.b. Should the operation include stripping and highwall mining, the highwall mining shall follow the stripping within sixty (60) days, or a reasonable time as prescribed by the director. Grading and backfilling shall follow the highwall mining by not more than thirty (30) days or one thousand (1,000) linear feet; and

6.10.c. Should the particular site conditions or weather make adherence to

these guidelines impractical the period of time or the distance required to be current may be reasonably extended.

6.11. Mining and Restoration Plan. -- The mining and restoration plan for each operation shall be site specific and shall describe how the mining operations and restoration operations are to be coordinated to minimize total land disturbance and to keep restoration operations as contemporaneous as possible with the advance of mining operations.

6.12. Off-Site Protection. -- The operator must protect off-site areas from slides or damages occurring during mining operations and not deposit spoil material or locate any part of the operations or waste accumulations outside the permit area. Provided, that spoil material may be placed outside the permit area, if approved by the director after a finding that benefits to the environment or the health, safety or welfare of the public will result.

6.13. Alternative Plans. -- Alternative plans for restoration of the disturbed area may be submitted to the director. If such restoration will be consistent with the purpose of WV Code §22-4, as amended, and if such plans are approved by the director and complied with within such time limits as may be determined by him as being reasonable for carrying out such plans, the backfilling and grading requirements heretofore contained, may be modified.

6.14. Water Impoundments. -- Prior to the construction of an impounding area for the storage of water after mining, approval must be obtained from the director for such impoundment. This plan shall include but not be limited to the following:

6.14.a. Location of the impounding area;

6.14.b. Dimensions of the area as to capacity and depth (average, maximum and minimum);

6.14.c. Plot plan of impoundment area;

6.14.d. Source of water entering the impoundment;

6.14.e. Quality of the water entering the impoundment;

6.14.f. Quality of water leaving the impoundment and mechanism of discharge;

6.14.g. Mineral or seams mined or involved with impoundment;

6.14.h. Chemical characteristics of the soils and underlying strata in the impoundment area as they relate to acid production;

6.14.i. Safety aspects considered such as spillway overflow, emergency spillway, access to area; and

6.14.j. Consent of the landowner for such impoundment with submission on specified forms.

6.15. Sanitary Landfills. Where waste materials from a coal preparation or conversion facility or from other activities conducted outside the permit area such as municipal wastes, garbage, etc., are used for fill material, plans for such use shall be approved by the director. Such plans for sanitary landfills and/or solid waste disposal areas shall be accompanied by the written approval of the Office of Waste Management and where appropriate, the state Department of Health and Human Resources.

6.16. Steep Slope Mining. Steep slope mining on surface mining operations where the natural slope exceeds twenty degrees (20°), the provisions of this section in addition to other applicable provision of this rule, shall apply. On lesser slopes that require measures to protect the area from disturbance as determined by the director based on consideration of soils, climate, method of operation, geology, and other regional characteristics, the provisions of this section, in addition to other applicable provisions of this rule, shall also apply.

6.17. Downslope Placement. Spoil or debris including that from clearing and grubbing, shall not be placed on the downslope except as provided for in subsections 7.1., 7.2., or 7.3. of this rule.

6.18. Backfilling and Regrading. All disturbed areas are to be backfilled and regraded in accordance with the pre-plan. Land above the highwall shall not be disturbed unless the director finds that the disturbance will benefit the future land use of this site or facilitate compliance with the requirements of this section.

6.19. Stabilization. The material used to backfill or eliminate the highwall shall be sufficiently compacted or otherwise mechanically stabilized so as to insure stability of the backfill. Woody materials may be buried in the backfilled area only when the burial does not cause or add to instability.

§38-2A-7. Excess Spoil Disposal.

7.1. Disposal of Excess Spoil in Permanent Overburden Disposal Sites by Methods Other Than Valley or Head-of-Hollow Fills. Excess spoil or material to be placed in permanent disposal sites shall be transported to and placed in a controlled manner in disposal areas other than the mine workings or excavation only if all the provisions of this section are met.

7.1.a. Location of Disposal Sites. -- The disposal areas shall be within the

permit area and they must be approved by the director as suitable for construction of fills. The disposal area shall be located on the most moderate slopes and naturally stable areas available.

7.1.b. Certification. -- Certification of the fill shall be as follows:

7.1.b.1. The fill shall be designed using recognized professional standards and certified by an approved registered professional engineer or other approved professional specialist; and

7.1.b.2. The fill shall be inspected for stability by an approved registered professional engineer after completion of the first fifty foot (50') lift, to assure removal of all organic material and topsoil, placement of under-drainage systems, and proper construction in accordance with the approved pre-plan. The approved registered professional engineer shall also provide a certified report upon completion of the fill that the fill has been constructed as designed in the approved pre-plan.

7.1.c. Stabilization. Where the slope in the disposal area exceeds 2.8 horizontal to one (1) vertical (thirty-six (36%) percent) or where necessary to achieve a static safety factor of 1.5, measures such as keyway cuts, rock toe buttresses or other techniques shall be used. All organic material shall be removed from the disposal area and the topsoil must be removed and segregated before the overburden is placed in the disposal area. Suitable organic material may be used as mulch or may be included in the topsoil. The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to insure long-term mass stability and prevent mass movement. The fill shall be drained and graded to allow surface and subsurface drainage to be compatible with the natural surroundings.

7.1.d. Drainage. -- The disposal area shall not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the under drains in such a manner that infiltration of the water into the fill shall be prevented. The drains shall be designed and constructed of course rock. If no filter is designed for the under drain, sufficient capacity shall be provided to allow for partial plugging of the drain. No rock shall be used in under drains if it tends to disintegrate or if it is acid-forming or toxic-forming.

7.1.e. Construction. -- Construction of the fill shall be as follows:

7.1.e.1. All areas upon which the fill is to be placed shall first be progressively cleared of all trees, brush, shrubs, and other organic material. This material shall be removed from the fill area;

7.1.e.2. Depositing and compacting the fill in layers shall begin at the toe of the fill. The layers shall be constructed approximately parallel with proposed finish grade. All material shall be deposited in uniform horizontal layers and compacted with

haulage equipment;

7.1.e.3. The thickness of the layers shall not exceed four (4) feet;

7.1.e.4. The outer slope shall be no steeper than two (2) horizontal to one (1) vertical. A twenty foot (20') wide bench shall be installed at a maximum of every fifty feet (50') in vertical height of the fill with a three percent (3%) to five percent (5%) slope toward the fill area, normal to such, and a one percent (1%) slope toward a rock rip-rap channel or natural drainway; and

7.1.e.5. When construction of each lift (maximum of every fifty feet (50') in vertical height) of the fill is completed, topsoil or other suitable material which will support vegetation shall be spread over the completed slope and bench. The slopes and benches shall then be seeded and mulched immediately in accordance with the approved revegetation plans.

7.2. Disposal of Excess Spoil Materials in Valley or Head-of-Hollow Fills. Excess spoil being placed in permanent overburden disposal sites shall be transported to and placed in a controlled manner; spoil to be disposed of in natural valleys must be placed in accordance with the following requirements:

7.2.a. Location of Excess Spoil Areas. The disposal areas shall be within the permit area and they must be approved by the director as suitable for construction of fills. The disposal area shall be located on the most moderate slopes and naturally stable areas available.

7.2.b. Certification. Certification of the fill shall be as follows:

7.2.b.1. The fill shall be designed using recognized professional standards and certified by an approved registered professional engineer; and

7.2.b.2. The fill shall be inspected for stability by an approved registered professional engineer after completion of the first fifty (50) foot lift, to assure removal of all organic material and topsoil, placement of under-drainage systems, and proper construction in accordance with the approved pre-plan. The approved registered professional engineer shall also provide a certified report upon completion of the fill that the fill has been constructed as designed in the approved pre-plan. Any deviations from the approved pre-plan which result from unforeseen site specific circumstances arising during construction, shall be reflected in as-built plans submitted by the operator and approved by the director immediately following construction. The as-built plans shall indicate the original design, the extent of the changes, and reference points. If as built plans are submitted, the certification shall describe how and to what extent the construction deviates from the proposed design and shall certify that the fill will meet rule standards.

7.2.c. Stabilization. Where the slope in the disposal area exceeds 2.8 horizontal to one (1) vertical (thirty-six (36) percent) or where necessary to achieve a static safety factor of 1.5, measures such as keyway cuts, rock toe buttresses or other techniques shall be used. All organic material shall be removed from the disposal area and the topsoil must be removed and segregated before the overburden is placed in the disposal area. Suitable organic material may be used as mulch or may be included in the topsoil. The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to insure long-term mass stability and prevent mass movement. The fill shall be drained and graded to allow surface and subsurface drainage to be compatible with the natural surroundings.

7.2.d. Drainage. -- The disposal area shall not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the under drains in such a manner that infiltration of the water into the fill shall be prevented. If springs, natural water courses or wet weather seeps are encountered, a system of under drains shall be constructed from each spring or seepage area as lateral drains to the rock core. If no filter is designed for the under drain, sufficient capacity shall be provided to allow for partial plugging of the drain. No rock shall be used in under drains if it tends to disintegrate or if it is acid-forming or toxic-forming.

7.2.e. Construction. -- Construction of the fill shall be as follows:

7.2.e.1. All areas upon which the fill is to be placed shall first be progressively cleared of all trees, brush, shrubs, and other organic material. This material shall be removed from the fill area. No more than three (3.0) acres, excluding roadway for construction of fill, shall be cleared in the valley fill site until the first lift is completed;

7.2.e.2. A rock core shall be progressively constructed as the layers are brought up through the valley fill. The rock core shall be a minimum of sixteen feet (16') in width and composed of rock with a minimum dimension of twelve inches (12"). The rock core shall consists of no more than ten percent (10%) fines as determined by visual inspection (fines being a material with a dimension of less than twelve inches) (12");

7.2.e.3. Depositing and compacting the fill in layers shall begin at the toe of the fill. The layers shall be constructed approximately parallel with proposed finish grade. All material shall be deposited in uniform horizontal layers and compacted with haulage equipment;

7.2.e.4. The thickness of the layers shall not exceed four feet (4');

7.2.e.5. During and after construction, the top of the fill shall be graded to drain back to the head of the fill on a slope no greater than three percent (3%). A drainage pocket shall be maintained at the head of the fill at all times to intercept surface runoff. Maximum size of the drainage pocket shall be ten thousand (10,000) cubic feet;

7.2.e.6. The outer slope shall be no steeper than two (2) horizontal to one (1) vertical. A twenty foot (20') wide bench shall be installed at a maximum of every fifty feet (50') in vertical height of the fill with a three percent (3%) to five percent (5%) slope toward the fill area, normal to such, and a one percent (1%) slope toward a rock rip-rap channel or natural drainway; and

7.2.e.7. When construction of each lift (maximum of every fifty feet (50') in vertical height) of the valley fill is completed, topsoil or other suitable material which will support vegetation shall be spread over the completed slope and bench excluding the rock core. The completed slope and bench shall then be seeded and mulched immediately in accordance with the approved revegetation plans.

7.3. Durable Rock Fills. The director may approve the design, construction, and use of a single lift fill consisting of at least eighty (80) percent durable rock if it can be determined, based on information provided by the operator, that the following conditions exist:

7.3.a. Geotechnical Information. -- Examination of core borings and the geologic column show that the overburden consists of durable sandstone, limestone, or other durable material in sufficient thickness and amounts to generate spoil material that is eighty (80) percent or greater durable rock. Where the fill will contain non-cemented clay shale, clay spoil, or other nondurable material, such material must be mixed with durable rock in a controlled manner such than no more than twenty (20) percent of the fill volume is not durable rock. Tests shall be performed by a Registered Professional Engineer and approved by the director to demonstrate that no more than twenty (20) percent of the fill is not durable rock.

7.3.a.1. The durable rock shall not consist of acid-producing or toxic-forming material, will not slake in water, or will not degrade to soil material. For purposes of this paragraph only, soil material means material of which at least fifty (50) percent is finer than 0.074 mm, which exhibits plasticity, and which meets the criteria for group symbol ML, CL, OL, MH, CH, or OH, as determined by the United Soil Classification System (ASTM D-2487).

7.3.a.2. The toe of the fill shall rest on natural slopes no steeper than twenty (20) percent.

7.3.b. The fill shall be designed based on the results of sufficient geotechnical investigations of the construction site. The investigation shall include such factors as geologic conditions, soil characteristics, depth to bedrock location of springs, seeps and groundwater flow, potential effects of subsidence and a description of materials to be placed in rock cores and drains.

7.3.c. The design and construction of all durable rock fills must be certified

by a registered professional engineer experienced in design and construction of earth and rock embankments.

7.3.d. The foundation of the fill and the fill shall be designed to assure a long-term static safety factor of 1.5 or greater, and meet an earthquake safety factor of 1.1.

7.3.e. The outer slope or face of the fill shall be regraded to be no steeper than two (2) horizontal to one (1) vertical (2:1). Terraces shall be constructed on the fill at a maximum of every fifty (50) feet in vertical rise above the toe of the fill. The terraces shall be no less than twenty (20) feet in width and slope toward the fill at a three (3) to five (5) percent grade and slope laterally at one (1) percent grade to discharge channels capable of passing the peak runoff for a one-hundred (100) year twenty-four (24) hour precipitation event.

7.3.f. All areas upon which the fill is to be placed shall first be progressively cleared of all trees, brush, shrubs and other organic material which is above ground level; provided that, in critical foundation areas, including, but not limited to, the toe of the fill, seepage or underdrain areas, and downstream portions of the fill that provide resisting force against massive slope failure, all organic material both above and below that ground surface must be removed. This material shall be disposed of outside the fill area.

7.3.g. The underdrain system may be constructed simultaneously with excess spoil placement by natural segregation of dumped materials; provided, that the resulting underdrain system shall be capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and other springs in the foundation of the disposal area and the other requirements for drainage control shall be met. If the underdrain system is not constructed by natural segregation of dumped material, it shall be designed and constructed in accordance with subdivision 7.2.d. and paragraph 7.2.e.2. of this rule.

7.3.h. Surface water runoff from areas above and adjacent to the fill shall be diverted into properly designed and constructed stabilized diversion channels which have been designed using the best current technology to safely pass the peak runoff from a 100 year, 24 hour precipitation event. The channel shall be designed and constructed to ensure stability of the fill, control erosion, and minimize water infiltration into the fill.

7.3.i. The grade of the top surface of the completed fill shall not exceed five (5) percent and shall slope toward the drainage channel.

7.3.j. No permanent impoundments may be constructed on the completed fill except small depressions may be allowed if they are needed to retain moisture, minimize erosion, create and enhance wildlife habitat, or assist revegetation; and if they are not incompatible with the stability of the fill.

7.3.k. Notwithstanding any other provisions of this rule or terms and

conditions of a permit to the contrary, additional storage capacity or sediment control measures may be required through permit revision if sediment removal performance of the structure(s) during operation and construction of the fill is found to be deficient to the point that significant non-compliance with applicable effluent limits or water quality standards results.

7.3.l. The following materials are hereby prohibited from being placed, deposited, or disposed of into a durable rock fill or durable rock fill area:

7.3.l.1. Surface soils, provided that such soils used to establish vegetation on the surface of the fill are not prohibited; provided, however, the such soils may be placed in the fill if accounted for in design and construction as nondurable material and such soils are not deposited in critical zones of the fill;

7.3.l.2. Mud, silt, or sediment cleaned or removed from mining pits, roadways, sediment control structures and/or other areas of the operation;

7.3.l.3. Vegetative or organic materials cleared or grubbed from the permit or other areas; and

7.3.l.4. Coal refuse.

7.3.m. Inspection and Certification of Durable Rock Fills – Certification of all durable rock fills shall be required as follows:

7.3.m.1. The fill and appurtenant structures shall be designed in accordance with professional design standards, which meet the requirements of this subsection, and certified by a registered professional engineer experienced in the design of earth and rock fill embankments;

7.3.m.2. During construction, the fill shall be inspected quarterly for stability by a registered professional engineer experienced in the construction of earth or rock fills or other qualified professional specialist working under the direction of a professional engineer experienced in the construction of earth or rock fills. Regular inspections are also required during placement and compaction of fill materials and during critical construction periods such as foundation preparation, underdrain placement, installation of surface drainage systems, and construction of rock toe buttresses. Within two (2) weeks following completion of the inspections, a report certified by the registered professional engineer shall be submitted to the director. The certified report shall contain a statement that the fill is being constructed and maintained as designed in accordance with the approved plan and this rule. The report shall also note any instances of apparent instability, structural weaknesses, and other hazards. The report on the drainage system and protective filters shall include color photographs taken during and after construction, but before the underdrains are covered with excess spoil. Color photographs shall be of sufficient size and number to provide a relative scale and to clearly identify the site. If the

underdrains are constructed in phases, each phase must be certified separately. If excess durable rock spoil is placed such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, color photographs of the underdrains must be taken as they are formed. All color photographs shall be of adequate size and number to provide a relative scale and to clearly identify the site. A copy of the certified report shall be maintained at the mine site;

7.3.m.3. After total completion of the fill, a certification form shall be completed and submitted to the director by the registered professional engineer overseeing construction of the fill; and

7.3.m.4. In addition to the requirements of subparagraph (2) of this paragraph, certification forms for durable rock fills shall be accompanied by the following:

7.3.m.4.A. A statement attesting that the fill contains no more than twenty-percent (20%) non-durable material;

7.3.m.4.B. A statement attesting that foundation preparation is proceeding in accordance with the design plans;

7.3.m.4.C. A statement that prohibited material are not being placed, deposited, or disposed of into the fill area; and

7.3.m.4.D. A statement that sediment control measures are constructed and being maintained in accordance with the approved design plans and the terms and conditions of the permit.

7.4. Variance. Where it can be demonstrated that other design criteria are justified, certain requirements of this section may be waived. The basis for justification are, but not limited to, land use potential, unavailability of durable rock, and site stability.

§38-2A-8. Revegetation and Standards for Evaluating Vegetative Cover.

8.1. General Requirements. -- Each operator shall establish on all regraded areas and all other disturbed areas a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of disturbed land, or introduced species that are compatible with the approved postmining land use.

8.2. Objective in Revegetation. -- The objective in revegetation is to quickly establish a vegetative cover on all disturbed areas to minimize erosion, provide economic benefits, and restore aesthetic appeal. Plants that will give a quick permanent cover and enrich the soil shall be given priority. A temporary or permanent cover should be established by the end of the first growing season and a permanent cover by the end of the second growing season. All plants shall be considered a tool in achieving stabilization

and an appropriate land use objective.

8.3. Seeding and Planting.

8.3.a. Seasonal Feasibility. -- Appropriate vegetation shall be planted, seeded, aerial-seeded, or hydro-seeded in accordance with accepted agricultural and reforestation practices when the season is favorable for seed germination and plant survival except as otherwise specified in this rule.

8.3.b. Minesoil Characteristics. -- Surface mining of minerals and removal of overburden results in minesoil which varies greatly in fertility, acidity and stoniness. These three (3) characteristics, together with steepness of slope, shall be used in determining characterization for the purpose of establishing vegetation. Premining overburden sampling and analysis or previous experience and correlation data, shall be submitted with the pre-plan for all acid-producing seams. The plan shall identify acid strata and provide planned handling and final placement for acid strata. Overburden analysis shall be in accordance with standard procedures outlined in Environmental Protection Agency Manual No. 600/2-78-054 (Field & Laboratory Methods Applicable to Overburdens and Minesoils) or other approved methods by the Division of Environmental Protection.

8.3.c. Function of Temporary Cover Crops. -- On areas where excessive erosion is likely to occur, rapid establishment of vegetative cover shall be required. Seeding of annuals and biennials on such areas shall be considered as a means for achieving temporary vegetative cover only and not acceptable in the achievement of permanent cover. See Table Five.

8.3.d. Development of Planting Plan. -- Planting plans shall be a part of the premining and restoration plan. The mining plan and the projected configuration after mining will be the basis for classifying the area as follows:

8.3.d.1. Tests for minesoil acidity, expressed as pH, shall be taken at points distributed uniformly over the disturbed area. Minesoil tests may be made with accepted field indicators or other approved techniques. Minesoils with chemical characteristics that could restrict vegetation establishment and growth shall be analyzed by an approved soils laboratory;

8.3.d.2. Treatment to neutralize acidity;

8.3.d.3. Mechanical seed bed preparation;

8.3.d.4. Rate and analysis of fertilization;

8.3.d.5. Rates and types of mulch;

8.3.d.6. Perennial vegetation including herbaceous and woody plants

where appropriate, rate and species;

8.3.d.7. Areas to be planted or seeded to trees and shrub;

8.3.d.8. Land use objective; and

8.3.d.9. Maintenance schedule if appropriate

8.3.e. Concurrent Revegetation. -- Seeding shall be concurrent with the operation as mining and restoration progresses.

8.3.f. Development of Final Planting Plan. -- A final planting plan shall be prepared and submitted to the director for his approval within thirty (30) days after the grading and restoration of the operation have been approved.

8.3.g. Plant Material Selection and Treatment.

8.3.g.1. Specifications. -- All planting plans for woody vegetation shall include provisions for herbaceous cover using a suitable mixture from Table One (1). The following specifications should govern the selection and establishment of seeds and plants used in the revegetation of surface minesoil and based upon the following capability class:

8.3.g.1.A. On favorable minesoil material, prepared for perennial cover crop use, non-stoney and with pH 5.5 or higher, one of the following mixtures should be used:

8.3.g.1.A.1. Seed mixtures one (1), two (2), three (3), four (4), or five (5) from Table one, of this rule should be applied where annual maintenance treatment is assured. Mixture four (4) should be applied where the graded portion of minesoil is to be used as a firebreak or occasionally as a haulageway;

8.3.g.1.A.2. Establishment of grass, legume or perennial grass cover crop shall require the following treatment:

8.3.g.1.A.2.(a) Inoculation of legume seed with proper strain;

8.3.g.1.A.2.(b) Triple inoculation rate if hydro-seeded;

8.3.g.1.A.2.(c) Protection of seeded minesoil area from grazing livestock;

8.3.g.1.A.2.(d) Application of lime to pH 6.0 for

mixture four (4), to pH 6.5 to 7.0 for all other mixtures;

8.3.g.1.A.2.(e) Application of fertilizer shall be based on a minesoil test for lime, phosphorus, and potash from a soils lab or shall be a minimum of two-hundred (200) lbs., ammonium nitrate and two-hundred (200) lbs. triple super phosphate or equivalent;

8.3.g.1.A.2.(f) Preparation of seed bed by harrowing, discing or other approved methods; and

8.3.g.1.A.2.(g) Completion of fall seeding for legumes should be completed by September 1.

8.3.g.1.A.3. Maintenance of cover crop shall be carried out by the operator until the cover crop is adjudged by the director to be satisfactorily established and may require the following treatment:

8.3.g.1.A.3.(a) Maintain pH 6.5-7.0 for Mixture one (1);

8.3.g.1.A.3.(b) Maintain pH 6.0-6.5 for Mixture two (2), three (3), four (4), and six (6);

8.3.g.1.A.3.(c) Maintain pH 5.5-6.0 for Mixture four (4); and

8.3.g.1.A.3.(d) Top dress every two (2) years with four-hundred (400) lbs. per acre 0-20-20 for Mixture five (5).

8.3.g.1.B. On favorable minesoil material prepared for woodland and wildlife use, any one mixture from Table two (2) of this rule, along with proportions and treatment prescribed for it, should be selected for use in the direct seeding of herbaceous species and planting of trees and seedlings.

8.3.g.1.B.1. Establishment of plant growth for woodland cover on favorable minesoil material prepared for woodland and wildlife use should require the following:

8.3.g.1.B.1.(a) Spring planting of seedlings not later than May 1st and preferably before April 15th; and

8.3.g.1.B.1.(b) Spacing of shrubs and all trees in a pattern eight feet (8') by eight feet (8') apart of six hundred-eighty (680) trees per acre.

8.3.g.1.B.2. Establishment of crown vetch-rye grass or

Serecia-tall Fescue mixtures for wildlife cover may be done in accordance with paragraph 8.3.g.1.A.2 of this rule.

8.3.g.1.C. On moderately favorable minesoil material, prepared for woodland and wildlife use, with pH 5.5 and above, graded but stoney, on moderate to steep slopes, non-stoney and stoney, one of the mixtures with specified proportion and treatment from Table three (3), of this rule should be used:

8.3.g.1.C.1. Over seeding on moderate to steep slopes on tree planting sites shall be carried out on minesoil in order to prevent siltation, established ground cover and minimize erosion. Seed one of the mixtures from Table one (1); and

8.3.g.1.C.2. Establishment of plant growth shall require inoculation of legume seed with proper strain, and shall be protected from grazing by livestock. Triple inoculation rate if hydroseeding.

8.3.g.1.D. On favorable minesoil material prepared for woodland and wildlife use, which includes all extremely steep and/or stony minesoil, one of the mixtures with specified proportions and treatment from Table three (3) of this rule shall be used:

8.3.g.1.D.1. Establishment of plant growth should require:

8.3.g.1.D.1.(a) Broadcasting Mixture one (1) and three (3) before May 1st and frost seeding mixture two (2) by early March; and

8.3.g.1.D.1.(b) Black locust seed must be seventy percent (70%) or more viable. All legumes must be inoculated and must be protected from grazing by livestock. Triple inoculation rate if hydroseeding. Mixture No. one (1) of Table three (3), should be used for extremely stoney areas when tested acidity indicated a pH of 4.0 or better.

8.3.g.1.E. Other species of trees, shrubs, grasses, legumes or vines may be approved by the director.

8.3.h. Mulch Specifications. -- Mulch shall be used on all disturbed areas. Annual grains such as oats, rye, wheat, etc. may be used instead of mulch when it is shown to the satisfaction of the director that the substituted grains will provide adequate stability and that they will be replaced by species approved for the post mining land use. Approved materials and minimum rates to be applied are as follows:

Material	Rate/Acre
Straw or hay	1 - 2 tons material may be

	anchored with asphalt emulsion or other techniques approved by the director.
Wood fiber or wood cellulose products	1,000 lbs.
Shredded Bark	50 cubic yards

8.3.i. Standards for Evaluating Vegetative Cover.

8.3.i.1 Final Planting Report. -- A planting report shall be prepared by the operator and filed with the director on the prescribed form when the planting of a permit area is completed. All planting reports shall be certified by the operator or by the party with which the operator contracted for planting.

8.3.i.2. Time for Inspection. -- The operator shall review all areas he has under permit prior to the recognized spring and fall planting seasons. The operator shall cause those areas deficient of vegetative cover to be retreated, graded, seeded, planted, mulched, limed, or whatever, to establish a satisfactory stand of vegetation.

8.3.i.3. Standards for Perennials. -- Standards for legumes and perennial grasses shall require at least an eighty percent (80%) ground cover. Substandard areas shall not exceed one-fourth (1/4) acre (100' X 100') in size nor total more than twenty percent (20%) of the area seeded. Exceptions to this standard may be authorized by the director based on the following:

8.3.i.3.A. For areas to be developed for industrial or residential use less than two (2) years after regrading is completed, the ground cover of living plants shall not be less than required to control erosion.

8.3.i.4. Standards for Woody Plants with Perennials. -- Standards for woody plants with legumes and perennial grasses overseeded shall require a sixty percent (60%) establishment of ground cover of legumes and perennial grasses, and four hundred (400) trees (including volunteer tree species) and/or planted shrubs per acre, comprising a satisfactory vegetative ground cover as determined by the director. Substandard areas shall not exceed one-fourth (1/4) acre (100' X 100') in size not total more than twenty percent (20%) of the area seeded or planted.

8.3.i.5. Final Inspection Report. -- In no instance shall the official vegetative cover evaluation be carried out until the planting and seeding concerned has survived two (2) growing seasons or a minimum of eighteen (18) months. A final inspection report shall be prepared and filed following inspection to determine that the above evaluative standards have been complied with. If acceptable, the director may then

cause the permit to be released.

§38-2A-9. Mapping, Approved Persons, and Markers.

9.1 Scale for Maps. -- The scale required for all maps and plans prepared for submission with an application for a surface mining permit shall be as follows:

9.1.a. Scale on a U.S. geological survey topographic seven point five (7.5) minute quadrangle shall be enlarge to five hundred feet (500') or less to the inch; and

9.1.b. Scale on aerial photograph shall be six hundred sixty feet (660') or less to the inch.

9.2. Scale for Progress, Alternate Plan and Final Maps. -- The scale required for progress maps, alternate plan maps and final maps shall be the same scale as the proposal and drainage map.

9.3. Scale Approved. -- Written permission from the director shall be required prior to the submission of maps drawn to any scale other than set forth by this rule.

9.4. Map Size. -- All maps and plans shall be submitted on standard print paper, twenty-four inches (24") by thirty-six inches (36") or less. If supplementary maps or plans are attached, match lines shall be used.

9.5. Color Code. -- A color code shall be used in preparing all maps to indicate critical features of the permit area as follows; provided, that drafted or computer generated graphic symbols or shading may be used in place of a color code, if a separate, uniquely identifiable, and clearly discernible symbol or shading is provided in place of each color as specified below, and if the symbols or shading are clearly defined on map legends and used consistently throughout the permit application, and in any subsequent permit revisions, progress maps, or other submittals relating to the permit:

9.5.a. Red shall indicate mineral to be removed;

9.5.b. Yellow shall indicate the total disturbed land;

9.5.c. Blue shall indicate water and drainage;

9.5.d. Brown shall indicate special uses;

9.5.e. Green shall indicate regrading; and

9.5.f. Purple shall be used to outline adjacent mining permits.

9.6. Approved Person. Any person certifying the construction of drainage control structures, haulageways, or preparing a complete restoration and/or mining plan for the area of land to be disturbed as required by the provisions of WV Code §22-4, as amended, or by this rule, shall first submit to the director a written resume of their past experience and training. A written test may also be administrated. On the basis of such resume and/or written test, he or she shall be adjudged qualified or not as the case may be, and so notified by the director in writing. Approved person status may be revoked at the discretion of the director.

9.7. Permit or End of Strip Marker. -- A two-inch (2") pipe shall be driven into the earth with a minimum of three feet (3') exposed to permanently mark the beginning and ending points of the area under permit. It shall be identified by painting the exposed portion of the pipe red. Any suitable substitute may be approved. The assigned permit number shall be permanently affixed to the permit marker or end of strip marker.

§38-2A-10. Transfer or Sale of Permit Rights.

10.1. The director may grant written approval for the transfer or sale of a permit under the following terms and conditions:

10.1.a. The application for transfer or sale shall be set forth on forms prescribed by the director;

10.1.b. The applicant for transfer or sale of a permit shall, upon filing of the application with the director, give notice of the filing in a newspaper of general circulation in the locality of the operation. The notice shall be in the form of a legal advertisement containing information as set forth on forms provided by the director, the name and address of the original permittee and the permit number and shall provide for a thirty (30) day comment period. Any person whose interests are or may be adversely affected, may submit written comments to the director within thirty (30) days of the date of publication;

10.1.c. Approval of the application for transfer or sale of a permit may be granted upon a written finding by the director that the applicant shall conduct mining operations in accordance with the purposes and intent of the Act, this rule, and the terms and conditions of the permit. Such findings shall be based on information set forth in the application for transfer or sale and any other information made available to the director. Such approval may be granted in advance of the close of the public comment period Provided: That where information is made available to the director as a result of public comment that would preclude approval, such approval shall be immediately withdrawn;

10.1.d. Each application for a transfer or sale of a permit shall contain a sworn statement as follows: "The information contained in this application is true and correct to the best of my knowledge and belief." Such statement shall be signed by a principal officer of the applicant and shall be notarized; and

10.1.e. Any person who, through whatever means, assumes ownership or control directly or indirectly of a quarry operation shall be eligible to receive a permit and shall become responsible for the correction of all outstanding unabated violations.

§38-2A-11. Public Notice, Permit Renewals, Permit Revisions, and Incidental Boundary Revisions

11.1. Public Notice.

11.1.a. In addition to the requirements of WV Code §22-4 for a class III legal advertisement for new permit applications, any person who may be adversely affected by the issuance of the new permit, or a significant revision of a permit, may request a public hearing.

11.1.b. Such request for a public hearing shall be in writing and received by the director before the close of the public comment period.

11.1.c. The director shall conduct the public hearing in the locality of the proposed mining within three (3) weeks after the close of the public comment period.

11.1.d. Those requesting the public hearing shall be notified, and the date, time, and location of the public hearing shall also be advertised by the director in a newspaper of general circulation in the locality of the proposed mining at least one (1) week prior to the scheduled hearing date.

11.1.e. The director's authorized agent shall preside over the public hearing; and

11.1.f. In the event all parties requesting the public hearing stipulate agreement prior to the hearing and withdraw their request, a hearing need not be held.

11.2. Permit Renewals.

11.2.a. Each request for a permit renewal shall be submitted on forms prescribed by the director, shall contain a sworn statement as follows: "The information contained in this application is true and correct to the best of my knowledge and belief.", and shall be signed by a principal officer of the applicant and shall be notarized.

11.2.b. Each application for a permit renewal shall be subject to review and approval by the director.

11.2.c. Each application for permit renewal shall be accompanied by a

certificate of insurance affirming insurance coverages in the kind and amount as required by WV Code §22-4, and containing a statement affirming that the insurer shall promptly notify the director of any substantive change in the policy, including cancellations, terminations, or failure to renew. A true copy of the original policy of insurance shall be maintained current and on file with the director.

11.2.d. Each mining and restoration plan shall be reviewed at the time of permit renewal to ensure compliance with the requirements of WV Code §22-4, this rule, and permit conditions. Consideration should be given to those areas which were permitted and disturbed prior to the effective date of this rule in allowing reasonable time to bring these areas into compliance. Areas that were permitted, disturbed, and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

11.2.e. When the application for permit renewal also contains revisions which constitute a significant departure from the terms and conditions of the existing permit, or which may result in a significant impact in any of the following areas, it shall be subject to the same public notice requirements required for a new permit:

11.2.e.1. Impact on the environment;

11.2.e.2. The health, safety, or welfare of the public;

11.2.e.3. The postmining land use;

11.2.e.4. Areas prohibited from mining by the Act; and

11.2.e.5. An individual's legal right to receive notice, as prescribed by the provisions of this rule.

11.2.f. When the application for permit renewal also contains permit revisions which constitute only an insignificant departure from the terms and conditions of the approved permit, it shall be deemed to be a non-significant revision requiring no public notice.

11.2.g. Each application for a permit renewal shall be accompanied by a Progress Map of an approved size and scale as the proposal maps indicating all new progress, disturbance, or revisions; Provided however, that those operations with no new disturbance or revisions since the last renewal may submit a notarized statement from the permittee stating this fact.

11.3. Permit Revisions.

11.3.a. Each request for a permit revision shall be submitted on forms prescribed by the director which shall be signed by a principal officer of the applicant and shall be notarized.

11.3.b. Each application for a permit revision shall be subject to review and approval by the director. The director shall make a determination, on the basis of information provided in the permit revision application, whether or not the revision is of a significant or non-significant nature. The following criteria shall provide guidance for making such a determination:

11.3.b.1. Where the permit revision constitutes a significant departure from the terms and conditions of the existing permit which may result in a significant impact in any of the following areas, it shall be deemed to be a significant revision and be subject to the same public notice requirements required for a new permit:

11.3.b.1.A. Impact on the environment;

11.3.b.1.B. The health, safety, or welfare of the public;

11.3.b.1.C. The postmining land use;

11.3.b.1.D. Areas prohibited from mining by the Act; and

11.3.b.1.E. An individual's legal right to receive notice, as prescribed by the provisions of this rule.

11.3.b.2. Where the permit revision constitutes only an insignificant departure from the terms and conditions of the approved permit, it shall be deemed to be a non-significant revision requiring no public notice.

11.3.c. The director may require reasonable revisions to mining permits where such revisions are necessary to assure compliance with the Act and this rule; provided, that the director shall notify the permittee that such revisions are necessary and shall provide a reasonable time for compliance.

11.4. Incidental Boundary Revisions (IBRs).

11.4.a. Incidental Boundary Revisions (IBRs) shall be limited to minor shifts or extensions of the permit boundary into non-mineral areas or areas where any mineral extraction is incidental to or of only secondary consideration to the intended purpose of the IBR or where it has been demonstrated to the satisfaction of the director that limited mineral removal on areas immediately adjacent to the existing permit is the only practical alternative to recovery of unanticipated reserves or necessary to enhance restoration efforts or environmental protection. IBRs shall also include the deletion of permitted acreage which is overpermitted by another valid permit and for which full liability is assumed in writing by the successive permittee. Incidental Boundary Revisions shall not be granted to abate a violation where encroachment beyond the permit boundary is involved, unless an equal amount of acreage covered under the IBR for encroachment is

deleted from the permitted area and transferred to the encroachment area.

11.4.b. General. -- Applications for IBRs shall be as follows:

11.4.b.1. The application shall be filed on forms provided by the director;

11.4.b.2. The application shall be accompanied by a map showing the areas covered by the IBR;

11.4.b.3. The application shall be accompanied by a restoration plan for the area of the IBR which is consistent with the existing restoration plan; and

11.4.b.4. The application shall be subject to review and approval by the director.

11.4.c. An IBR may not be implemented by any operator until written approval of the director has been granted.

11.4.d. The director shall make the following findings prior to approval of an IBR:

11.4.d.1. The IBR does not constitute a change in the postmining land use;

11.4.d.2. The IBR does not constitute a change in the method of mining;

11.4.d.3. The IBR will not result in adverse environmental impacts of a larger scope or different nature from those described in the approved permit;

11.4.d.4. IBR will facilitate the orderly and continuous conduct of mining and restoration operations; and

11.4.d.5. An area permitted under an IBR must be contiguous to the original permitted area.

11.4.e. Upon review of an application for an Incidental Boundary Revision, the director may require an advertisement to be published which provides for a ten (10) day public comment period. The advertisement shall contain such information as set forth on a form prescribed by the director.

§38-2A-12. State and Federal Compliance.

The issuance of surface mining permit pursuant to WV Code §22-4, as amended, and any rules promulgated thereunder authorizes the operations covered by said permit, but does not release the permit holder from any other legal duties imposed by the laws of this state or these United States.

TABLE ONE

USE: HAY, PASTURE OR OTHER WHERE HERBACAOUS COVER IS DESIRED

1.	Alfalfa	20 lbs.
	Orchard grass	10 lbs.
	Tall Fescue	15 lbs.
2.	Birdsfoot Trefoil	10 lbs.
	Tall Fescue	15 lbs.
3.	Birdsfoot Trefoil	10 lbs.
	Orchard grass	10 lbs.
4.	Orchard grass	20 lbs.
	Red Top	3 lbs.
5.	Crown Vetch	15 lbs.
	Tall Fescue	20 lbs.
	[2]Weeping Lovegrass	3 lbs.
6.	Crown Vetch	15 lbs.
	Rye Grass	15 lbs.
	[2]Weeping Lovegrass	3 lbs.

[1]APPROVED SEED MIXTURES FOR OVER SEEDING TREE AND SHRUB SEEDLINGS

7.	Tall Fescue	30 lbs.
	Birdsfoot Trefoil	15 lbs.
8.	Tall Fescue	20 lbs.
	Rye Grass	10 lbs.
	Birdsfoot Trefoil	15 lbs.
9.	Tall Fescue	20 lbs.
	[2]Weeping Lovegrass	3 lbs.
	Birdsfoot Trefoil	15 lbs.

FOR ELEVATIONS ABOVE 2500

10.	Tall Fescue	20 lbs.
	Red Top	4 lbs.
11.	Tall Fescue	20 lbs.
	[2]Weeping Lovegrass	3 lbs.
12.	Tall Fescue	20 lbs.
	Sweet Clover	10 lbs.

[1]Establishment of vegetation includes liming pH range 5.5-7.0. Application of fertilizer shall be based on soil test results from a soil laboratory. Without a soil test, apply 600 lbs. 10-20-10 or equivalent, and protection from grazing during the seedling state.

[2] Red Top may be substituted for Weeping Lovegrass for late summer and fall seedings at a rate of 3 lbs. per acre.

TABLE TWO

APPROVED WOODLAND PLANT MIXTURES
(Nursery Grown Seedlings)

1.	Black Locust (3000') White Pine	Plant in bands 6 rows or more in width Black Locust not to exceed 50%.
2.	Black Locust (3000') Virginia Pine	Plant in bands 6 rows or more wide Black Locust not to exceed more than 50%.
3.	Scotch Pine White Pine Red Pine (above 2000') Virginia Pine (below 2500')	Use mixture of two or more if available Plant in bands 6 rows or more.
4.	Black Locust (below 3000') Tulip Poplar (below 3000') Sycamore (below 2500') Red Oak	Use up to one-half locust with one or more of hardwood species. Plant in bands 6 or more rows in each species.
5.	Autumn Olive and adapted pine or hardwoods	Where owner's interest is wildlife improvement, plant in bands of 3 to 6 rows preferable with pines or in blocks of one-fourth acre spaced 600' apart.
6.	European Black Alder (below 2500') Sycamore Indigo Bush Autumn Olive	Use these plants where protection from grazing is impractical or protection will not be maintained. For wildlife habitat improvement use 3 to 6 row bands where two or more species are planted.
7.	European Black Alder	Use European Black Alder where pH is near 5.5.
8.	Black Locust	Use only on steep erodible outslopes.
9.	Sweet Crab Apple[1] Washington Hawthorne[1]	On bench of areas where owners primary' interest is wildlife habitat improvement, plant in clumps of 12 spaced 10' to 12' apart. Clumps should be spaced 200' to 300' apart, planted in between with pine, Indigo Bush or Autumn Olive.
10.	Blackberry[1]	Plant on bench spaced 6 x 6 in blocks 100 plants per block.
11.	Grey Dogwood[1] Silky Cornell[1]	On bench near water impoundments spaced 8 x 8.

[1]Should be planted only on the more favorable sites. Preferably a north or northeastern aspect with a pH of 5.5 or above.

TABLE THREE

[1]APPROVED MIXTURES
HERABACEOUS AND WOODY SPECIES FOR DIRECT SEEDING

1.	Tall Fescue	30 lbs.	
	Birdsfoot Trefoil	15 lbs.	
	Black Locust[2]	3 lbs.	
2.	Tall Fescue	20 lbs.	
	Rye Grass	10 lbs.	
	Birdsfoot Trefoil	15 lbs.	
	Black Locust[2]	3 lbs.	
3.	Tall Fescue	20 lbs.	
	Weeping Lovegrass	3 lbs.	
	Birdsfoot Trefoil	15 lbs.	
	Black Locust[2]	3 lbs.	
4.	Orchard grass	30 lbs.	Better suited to higher
	Birdsfoot Trefoil	10 lbs.	elevations above 2500'
	Black Locust[2]	3 lbs.	
5.	Orchard grass	20 lbs.	Better suited to higher
	Red Top	3 lbs.	elevations to 2500'
	Birdsfoot Trefoil	10 lbs.	
	Black Locust[2]	3 lbs.	

[1]Application of fertilizer shall be based on soil testing results from a soils laboratory. Without a soil test, apply a minimum of 600 lbs. per acre of 10-20-10 or 10-20-20. Equivalent amounts of nitrogen and phosphorus is acceptable.

[2]Black Locust seed may be omitted on the bench areas or where erosion is not a serious problem, or at elevations above 2000', 1/4 lb./acre Virginia Pine; 1/4 lb/acre White Pine, and 3 lbs./acre Japonica Intermedia may be substituted for Black Locust.

TABLE FOUR

[1]APPROVED MIXTURES FOR WATERWAYS, DIVERSIONS DRAINAGE STRUCTURES, HAULAGEWAYS, HIGHWALL ACCESS, ETC.

1.	Tall Fescue	50 lbs.
	Birdsfoot Trefoil	10 lbs.
	Red Top	3 lbs.
2.	Perennial Rye Grass	20 lbs.
	Tall Fescue	30 lbs.
	Birdsfoot Trefoil	3 lbs.
3.	Tall Fescue	40 lbs.
	Crown Vetch	15 lbs.
	Red Top	3 lbs.
4.	Tall Fescue	50 lbs.
	Crown Vetch	15 lbs.
5.	Tall Fescue	30 lbs.
	Reed Canarygrass	20 lbs.
	Red Top	3 lbs.

NOTE: Weeping lovegrass at 3 lbs. per acre may be substituted for Red Top for spring and early summer seedlings on well drained areas.

[1]Application of fertilizer shall be based on soil test results from a soils laboratory. Without a soil test, apply a minimum of 600 lbs. per acre of 10-20-10 or 10-20-20. Equivalent amounts of nitrogen and phosphorus fertilizer is acceptable.

TABLE FIVE

[1]ANNUAL AND BIENNIAL COVER CROPS FOR TEMPORARY COVER

- Grasses -	Suggested Rates of Application - Pounds in Acres	Seeding Season
Balbo Rye	30 - 60	Fall
Abruzzi Rye	30 - 60	Fall
Wheat	30 - 60	Fall
Oats	30 - 60	Fall
Japanese Millet	10 - 15	Summer
Millets - German, Foxtail	10 - 15	Summer
Sudan Grass - Sorghum Hybrid	10 - 20	Summer
Pearl Millet	10 - 20	Summer
Sudan Grass	10 - 20	Summer
Annual Rye Grass	10 - 15	Spring or Fall
- Legumes -		
Kobe Lespedeza	5 - 10	Summer
Korean Lespedeza	5 - 10	Summer
Hairy Vetch	20 - 40	Fall
Sweet Clover	10 - 20	Summer
- Forbs -		
Buckwheat	30 - 60	Summer

[1]Application of fertilizer shall be based on soil test results from a soils laboratory. Without a soil test, apply a minimum of 600 lbs. per acre of 10-20-10 or 10-20-20. Equivalent amounts of nitrogen and phosphorus fertilizer is acceptable.

BEFORE THE DIVISION OF ENVIRONMENTAL PROTECTION
STATE OF WEST VIRGINIA

IN RE: 38 CSR 2A, Rules for Mining and Restoration of Limestone, Sandstone, and Sand

38 CSR 2B, Rules for Mining and Reclamation of Minerals Other than Coal

TRANSCRIPT OF PROCEEDINGS had at a public hearing in the above-referenced matter, held on July 21, 1999, before the Department of Environmental Protection, pursuant to notice duly given to all interested parties.

ANDY GALLAGHER, DEP, Public Information Officer

ERIN WINTER, DEP, Office of Public Information

ROCKY PARSONS, Assistant Chief, Office of Mining

SPEAKERS

MIKE CLOWSER, Executive Director, West Virginia Crushed Aggregates Council

MICHAEL McTHOMAS, AAL, West Virginia Crushed Aggregates Council

GARY GUESS, Capitol Cement

BILL KERNS, Laurel Aggregates

TERRY GHOUL, Kermit Butcher Quarries

TOM DEGEN

PAT STUMP, Mountain Valley Coalition

RICK EADS, West Virginia Citizen Action Group

PROCEEDINGS

MR. GALLAGHER: My name is Andy Gallagher. I'm the Public Information Officer at the Division of Environmental Protection.

We're going to run, at the request of Rocky Parsons, who's the Assistant Chief of the Office of Mining, simultaneous public hearing on 38 CSR 2A, Rules for Mining and Restoration of Limestone, Sandstone, and Sand. This is a new proposed rule to regulate only sandstone, limestone, and sand that previously were regulated under 38 CSR 2B, Rules for Mining and Reclamation of Minerals Other Than Coal.

At the same time we're going to have a hearing and you can comment on 38 CSR 2B, Rules for Mining and Reclamation of Minerals Other than Coal. This rule is being amended to regulate minerals other than coal, limestone, sandstone, and sand.

Are we clear on that? Does anybody have any objections? You may file written comments with us, or you may come up here and provide oral comments.

With me tonight is Erin Winter, who is my assistant in the Office of Public Information, and she'll be here to handle any materials. Rocky will be here to handle any

questions you have right now.

Does anybody want to come forward, volunteer? I want you all to sign the paper and make sure we have you registered here. The comment period will close at the end of this hearing.

MR. CLOWSER: Thank you. My name is Mike Clowser. I'm here as Executive Director of the West Virginia Crushed Aggregates Council. This council is a newly formed organization that has been in existence for about ten days.

The goal of the organization is to provide a communications forum for the aggregates industry to facilitate the exchange of information on industry issues; technology, trends, market development, safety and health issues, certainly environmental enhancement issues, as well as governmental and public affairs.

The West Virginia Crushed Aggregates Council will be a Division of the Contractors Association of West Virginia, which is a group of about 475 members in the highway building and utility construction industry throughout the State of West Virginia.

I'd just like to offer a few comments prior to, because we will have a number of speakers who will address

specific topics related to the technical and statutory aspects of the proposed regulations.

But just as a little bit of a background, in 1998, 13.9 million tons of crushed stone and 1.8 million tons of sand and gravel were produced in the State of West Virginia. Total sales for these aggregates were approximately 83 million dollars.

So the quarrying industry is a very vital industry within the state that employs hundreds of people directly within the industry, certainly has much more of that in a spinoff activity, and certainly is a producer of revenue and jobs for the State of West Virginia.

The members of the Crushed Aggregates Council are mostly small to medium size companies. Many are small family owned operations that have been in business 25, 50, and in some cases 100 years. So we've been a vital part of this state for many, many years.

We provide many services and many products to the Department of Transportation, Department of Highways. Also, specifically as it relates to home building, home construction, and such things as fillers for paint, toothpaste, and makeup. So we think we are a very vital industry within the confines of the State of West Virginia.

Just as a history, the industry has worked on legislation relating to quarries for the past eight years. When we first started off, there was certainly, to be quite honest, a defensive mode and we worked to basically block legislation that we felt was harmful to the industry.

Over the last three or four years the industry has promoted legislation that we feel is a blend between being responsible citizens to the State and providing reasonable means to operate environmentally sound, and to be good corporate and community citizens while balancing the fact that we do provide a service and we do provide jobs throughout the state.

That legislation has not advanced over the last three or four years due to various reasons, mostly that there has not been an agreement between the environmental community and the industry. And because of that gridlock, we have basically not been successful, nor has anyone else been successful, in providing meaningful regulations or legislation through the legislative process.

The industry has done a number of things to try to make people more aware of the services, and the benefits, and the attributes of the quarrying community. We have had tours where we had a number of legislators to see exactly what is

comprised within a quarry, how we operate, what we are constrained by, the regulations that we currently follow. We've invited those and opened those to the environmental community, many of whom have participated in those tours.

It's certainly been, I think, a very good process for the industry because we've gotten great input from other people. And hopefully, those tours have provided insight to other people who have not had a good working knowledge of a quarry and the type of regulations and restrictions by which we follow.

We were at a meeting last week with various members of the Legislature and various representatives of industry in the environmental community in which we were told that there will be legislation coming out in the Legislature next session.

I guess one of the things that we are going to question today is the fact that we are looking at these regulations, and I guess one of our questions is, if there is going to be legislation put forth in this session, are we duplicating our efforts by working on these regulations, or do they need to be postponed and we look at specific legislation come January.

We throw that out as a viable discussion so we do not have duplication and we do not fragment our resources to get some meaningful legislation put through this year.

The speakers that will be following my presentation from the industry standpoint will be talking about specific technical issues that we feel need to be addressed, if the regulations are pushed forward. Also, we have some questions regarding the statutory authority that the Department has in promulgating some of the rules and regs that are proposed in that.

With that, I will turn it over to other members who have questions, and also to our representatives who will have some very specific comments as to the regs themselves. Thank you.

MR. McTHOMAS: My name is Michael McThomas. I'm an attorney with Robinson & McElwee. I am legal counsel with the West Virginia Crushed Aggregates Council.

We have reviewed the proposed rule and I just want to highlight a couple of issues for the record. We're also filing at this time written comments on Rule 38 CSR 2A, as well as comments, also, on 2B, which are very similar rules.

The first thing I'd bring to your attention is

Appendix B of the proposed filing of the rule, which is a statement that goes to the Legislative Rulemaking and Review Committee, which one of the questions which is posed that the agency, the Division of Environmental Protection must answer is whether or not there is an economic impact on specific industries or state government.

The DEP responded that there was no economic impact. We believe that this assertion is erroneous. It may be that detail analyses were not performed by the agency as to the economic impact on the industry by the regulation, or the economic impact on state government and consumers of the aggregate material that is produced by quarries.

Those costs of increased environmental compliance will necessarily have to be passed through. It also puts West Virginia businesses somewhat at a competitive disadvantage versus other quarry operations if the regulations as drafted pose undue burden on industry in West Virginia. So we think that issue is something that needs to be addressed.

I would request at this time then that the council would be permitted to file some subsequent comments potentially addressing that issue, as well as some other more minor technical issues at a date after the close of this hearing, and go on the

record with that request.

The areas that I've highlighted for the agency's attention is that the quarry operators, as Mike Clowser has addressed, has spent considerable time in attempting to distinguish the differences between coal mining operations and quarry operations. As we review the regulations, we found that repeatedly coal mining type of references and standards are being imposed on quarries.

We believe that there is a clear distinction between quarry operations on the one hand and coal mining operations on the other hand. We believe that the agency needs to recognize this when it drafts rules applying for the compliance of quarries.

The second major issue deals with how existing quarry operations are going to be treated under the regulations and the application of the regulations to those operations.

In the legislation that was considered there was what's commonly called a grandfather clause, so that operations that have been completed or are ongoing under current regulations are not otherwise disturbed by the new quarry regulations should they be implemented. It makes no sense to us from an environmental standpoint to go back and redisturb land

that has already been placed and stabilized from quarry operations as may have taken place for the last 30 or 50 years.

Therefore, we suggest highly that the agency consider including some grandfathering clause into this regulation so that we don't have to go back in time to redisturb spoil piles, et cetera, that have already been stabilized. We think it serves no environmental benefit to do so, and also increases the cost tremendously to the quarry operations. We think that perspective application of the new rules would be a more appropriate way to implement that.

The last issue, which is really very much a legal issue, and that is whether or not the agency has the authority to require reclamation in light of the clear statutory exemption from reclamation requirements for quarry operations.

Despite the statutory exemption, it appears that the agency is resistant to recognizing this statutory provision and continued to impose reclamation requirements in the new rules where the statute clearly provides an exemption.

We think that the agency ought to reject this approach by continuing to impose reclamation requirements to the rules, and it work out clear statutory authority prior to implementation of reclamation requirements.

With that being said, I will conclude my remarks. I think that the statutory authority, which is more detailed in our written comments, is a very important point that needs serious analysis.

In my closing remarks I'd say that I believe that the Council stands ready to work with the DEP to work out certain minor language changes that we as an industry may read differently than the agency in its drafting of the regulations. Sometimes the intent may be very similar or the same, yet, what's actually written on paper doesn't necessarily reflect what that intent is.

I think with those minor points that we can certainly work out some resolution with the agency to clarify what the agency intended, and how those particular provisions as a rule would be interpreted.

I thank you for your time.

MS. WINTER: Anyone else?

MR. GUESS: My name is Gary Guess. I'm here from Capitol Cement over in the eastern panhandle of the state. Our company and its predecessor companies has had a quarry in the eastern panhandle for in excess of 100 years. As Mike Clowser said, some operations have been around for a long time.

We are submitting separate comments, written comments in more detail. I'd just like to briefly say we are concerned initially with the lack of grandfathering in these proposed regulations in certain, what I would characterize as reach-back provisions that require reaching back possibly and making changes in practices and so forth which have been acceptable up till this time.

This is going to impose a significant expense on the industry and we don't see any environmental benefit from doing this, going back and disturbing acres that have been essentially stabilized and reclaimed up to this point.

We have also worked with members of the Legislature and other groups over the years in trying to draft new regulations for quarries. We think there is a need for some bringing up-to-date of the regulations.

We understand that in the upcoming legislative session there will be another effort to -- in fact, we have heard that legislation is being drafted to be presented at the next legislative session. We think that this effort on regulations can pose a conflict, a waste of time for the agency and possibly the industry, as far as duplication or actual conflicts between legislation that could come about as early as the next session,

and what these regulations will be proposing.

I would like to ask the agency, if they would, to extend the comment period for a short period of time to allow individual companies or organizations to make further comments, essentially on comments that are made here tonight of new points that are brought up.

We think that there is a need for upgrading some of the regulations. However, the set as proposed, there's a lot of gray areas that need clarification, so we think there needs to be a lot of reworking of some of the wording just so everybody understands exactly what is being proposed.

Like I said, we have submitted earlier our written comments and will file additional written comments if the comment period is extended. Thank you.

MS. WINTER: Anyone else want to make a comment?

MR. KERNS: Good evening. My name is Bill Kerns and I'm here representing Laurel Aggregates. We're a company located in Monongalia County producing limestone aggregates.

I have quite a few written comments which I'll be filing here this evening. Of those comments, five of them deal with language that's in the existing regulations that have been taken over and made a part of the proposed rules, and would ask

that those regulations be looked at more carefully, and whatever changes that should be made to them be made now.

These five items really are detrimental to the environment as they stand. With the newer technology and the newer methods of mining that we have now compared to when the regulations were initially set forth really dictates to us that we make those changes now, rather than waiting. If you're going to change them, now is the time to change them.

But what I'd really like to speak on this evening is three other items, three technical items which I think the DEP needs to take a closer look at before these rules are made in effect or taken a position with the Legislature.

The first deals with the definition of excess spoil in Section 2.2(1). Basically, that definition says that excess spoil is any overburden or waste drop that is placed outside of the pit.

Now the problem with that is, is that basically every operation when they begin takes their first cut and puts it on the outside of the pit. That can be a placement which is basically on level ground or a gently sloping ground. It doesn't have to be on steep ground. We've been doing that for literally hundreds of years in the quarry industry. As things stand

right now, I don't know that it has ever presented a problem.

But here we have, the way the definition is, when it's coupled with the definition of downslope placement that is found in 6.1(7), says that now we have to certify with a registered professional engineer all of those piles, and that not only do they have to be certified, but they have to be engineered. They have to be designed and then the placement of the piles has to be carried out with those design criteria.

And it's simply not needful. It's wasteful and it needs to be reconsidered. Simply a redefinition of excess spoil or spoil would take care of that problem, so it needs to be rethought.

The second problem that I would like to speak about this evening in the proposed rules is the definition of haulageway as found in 2.2(6). Haulageway basically is defined as any road anywhere on the permit.

The problem with that is, is that you can have a lot of inner roads which rock or spoil is being carried on which is already -- the drainage from those roads are already contained or taken care of, either within the pit area itself or with the outer drainage controls.

There is no need whatsoever to submit design

criteria for those inner permit roads. Those roads are moved often. Sometimes they are extremely temporary. Weather will even dictate having to move those roads. And there's no way that you can predict the placement of those roads in the pre-planning process.

And so the definition of haulageway, once again, needs to be rethought and modified. If you don't do this, you're going to have permit modifications coming in to you out the gazoo. It's just simply a matter of practicality.

The third issue that I'd like to speak about is found in Section 8.3(b), which deals with mine soil characteristics. It appears to me that this language has largely been lifted from the coal regulations, and by and large has no place in quarry regulation. For whatever reason, the DEP just can't seem to get out of the coal industry mode when it comes to writing regulations.

Whereas it may be true that not all quarries are limestone quarries, I certainly know of no limestone quarry in the state that has an acid overburden problem. And although these regulations also pertain to sandstone and sand quarries, there's only a handful of those in the state, and out of that handful of quarries which are dedicated sand or sandstone

production, how many of them have water problems? Very few.

And so what the DEP needs to do is, rather than require that the industry either submit a reason why they shouldn't do these expensive tests or submit the test, is simply to give themselves the opportunity to request them. The DEP is supposedly made up of professional individuals who have a good feeling for the geology of any given strata in any given area, and they know, or at least they should know which areas are going to be problem areas.

So the regulation, rather than putting the burden upon industry, should simply give the DEP the right to ask for that information should it be dictated by the lithology of the area.

Once again, I'll be submitting written comments with the DEP this evening. But I would also like to ask that the comment period be extended, because after hearing some of the comments made this evening, I would like the opportunity to comment on those additional areas, as well as other areas of the regulations themselves. Thank you.

MS. WINTER: Is there anyone else who would like to make a --

MR. GHOUL: My name is Terry Ghoul. I represent

Kermit Butcher Quarries in Elkins, West Virginia, Randolph County, a small quarry, but a viable one in the area. Our company will be filing comments, if permitted, in regard to these rules.

My oral comment concerns the cost and economic consideration of these rules on a small quarry. Numerous places in here I find certification testing. What I want you to remember, that not all quarries have engineering on staff. We have to do a lot of this with outside people. These rules will increase the cost to our company.

So what we would like to do is to have you consider the fact that costs are a big consideration when it comes to these rules. That, basically, is what I would like to say to the group.

MS. WINTER: Is there anyone else who would like to make a public comment?

MR. DEGEN: Good evening. My name is Tom Degen. The best thing about these rules is that they finally address sand, sandstone, and limestone.

I appreciate the fact that these rules address permit transfers and renewals, preblast surveys, restoration and public hearings, but for the most part these provisions are

weak and the statutory authority is questionable.

However, the fact that there are two separate rules for quarrying is going to get real confusing for those quarries that find themselves subject to both of them. For example, an operation that quarries sand and gravel.

Probably most important is that some of the most crucial of citizen concerns, such as hydrological studies, groundwater monitoring, replacement of water supplies, dust and noise abatement, compliance with local zoning ordinances, bonding, updated insurance requirements, and a special reclamation fund cannot be addressed by the agency until the Legislature authorizes it through legislation.

I realize that there has been quarry legislation introduced for a good number of years with no result, but this is the first year that an interim committee has been charged with studying the quarry issue, and there is a good chance that there will finally be a quarry bill.

For that reason, I urge the agency to withdraw these rules and assist the interim committee in its work to craft a quarry bill. Then the agency will be able to prepare a single quarry rule and have the statutory authority to address a wider range of issues.

Because my main comment is not to do the rules, I do not have specific comments on their content. But there is one thing that I have to draw attention to.

Section 6.15 discusses using garbage and municipal waste for fill, and refers to this practice as sanitary landfills. This language is carried over from the existing rule, which was written before our modern solid waste laws came into effect. The current solid waste laws and rules do not allow such uses for garbage, and this section should reflect that.

I appreciate the opportunity to comment on these rules. Thank you.

MS. WINTER: Are there any other people who want to make verbal comment? Anyone?

MR. STUMP: I would just like to put on the record, my name is Pat Stump. I'm with the Mountain Valley Coalition out of Snowshoe, who is opposing the expansion of a permit.

I feel that these rules and regulations as proposed, I have the same thoughts, basically, that the industry does. They need more time to be studied.

We would graciously request an extension of the time period for comment. I just wanted it on the record that I'm here. Thank you.

MS. WINTER: Any other public comment? Anyone else?

MR. EADS: My name is Rick Eads. Today I represent the West Virginia Citizen Action Group.

I have studied the two legislative bills that were before the session last time. I have read the rules that have been proposed. I'm also aware of a little bit of the activity of the interim committee's work to advance a quarry bill as a new statute having participated recently in a little group that talked about these a week ago today with Mr. McThomas, Mr. Clowser.

I feel a lot like Mr. Clowser. He mentioned that if there is any legislation that's going to move forward, he asked the question, are we duplicating effort, and I think we certainly are. I heard from the industry their concerns. I'm aware of industry's concerns, at least about the statute, as they were expressed within the last week, and they're aware of the concerns that I have.

For the record today, some of the things that I think the rule does not address and a very good reason to table it, because I think these issues will plague us throughout the session in trying to advance this rule, is that groundwater protection, restoration is mentioned in one line, to my

knowledge, directly, underground water, in the current rules. I think we're all aware here that there are some groundwater resources that might need protection.

Secondly, the rule nowhere addresses the provision that's in current law to protect sensitive areas, and I think this has led to a lot of cost to the Division of Environmental Protection, to the industry, and to citizens, because several sensitive areas are currently having quarry proposals and expansions of quarries proposed in their areas. What I mean sensitive areas, I'm talking about people who have present or future aesthetic and economic uses in the surrounding areas.

I do believe these fights will escalate. I do not think these rules will serve to diffuse them, that we need to revisit these types of provisions, keep that provision in law and work with the industry to try to avoid those conflicts, because they cost us all a lot of resources. They may pay Mr. McThomas' bills, but they don't pay mine.

I think that we are looking at a situation here that's based on a 1971 law that we should all agree has room for improvement in groundwater protection. We should all agree that public participation early in the process is much more beneficial than the types of public participation that the industry is facing

today, that we should improve those provisions of the law.

Specifically, we should not exclude people, as certain provisions of previously proposed laws would do so, outside of 1,000 feet of a quarry. I think that blasting damages should be handled much like they're being handled in the coal industry, if, in fact, there is damage and a preblast survey says so. We should have a rebuttable presumption. That means that people should automatically have their wells replaced.

I believe that the law must do something to address grandfathering. As Mr. Clowser stated in his testimony today, some quarries operate 20, 50, and he was even proud to say 100 years. So that means a quarry that had a permit granted last year can run amok for 99 years without any oversight from new rules or legislation, if they are grandfathered in.

I think we need to be fair with the industry in pricing, but the current rules really do nothing to address the bonding issue. And I'm sensitive to industry's concern that on a 50 year old quarry that their bond might be held for a very long time, and that's not a fair thing to do to certain industries. I think we should be a little more creative than that and figure out ways to set bonds and do certain release stages, bond maybe by the acre, or bond the active areas, whatever.

I have talked to the National Mine Safety and Health Administration, and I know now that there are 387 fatalities nationwide at abandoned mine lands from playing.

The industry is correct, they have no overburden material to put back and restore these sites, as we're used to in surface mining. However, reducing highwalls is critical. Future land use is critical.

I believe without bonding, the provisions for reclamation are moot. I think unless there's some teeth there, and this rule certainly has none and I appreciate the DEP's intent and effort, because the current law is so weak, it can have no teeth.

That 1971 law, to all you quarry operators out there, that's just more heartburn for you. You may be hearing certain things from your leadership, and they're sincere in their intent to assist you.

I'm here to say that this rule will not assist you, that this rule will draw further attention, that the way the rule is written things will become more difficult for quarry operators to get permitted and modifications to be made, and a good law might benefit all parties.

I think the last thing that I want to comment on

today at this public hearing is of serious concern to me, without knowing anything else. I have heard now on two separate occasions, one in front of the Legislature and one in front of a group that met informationally about this rule some month-and-a-half ago, something like that, June 9th or June 7th, I think, and I heard stated that the Director of the Division of Environmental Protection had "certified" that the quarry industry was in compliance with the Groundwater Protection Act.

I don't know -- I will appeal to lawyers in the future to help me understand this. I don't know how you certify an entire industry, if that's a blank check to do whatever you want to groundwater. I'm not sure. That deeply concerns me. I think that that type of provision, he probably has the latitude to do so or his legal counsel would have advised him otherwise, but that's the type of thing I think we should be working out in the new law.

I do believe, like Mr. Clowser, this is a duplication of effort. Both industry, citizens are interested parties, and the DEP can redevote our efforts to statutory changes. We have a lot of time. It seems like there are a lot of sincere people at the table.

The last thing that I will mention, and a lot of

people in the room have heard a lot of this before, but there is a new twist. These rules as written, both from a blasting standpoint, from drainage systems, do nothing to address the water issue at a highwall in a quarry.

That water issue includes possibly extracting 200,000 gallons of water a day to be able to mine the quarry. That is groundwater, because that is seeping out at the face and presenting problems which the industry must overcome, and I'm sympathetic to that, in order to make their product and keep their employees and their contracts.

However, extracting that type of groundwater, particularly in 38 CSR 2A for limestone quarrying will be regulated should these rules move forward, is potentially very devastating. At 200,000 --I am a professional hydrageologist. At 200,000 gallons a day, the influence of that type of withdrawal, even for a short period of time, can radically alter subsurface water flow. Everyone in this room that is involved in limestone quarrying understands how groundwater behaves in limestone, and the flows that we're talking about.

I am aware today of an abutting property owner to a limestone quarry who has had tremendous diminution of his springs. There has been nothing in this rule, nor prior, that

would establish the baseline condition of his springs. The economic loss to this individual could put the quarry out of business.

As the law is currently written, there are treble damages for that type of economic loss. For the quarry operators that are out there, I think that it's in our interest to include that language or table it, and deal with the issue of damages to groundwater or move the legislation forward.

I thank you very much for the opportunity to comment.

MS. WINTER: Are there any other verbal comments? Anybody? Does anyone have any written comments to submit at this time?

MALE VOICE: Is the written comment period concluding today?

MS. WINTERS: I actually --

MALE VOICE: I heard in a legislative session that the written comment period would run to August 20th (inaudible).

MR. GALLAGHER: The comment period ends when the public meeting ends today.

MALE VOICE: Okay, I thought so. I would have

loved that information (inaudible).

MS. WINTER: Any other verbal or written comments?

MALE VOICE: That's not what I was told a week ago.

MS. WINTER: All right. I guess that concludes this hearing.

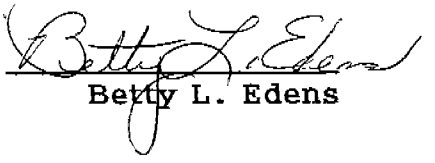
(WHEREUPON, the hearing was concluded.)

TYPIST'S CERTIFICATE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to wit:

I, Betty L. Edens, do hereby certify that the foregoing is, to the best of my ability, a true and correct transcript of all proceedings had in the public hearing held on July 21, 1999, as stated in the caption hereto, as recorded by audiotape provided to me by the Department of Environmental Protection.



Betty L. Edens

RULES FOR MINING AND RESTORATION OF LIMESTONE, SANDSTONE, AND SAND - 38CSR2A

WV Division of Environmental Protection, Nitro, WV

Tuesday, July 20 – 6:00 p.m.

↓ SPEAK ?

NAME	ADDRESS	ORGANIZATION	PHONE/FAX	E-MAIL
YES MIKE CLOWSER	2114 Kanawha Blvd. East	WV Crushed Aggregate Council	342-1166	342-1074 mclowser@cawv.org
YES MIKE McTHOMAS		WV Crushed Aggregates Council		
YES Gary Cress	P.O. Box 8855 Martinsburg	Capitol Cement	267-8966	
YES Bill KERNS	P.O Box 1209 MORGANTOWN, WV 26507	LAUREL AGGREGATES	296-4501 / 292-4006	WEKE@ACCESS.MOUNTAIN.NET
S.R. HOLLIDAY	P.O. BOX 662 HURRICANE WV 25526	NELSON BROTHERS	340-1530	
Pat Parsons	2114 Kanawha Blvd, East Charleston WV 25311	WV crushed Aggregates Council	342-1166	Pat@WVEXPO.com
Ron Potesta	2300 McCorkle Ave Chas WV	Potesta & Ass.	343 9031	rrpotesta@potesta.com
Terry Gould	188 Fayette St Buckhannon WV	Kerr-it Butcher Quarry	472-7099	
Tom Degan	PO Box 83 Alloe WV 25235		655-8651	TDegan@wvwisp.org
RICK EADES	1324 VIRGINIA ST E CHARLESTON, WV 25301	WV CITIZEN ACTION GROUP	346-5891	WVCAG@NEWWAVE.NET
C.K. MEADOWS #	P.O. BOX 10 GASSAWAY WV 26624	MEADOWS STONE & PAVING INC.	364-5151 / 364-5153	MSPI@ACCESS.MOUNTAIN.NET
John Zimnox				
Mike Devlos-	1100 Penn. Ave	WVA C S A s.	304-3434571	
Rocky Persons	1055 Railroad St Philippi	WV DEP	304 / 457-3219	

WRITTEN COMMENTS
ON PROPOSED RULES
Title 38, Series 2A

1. How was the determination made that these proposed regulations will not have a negative economic impact on our industry as indicated in Appendix B—Fiscal Note For Proposed Rules? Only the most naive person would look at the complexity of these regulations and not believe that there would be an additional financial burden placed upon the quarry industry. Obviously, to meet the technical and physical requirements that are not currently required by existing regulations, quarry operators will be required to spend much more money on preplanning and engineering. In addition, operating and production costs themselves will be increased due to the new reclamation standards. That production costs will increase is not debatable. All that needs to be ascertained is the extent of the increase.
2. The West Virginia Division of Environmental Protection does not have the authority to require the reclamation requirements that these proposed rules disguise under the term "restoration." §22-4-2(k) giving the definition of the all encompassing aspect of quarry operations as "Surface mining" states: "...Provided, That the bonding and ***reclamation*** provisions of this article do not apply to surface mining of limestone, sandstone, and sand:" (Emphasis added.)
3. The proposed definitions of "willful" and "deliberate" do not adequately clarify the difference between the two. Since any violations are criminal and not administrative, I believe that the clarity of these definitions is of the utmost importance.
4. The definition of "Excess Spoil" needs to be reworded. Here's why:
   When one considers the definition of "Downslope Placement" as dictated by Section 6.17 and combines that with the definition of "Excess Spoil" in 2.21 virtually all spoil piles would be required to be certified by a RPE. Due to the nature of their operations, most companies begin spoil placement at the edge of the pit and fill outward to avoid becoming "spoil bound" on their first cuts. Therefore, these spoil piles would be considered "Downslope Placement" even though they might be placed on level or very gently sloping ground. The past 100 years of quarry experience show that these spoil piles certainly do not need to be engineered to the specifications of 7.1, nor certified as required by 7.2, nor constructed as required by 7.2e.
5. The definition of "Area surface mining" (Section 2.6) is poor. It certainly is possible to quarry stone by the area surface mining method and produce benches as defined in Section 2.9.
6. The definition of "Haulageway" ***must*** be redefined. This definition coupled with Section 3 would require the design and certification of temporary "inter-permit" roads that will change frequently and whose drainage is ultimately controlled by the total permit drainage control requirements of Section 5. These roads are constructed by the operators on an "as needed" basis and their placement is dictated by the ever changing requirements of the day to day operations. Even changes in the weather can cause the need to relocate these roads. With the ever changing quarry environment, these roads simply cannot always be designed as a part of the pre-planing and permit application preparation. Therefore, multiple permit modifications will ensue causing

production delays and ever escalating costs. In connection with this, the last sentence of Section 3.20 needs to be reworded.

7. If the DEP is going to specify that the analytical procedures be performed as set forth in a particular publication, a *minimum* edition reference should be included. (The 20th edition is the current edition.)
8. Section 5.2 needs to be reworded. It contradicts itself. First it says that overburden placement in natural streams is allowed with special approval, and then it says that mining operations are prohibited within 50 feet of a natural drainway. The prohibition should be stated first, then the exception or possible waiver should be stated so as clarify the intent.
9. Section 5.3.b is also poorly worded. First it says "in no case" shall water be discharged over a spoil slope, then the very next sentence explains how to convey water from the bench over a spoil slope. Adding the word "unprotected" before the words "spoil slope" would correct the problem.
10. Section 5.3c – "treatment" ponds would better be described as "sedimentation" ponds within this context. None the less, the requirement of constructing these ditches within 25' of the toe of the spoil will, under certain conditions, encourage material interference with flow. In addition, this distance requirement will prohibit the use of anti-sedimentation techniques such as grass filter strips, thereby increasing sedimentation in the ditches and ponds and thereby creating an attendant increase in maintenance.
11. Sections 5.6.a.1 through 5.6.a.3 are confusing. Are they trying to say, "Upstream and downstream samples must be collected for any stream which will receive runoff from, or be affected by, the disturbed area." ? If so, that is what this section should say. The wording of this section needs reworked.
12. Why is Section 5.6.b entitled "Treatment Facilities for Drainage from Surface Mine Operations" when the paragraph never mentions treatment facilities? The topic appears to be "permits." I am assuming the paragraph is attempting to convey the fact that if treatment facilities are required in order for discharges from the proposed operation to meet effluent limitations, then a special recommendation of approval from OWR is required. However, that certainly is not clear from the language.
13. Section 5.9 – Water Replacement Rights. There should be additional language that makes plain the fact that the quarry operator will have the right to appeal to the any adverse determination of WVDEP to the director. Certainly, WV code § 22-4-21 gives the right of appeal to any aggrieved party to the Surface Mine Board of any decision by DEP. However, an additional appeal to the director such as is contained in §22-4-7, would give assurance to quarry operators that this provision will not result in the wholesale exploitation by disgruntled neighbors to get an undeserved, free water source.
14. Section 7.3.1.4. –What is this doing here? Coal refuse in context with fills in a quarry seems a very unlikely scenario. In addition, no language follows the paragraph heading.
15. Section 8.3.b – WVDEP just can't seem to get out of the coal industry mode. The overburden analysis required by this Section is very expensive. If the wording of this section remains as it is currently written, it will only be a matter of time before WVDEP will require all permit applicants to submit an overburden analysis for every

application. Rather than requiring the industry to submit data for a waiver of these requirements, why not allow the DEP to request an overburden sample if they have reason to believe that the quarry will encounter an acid producing overburden? I don't know of any limestone quarries that have this concern. I doubt there are more than a handful of sand and sandstone quarries in the state. How many of them have water quality problems? Not many, if any. Let's use some common sense here and not get carried away.

Respectfully submitted,

Laurel Aggregates, Inc.
William E. Kerns
PO Box 1209
Morgantown, WV 26507

Concrete Products Inc.

Sand & Crushed Stone Co., Inc.

July 19, 1999

Mr. Rocky Parsons
Division of Environment Protection
105 South Railroad St.
Philippi, WV 26416

Re: Proposed Quarry Regulations

Dear Rocky,

I have reviewed the proposed regulations and have listed my comments on the attached sheets. In addition to those specific comments, I would like to add the following general comments:

- Existing quarry permits should be grandfathered.
- An appeal process should be established for the permittee who disagrees with the director's decision(s).

Thank you for the opportunity to comment on the regulations. If you or your staff have any further questions, please feel free to contact me at (301) 953-7650.

Sincerely,

Tim Schmidt

Tim Schmidt
Director of Land Resources

Cc: Pat Parsons
Mike McThomas

received 5:50 pm
7-20-99
WMP

Comments on Proposed Regulations §38-2A

2.5 Does "Backfilling and Grading" in this definition mean that another hole has to be dug in order to fill this one?

2.8 Does "At any point" mean at any point of the slope of an overburden or spoil pile?

2.10 What about benches in mined areas?

2.12 Our quarries are sometimes shut down this long just because of winter weather. A longer time should be provided.

2.14 "Cut" does not include the mineral to be mined.

2.32 A source to find the classifications of the USGS would be helpful.

2.40 "Complete Backfilling" would require another hole be dug in order to provide backfill – this hole would then have to be backfilled, etc.

2.45 "... or an individual's legal right to receive notice under this article." How does this relate to a significant revision?

2.57 Who publishes "Standard Methods for the Examination of Water and Wastewater"?

3.5 "Cut Slope" should be defined so that it is not confused with the mining face and overburden stripping process.

3.13 "Acid Producing" could preclude using rock found naturally on site thus adding greatly to road construction costs.

4.1 "certified by the division..." should reference the statute and regulations that control the certification process.

4.2 "Limitations of the operator" should be defined or explained.

4.3.c. It is not possible to state the dates that blasting will occur since the quarry will be operational for years.

4.5.a Since most requests for Sunday blasting are likely to be of an urgent nature, there probably won't be time to advertise and conduct the hearing.

4.5.b.4 "Blasted Material" is flyrock.

4.6.b. "Blast Area" – Does it equal the permit line or the quarry face where blasting will occur? The permit line could be excessively burdensome.

4.6.b.1 Would a simple porch or a metal shed be considered an addition to the structure? It would be helpful to have addition defined or explained.

4.6.b.4 If somebody requests a survey less than 10 days – does that mean that the blasting will not be allowed or that the request is denied?

4.6.b.5 If somebody disagrees with the survey, will this delay blasting?

5.2 Prohibiting a mining operation within 50'of a natural drainway could prevent mining at any of our existing quarries.

5.3.a Preventing surface water from entering the pit would adversely affect all of our quarries since we use them for pit storage. Many quarry sites would not have sufficient area to install drainage controls if pit storage is not allowed.

5.4.a The inclusion of land disturbed by previous operations would be extremely costly if the present operator has no need for these lands.

5.6.a - See 5.3.a Re: Water entering pit area.
- A monthly compilation of NPDES data exceeds the NPDES requirement.

5.6.a.1 How does this differ from 5.6.a.3?

5.6.b Does "...any such permit should be granted or denied." refer to the quarry permit or the NPDES permit?

5.7 This should allow the use of rip rap or other stabilization methods.

5.9 "Proximately" should be explained/defined.

6.2 Often, the "topsoil" is too thin to strip separately. What happens if analysis shows that the substitute won't "support and sustain" vegetation?

6.3 - Has "Toxic Material" ever been a concern at a quarry site?
- What is to be done if 4' of nontoxic material is not available?

6.5 - What if the bench is not going to be used for farming?
- What does "All available spoil material" mean?

6.6 This refers only to overburden slopes – see 2.46

6.10.a - What does "only stripping" mean? How can there be only stripping and no mining?
- Because quarries often work multiple benches, are long lived, etc., it is unreasonable to put a time or distance limit on backfilling.

6.10.b Same comment as 6.10.a regarding time/distance.

6.10.c The word "shall" should replace "may".

6.13 Is an "Alternative Plan" submitted at the time of an original permit or permit modification?

6.17 "Downslope" should be defined.

7.1.a "Disposal Area" should state those within the permit area.

7.1.b.1 "The fill [shall] be designed..."

7.1.c Does the slope found in the disposal area refer to the naturally occurring slope or the fill slope?

7.2.a The location of the spoil area shall be within the permit area.

7.2.e.5 Why are drainage pockets required when the site has drainage controls as part of the approved plan?

7.3 Define "Durable Rock Fill".

8.1 Pit floors and highwalls should be excluded. Also, it should be acceptable to have crushed stone considered as a method of stabilization for roadways, parking areas, stockpile areas, etc.

8.3.b Define "Pre-Plan". Is it necessary to have a pre-plan?

8.3.d What does "projected configuration" mean?

8.3.f Isn't planting a part of the restoration plan?

8.3.g.1.a.3 "Adjudged by the Director" should list criteria so that it is an objective decision.

8.3.g.1.a.3(a) – (d) How long do these limits have to be in place?

8.3.g.1.b.1 "...require the following is required." is confusing.

8.3.I.3 Do these requirements pertain to the entire permit area or just the areas planted incrementally?

8.3.I.4 Same as 8.3.I.3

8.3.I.5 This should include partial releases.

9.2 What is the purpose of a progress map? How often will they be required? Could air photos be substituted?

10.1.c The type of information that would "preclude approval" should be listed.

11.1.a "Any person" is too broad. This section should agree with the law.

11.1.d. This sentence is confusing. Should it be two sentences with a period after "public hearing"?

11.2.d - Reviewing the mining and restoration each year for the renewal is burdensome, particularly since the site is inspected every 15 days.
- Areas disturbed prior to the effective date of this rule should be grandfathered.

11.2.e What is "significant"

11.2.e.5 How is this determined as significant?

11.2.g It will be expensive and redundant to do a progress map yearly.

To: Pat Persons
From: Ed Treadway
4 pages

Engineering Services, Inc.
119 Appalachian Dr. * Beckley, WV 25801-2201 * (304) 255-5796

Mike → based on FIRST DRAFT

TO: Ed Treadway - Pioneer Mid-Atlantic
FROM: Jim Jones - ESI
DATE: 6/10/99
SUBJECT: Review of Proposed Quarry Regulations - Draft of 6/2/99

Dear Ed:

As per your request I have reviewed the proposed quarry regulations for content and possible oversights, conflicts or problem areas. In general, they appear to very closely follow the applicable regulations for the surface mining operations of the coal industry, too closely in some cases. Some possible problem areas are detailed below:

Definitions

1. 2.11 This time should be increased – two months does not even allow for winter idle time. This reg could cause unnecessary paperwork and enforcement action.

2. 2.40 Reclamation should not be tied to AOC for a quarry operation. AOC is not even defined in these regulations and has little applicability for a quarry due to the large amount of material removed versus the spoil generated. Recommend wording such as ... "backfilling to meet the reclamation or restoration plan". Additionally the introduction of the new term "restoration" is disturbing and unnecessary. Reclamation is sufficient to describe all backfilling, grading and revegetation.

Haulageways

3. 3.3 100' spacing could be excessive here especially for a long road. This should be site specific and be worded as to be "adequately visible".

Blasting

4. 4.3 Written notification is excessive as presented. If this is a one-time notification with the permit application it should so state. Is the intent yearly or prior to each shot? This could be a very expensive and unwieldy regulation.

5. 4.4.c.17 This appears to routinely require seismographic and air blast monitoring which should be site specific. This also appears to conflict with 4.5.f.

Drainage

6. **5.3.a** Though this is waiveable it should also be site specific to allow for existing operations where above highwall ditching might be unnecessary and dangerous to construct.

7. **5.4.a** This section appears to preclude the use of pit drainage control though it is later mentioned in **5.6.** This section should be reworked to allow the "evaluation of pit storage and monitoring of overall capacity" for site drainage control.

Method of Operation

8. **6.9** Inactive status of 1 year is not sufficient. This should be considered on a case by case basis or at least tied to the expected life of the quarry.

9. **6.10** This entire section appears to relate to surface coal mining operations (augering, highwall mining?) This method of reclamation timing will not work on a quarry and this section should be deleted or at least revised to match the completion of operations or quarrying, or use the reclamation/restoration plan.

Excess Spoil Disposal

10. **7.1.b.1** A "professional specialist" is not defined. Fill design is as important as construction and should be carried out by or under an RPE. Revision here would make this section correspond with construction sections presented later.

11. **7.2.e.1** This area should not be limited to 3.0 acres. This does not allow for difficult foundations or special cases such as soil removal from a broad valley. This should be eliminated or made site specific based on fill size with a waiver option.

12. **7.2.e.2** This type fill core is wasteful of the mineral being mined. This should be handled on a site specific basis with side hill fills or hollow fills constructed as coal refuse disposal types (both are mostly shales and fines) being used as possible. This can further be developed as extensions of the bench for some post mining land uses.

13. **7.3** This entire section should be rethought as the 80% durable rock necessary is the marketable commodity. Again, the use of side hill fills, hollow fills of refuse disposal type construction and configuration and creative reclamation and post mining use is preferable.

14. **7.3** It this section is retained the wording "single lift fill" should reflect the potential to be a single construction fill with multiple cut-in faces and benches.

15. **7.3.1.2** This section should consider the use of drying areas atop the current fill lift as done with coal refuse and/or specify preferable locations and options.

16. **8.3.e** This section is not well defined as to timing though it's intent is clear. It would be better suited to quarry operations to be tied to the completion of operations or the reclamation/restoration plan.

IBRs

17. **11.4.d.5** This section is too restrictive and should allow for situations with no contiguous aspects to allow for future situations that are certain to occur. (ie infrequently used access from a country road, office sites, etc.)

I hope this review and information will be helpful. If you have any questions or if I can be of any further service please feel free to contact me.

Sincerely,

James A. Jones, RPE, PS
Vice President - Engineering

11.4.b.4. The application shall be subject to review and approval by the director.

11.4.c. An IBR may not be implemented by any operator until written approval of the director has been granted.

11.4.d. The director shall make the following findings prior to approval of an IBR:

11.4.d.1. The IBR does not constitute a change in the postmining land use;

11.4.d.2. The IBR does not constitute a change in the method of mining;

11.4.d.3. The IBR will not result in adverse environmental impacts of a larger scope or different nature from those described in the approved permit;

11.4.d.4. IBR will facilitate the orderly and continuous conduct of mining and restoration operations; and

11.4.d.5. An area permitted under an IBR must be contiguous to the original permitted area.

11.4.e. Upon review of an application for an Incidental Boundary Revision, the director may require an advertisement to be published which provides for a ten (10) day public comment period. The advertisement shall contain such information as set forth on a form prescribed by the director.

§38-2A-12. State and Federal Compliance.

The issuance of surface mining permit pursuant to WV Code §22-4, as amended, and any rules promulgated thereunder authorizes the operations covered by said permit, but does not release the permit holder from any other legal duties imposed by the laws of this state or these United States.

JONES & JORDAN ENGINEERING
133 Gaines Street Beckley, WV 25801
(304) 252-5872

To: **Ed Treadway** - Pioneer Mid-Atlantic
From: **Jim Jones** - Jones & Jordan Engineering
Date: July 15, 1999
Subject: Review of Proposed Quarry Regulations - Revised Copy of Original June 2, 1999 Draft (Rule Title 38CSR2A)

Dear Mr. Treadway:

As per your request I have reviewed the proposed quarry regulations for content and possible oversights, conflicts, or problem areas. In general, they appear to very closely follow the applicable regulations for the surface mining operations of the coal industry, too closely in some cases. Some possible problem areas are detailed below.

Definitions

1. **2.5** Approximate Original Contour (AOC) is now defined in the latest revision, but is defined as per coal surface mining regulations. AOC generally cannot be applied to a quarry due to the volume of material removed. The pits in a quarry generally could not be brought back to +/- 50' without massive costly earthmoving and adequate supply. This could be applied to ancillary areas though the introduction of the concept is unnecessary. Quarries present a set of unique reclamation requirements that AOC should not be a consideration for.

2. **2.12** This time should be increased – two months does not even allow for winter idle time. This reg could cause unnecessary paperwork and enforcement action.

3. **2.40** Reclamation should not be tied to AOC for a quarry operation. AOC is now defined in these regulations but with a coal / surface mining philosophy which has little applicability for a quarry due to the large amount of material removed versus the spoil generated. Recommend wording such as ... "backfilling to meet the reclamation or restoration plan." Additionally, the introduction of the new term "restoration" is disturbing and unnecessary. Reclamation is sufficient to describe all backfilling, grading and revegetation.

Haulageways

4. **3.3** 100' spacing could be excessive here, especially for a long road. This should be site specific and be worded as to be "adequately visible."

Blasting

5. **4.3** Written notification is excessive as presented. If this is a one-time notification with the permit application it should so state. Is the intent yearly or prior to each shot? This could be a very expensive and unwieldy regulation.

6. **4.4.c.17** This appears to routinely require seismographic and air blast monitoring which should be site specific. This also appears to conflict with **4.5.f.**

Drainage

7. **5.3.a** Though this is waiveable, it should also be site specific to allow for existing operations where above highwall ditching might be unnecessary and dangerous to construct.

8. **5.4.a** This section appears to preclude the use of pit drainage control though it is later mentioned in **5.6**. This section should be reworked to allow the "evaluation of pit storage and monitoring of overall capacity" for site drainage control.

9. **5.9** Water replacement rights have been strengthened from the first draft. This replacement is now based upon "determination of a hydrologist of the Office of Mining and Reclamation" at the "written notice by the Director." This appears to allow a totally in-house agency assessment and decree, possibly without consideration of an outside consultant or company assessment. This could be very biased and potentially costly for situations with little background data or hotly contested public participation. This situation could be offset by allowance for company input on the problem and the remedy.

Method of Operation

10. **6.9** Inactive status of one year is not sufficient. This should be considered on a case by case basis or at least tied to the expected life of the quarry.

11. **6.10** This entire section appears to relate to surface coal mining operations (augering, highwall mining?) This method of reclamation timing will not work on a quarry and this section should be deleted or at least revised to match the completion of operations or quarrying, or use the reclamation/restoration plan.

Excess Spoil Disposal

12. **7.1.b.1** A "professional specialist" is not defined. Fill design is as important as construction and should be carried out by or under the supervision of an RPE. Revision here would make this section correspond with construction sections presented later.

13. **7.2.e.1** This area should not be limited to 3.9 acres. This does not allow for difficult foundations or special cases such as soil removal from a broad valley. This should be eliminated or made site specific based on fill size with a waiver option.

14 **7.2.e.2** This type fill core is wasteful of the mineral being mined. This should be handled on a site specific basis with side hill fills or hollow fills constructed as coal refuse disposal types (both are mostly shales and fines) being used as possible. This can further be developed as extensions of the bench for some post mining land uses.

15. **7.3** This entire section should be rethought as the 80% durable rock necessary is the marketable commodity. Again, the use of side hill fills, hollow fills of refuse disposal type construction and configuration and creative reclamation and post mining use is preferable.

16. **7.3** If this section is retained, the wording "single lift fill" should reflect the potential to be a single construction fill with multiple cut-in faces and benches.

17. **7.3.1.2** This section should consider the use of drying areas atop the current fill lift as done with coal refuse and/or specify preferable locations and options.

18. **8.3.e** This section is not well defined as to timing though its intent is clear. It would be better suited to quarry operations to be tied to the completion of operations or the reclamation/restoration plan.

IBRs

19. **11.4.d.5** This section is too restrictive and should allow for situations with no contiguous aspects to allow for future situations that are certain to occur (i e. ponds, infrequently used access from a country road, office sites, etc.)

Changes from the first draft to the current proposal include:

1. **2.5** AOC definition included.
2. **5.9** Water replacement rights strengthened.
3. **7.3.1.4 & 5** Non coal wastes reference removed.

I hope this review and information will be helpful. If you have any questions or if I can be of any further service please feel free to contact me.

Sincerely,

James A. Jones, RPE, PS

JAMES A. JONES REGISTERED NO. 10352 STATE OF WEST VIRGINIA

TOM DEGEN

P.O. Box 83 • Chloe, WV 25235 • phone/fax (304) 655-8651 • TDegen@wvwise.org

Date: July 20, 1999

To: Rocky Parsons, Assistant Chief Office of Mining and Reclamation
Division of Environmental Protection
105 South Railroad Street
Philippi, WV 26416

Re: Comments on 38CSR2A and 38CSR2B Quarry rules

The best thing about these rules is that they finally address sand, sandstone, and limstone. I appreciate the fact that these rules address permit transfers and renewals, pre-blast surveys, restoration, and public hearings, but for the most part, those provisions them are weak, and the statutory authority is questionable.

However, the fact that there are two separate rules for quarrying is going to get real confusing for those quarries that find themselves subject to both of them, for example, an operation that quarries sand and gravel.

Probably most important is that some of the most crucial of citizen concerns, such as hydrological studies, groundwater monitoring, replacement of water supplies, dust and noise abatement, compliance with local zoning ordinances, bonding, updated insurance requirements, and a special reclamation fund *cannot* be addressed by the agency until the legislature authorizes it through legislation.

I realize that there has been quarry legislation introduced for a good number of years with no result, but this is the first year that an interim committee has been charged with studying the quarry issue, and there is a good chance that there will finally be a quarry bill. For that reason I urge the agency to withdraw these rules and assist the interim committee in its work to craft a quarry bill. Then the agency will be able to prepare a single quarry rule and have the statutory authority to address a wider range of issues.

Because my main comment is not to do the rules, I do not have specific comments on their contents, but there is one thing that I have to draw attention to. Section 6.15 discusses using garbage and municipal waste for fill, and refers to this practice as "sanitary landfills." This language is carried over from the existing rule, which was written before our modern solid waste laws came into effect. The current solid waste laws and rules do not allow such uses for garbage, and this section should reflect that.

I appreciate the opportunity to comment on these rules.

Thank you,

Tom Degen

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July 20, 1999

Mr. Rocky Parsons
West Virginia Division
of Environmental Protection
105 South Railroad Street
Philippi, WV 26416-9998

Re: Division of Environmental Protection, Office of Mining and Reclamation
Rules for Mining and Restoration for Sandstone, Limestone, and Sand
38 C.S.R. 2A

Dear Mr. Parsons:

On June 17, 1999, the West Virginia Division of Environmental Protection proposed for public comment and public hearing the above-referenced rules. The closure of the comment period and the date of public hearing are July 20, 1999 at 6:00 p.m. These comments are filed by the West Virginia Crushed Aggregates Council in response to said notice of public hearing on the proposed rule.

The West Virginia Crushed Aggregates Council is a newly formed organization comprised of quarry operators and related businesses with direct concern over the regulation of quarry operations. As these new regulations will impose significant additional costs potentially resulting in the competitive disadvantage of West Virginia businesses, the members of the West Virginia Crushed Aggregates Council are deeply concerned by the new proposed rules. We note that in Appendix B of the proposed rule the DEP submits that there is no economic impact on specific industries or state government. We believe this assertion to be erroneous. Both the industry, (including the State of West Virginia) will bear increased costs of compliance.

There are few issues that should be highlighted for your attention while you review the comments of the council. First, quarry operators have repeatedly urged the DEP to refrain from using the surface coal mining and reclamation regulations as a model for quarry operations. Our members have dedicated significant time in demonstrating the unique and distinguishing factors of

quarry operations vis-a-vis coal mining activities. Still, remnants of the coal regulations continuously re-surface throughout the new quarry regulations.

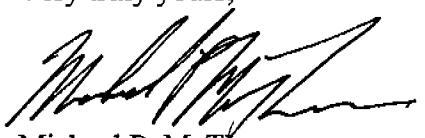
Secondly, these new quarry regulations make no provision for grandfathering in existing sites which have operated for years under the existing regulations. Requiring completed and existing operations to comply with the new requirements would be cost prohibitive and serve no environmental benefit. Therefore, the Council strongly urges the DEP to make the application of the rules prospective only, and add specific language for existing operations.

Lastly, it has been discussed with agency on several occasions, the clear statutory exemption from reclamation requirements for quarry operations. Despite this statutory exemption, the agency appears resistant to recognizing the statutory provision and continues to impose reclamation requirements in the proposed rules. Accordingly, the Council requests that the agency reject this approach.

Council members stand ready to work with the Division of Environmental Protection and Legislators to develop an appropriate legislative change to update the existing non-coal surface mining laws. However, until such time that the new legislation is developed and enacted, the agency must continue to abide by the existing law and not impose requirements not supported by statute.

If you have any questions or if we can provide additional information, please do not hesitate to contact me.

Very truly yours,



Michael P. McThomas
Counsel, West Virginia Crushed Aggregates Council

MPM/skl

cc: Mr. Pat Parsons
Mr. Ed Treadway
West Virginia Crushed Aggregates Council

COMMENTS OF THE WEST VIRGINIA CRUSHED AGGREGATES COUNCIL ON 38 CSR 2A, PROPOSED RULES FOR MINING AND RESTORATION FOR SANDSTONE, LIMESTONE, AND SAND.

DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF MINING AND RECLAMATION

Prepared by:
Michael P. McThomas, Esquire
Elizabeth K. Appel, Esquire
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P. O. Box 1791
Charleston, WV 25326
304/344-5800

Counsel for West Virginia Crushed Aggregates Council

July 20, 1999.

COMMENTS OF THE WEST VIRGINIA CRUSHED AGGREGATES COUNCIL ON 38 CSR 2A, PROPOSED RULES FOR MINING AND RESTORATION FOR SANDSTONE, LIMESTONE, AND SAND.

I. THE PROPOSED RULE EXCEEDS ITS STATUTORY AUTHORITY BY IMPOSING RECLAMATION REQUIREMENTS ON LIMESTONE, SANDSTONE AND SAND QUARRYING OPERATIONS

The Director of the Division of Environmental Protection ("the Director") has authority under W.Va. Code § 22-4-2(k) to promulgate rules for the surface mining ("quarrying") of limestone, sandstone, and sand. This same provision exempts limestone, sandstone, and sand quarrying from bonding and reclamation requirements.[1] The Director is therefore clearly prohibited from promulgating rules requiring reclamation for limestone, sandstone and sand quarrying operations. This exemption is what differentiates limestone, sandstone and sand quarrying from quarrying of other minerals other than coal. Without the exemption, there is no logical reason to have two separate rules rather than one rule applying to all minerals other than coal. The reclamation requirements included in this proposed rule are therefore contrary to clear statutory authority.

The meaning of the term "reclamation" is established by the Code to include all restoration activity. The proposed rule narrows this meaning to mean only backfilling. The rule then requires operators of limestone, sandstone and sand to restore land, thereby subjecting them to the reclamation requirements from which the Code exempts them. Because the rule imposes reclamation requirements under the guise of "restoration," these provisions still contradict the clear

---

[1] "'Surface mining' means all activity for the recovery of minerals, and all plants and equipment used in processing said minerals: Provided, That the bonding and reclamation provisions of this article do not apply to surface mining of limestone, sandstone and sand: Provided, however, That the surface mining of limestone, sandstone and sand is subject to separate rules to be promulgated by the director." W.Va. Code § 22-4-2(k).

statutory exemption and exceed statutory authority. Therefore, the provisions related to "reclamation" and "restoration" must be deleted. If adopted, these provisions will surely be challenged in court and will just as surely fail.

As a general comment, the repeated use of the Surface Coal Mining And Reclamation Act as a model for quarrying regulations is disturbing and misplaced. Operators have repeatedly pointed out the distinctions between coal mining and quarrying. We urge the DEP to cease borrowing from statutory and regulatory provisions crafted for coal mining.

A. THE CODE'S USE OF THE TERM "RECLAMATION" EXEMPTS LIMESTONE, SANDSTONE AND SAND QUARRIES FROM ALL RESTORATION ACTIVITY.

Mining provisions in the West Virginia Code establish the scope of "reclamation" to be broad, encompassing all sloping, grading, benching, and revegetation activity on disturbed land. For example, the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA") clearly includes within the meaning of "reclamation" all activities taken to restore land to its pre-mining use. SCMRA Section 22-3-12(b)(2) includes all restoration activity by requiring operators "to restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses..." SCMRA regulations also define "reclamation" to be "those actions taken to restore mined land to the approved post mining land use." 38 CSR 2-2.101.

The current rule governing mining of minerals other than coal and House Bill 4460[2] define "reclamation" in essentially the same way: the process of restoring disturbed land to a stable form

[2]Though never enacted, House Bill 4460 was a result of agency-industry negotiations to amend Article 4, pertaining to the surface mining of all minerals other than coal

for productive use. While there is disagreement as to the ultimate use required, the concept of reclamation is clearly established by these laws and regulations to be the restoration of disturbed land.

The proposed rule takes this concept of reclamation, and renames it "restoration." It even borrows the term "restore" from the "reclamation" definition. Meanwhile, the proposed rule redefines "reclamation" to be only "backfilling to the approximate original contour of the land... [i]ncluding the elimination of highwalls and spoil peaks." This definition apparently comes from a provision buried in W.Va. Code § 22-4-13(4) stating "with the exception of limestone, sandstone and sand, complete backfilling is required, not to exceed the approximate contour of the land. Such backfilling shall eliminate highwalls and spoil peaks." Backfilling is certainly a reclamation activity. However, it is a leap of logic to assert that because backfilling is specifically mentioned in this statutory provision as not being required for limestone, sandstone and sand operations, that the code means to say that reclamation is composed *only* of backfilling.

By taking this statutory provision out of context for use in the "reclamation" definition, the proposed rule ignores the common and industry understanding of the term "reclamation" to broadly include all activities, including backfilling, which are conducted to restore land to an un-disturbed condition. Other parts of the statute even indicate that this broader meaning of the term was intended. For example, "grading, backfilling and water management practices" are listed under the section entitled "[t]ime in which reclamation shall be done." W.Va. Code § 22-4-12.

The legislature intended that operators of limestone, sandstone and sand quarries be exempt from certain activities which constitute "reclamation." The proposed rule renames reclamation

activities "restoration," in direct opposition to statutory intent, and impermissibly imposes reclamation activities on limestone, sandstone and sand quarry operators. Statutory authority requires that the current rule's definition of "reclamation" be retained and the proposed definitions of "reclamation" and "restoration" deleted.

B. ALL POST-MINING SLOPE, BENCH, GRADE, BACKFILL AND REVEGETATION REQUIREMENTS SHOULD BE DELETED SINCE THEY CONSTITUTE "RECLAMATION" FROM WHICH SANDSTONE, LIMESTONE AND SAND QUARRYING ARE EXEMPT.

The current rule, because it applies to all minerals other than coal, contains several provisions requiring reclamation. Retention of these provisions is not appropriate for a rule applying exclusively to surface mining of limestone, sandstone and sand: those minerals which are exempt from reclamation.

Section 6 of the proposed rule, for example, requires essentially the same activities as the "Reclamation Plan Requirements" section in SCMRA. See W.Va. Code § 22-3-10. Among the reclamation activities required by Section 6 are topsoiling (see Section 6.2); grading and backfilling (Sections 6.5-6.7); regrading, replacing topsoil, and revegetation (Section 6.8); and backfilling (Section 6.19). In addition, Section 6.4's reference to approval of post-mining use is illogical since no such approval is required. Section 6.11 also requires essentially the same activity as that identified as "reclamation" in SCMRA Section 22-3-13(16). Section 8 of the proposed rule also requires reclamation by requiring revegetation. The proposed rule requires reclamation, by requiring backfilling, even under its own narrow definition of the term. See, for example, Sections 6.2, 6.5, 6.10.b, and 6.19.

These provisions should therefore be deleted from the proposed rule as impermissibly requiring activity from which limestone, sandstone and sand quarrying is exempt.

C. SECTIONS 7.1 AND 7.1.E SHOULD BE DELETED SINCE THEY REQUIRE SLOPING AND GRADING ACTIVITY FOR SPOIL PILES WHICH WAS DETERMINED BY THE SURFACE MINE BOARD TO BE "RECLAMATION."

Section 7.1 of the proposed rule requires that all "excess spoil or material to be placed in permanent disposal sites" meet the provisions of Section 7.1, including that the location be suitable for the construction of fills, and abide by the slope and bench requirements of Section 7.1.e. Section 7.1 should be deleted in its entirety and replaced with a provision explicitly stating that spoil piles are not "fill." Section 7.1.e (pertaining to construction of the fill) should also be deleted in its entirety since it requires sloping and grading which has been established by the Surface Mine Board as constituting "reclamation." See Inwood Quarry, Inc. v. McCoy, October 24, 1996 Final Order. Specifically, the Surface Mine Board determined that a spoil pile composed of natural earth and rock, located on the perimeter of the pit, on natural, level ground, for the purpose of serving as a screen for noise and visual aesthetics, was not subject to a 2 to 1 slope requirement. Id.

Proposed sections 7.1 and 7.1.e are essentially the same as the current provisions in Section 6 on which the Inwood Quarry decision was based. Whereas the current rule applies to quarrying of all minerals other than coal, and these provisions were authorized as long as they weren't applied to limestone, sandstone, and sand quarrying, the proposed rule applies only to limestone, sandstone and sand quarrying, rendering retention of the slope and bench requirements in direct conflict with the Act. These requirements are clearly unauthorized in the proposed rule since the rule applies only

to limestone, sandstone and sand quarrying. The proposed rule blatantly disregards the Inwood Quarry decision by applying a 2:1 slope requirement, among other slope and bench requirements which constitute "reclamation," to "excess spoil" from limestone, sandstone and sand quarrying.

The Director should therefore withdraw the foregoing provisions and Section 7.1.e of the proposed rule, as they exceed the authority granted it by W.Va. Code § 22-4-2(k) by imposing reclamation requirements on limestone, sandstone and sand quarrying.

D. THE DEFINITION FOR "FILL" SHOULD BE AMENDED TO EXCLUDE PILES AND THE DEFINITION FOR "BERM" SHOULD BE AMENDED TO CLARIFY THAT IT IS *NOT* A TYPE OF FILL.

The proposed rule further attempts to undo the Surface Mine Board decision by modifying the rule's language such that the proposed language would compel a directly opposite result in specific situation addressed in Inwood Quarry. The proposed rule adds a definition for "fill" which includes spoil piles and is illogical in itself:

> Fill shall mean a man-made deposit of earth, stone, spoil, or waste materials that is raised above the natural surface of the land and usually exhibits at least one sloping side. 38 CSR 2A-2.23.

This definition is illogical because historical use of the term "fill" in both common and mining contexts includes that material which is placed in a depression in the ground, or anywhere *below* the natural surface of the land. Apparently, the proposed definition is a response to the Surface Mine Board decision to exclude spoil piles from slope and bench requirements. By defining "fill" to be any material placed above the natural surface of the land, the proposed rule exposes spoil piles to the requirements for construction of a fill found in Section 7.1.e. "Fill" should be defined to clarify that it does not include spoil piles.

The proposed rule goes even further in its attempt to specifically reverse the Inwood Quarry decision by adding a definition for "berm"which includes those spoil piles used for acoustic control or aesthetics, and designating berm as a "type of fill," thus subjecting piles created for aesthetic or noise reasons to reclamation requirements.

The Director should therefore amend the definition of "fill" to reflect the historical understanding of the word as that material placed below the natural surface of the ground and amend the definition of "berm" to clarify that it is not a type of fill. The regulations should also explicitly recognize and clarify that berms and other spoil piles are not subject to slope and bench or other reclamation requirements.

E. REMOVAL OF RECLAMATION EXEMPTIONS FOR LIMESTONE, SANDSTONE AND SAND MINING OPERATIONS IS CONTRARY TO STATUTORY AUTHORITY.

The proposed rule impermissibly removes the current rule's sections 6E.8 and 7.2 which explicitly grant an exemption from reclamation activity.

Current section 6E.8 states:

> Limestone, sandstone and sand mining operations unless otherwise specified in the Act or these rules and regulations shall be exempt from bonding and reclamation requirements.

Current section 7.2 states:

> Objective in Revegetation- ... Provided that limestone, sandstone, and sand mining operations shall be exempt from revegetation requirements unless otherwise specified.

The West Virginia Code clearly provides an exemption from reclamation requirements for surface mining of limestone, sandstone and sand.[3] Any attempt to remove this exemption by removing these regulatory provisions is directly contrary to statutory authority. Although it is not necessary to restate this exemption, WVCA objects to any implication created by deletion of these provisions that the exemption is no longer available. The content of sections 6E.8 and 7.2 should therefore be replaced.

II. EXISTING PERMITTED QUARRY OPERATIONS SHOULD BE GRANDFATHERED.

Sections of the proposed rule imposing new requirements should apply only to those operations receiving permits after finalization of the proposed rule. Section 11.3.c gives the Director the authority to revise permits to comply with the proposed rule, after allowing a "reasonable time" for the permittee to comply. Section 11.2.d similarly allows for a reasonable time for permittees to comply with the proposed rule, once enacted. These provisions should be replaced with provisions grandfathering those operations holding a permit issued under the current rule.

Both the quarrying industry and DEP agreed on a grandfather clause for "prior permitted quarries" in the last quarrying document negotiated by them: House Bill 4460, introduced February 17, 1998. The proposed rule adds several new requirements, while expanding existing requirements; it is inherently unfair to subject those operations which have been complying, in good faith, with an existing permit issued under the current rule to these new and expanded requirements.

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[3] W.Va. Code § 22-4-2(k).

Additionally, requiring existing operations to come into compliance with new and expanded requirements is impractical and unnecessarily costly. Examples abound. Bringing spoil piles which were created and stabilized under the provisions of the current rule into compliance with reclamation provisions of the proposed rule would require disturbing and regrading the piles, a near- impossible task both practically and financially. Coming into compliance with proposed section 3.2 would require existing operations with transportation facilities and haulageways to submit plans and certification, respectively, even though such facilities and haulageways had already been constructed. Similar lunacy results from proposed section 3.3 requiring markings for proposed haulageways and transportation facilities. Requiring existing operations to abide by proposed section 4.3 requiring notification to a larger area would be duplicative and not serve any useful purpose.

Therefore, the rule must specifically state that the application of the rule is prospective and applies only to new quarrying activity.

III. "WILLFUL" AND "DELIBERATE" SHOULD BE REDEFINED TO MORE ACCURATELY REFLECT STATUTORY INTENT.

The proposed rule adds definitions for "willfully" and "deliberate." As the rule does not contain these words, it apparently defines them for the sake of interpreting the statutory provision W.Va. Code § 22-4-22. Section 22-4-22 sets a penalty for anyone who "willfully violates any provision of this article," and sets a more severe penalty for any person who "deliberately violates any provision of this article." Black's Law Dictionary gives very similar definitions for "willfully" and "deliberately," and each definition references the other as a synonym. The proposed rule attempts to distinguish between the two by offering the following definitions:

"Willfully shall mean a person or operator acted with disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out an action or omission that constituted a violation, failure or refusal."

"Deliberate[ly] shall mean a person or operator acted either intentionally, voluntarily, or consciously in authorizing, ordering, or carrying out an action or omission that constituted a violation, failure, or refusal. "

WVCA appreciates the need to clarify the relative meaning of these terms for the purposes of Section 22-4-22. However, as written, the definitions do not reflect the intent of the State Legislature to require at least some level of intent for each definition, as indicated by its choice of these terms over others such as "recklessly."

Given that both terms require some intent, the means of distinguishing the two must be sorted out. "Willfully" is written such that a person who commits an act or omission, whether meaning to or not, falls within the definition and thereby made subject to penalties. "Willfully" should be rewritten to clarify that the person intended to commit the act, but disregarded the fact that the action was a violation, as follows:

"Willfully means a person or operator intentionally authorized, ordered, or carried out an action or omission with disregard or plain indifference to the fact that such action or omission constituted a violation."

The State Legislature obviously intended a higher level of intent through the use of the term "deliberately," as it carries the more severe penalty. Above general intent, or intent to commit the act, required by the "willfully" definition, is specific intent or mens rea to violate. As written, the definition for "deliberate" does not require this specific intent. The terms "voluntarily" and "consciously" include general intent to commit the act, since someone who voluntarily commits an

act which constitutes a violation fits the definition, even though the person did not intend to violate. Therefore, the definition for "deliberate" should be rewritten as follows:

> "Deliberately means a person or operator authorized, ordered, or carried out an action or omission with specific intent to commit a violation."

The terms "failure" and "refusal" are unnecessary since they are encompassed by the term "violation."

IV. THE DEFINITION OF "BERM" MUST BE CLARIFIED TO IMPOSE EROSION REQUIREMENTS ONLY ON LARGE, PERMANENT BERMS.

The added definition for "berm" requires any berm "consisting of greater than 20% fines or non-durable rock [to] be protected from wind and water erosion." Section 2.11. This requirement is unnecessary for those berms on drill sites or along roadways since they are already subject to Miners Safety and Health Act (MSHA) requirements for protection.

V. PERIOD OF INACTIVITY FOR COMPLETION OF MINING AND INACTIVE STATUS SHOULD BE EXTENDED TO AT LEAST 2 YEARS.

Section 2.12 defines "completion of mining" to be an operation whereby no mineral or overburden has been removed for two months. This period should be lengthened to at least two years to account for seasonal and market-dependent operations. Operations of these types regularly lay dormant for several months. Winter weather, for example, often requires mines to be shut down for months at a time. Requiring each of these operations to submit "sufficient evidence" to the Director to prove that the operation is ongoing is unnecessarily burdensome.

The time period for inactive operation status, designated in Section 6.9, should also be extended to an undetermined time at the request of the operator. Allowing for inactive status only for a period less than one year is unrealistic. Providing a regulatory cap on the amount of time for which inactive status is available is unnecessary and unjustifiable given the fact that the Director must approve all requests for such status. The Director should have the discretion to allow for whatever time period time period is appropriate for the particular circumstances of the operation.

Absent a compelling reason to the contrary, the time period triggering completion should be lengthened to at least two years and inactive status should be available for any period of time with the Director's approval.

VI. FREQUENCY OF MONITORING REPORT SUBMISSION TO THE OFFICE OF MINING AND RECLAMATION SHOULD BE EVERY THREE MONTHS.

Section 5.6.a of the proposed rule requires submission of water discharge monitoring reports to be submitted to the chief of the Office of Mining and Reclamation every month. These reports are required to be submitted to the Office of Water Resources under the National Pollutant Discharge Elimination System regulations only once every three months. There is no need to increase the frequency, and accompanying paperwork, to once a month. To do so would make the rule more stringent than the federal counterpart regulations.

VII. THE ADDED DEFINITIONS FOR "EXCESS SPOIL" AND THE AMENDED DEFINITION FOR "SPOIL" SHOULD BE CLARIFIED.

"Excess spoil" is defined in the proposed rule as "overburden or waste rock" placed outside the pit. Use of the terms overburden or waste rock instead of "spoil" is poor crafting and leads to a string of definitions that is not necessary. "Overburden" includes all that natural material which

overlays a mineral deposit.[4] "Waste material or waste rock" includes natural and non-natural material overlaying a mineral deposit.[5] "Excess spoil" should be defined as "spoil placed in a permanent or temporary location other than the pit."

The proposed rule defines "spoil" as "material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means, or material of any kind which is separated from the mineral being mined as undesirable to the current product." "Spoil" essentially is the combination or either one of overburden or waste rock, so the definition of "spoil" should refer to these terms, either by including them in the body of the definition or listing them as examples. Also, the last sentence of the definition of "spoil" ("material of any kind which is separated from the mineral being mined as undesirable to the current product") is duplicative of the definition for "waste material or waste rock." "Spoil" should therefore be redefined in one of the following two ways:

1. "Spoil means material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means. Examples include overburden or waste material or waste rock"

OR

2. "Spoil means overburden or waste material or waste rock which is removed or displaced by excavating equipment, blasting or any other means."

VIII. WATER REPLACEMENT RIGHTS SECTION SHOULD BE DELETED IF UNAUTHORIZED AND, IF RETAINED, SHOULD BE AMENDED TO (1) ALLOW

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[4] "Overburden shall mean the earth, rock, and other materials lying in the natural state above a mineral deposit before or after excavation." 38 CSR 2A-2.35.

[5] "Waste material or waste rock shall mean that part of the spoil which is separated from the current product as being excess or undesirable for the current product being produced." 38 CSR 2A-2.56.

FOR REPAIR OF WATER SUPPLY WHERE APPROPRIATE AND (2) PROVIDE OPPORTUNITY FOR APPEAL.

Proposed section 5.9 is borrowed almost word-for-word from Section 22-3-24 of the Surface Coal Mining And Reclamation Act. There is no statutory authority for including this provision in a non-coal regulation. The fact that the West Virginia Legislature explicitly set out such a provision in SCMRA but did not set out a similar provision in Article 4 implies that the Legislature did not intend for the Director to have authority to direct quarry operators to replace water supplies.

If statutory authority for this provision exists, and the provision is retained, it should be amended in two ways. As written, proposed section 5.9 requires an operator, under the Director's order, to replace water where such water has been contaminated, diminished, or interrupted by a mining operation. Replacement of water may be unnecessary in cases where the water supply was only briefly interrupted or diminished, or where the contamination is removable. The section should therefore be amended to allow the Director to require repair of the water supply in appropriate cases.

Operators have the right under W.Va. Code § 22-4-21 to appeal a determination by the Director that replacement (or repair) of a water supply is necessary. This right to appeal should be made plain by being explicitly provided for in Section 5.9 of the rule. The determination of whether mining operations proximately caused an adverse effect in the water supply is subjective at best and otherwise requires specific proof. Because property rights are affected, placement issues need to be adjudicated in an appropriate forum and not within the DEP. Without revision, this section may become a tool, subject to wholesale use by disgruntled neighbors, for obtaining a water source at the operator's expense.

IX. THE LOCATIONS FOR PRELIMINARY TESTS FOR WATER QUALITY SHOULD BE CLARIFIED.

The locations for preliminary water quality testing set out in sections 5.6.a.1 through 5.6.a.3 should be clarified. If samples are to be taken upstream and downstream for any stream which could receive runoff from the disturbed area, these sections should state so more clearly. As written, it is unclear where these tests should occur.

X. SECTION 5.6.b SHOULD BE RE-TITLED TO BETTER REFLECT THE CONTENT OF THE SECTION.

Section 5.6.b is entitled "Treatment Facilities for Drainage from Surface Mine Operations." The content concerns the procedure for investigating and approving a permit application. Use of this title was apparently a mistake and should therefore be replaced with a title more appropriate for the content, such as "Application Review."

XI. ALL REFERENCES TO COAL AND LOGISTICS APPLICABLE ONLY TO COAL MINING OPERATIONS SHOULD BE REMOVED.

The proposed rule contains several provisions which technically apply only to coal mining operations and are wholly irrelevant to the surface mining of limestone, sandstone and sand. The most blatant example is found in section 7.3.1 where "coal refuse" is listed as being prohibited from being placed in a durable rock fill. Another example is the overburden analysis required by section 8.3.b. Besides the fact that this section is inappropriate for a rule covering limestone, sandstone and sand because it is a reclamation requirement, this particular provision is also inappropriate since it presumes that such quarries will encounter acid producing overburden: a situation which is common for coal mining operations but rarely, if ever, occurs in limestone, sandstone, and sand quarrying. Requiring operators to submit data for a waiver of overburden analysis is unnecessary and expensive. If this provision is retained at all, it should allow the Director to request an overburden sample if he has some valid reason for believing that the quarry will encounter acid producing overburden.

The West Virginia Legislature recognized that provisions appropriate for coal are not appropriate for other minerals and enacted a law separate from SCMRA to govern mining of all other minerals. A thorough review of the proposed regulation is necessary to remove those provisions which were crafted to address the surface mining of coal and have been inappropriately applied to surface mining of other minerals.

XII. OBJECTIVE CRITERIA SHOULD BE ESTABLISHED TO DETERMINE WHETHER A COVER CROP IS SATISFACTORILY ESTABLISHED.

Once again, the Council reiterates that quarrying of limestone, sandstone, and sand are statutorily exempt from reclamation requirements, including all revegetation requirements set out in Section 8 of the proposed rule. However, if for some reason this section is retained, the Council suggests that such requirements be made more definitive.

Section 8.3.g.1.A.3 requires the operator to maintain a cover crop until the crop is "adjudged by the director to be satisfactorily established." Under this provision, the Director has unfettered discretion to require an operator to perpetually maintain a cover crop. Some objective criteria must be inserted to define when a crop has been "satisfactorily established" and guidance on how long a Director can require that pH's be maintained and cover crops be top dressed.

XIII. VEGETATIVE COVER EVALUATION SHOULD ALLOW FOR PARTIAL RELEASE OF THE PERMIT.

Once again, the Council reiterates that quarrying of limestone, sandstone, and sand are statutorily exempt from reclamation requirements, including all revegetation requirements set out in Section 8 of the proposed rule. However, if the vegetative cover evaluation section is retained, the Council suggests that a provision be added to allow the Director to grant partial releases of permits in those situations where some of the revegetation requirements have been fulfilled though

there may be others remaining. Otherwise, an operator may be unfairly denied release of his permit due to a technicality or a situation beyond his control.

IX. AN APPEAL PROCESS SHOULD BE ESTABLISHED FOR AN OPERATOR TO CHALLENGE A DECISION OF THE DIRECTOR.

The proposed regulation is replete with instances whereby the Director may impose requirements on the operator based on enumerated factors. Although an appeal process is technically provided for by W.Va. Code § 22-4-21, the regulations should reiterate that process and expand on it if necessary. An adverse decision of the Director could cost a mining company huge sums of money in expenses or lost production. It is therefore imperative that the economic and legal rights of such operators be explicitly stated in a separate, distinct provision of the regulations.

X. "SIGNIFICANT REVISION" DEFINITION SHOULD BE CLARIFIED.

The need for a definition of "significant revision" is unclear. The definition does not appear to prompt any public notice requirements or other process. If this term is actually used in some provision of this regulation, the definition should clarify how a revision is determined to be significant in the context of that provision. The definition for "significant revision" is so amorphous that it nearly gives the Director carte blanche to classify a permit revision as "significant." The definition lacks objective criteria for determining what constitutes a "significant departure from the terms and conditions of the existing permit."

XI. CONCLUSION

All provisions imposing what are essentially reclamation requirements on the surface mining of limestone, sandstone, and sand are contrary to the statutory exemption set out at W.Va. Code § 22-4-2(k) and should therefore be deleted from this rule. Other provisions should be clarified or

amended, as suggested above, to more accurately reflect the operational characteristics of non-coal surface mining.

COMMENTS OF THE WEST VIRGINIA CRUSHED AGGREGATES COUNCIL ON 38 CSR 2B, PROPOSED RULES FOR MINING AND RECLAMATION OF MINERALS OTHER THAN COAL, LIMESTONE, SANDSTONE, AND SAND.

DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF MINING AND RECLAMATION

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July 20, 1999.

COMMENTS OF THE WEST VIRGINIA CRUSHED AGGREGATES COUNCIL ON 38 CSR 2B, PROPOSED RULES FOR MINING AND RECLAMATION OF MINERALS OTHER THAN COAL, LIMESTONE, SANDSTONE, AND SAND.

Proposed 38 CSR 2B is nearly identical to proposed 38 CSR 2A, except that it is intended to apply to surface mining of minerals other than coal, limestone, sandstone, and sand. Although the bulk of 38 CSR 2B is appropriate since minerals covered under this rule are not exempt from reclamation requirements, the West Virginia Crushed Aggregates Council ("the Council") would like to offer the following comments on specific issues, some of which are also incorporated in comments on 38 CSR 2A:

I. THE DEFINITION OF "MINERAL" SHOULD BE AMENDED TO MEAN ALL MINERALS *OTHER THAN* LIMESTONE, SANDSTONE, OR SAND.

Section 2.29 of the proposed rule, which, by its title applies to all minerals other than coal, limestone, sandstone and sand, defines "mineral" to be "...a limestone, sandstone, or sand layer, vein, seam, bed or deposit; a stratigraphic part of the earth." This definition is apparently an oversight since the rule applies to all minerals other than those included in this definition. The definition for "mineral" should therefore be amended to read "natural veins, seams, beds, or deposits of commercial value, other than coal, limestone, sandstone, or sand, which are a stratigraphic part of the earth.

II. THE DEFINITION OF RECLAMATION SHOULD BE BROADENED TO MEAN "ALL BACKFILLING, GRADING, SLOPING AND REVEGETATION IN ACCORDANCE WITH THE RECLAMATION PLAN."

The proposed definition of "reclamation" includes only backfilling and requires backfilling to the approximate original contour ("AOC"). The meaning of "reclamation" established by the West Virginia Code, the Surface Mine Board and industry usage is more broad, encompassing backfilling and grading, sloping, and revegetation. This established meaning has been renamed "restoration." The proposed rule's definition of "reclamation" should be amended accordingly and its definition of "restoration" should be deleted.

As a general comment, the repeated use of the Surface Coal Mining And Reclamation Act as a model for quarrying regulations is disturbing and misplaced. Operators have repeatedly pointed out the distinctions between coal mining and quarrying. We urge the DEP to cease borrowing from statutory and regulatory provisions crafted for coal mining.

III. EXISTING PERMITTED QUARRY OPERATIONS SHOULD BE GRANDFATHERED.

Sections of the proposed rule imposing new requirements should apply only to those operations receiving permits after finalization of the proposed rule. Section 11.3.c gives the Director the authority to revise permits to comply with the proposed rule, after allowing a "reasonable time" for the permittee to comply. Section 11.2.d similarly allows for a reasonable time for permittees to comply with the proposed rule, once enacted. These provisions should be replaced with provisions grandfathering those operations holding a permit issued under the current rule.

Both the quarrying industry and DEP agreed on a grandfather clause for "prior permitted quarries" in the last quarrying document negotiated by them: House Bill 4460, introduced February 17, 1998. The proposed rule adds several new requirements, while expanding existing

requirements; it is inherently unfair to subject those operations which have been complying, in good faith, with an existing permit issued under the current rule to these new and expanded requirements.

Additionally, requiring existing operations to come into compliance with new and expanded requirements is impractical and unnecessarily costly. Examples abound. Bringing spoil piles which were created and stabilized under the provisions of the current rule into compliance with reclamation provisions of the proposed rule would require disturbing and regrading the piles, a near- impossible task both practically and financially. Coming into compliance with proposed section 3.2 would require existing operations with transportation facilities and haulageways to submit plans and certification, respectively, even though such facilities and haulageways had already been constructed. Similar lunacy results from proposed section 3.3 requiring markings for proposed haulageways and transportation facilities. Requiring existing operations to abide by proposed section 4.3 requiring notification to a larger area would be duplicative and not serve any useful purpose.

Therefore, the rule must specifically state that the application of the rule is prospective and applies only to new quarrying activity.

IV. "WILLFUL" AND "DELIBERATE" SHOULD BE REDEFINED TO MORE ACCURATELY REFLECT STATUTORY INTENT.

The proposed rule adds definitions for "willfully" and "deliberate." As the rule does not contain these words, it apparently defines them for the sake of interpreting the statutory provision W.Va. Code § 22-4-22. Section 22-4-22 sets a penalty for anyone who "willfully violates any provision of this article," and sets a more severe penalty for any person who "deliberately violates any provision of this article." Black's Law Dictionary gives very similar definitions for "willfully"

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WVCA appreciates the need to clarify the relative meaning of these terms for the purposes of Section 22-4-22. However, as written, the definitions do not reflect the intent of the State Legislature to require at least some level of intent for each definition, as indicated by its choice of these terms over others such as "recklessly."

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overlays a mineral deposit.[1] "Waste material or waste rock" includes natural and non-natural material overlaying a mineral deposit.[2] "Excess spoil" should be defined as "spoil placed in a permanent or temporary location other than the pit."

The proposed rule defines "spoil" as "material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means, or material of any kind which is separated from the mineral being mined as undesirable to the current product." "Spoil" essentially is the combination or either one of overburden or waste rock, so the definition of "spoil" should refer to these terms, either by including them in the body of the definition or listing them as examples. Also, the last sentence of the definition of "spoil" ("material of any kind which is separated from the mineral being mined as undesirable to the current product") is duplicative of the definition for "waste material or waste rock." "Spoil" should therefore be redefined in one of the following two ways:

IX "Spoil means material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means. Examples include overburden or waste material or waste rock"

OR

IX "Spoil means overburden or waste material or waste rock which is removed or displaced by excavating equipment, blasting or any other means."

IX. WATER REPLACEMENT RIGHTS SECTION SHOULD BE DELETED IF UNAUTHORIZED AND, IF RETAINED, SHOULD BE AMENDED TO (1) ALLOW

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[1] "Overburden shall mean the earth, rock, and other materials lying in the natural state above a mineral deposit before or after excavation." 38 CSR 2A-2.35.

[2] "Waste material or waste rock shall mean that part of the spoil which is separated from the current product as being excess or undesirable for the current product being produced." 38 CSR 2A-2.56.

FOR REPAIR OF WATER SUPPLY WHERE APPROPRIATE AND (2) PROVIDE OPPORTUNITY FOR APPEAL.

Proposed section 5.9 is borrowed almost word-for-word from Section 22-3-24 of the Surface Coal Mining And Reclamation Act. There is no statutory authority for including this provision in a non-coal regulation. The fact that the West Virginia Legislature explicitly set out such a provision in SCMRA but did not set out a similar provision in Article 4 implies that the Legislature did not intend for the Director to have authority to direct quarry operators to replace water supplies.

If statutory authority for this provision exists, and the provision is retained, it should be amended in two ways. As written, proposed section 5.9 requires an operator, under the Director's order, to replace water where such water has been contaminated, diminished, or interrupted by a mining operation. Replacement of water may be unnecessary in cases where the water supply was only briefly interrupted or diminished, or where the contamination is removable. The section should therefore be amended to allow the Director to require repair of the water supply in appropriate cases.

Operators have the right under W.Va. Code § 22-4-21 to appeal a determination by the Director that replacement (or repair) of a water supply is necessary. This right to appeal should be made plain by being explicitly provided for in Section 5.9 of the rule. The determination of whether mining operations proximately caused an adverse effect in the water supply is subjective at best and otherwise requires specific proof. Because property rights are affected, placement issues need to be adjudicated in an appropriate forum and not within the DEP. Without revision, this section may become a tool, subject to wholesale use by disgruntled neighbors, for obtaining a water source at the operator's expense.

X. THE LOCATIONS FOR PRELIMINARY TESTS FOR WATER QUALITY SHOULD BE CLARIFIED.

The locations for preliminary water quality testing set out in sections 5.6.a.1 through 5.6.a.3 should be clarified. If samples are to be taken upstream and downstream for any stream which could receive runoff from the disturbed area, these sections should state so more clearly. As written, it is unclear where these tests should occur.

XI. SECTION 5.6.b SHOULD BE RE-TITLED TO BETTER REFLECT THE CONTENT OF THE SECTION.

Section 5.6.b is entitled "Treatment Facilities for Drainage from Surface Mine Operations." The content concerns the procedure for investigating and approving a permit application. Use of this title was apparently a mistake and should therefore be replaced with a title more appropriate for the content, such as "Application Review."

XII. ALL REFERENCES TO COAL AND LOGISTICS APPLICABLE ONLY TO COAL MINING OPERATIONS SHOULD BE REMOVED.

The proposed rule contains several provisions which technically apply only to coal mining operations and are wholly irrelevant to the surface mining of limestone, sandstone and sand. The most blatant example is found in section 7.3.1 where "coal refuse" is listed as being prohibited from being placed in a durable rock fill. Another example is the overburden analysis required by section 8.3.b. This provision presumes that such quarries will encounter acid producing overburden: a situation which is common for coal mining operations but rarely, if ever, occurs in quarrying for minerals other than coal. Requiring operators to submit data for a waiver of overburden analysis is unnecessary and expensive. If this provision is retained at all, it should allow the Director to request an overburden sample if he has some valid reason for believing that the quarry will encounter acid producing overburden.

The West Virginia Legislature recognized that provisions appropriate for coal are not appropriate for other minerals and enacted a law separate from SCMRA to govern mining of all other minerals. A thorough review of the proposed regulation is necessary to remove those provisions which were crafted to address the surface mining of coal and have been inappropriately applied to surface mining of other minerals.

XIII. OBJECTIVE CRITERIA SHOULD BE ESTABLISHED TO DETERMINE WHETHER A COVER CROP IS SATISFACTORILY ESTABLISHED.

Section 8.3.g.1.A.3 requires the operator to maintain a cover crop until the crop is "adjudged by the director to be satisfactorily established." Under this provision, the Director has unfettered discretion to require an operator to perpetually maintain a cover crop. Some objective criteria must be inserted to define when a crop has been "satisfactorily established" and guidance on how long a Director can require that pH's be maintained and cover crops be top dressed.

XIII. VEGETATIVE COVER EVALUATION SHOULD ALLOW FOR PARTIAL RELEASE OF THE PERMIT.

The Council suggests that a provision be added to proposed section 8.3.i.5 to allow the Director to grant partial releases of permits in those situations where some of the revegetation requirements have been fulfilled though there may be others remaining. Otherwise, an operator may be unfairly denied release of his permit due to a technicality or a situation beyond his control.

IX. AN APPEAL PROCESS SHOULD BE ESTABLISHED FOR AN OPERATOR TO CHALLENGE A DECISION OF THE DIRECTOR.

The proposed regulation is replete with instances whereby the Director may impose requirements on the operator based on enumerated factors. Although an appeal process is technically provided for by W.Va. Code § 22-4-21, the regulations should reiterate that process and expand on

it if necessary. An adverse decision of the Director could cost a mining company huge sums of money in expenses or lost production. It is therefore imperative that the economic and legal rights of such operators be explicitly stated in a separate, distinct provision of the regulations.

X. "SIGNIFICANT REVISION" DEFINITION SHOULD BE CLARIFIED.

The need for a definition of "significant revision" is unclear. The definition does not appear to prompt any public notice requirements or other process. If this term is actually used in some provision of this regulation, the definition should clarify how a revision is determined to be significant in the context of that provision. The definition for "significant revision" is so amorphous that it nearly gives the Director carte blanche to classify a permit revision as "significant." The definition lacks objective criteria for determining what constitutes a "significant departure from the terms and conditions of the existing permit."

XI. CONCLUSION

The aforementioned provisions should be clarified or amended, as suggested above, to more accurately reflect the operational characteristics of non-coal surface mining.

6/20/99

TO:Rocky Parsons
DEP
105 South Railroad ST
Suite 301
Philippi, Wv 26416

From: Bill Currey
P.O.Box 91
Slatyfork, WV
(Business: 5 Greenbrier ST.
Charleston, WV. 25311)
Phone 304 344-8989

Subject: Comments and proposed language to consider for proposed Regulations IE> Rock Quarry

Thanks for the offer to recommend language for the Regs.

The point that I wanted to make had to do with the language throughout the bill that provided specific parameters for environmental standards IE. Sludge ponds, ground water Regs, surface water impoundments, underground seepage, etc. The term ENVIRONMENTALLY SENSITIVE should be included in the Definitions.

The term Environmentally Sensitive , then could be defined as being any area that is determined by the director to be sensitive because of unique Geological, Topographic, Atmospheric Aesthetic, or hydrological conditions.

The term would be applied throughout the Regulations in appropriate areas where such Sensitive conditions may occur.

The public would be assured that for example if such terms where provided in the regulations that apply to surface water seepage IE> 2.44 definition of seepage is far to liberal to protect the pristine groundwater in an area like Slatyfork and Big Springs...plus the definition requires that water must re-surface to be considered effected...this is not a definition that will protect water in our area....Add the Term Environmentally Sensitive to this definition and the public water supply could be protected if the Director deemed the area to be Sensitive .

Another example of how the term could be used to protect the best interest of the public is again at Snowshoe....the regulations do not address the sensitive nature of the surrounding business and residence....Lets face it home building at snowshoe and the area in particular that surrounds the existing rock quarry employees far more people at far higher

paying wages than an 8 employee rock Quarry. If the regulations allow unsightly open rock storage along the states most heavily traveled tourist highway, allows trucks to despoil roadways that with a never before layer of white dust and if sludge ponds are allowed to be constructed that can, in a large rain, overflow silt storage into one of the states finest natural trout breeding streams then you are killing another business for the benefit of a much less productive one. People will not build new homes when faced with the expansion and aesthetic nuisance posed by such mining and the existing tourist based business in the area will be negatively impacted by the quarry operations impact on tourism in the area.

The DEP must find ways such as incorporating this Sensitive term in regulations to truly protect the publics environment. The old days of the public be dammed are gone. Today we in WV are rightfully demanding that our government regulations truly protect all citizens. A Mining business that is allowed to destroy other business and private property owners land and environment can not be tolerated.

Regulations that your agency impose are critical to keeping a balance between for-profit business activities and the publics welfare.

Finely the regulations do not adequately address public notice issues. The public notice when it is advertised should at the operators cost be mailed via certified mail to property owners of record in a radius of at least two miles from the boundary of the proposed permit area or any new permitted area. Such notice will insure that those who do not subscribe to (for example the Pocahontas times with a circulation of maybe 1000 can not be considered as a serious notice to the 1000s of property owners at Snowshoe , most of whom have other residence far away. Again we are dealing with a unique area that nevertheless deserves a different criteria than say the Millpoint area of the county which is not a tourist destination area at this time.

But on the other hand what if Millpoint becomes a tourist destination area and because of that new business growth hundreds of new jobs are created in that community....would the regulations without a Sensitive clause help to protect the new industry ? No! The Quarry could continue to grow and grow with no consideration being given to the fragile nature of these new business....is that fair...no it is not....the nature of all business is that it is constantly changing.

A rock quarry is no different than any other business if it can not meet the requirements to protect the environment then it can not be allowed to continue without major changes.

Thank you for your consideration of my concerns.

Bill Cumy

CAPITOL CEMENT CORPORATION

SOUTH QUEEN STREET
P.O. BOX 885
MARTINSBURG, WEST VIRGINIA 25402
TELEPHONE (304) 267-8966

July 15, 1999

Mr. Harold (Rocky) Parsons
Chief of Northern Operations
DEP - OMR
105 S. Railroad Street
Philippi WV 26416-9998

Dear Rocky:

We have reviewed the draft regulations proposed for limestone, sandstone, and sand. While we agree that there needs to be some updating and revision to the current regulations, the draft document contains some things that may be contrary to current State Code and some others that need further clairfication. There is also concern about the affect of changes in certain requirements on existing operations. We have listed our comments below by section:

1) Sec. 2.11 states that "----- any berm consisting of greater than 20% fines or non-durable rock must be protected from wind and water erosion." This needs to be clarified. It should apply only to permanent berms over 10 feet in height. As it is, minor berms on drill sites or along roadways as required by MSHA and the Office of Miners Safety And Health would have to be protected which is not necessary.

2) Sec. 2.12 only allows two months of inactivity to determine what is "the completion of mining". This should be at least 6 months to cover small "seasonal" or "market dependent" operations.

3) Sec. 2.23 lumps the placing of all material under the category of a "fill". This is contrary to common usage and understanding which does not consider piles and fills to be, or mean, the same thing. Requirements for piles are different from what is generally considered a fill.

4) Sec. 3.2 and 3.3 should only apply to new permits. It doesn't make sense to go back and submit plans, do certifications etc. for currently permitted and operating quarries.

5) Sec. 4.3 should clearly state that existing operations are excluded. Notifications as required by the existing regulations would have already been done in the past and to require notification to a larger area now, for an existing operation, does not serve any useful purpose.

6) Sec. 4.5.b should also only apply to new operations. This section seems to lend itself to rural or sparsely populated areas since trying to contact everyone who lives or works in a municipal type area would be a nightmare.

7) Sec. 5.6.a requires submitting reports on a monthly basis. NPDES requirements were changed a few years ago to submit information every 3 months. There is no need revert back to the monthly reporting.

8) Sec. 5.9 needs to be clarified. We do not understand what is meant by "proximately caused by such surface-mining operation" . Water should be replaced if it is affected by the activity of removing mineral or overburden. It is not clear if a "surface mining operation" is a company or an activity of mining.

9) Sec. 6.5 says " all available spoil material " will be used to back fill pit areas. This needs to be clarified to mean only material that has not been placed, stabilized and seeded. I don't think the intent is to disturb revegitated and restored areas.

10) Sec. 6.10b says that " grading and back filling shall follow the highwall mining by not more than 30 days or one thousand feet;". This should also include the statement "or as prescribed by the director" to allow the flexibility needed for large operations.

11) Sec. 6.19 implies that highwalls are to be backfilled and eliminated which is usually impossible. It should start out by saying "If material is used to backfill or eliminate ----".

12) Sec. 7.1e requires activity which is presently prohibited by State Code. What is being discussed here is actually piles and not fills. The activity is Reclamation and not Restoration. There was an appeal of this issue to the Surface Mine Board in 1996. The Board ruled in case 96-34-SMB that slope requirements contained in this section are Reclamation activities and as such are exempted from limestone quarries. This again points out the importance of distinguishing between piles and fills. It is also important to note that spoil piles established prior to these regulations

should be exempted from these requirements since to go back disturb and regrade existing piles is an almost impossible task in some situations.

13) Sec. 11.2.d mentions nothing about grandfathering. It only talks about allowing reasonable time to bring areas into compliance. In the case of existing stabilized spoil piles and other areas where requirements are being changed this could be devastating .

14) Sec 11.3.c gives the director the authority to go back and change existing permits to comply with this rule. This amounts to after the fact regulation. What was permissible under existing regulation and included in existing permits could now be changed after the fact. This is like saying if the speed limit is reduced on a road today that you can be fined if you went over the new limit yesterday although yesterday it was legal.

We appreciate this opportunity to comment and hope that you will consider these comments before the proposed regulations are submitted to the Legislative Review Committee. We believe some things are violations of Code while others definitely need clarification. The affect on currently permitted operations needs to be very carefully considered. The extension of notifications and warnings from "adjacent areas" to one-half mile is an example of something that does not seem to serve a useful purpose when applied to current operations.

Sincerely,

Gary H. Gess
Senior Engineer

Cc: TGM
JEA

(comosmrg)

June 22, 1999

Jeff: These are the regulations governing revegetation on quarries. We are in the process of rewriting these regs. Please review the regs. and seed mixes/tables. Any suggestions would be appreciated. These were last changed in 1972.

Thank you - Rocky Call me

Rocky,

I've made a number of comments. Call if you have questions.

I've attached a guide for Treeplanting.

- Jeff Sk.

TABLE THREE

This table is not very correct any more.

[1]APPROVED MIXTURES
HERABACEOUS AND WOODY SPECIES FOR DIRECT SEEDING

1.	Tall Fescue	30 lbs.	
	~~Sericea~~ Birdsfoot	15 lbs.	
	Black Locust[2]	3 lbs.	
2.	Tall Fescue	20 lbs.	
	Rye Grass	10 lbs.	
	~~Sericea~~ Birdsfoot	15 lbs.	
	Black Locust[2]	3 lbs.	
3.	Tall Fescue	20 lbs.	
	Weeping Lovegrass	3 lbs.	
	~~Sericea~~ Birdsfoot	15 lbs.	
	Black Locust[2]	3 lbs.	
4.	~~Tall Fescue~~ Orchardgrass	30 lbs.	Better suited to higher elevations above 2500'
	Birdsfoot Trefoil	10 lbs.	
	Black Locust[2]	3 lbs.	
5.	~~Tall Fescue~~ Orchardgrass	20 lbs.	Better suited to higher elevations to 2500'
	Red Top	3 lbs.	
	Birdsfoot Trefoil	10 lbs.	
	Black Locust[2]	3 lbs.	

Black locust does do well by direct seeding but is this what you want in these quarries.? If they are to be woodlands I'd mate them transplant some pines and hardwoods - See attached planting guide & tables.

[1]Application of fertilizer shall be based on soil testing results from a soils laboratory. Without a soil test, apply a minimum of ~~200 lbs. ammonium nitrate and 200 lbs. triple super phosphate.~~ Equivalent amounts of nitrogen and phosphorus is acceptable. 600 lbs. per ac of 10-20-10 or 10-20-20.

[2]Black Locust seed may be omitted on the bench areas or where erosion is not a serious problem, or at elevations above 2000', 1/4 lb./acre Virginia Pine; 1/4 lb/acre White Pine, ~~and 2 lbs./acre Japonica Intermedia~~ may be substituted for Black Locust.

this is a bushy shrub - eliminate

TABLE ONE

USE: HAY, PASTURE OR OTHER WHERE HERBACAOUS COVER IS DESIRED

1.	Alfalfa	20 lbs.		
	Orchard grass	10 lbs.		
2.	Birdsfoot Trefoil	10 lbs.		
	Tall Fescue	15 lbs.		
3.	Birdsfoot Trefoil	10 lbs.		
	Orchard grass	10 lbs.		
4.	Sericea (Hulled)	20 lbs.		
	Red Top	3 lbs.		
	Tall Fescue	15 lbs.		
5.	Crown Vetch	15 lbs.		
	Tall Fescue	20 lbs.		
	[2]Weeping Lovegrass	3 lbs.		
6.	Crown Vetch	15 lbs.		
	Rye Grass	15 lbs.		
	[2]Weeping Lovegrass	3 lbs.		

I would eliminate this mixture

[1]APPROVED SEED MIXTURES FOR OVER SEEDING TREE AND SHRUB SEEDLINGS

			FOR ELEVATIONS ABOVE 2500	
7.	Tall Fescue	30 lbs.	10. Tall Fescue	20 lbs.
	~~Sericea~~ Birdsfoot	15 lbs.	Red Top	4 lbs.
8.	Tall Fescue	20 lbs.	11. Tall Fescue	20 lbs.
	Rye Grass	10 lbs.	[2]Weeping Lovegrass	3 lbs.
	~~Sericea~~ Birdsfoot	15 lbs.		
9.	Tall Fescue	20 lbs.	12. Tall Fescue	20 lbs.
	[2]Weeping Lovegrass	3 lbs.	Sweet Clover	10 lbs.
	~~Sericea~~ Birdsfoot	15 lbs.		

[1]Establishment of vegetation includes liming pH range 5.5-7.0. Application of fertilizer shall be based on soil test results from a soil laboratory. Without a soil test, apply 600 lbs. 10-20-10 or equivalent, and protection from grazing during the seedling state.

[2]Red Top may be substituted for Weeping Lovegrass for late summer and fall seedings at a rate of 3 lbs. per acre.

Both these (Sericea & Fescue) species are tough competitors

Sericea is a wonderful plant but it is generally not used anymore

Substitute Birdsfoot Trefoil

Tall Fescue is sometimes also discouraged for seeding but it is OK here, I think

Orchardgrass can be substituted if you wa

Response to Oral and Written Comments
38CSR2A and 38CSR2B

Division of Environmental Protection's Response to Public Comments on Proposed Rules – 38CSR2A Rules for Mining and Restoration of Limestone, Sandstone and Sand and – 38CSR2B Rules for Mining and Reclamation of Minerals Other Than Coal, Limestone, Sandstone and Sand.

The West Virginia Division of Environmental Protection's Office of Mining and Reclamation has proposed two (2) sets of rules – 38CSR2A Rules for Mining and Restoration of Limestone, Sandstone and Sand and 38CSR2B Rules for Mining and Reclamation of Minerals Other Than Coal, Limestone, Sandstone and Sand. Due to the similar nature and content of the two (2) sets of rules, a public hearing was held simultaneously for both sets of rules on July 20, 1999. Written and verbal comments were received concerning the proposed rules. The following are the agency's responses to these comments:

Verbal comments

Mike Clowser, Executive Director of the West Virginia Crushed Aggregates Council

Comment: I guess one of the things that we are going to question today is the fact that we are looking at these regulations, and I guess one of our questions is, if there is going to be legislation put forth in this session, are we duplicating our efforts by working on these regulations, or do they need to be postponed and we look at specific legislation come January.

DEP Response: Since proposed quarry legislation has been presented to, but not passed, the legislature for at least the past eight (8) years, DEP sees no guarantee that such legislation will pass in the upcoming session. Therefore DEP thinks that it is prudent to proceed with these Rule proposals, rather than risk loosing yet another year to the process.

Comment: Also, we have some questions regarding the statutory authority that the Department has in promulgating some of the rules and regs that are proposed in that.

DEP Response: This issue is addressed in the written comments as specific questions of authority are raised.

Michael McThomas, Robinson & McElwee, L.L.P.

Comment: The first thing I'd like to bring to your attention is Appendix B of the proposed filing of the rule, which is a statement that goes to the Legislative Rulemaking and Review Committee, which one of the questions which is posed that the agency, the Division of Environmental Protection, must answer is whether or not there is an economic impact on specific industries or state government. The DEP responded that there was no economic impact. We believe that this assertion is erroneous. ... I would request at this time then that the council would be permitted to file some subsequent comments potentially addressing that issue, as well as some other more minor technical issues, at a date after the close of this hearing, and go on the record with that request.

DEP Response: The Fiscal Note which was submitted to the Secretary of States Office with the proposed rules incorrectly indicated that there would be no cost to the industry in complying with these rules. Most responsible operators are already in voluntary compliance with many of the provisions of these rules. DEP attempted to keep the cost of complying with these rules to a minimum wherever possible. For example, many certifications can be provided by an "approved person" instead of a Registered Professional Engineer or a Licensed Land Surveyor. The less expensive method of excess spoil disposal by durable rock fill has been proposed. The proposed rule also provides cost savings by allowing for permit transfers and permit modifications. The DEP must respond to these comments. An extension of the comment period would not allow the DEP enough time to address the comments and still meet the deadline to file at the Secretary of State's Office.

Comment: We believe that there is a clear distinction between quarry operations on the one hand and coal mining operations on the other hand. We believe that the agency needs to recognize this when it drafts rules applying for the compliance of quarries.

DEP Response: DEP recognizes that there are significant differences between coal mining and other types of mining. However, there are also significant similarities. DEP prefers to emphasize the similarities and utilize proven technologies and standards when appropriate and discard the differences as not applicable. The technology and environmental standards proven to be of value for the similar aspects of coal and quarries should not be arbitrarily ignored nor shunned. Additionally, coal removal is legal in WV on quarries so permitted and where the coal production is less than sixteen and two-thirds of the commercial production and , therefore, should be addressed.

Comment: The second major issue deals with how existing quarry operations are going to be treated under the regulations and the application of the regulations to these operations.

DEP Response: Section 11.2.d of the proposed rules provide that each permit will be reviewed at renewal time to insure compliance . It also states that areas permitted and disturbed prior to the effective date of the rule should be given reasonable time in which to bring these areas into compliance. Upon further consideration, DEP will revise Section 11.2.d to say that areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: The last issue, which is really very much a legal issue, and that is whether or not the agency has the authority to require reclamation in light of the clear statutory exemption from reclamation requirements for quarry operations.

DEP Response: 22-4-2(k) exempts limestone, sandstone, and sand operations from reclamation provisions. 22-4-2(k) does not exempt such operations from restoration requirements to return the land to a desirable purpose and use (22-4-9) or other restoration work that may be required by the director, according to rules adopted by the director. (22-4-13) (emphasis added)

Gary Guess, Capitol Cement

Comment: I'd just like to briefly say we are concerned initially with the lack of grandfathering in these proposed regulations.

DEP Response: The proposed rules state that areas permitted and disturbed prior to the effective date of the rule should be given reasonable time in which to bring these areas into compliance. Upon further consideration, DEP will revise Section 11.2.d to say that areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: We think that this effort on regulations can pose a conflict, a waste of time for the agency and possibly the industry, as far as duplication or actual conflicts between legislation that could come about as early as the next session, and what these regulations will be proposing.

DEP Response: Since proposed quarry legislation has been presented to, but not passed, the legislature for at least the past eight (8) years, DEP sees no guarantee that such legislation will pass in the upcoming session. Therefore DEP thinks that it is prudent to proceed with these Rule proposals, rather than risk loosing yet another year to the process.

Comment: I would like to ask the agency, if they would, to extend the comment period for a short period of time to allow individual companies or organizations to make further comments, essentially on comments that are made here tonight of new points that are brought up.

DEP Response: The DEP must respond to these comments. An extension of the comment period would not allow the DEP enough time to address the comments and still meet the deadline to file at the Secretary of State's Office.

Bill Kerns, Laurel Aggregates

All but one of Mr. Kerns' verbal comments were addressed in the responses to his written comments.

Comment: I would also like to ask that the comment period be extended.

DEP Response: The DEP must respond to these comments. An extension of the comment period would not allow the DEP enough time to address the comments and still meet the deadline to file at the Secretary of State's Office.

Terry Ghoul, Kermit Butcher Quarries

Comment: These rules will increase the cost to our company. So what we would like to do is to have you consider the fact that costs are a big consideration when it comes to these rules.

DEP Response: Most responsible operators are already in voluntary compliance with many of the provisions of these rules. DEP attempted to keep the cost of complying with these rules to a minimum wherever possible. For example, many certifications can be provided by an "approved person" instead of a Registered Professional Engineer or a Licensed Land Surveyor. The less expensive method of excess spoil disposal by durable rock fill has been proposed. The proposed rule also provides cost savings by allowing for permit transfers and permit modifications.

Tom Degen

Mr. Degan's verbal comments were addressed in the responses to his written comments.

Pat Stump, Mountain Valley Coalition

Comment: We would graciously request an extension of the time period for comments.

DEP Response: The DEP must respond to these comments. An extension of the comment period would not allow the DEP enough time to address the comments and still meet the deadline to file at the Secretary of State's Office.

Rick Eads, West Virginia Citizen Action Group

Comment: For the record today, some of the things that I think the rule does not address and a very good reason to table it, because I think these issues will plague us throughout the session in trying to advance this rule, is that groundwater protection, restoration is mentioned in one line, to my knowledge, directly, underground water, in the current rules.

DEP Response: Since proposed quarry legislation has been presented to, but not passed, the legislature for at least the past eight (8) years, DEP sees no guarantee that such legislation will pass in the upcoming session. Therefore DEP thinks that it is prudent to proceed with these Rule proposals, rather than risk loosing yet another year to the process.

Comment: Secondly, the rule nowhere addresses the provision that's in the law to protect sensitive areas.

DEP Response: Neither the governing statute nor the rules refers to the term "environmentally sensitive". Chapter 22, Article 4, Section 10 does give the Director the authority to limit or prohibit mining in areas that may adversely impact the environment or the health or property rights of others.

Comment: I think that blasting damages should be handled much like they're being handled in the coal industry, if, in fact , there is damage and a preblast survey says so, we should have a rebuttable resumption.

DEP Response: The proposed rules address blasting in section 4.

Comment: I believe that the law must do something to address grandfathering.

DEP Response: These proposals are for "Rule" changes. Changes to the law are not under being considered in this particular process.

Comment: I think we need to be fair with the industry in pricing, but the current rules really do nothing to address the bonding issue.

DEP Response: Any changes to the bonding requirements will require statutory change.
Comment: Reducing highwalls is critical. Future land use is critical.

DEP Response: The proposed rules attempt to address future land use by defining and distinguishing between the terms of "reclamation" and "restoration", both of which are required under the law.

WRITTEN COMMENTS

Bill Currey

"Comments and proposed language to consider for proposed Regulations IE> Rock Quarry"

Comment: The term "environmentally sensitive" should be defined.

DEP Response: Neither the governing statute nor the rules refers to the term "environmentally sensitive". Chapter 22, Article 4, Section 10 does give the Director the authority to limit or prohibit mining in areas that may adversely impact the environment or the health or property rights of others.

Comment: The public notice when it is advertised should at the operators cost be mailed via certified mail to property owners of record in a radius of at least two (2) miles of the proposed area.

DEP Response: 22-4-6 currently requires that landowners within 500 feet be notified. To increase the radius of the notification area would require statutory change. Any new permit application causes a Class III legal advertisement to be published in the county in which the proposed operation will be located.

Laurel Aggregates, Inc.

"Written Comments on Proposed Rules Title 38, Series 2A."

Comment: 1. How was the determination made that these proposed regulations will not have a negative economic impact on out industry as indicated in Appendix B - Fiscal Note For Proposed Rules?

DEP Response: The Fiscal Note which was submitted to the Secretary of States Office with the proposed rules incorrectly indicated that there would be no cost to the industry in complying with these rules. Most responsible operators are already in voluntary compliance with many of the provisions of these rules. DEP attempted to keep the cost of complying with these rules to a minimum wherever possible. For example, many certifications can be provided by an "approved person" instead of a Registered Professional Engineer or a Licensed Land Surveyor. The less expensive method of excess spoil disposal by durable rock fill has been proposed. The proposed rule also provides cost savings by allowing for permit transfers and permit modifications.

Comment: 2) The West Virginia Division of Environmental Protection does not have authority to require the reclamation requirements that these proposed rules disguise under the term "restoration." 22-4-2(k) giving the definition of the all encompassing aspect of quarry operations as "Surface mining" states: "...Provided, That the bonding and *reclamation* provisions of this article do not apply to surface mining of limestone, sandstone, and sand." (emphasis added.)

DEP Response: DEP notes that the very first sentence of the very first paragraph of the very first section of Chapter 22, Article 4, Code of WV (the Act) grants the Division of Environmental Protection "...jurisdiction over all aspects of surface mining and with jurisdiction and control over

land, water and soil aspects pertaining to surface-mining operations, and the *restoration* and reclamation of lands surface mined and areas affected thereby." It is also noted that the term "restoration" appears in the Act ahead of the term "reclamation" and that the two terms are separate and distinct. The term "restoration" appears three more times in the Act: 22-4-9, entitled "Alternative Plans; Time" speaks of "...if such *restoration* will be consistent with the purpose of this article." 22-4-9 elsewhere states that "The purpose of this section is to require *restoration* of land disturbed by surface mining to a desirable purpose and use." 22-4-13 entitled "Obligations of the Operator" states that "Additional *restoration* work may be required by the director, according to rules adopted by the director."
(emphases added)

22-4-2(k) exempts limestone, sandstone, and sand operations from reclamation provisions. 22-4-2(k) does not exempt such operations from restoration requirements to return the land to a desirable purpose and use (22-4-9) or other restoration work that may be required by the director, according to rules adopted by the director. (22-4-13) (emphasis added) DEP distinguishes the two terms by definitions in the proposed rule, by which "restoration" is a much lesser standard than "reclamation". DEP believes that to return disturbed land to a stable, usable condition for future generations is simply a policy of good stewardship of our earth.

Comment: 3) The proposed definitions of "willful" and "deliberate" do not adequately clarify the difference between the two. Since any violations are criminal and not administrative, I believe that the clarity of these definitions is of the utmost importance.

DEP Response: DEP agrees and will delete the definitions of "deliberate" and "willfully".

Comment: 4) The definition of "Excess Spoil" needs to be reworded. (et al.) [Note: the notation "et al. is meant to recognize that a discussion accompanied the original written comment, which was left out here for the sake of brevity.]

DEP Response: The intent of the proposed rule is to require that all excess spoil disposal structures are properly designed, constructed, and certifiable by professional standards to be stable. The concept of a "pile" has never been recognized nor defined by WV quarry law or rules, past or present, in that there are no definitions, criteria, construction specifications, or exemptions from law or rule for "piles". If spoil is outside of the pit, it is "excess" by definition.

Comment: 5) The definition of "Area surface mining" (Section 2.6) is poor. It certainly is possible to quarry stone by the area surface mining method and produce benches as defined in section 2.9.

DEP Response: The definition will be rewritten to delete the phrase "...which does not produce a bench".

Comment: 6) The definition of "Haulageway" *must* be redefined. This definition coupled with Section 3 would require the design and certification of temporary "inter-permit" roads that will change frequently and whose drainage is ultimately controlled by the total permit drainage control requirements of Section 5. (et al.)

DEP Response: The definition states that the haulageway "ends at the pit or bench" which indicates that it does not include internal roads within the mineral excavation area.

Comment: 7) If the DEP is going to specify that the analytical procedures be performed as set forth in a particular publication, a *minimum* edition reference should be included. (The 20th edition is the current edition.)

DEP Response: DEP will revise the definition to read: "Water analysis shall mean those water analyses performed by or for the operator using the analytical procedures set forth in the most current edition of "Standard Methods for the Examination of Water and Wastewater."

Comment: 8) Section 5.2 needs to be reworded. It contradicts itself. (et al.)

DEP Response: DEP will revise section 5.2 and delete the sentence "Surface mining operations shall be prohibited fifty feet (50') on either side of a natural drainway".

Comment: 9) Section 5.3.b is also poorly worded. First it says "in no case" shall water be discharged over a spoil slope, the very next sentence explains how to convey water from the bench over a spoil slope. Adding the word "unprotected" before the words "spoil slope" would correct the problem.

DEP Response: DEP will revise section 5.3.b to read: "... In no case shall water be discharged over an unprotected spoil slope. ..."

Comment: 10) Section 5.3.c - "treatment" ponds would better be described as "sedimentation" ponds within this context. None-the-less, the requirement of constructing these ditches within 25' of the toe of the spoil will, under certain circumstances, encourage material interference with flow. In addition, this distance requirement will prohibit the use of anti-sedimentation techniques.... (et al.)

DEP Response: Retention time can be a form of treatment. Furthermore, the rule can be waived.

Comment: 11) Sections 5.6.a.1 through 5.6.a.3 are confusing. The wording of this section needs to be reworked. (et al.)

DEP Response: Those sections are taken directly from the current rules and have been in effect since 1983. Section 5.6.a.1 requires a sample location on natural drainways above the proposed mining operation. Section 5.6.a.3 requires that any natural drainways that enter the stream adjacent to the proposed mining operation have a sample location upstream from the confluence (mouth) where the two drainways join. The location upstream of the confluence is chosen so as to be unaffected by co-mingling of the two waters. The stream running adjacent to the operation has the potential to be impacted by the operation as it flows past the operation. Therefore, this stream is sampled upstream of any possible influence from the subject mining area to document the water quality before entering the potential mine influence area. These same streams are again sampled below the potential mine influence area to determine before and after quality differences of water flowing past the mine area. Section 5.6.a.3 is designed to document non-mining influenced water quality of any tributaries entering the drainways between the upstream and downstream monitoring points.

Comment: 12) Why is Section 5.6.b entitled "Treatment Facilities for Drainage from Surface Mine Operations" when the paragraph never mentions treatment facilities? (et al.)

DEP Response: Section 5.6.b is a holdover from current rules and has been in effect since at least 1983. It addresses the process to assess the adequacy of the treatment facilities for permit approval.

Comment: 13) Section 5.9 - Water Replacement Rights. There should be additional language that makes plain the fact that the quarry operator will have the right to appeal to the any adverse determination of WVDEP to the director.

DEP Response: 22-4-21 allows for appeal.

Comment: 14) Section 7.3.1.4. - What is this doing here? Coal refuse in context with fill in a quarry seems a very unlikely scenario. In addition, no language follows the paragraph.

DEP Response: The definition of "surface mining" under the Surface Coal Mining and Reclamation Act (SCMRA), Chapter 22, Article 3, Code of WV, exempts those activities which "include 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" from regulation under SCMRA. There are some permitted quarries with coal in the state of WV. Otherwise, when read in context with section 7.3.1., section 7.3.1.4 simply states that coal refuse is prohibited from being placed, etc., into a durable rock fill. No further language is necessary.

Comment: 15) Section 8.3.b - WVDEP just can't seem to get out of the coal industry mode. The overburden analysis required by this section is very expensive. ...why not allow the DEP to request an overburden sample if they have reason to believe that the quarry will encounter an acid producing overburden? (et al.)

DEP Response: There are some quarries that produce acid mine drainage. This section allows for previous experience or correlation data to be substituted for overburden analysis.

Capitol Cement Corporation

"...draft regulations proposed for limestone, sandstone, and sand."

Comment: 1) Sec. 2.11 states that "...any berm consisting of greater than 20% fines or non-durable rock must be protected from wind and water erosion." This needs to be clarified. It should apply only to permanent berms over 10 feet in height. As it is, minor berms on drill sites or along roadways as required by MSHA and Office of Miner's Safety and Health would have to be protected which is not necessary.

DEP response: The DEP believes that all berms should be protected against erosion by wind and/or water. It is noted that "temporary" berms may be in place for many years. 22-4-9 requires all cut fill slopes of the operation or haulageways to be seeded and planted in the proper season. This would include appropriate types of safety berms as part of a road. It is sound environmental practice to keep material where it is placed.

Comment: 2) Sec.2.12 only allows two months of inactivity to determine what is "the completion of mining". This should be at least 6 months to cover small "seasonal" or "market dependent" operations.

DEP response: DEP will revise the "Completion of Mining" standard to allow three (3) consecutive months of inactivity without an approved inactive status. Three (3) consecutive months constitute one quarter of a calendar year. After this three (3) month period of inactivity without an approved inactive status, the Agency may issue a notice declaring completion of mining, after which the company has thirty (30) more days in which to respond.

Comment: 3) Sec. 2.23 lumps the placing of all material under the category of a "fill". This is contrary to common usage and understanding which does not consider piles and fills to be, or mean, the some thing. Requirements for piles are different from what is generally considered a fill.

DEP Response: In these rules, "fills" is used in the context of excess spoil disposal sites (7.1.a, 7.2.a and 7.3). Neither the quarry law nor the rules define, or set forth requirements for "piles".

Comment: 4) Sec. 3.2 and 3.3 should only apply to new permits. It doesn't make sense to go back and submit plans, do certifications etc. for currently permitted and operating quarries.

DEP Response: The section 3.2 requirement assures that those existing facilities meet the standard criteria set forth in the laws and rules. Section 3.3 clearly states that "Existing roads are exempt from this requirement."

Comment: 5) Sec. 4.3 should clearly state that existing operations are excluded. Notifications as required by the existing regulations would have already been done in the past and to require notification to a larger area now for an existing operation does not serve any useful purpose.

DEP Response: This section states "...prior to mining operations..." written notification will be given. Proof that this has been accomplished would satisfy this requirement for existing operations.

Comment: 6) Sec. 4.5.b should also only apply to new operations. This section seems to lend itself to rural or sparsely populated areas since trying to contact everyone who lives or works in a municipal type area would be a nightmare.

DEP Response: DEP disagrees. When the legislature passed the latest changes to blasting statute, it required DEP to propose rules to "provide for a warning of impending blasting to the owners, residents or other persons who may be present on property adjacent to the blasting area" (22-4-11)

Comment: 7) Sec.5.6.a requires submitting reports on a monthly basis. NPDES requirements were changer a few years ago to submit information every 3 months. There is no need revert back to the monthly reporting.

DEP Response: DEP will rewrite section 5.6.a. to read "...A compilation of the foregoing information shall be submitted to the chief of the Office of Mining and Reclamation by the 20th day of the month following the sample period."

Comment: 8) Sec. 5.9 needs to be clarified. We do not understand what is meant by "proximately caused by such surface-mining operation". Water should be replaced if it is affected by the activity of removing mineral or overburden. It is not clear if a "surface mining operation' is a company or an activity of mining.

DEP Response: Steven H. Gifis' Law Dictionary, second edition, defines "Proximate Cause" as "That which in natural and continuous sequence unbroken by any new independent cause produces an event, and without which the injury would not have occurred." According to 22-4 definition, "surface mining" is an activity.

Comment: 9) Sec. 6.5 says "all available spoil material" will be used to backfill pit areas. This needs to be clarified to mean only material that has not been placed, stabilized and seeded. I don't think the intent is to disturb revegetated and restored areas.

DEP Response: The phrase "all available spoil" means all spoil that is not "excess spoil". Section 2.21 of this Rule defines "excess spoil" as overburden or waste rock placed in a permanent or temporary location other than the pit. Section 2.48 of this Rule defines "spoil" as material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means; or material of any kind which is separated from the mineral being mined as undesirable to the current product." Excess spoil which has been properly placed and stabilized in a certified excess disposal site according to law and rule would not be redisturbed.

Comment: 10) Sec. 6.10b says that "grading and back filling shall follow the highwall mining by not more than 30 days or one thousand feet;". This should also include the statement "or as prescribed by the director" to allow flexibility needed for large operations.

DEP Response: Section 6.10c allows the time and distance requirements to be extended due to particular site conditions or weather.

Comment: 11) Sec. 6.19 implies that highwalls are to be backfilled and eliminated which is usually impossible. It should start out by saying "If material is used to backfill or eliminate----"

DEP Response: These rules define "excess spoil" as that material placed in approved disposal areas "other than the pit." Therefore, spoil that is not excess would be used to backfill or eliminate the highwall in the pit. Section 6.19 simply requires that material used to backfill or eliminate the highwall be appropriately stabilized

Comment: 12) Sec. 7.1e requires activity which is presently prohibited by State Code. What is being discussed here is actually piles and not fills. The activity is Reclamation and not Restoration. There was an appeal of this issue to the Surface Mine Board in 1996. The Board ruled in case 96-34-SMB that slope requirements contained in this section are Reclamation activities and as such are exempted from limestone quarries. This again points out the importance of distinguishing between piles and fills. It is also important to note that spoil piles established prior to these regulations should be exempted from these requirements since to go back disturb and regrade existing piles is an almost impossible task in some situations.

DEP Response: Neither WV quarry law nor rules have ever defined or recognized "piles". There are no criteria, construction specifications, or exemptions from law or rule for "piles" in current quarry law or rule. The concept of a "fill" and specifications for the proper construction thereof has been long established in current quarry rules. Section 7.1.e sets forth the construction standards for a fill used for "Disposal of Excess Spoil in Permanent Overburden Disposal Sites by Methods other than Valley or Head-of-Hollow Fills". 22-4-7 requires the operator to indicate the manner in which all permanent overburden disposal sites will be stabilized. The construction specifications outlined in Section 7 are to ensure stability. The DEP fails to see how this activity is prohibited by State Code. If these specifications are not allowed, then it will be difficult for the DEP to approve the construction of fills for excess spoil disposal. DEP will revise Section 11.2.d to say that areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: 13) Sec. 11.2.d mentions nothing about grandfathering. It only talks about allowing reasonable time to bring areas into compliance. In the case of existing stabilized spoil piles and other areas where requirements are being changed this could be devastating.

DEP Response: Section 11.2.d states that at time of renewal "consideration should be given to those areas which were permitted and disturbed prior to the effective date of this rule in allowing reasonable time to bring these areas into compliance." DEP will revise 11.2.d with an additional statement to read, "Areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: 14) Sec. 11.3c gives the director the authority to go back and change existing permits to comply with this rule. This amounts to after the fact regulation. What was permissible under existing regulation and included in existing permits could now be changed after the fact. This is like saying if the speed limit is reduced on a road today that you can be fined if you went over the new limit yesterday although yesterday it was legal.

DEP Response: Current rules allow the director to make modifications because of geologic structure, topography, particular watershed or permit conditions. These new rules are written to allow the permittee to make modifications to the approved preplan. DEP sometimes finds it necessary to require modifications to an approved permit. The new rule allows such modification to be made only after the director notifies the permittee that revisions are necessary and provides a reasonable time to comply. Additionally, 22-4-10 has given the Director the authority to make changes to permits since 1971.

Tom Degan

"Comments on 38CSR2A and 38CSR2B Quarry Rules"

Comment: I appreciate the fact that these rules address permit transfers and renewals, pre-blast surveys, restoration, and public hearings, but for the most part those provisions them are weak, and the statutory authority is questionable.

DEP response: DEP disagrees. DEP believes that various provisions of Chapter 22, Article 4 grant sufficient statutory authority to support the proposed Rules.

Comment: The fact that there are two separate rules for quarrying is going to get real confusing for those quarries that find themselves subject to both of them, for example, an operation that quarries sand and gravel.

DEP response: Chapter 22, Article 4, Section 2(k) requires that the surface mining of limestone, sandstone, and sand be subject to separate rules promulgated by the Director.

Comment: ...I urge the agency to withdraw these rules and assist the interim committee in its work to craft a quarry bill. Then the agency will be able to prepare a single quarry rule and have the statutory authority to address a wider range of issues.

DEP response: DEP stands ready, willing, and anticipates an active role in assisting the interim committee in any way possible to craft a quarry bill. There is no guarantee that a new quarry bill will be adapted in the upcoming legislature. Several such measures have failed for whatever reason in recent years. Likewise, there is no way possible to predict the range of issues addressed or the

standards to be adopted in such a bill. DEP has a current legal mandate to promulgate Rules for the regulation of quarry operations under the current quarry law.

Comment: Section 6.15 discusses using garbage and municipal waste for fill, and refers to this practice as "sanitary landfills". This language is carried over from the existing rule, which was written before our modern solid waste laws came into effect. The current solid waste laws and rules do not allow such uses for garbage, and this section should reflect that.

DEP response: The term "sanitary landfills" comes from 22-4-9. 38CSR2A and 2B, Section 6.15 clearly states that "Such plans for sanitary landfills and/or solid waste disposal areas shall be accompanied by the written approval of the Office of Waste Management and where appropriate, the state Department of Health and Human Resources."

Fairfax Sand and Crushed Stone Co., Inc.

"Comments on Proposed Regulations 38-2A"
(Rules for Mining and Restoration of Limestone, Sandstone, and Sand)

Comment: Existing quarry permits should be grandfathered.

DEP response: Section 11.2.d states that at time of renewal "consideration should be given to those areas which were permitted and disturbed prior to the effective date of this rule in allowing reasonable time to bring these areas into compliance." DEP will revise 11.2.d with an additional statement to read, "Areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: An appeal process should be established for the permittee who disagrees with the director's decision(s).

DEP response: Chapter 22, Article 4, Section 21 grants "any person claiming to be aggrieved or adversely affected by any rule or order of the Director" a right to appeal to the Surface Mine Board. This provision has been in effect since 1971.

Comment: 2.5 Does "Backfilling and Grading" in this definition mean that another hole has to be dug in order to fill this one?

DEP response: Section 2.5 is the definition of "Approximate Original Contour" (AOC). This definition sets standards for achieving "approximate original contour" by backfilling and grading of the disturbed areas so that the reclaimed area resembles the general surface configuration of the land prior to mining. There is no requirement to dig one hole in order to fill another.

Comment: 2.8 Does "at any point" mean at any point of the slope of an overburden or spoil pile?

DEP response: Section 2.8 is the definition of the "base of highwall". It is meant to define the point where the vertical face of the highwall in overburden, spoil, or mineral meets a horizontal face in the overburden, spoil, or mineral as the "base" or bottom of that highwall.

Comment: 2.10 What about benches in mined areas?

DEP response: This is a definition of "Bench Width" which was a carry-over from previous rules. It is no longer needed. DEP will delete the definition of "bench width".

Comment: 2.12 Our quarries sometimes shut down this long just because of winter weather. A longer time should be provided.

DEP response: DEP will revise the "Completion of Mining" standard to allow three (3) consecutive months of inactivity without an approved inactive status. Three (3) consecutive months constitute one quarter of a calendar year. After this three (3) month period of inactivity without an approved inactive status, the Agency may issue a notice declaring completion of mining, after which the company has thirty (30) more days in which to respond.

Comment: 2.14 "Cut" does not include the mineral to be mined.

DEP response: DEP will revise section 2.14 to read "Cut shall mean an excavation made by excavating equipment to remove overburden or mineral in a single progressive line.

Comment: 2.32 A source to find the classifications of the USGS would be helpful.

DEP response: The U.S. Department of the Interior, Geological Survey, National Mapping Division produces a pamphlet entitled "Topographic Map Symbols" to accompany USGS topographic maps. This pamphlet, as well as other US Geological Survey resources, are a source of USGS classifications.

Comment: 2.40 "Complete backfilling" would require another hole be dug in order to provide backfill - this hole would then have to be backfilled, etc.

DEP response: Section 2.40 is the definition of "Reclamation" which applies to minerals other that limestone, sandstone and sand. This definition was derrived from 22-4-13. DEP anticipated backfilling with available spoil and waste rock. There is no requirement to dig a hole to fill a hole.

Comment: 2.45 "...or an individual's legal right to receive notice under this article." How does this relate to a significant revision?

DEP response: A significant revision to a permit may alter the impact that the operation would have on the health, safety, and welfare of the public.

Comment: 2.57 Who publishes "Standard Methods for the Examination of Water and Wastewater"?

DEP response: The federal Environmental Protection Agency.

Comment: 3.5 "Cut Slope" should be defined so that it is not confused with the mining face and overburden stripping process.

DEP response: Section 3 is "Haulageways and Transportation Facilities". Section 3.5 is under this heading. The DEP does not anticipate confusion between a cut slope on a haulageway and a cut slope on the mining face or on the overburden stripping process.

Comment: 3.13 "Acid Producing" could preclude using rock found naturally on site thus adding greatly to road construction costs.

DEP response: Acid producing stone in natural, undisturbed beds is generally stable. Disruption of the natural bed by mining tends to significantly increase the amount of acid or toxic causing agents exposed to the atmosphere. Acid producing material should not be used for surfacing roads.

Comment: 4.1 "certified by the division..." should reference the statue and regulations that control the certification process.

DEP response: DEP will clarify section 4.1 by revising it to read "Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. The director is responsible for the training, examination, and certification of persons engaging in or directly responsible for blasting or use of explosives in surface mining operations. A blaster certified by the Division of Environmental Protection shall be responsible for all blasting operations including the transportation, storage, and use of explosives within the permit area in accordance with the blasting plan."

Comment: 4.2 "Limitations of the operator" should be defined or explained.

DEP response: The section asks for information on the blasting limitations that the operator shall meet. Blasting limitations for the permit would be found under the blasting section in the approved permit.

Comment: 4.3.c It is not possible to state the dates that blasting will occur since the quarry will be operational for years.

DEP response: Dates and times are given in general form in accordance with applicable blasting law and regulations. For example, such wording as "Blasting may occur weekdays during daytime hours, between the hours of sunrise and sunset. No blasting shall be conducted on Sunday." may be appropriate.

Comment: 4.5.a Since most requests for Sunday blasting are likely to be of an urgent nature, there probably won't be time to advertise and conduct the hearing.

DEP response: This section is intended to allow blasting on Sundays for those operations that must operate seven days per week. DEP does not anticipate a situation so urgent as to preclude public input for Sunday blasting. Provisions for emergency situations are also in this section.

Comment: 4.5.b.4 "Blasted Material" is flyrock.

DEP response: Flyrock is a form of blasted material. There may be other forms, such as rocks on the surface of the blast area.

Comment: 4.6.b. "Blast Area" - Does it equal the permit line or the quarry face where blasting will occur? The permit line could be excessively burdensome.

DEP response: The term "blast area" refers to the actual area where blasting will occur.

Comment: 4.6.b.1 Would a simple porch or metal shed be considered an addition to the structure? It would be helpful to have addition defined or explained.

DEP response: DEP finds that it is necessary to document the condition of any addition or renovation to a dwelling or structure.

Comment: 4.6.b.4 If somebody requests a survey less than 10 days - does that mean that the blasting will not be allowed or that the request is denied?

DEP response: The planned blast will be allowed. The request made with less than ten (10) days to the planned blast event will be honored and the survey completed before the next blast event.

Comment: 4.6.b.5 If somebody disagrees with the survey, will this delay blasting?

DEP response: No. Any person who requests a survey, but disagrees with the results may submit a detailed description of the specific areas of disagreement. This documentation will be made a part of that pre-blast survey file.

Comment: 5.2 Prohibiting a mining operation within 50' of a natural drainway could prevent mining at any of our existing quarries.

DEP response: DEP will revise section 5.2 and delete the sentence "Surface mining operations shall be prohibited fifty feet (50') on either side of a natural drainway".

Comment: 5.3.a Preventing surface water from entering the pit would adversely affect all of our quarries since we use them for pit storage. Many quarry sites would not have sufficient area to install drainage controls if pit storage is not allowed.

DEP response: Section 5.3.a also states that the Director, in exercise of his sound discretion and when not in conflict with the law, may waive this rule. DEP recognizes the value of in-pit drainage control.

Comment: 5.4.a The inclusion of land disturbed by previous operations would be extremely costly if the present operator has no need for these lands.

DEP response: This rule pertains to sediment control from permitted areas. If the permitted area includes disturbed area that is not stabilized, then that area must be accounted for in the sediment control plan with a minimum designed storage capacity of .125 acre-foot per acre of disturbed area.

Comment: 5.6.a See 5.3.a Re: Water entering pit area.
A monthly compilation of NPDES data exceeds the NPDES requirement.

DEP response: Section 5.3.a states that all surface water shall be effectively intercepted and diverted outside the disturbed area. Furthermore, section 5.3.a may be waived by the Director. Section 5.6.a speaks about all reasonable measures shall be taken to intercept undisturbed surface water from entering the pit area. DEP will rewrite section 5.6.a. to read "...A compilation of the foregoing information shall be submitted to the chief of the Office of Mining and Reclamation by the 20th day of the month following the sample period."

Comment: 5.6.a.1 How does this differ from 5.6.a.3?

DEP response: Section 5.6.a.1 requires a sample location on natural drainways above the proposed mining operation. Section 5.6.a.3 requires that any natural drainways that enter the stream adjacent to the proposed mining operation have a sample location upstream from the confluence (mouth) where the two drainways join. The location upstream of the confluence is chosen so as to be unaffected by co-mingling of the two waters. The stream running adjacent to the operation has the potential to be

impacted by the operation as it flows past the operation. Therefore, this stream is sampled upstream of any possible influence from the subject mining area to document the water quality before entering the potential mine influence area. These same streams are again sampled below the potential mine influence area to determine before and after quality differences of water flowing past the mine area. Section 5.6.a.3 is designed to document non-mining influenced water quality of any tributaries entering the drainways between the upstream and downstream monitoring points.

Comment: 5.6.b Does "...any such permit should be granted or denied." refer to the quarry permit or the NPDES permit?

DEP response: These regulations are for Chapter 22, Article 4, Code of West Virginia. Chapter 22, Article 4 is "Surface Mining and Reclamation of Minerals Other Than Coal". The statement refers to the permit granted or denied by Chapter 22, Article 4, Code of WV; that is, the "quarry permit". NPDES permits are governed by separate codes and rules.

Comment: 5.7 This should allow the use of rip rap or other stabilization methods.

DEP response: Section 5.7 is talking about stabilizing the outslopes and other disturbances made during the installation of the drainage system with vegetation to minimize erosion and restore aesthetic appeal in accordance with section 8 of this Rule. The specific structure design will dictate the stabilization method of the flow course.

Comment: 5.9 "Proximately" should be explained/defined.

DEP response: Steven H. Gifis' Law Dictionary, second edition, defines "Proximate Cause" as "That which in natural and continuous sequence unbroken by any new independent cause produces an event, and without which the injury would not have occurred."

Comment: 6.2 Often the "topsoil" is too thin to strip separately. What happens is analysis shows that the substitute won't "support and sustain" vegetation?

DEP response: Various soil amendments are in common use in the agricultural community. It could be suggested the operator contact the appropriate County Farm Extension Agent for assistance and recommendations. The Director cannot release a permit that cannot comply with the evaluative standards of section 8 of this Rule.

Comment: 6.3 Has "Toxic Material" ever been a concern at a quarry site?
What is to be done if 4' of nontoxic material is not available?

DEP response: Acid producing materials have been found to occur at quarry sites, especially those associated with coal removal. Also, some sandstone, sand and clay mining operations have encountered acid producing materials. Section 6.3 states that the offending materials shall be covered with a minimum of four (4) feet of nontoxic and noncombustible material; ***OR*** test, treat and blend material to provide materials suitable to prevent water pollution.

Comment: 6.5 What if the bench is not going to be used for farming?
What does "All available spoil material" mean?

DEP response: This section will be changed to read "...machinery or farm equipment". The phrase "all available spoil" means all spoil that is not "excess spoil". Section 2.21 of this Rule defines

"excess spoil" as overburden or waste rock placed in a permanent or temporary location other that the pit. Section 2.48 of this Rule defines "spoil" as material of any nature which overlays the mineral being mined which is removed or displaced by excavating equipment, blasting or any other means; or material of any kind which is separated from the mineral being mined as undesirable to the current product."

Comment: 6.6 This refers only to overburden slopes - see 2.46.

DEP response: Section 2.46 of this Rule also defines "slope" as "the angle of a hill or mountain". Therefore, section 6.6 refers to all final graded slopes in whatever material.

Comment: 6.10.a What does "only stripping" mean? How can there be only stripping and no mining?

Because quarries often work multiple benches, are long lived, etc., it is unreasonable to put a time or distance limit on backfilling.

DEP response: "Only stripping" means no auger or highwall mining. 22-4-9 requires the director to establish time limits requiring backfilling, grading and planting to be kept current.

Comment: 6.10.b Same comment as 6.10.a regarding time/distance.

DEP response: DEP expects each mining and reclamation/restoration plan to be site specific. 6.10.c states "should the particular site conditions... make adherence to these guidelines impractical the period of time or the distance required to be current may be reasonably extended".

Comment: 6.10.c The word "shall" should replace "may".

DEP response: DEP does not agree. The word "may" provides too much latitude, flexibility, and room for disagreement.

Comment: 6.13 Is an "Alternate Plan" submitted at the time of an original permit or permit modification?

DEP response: Either.

Comment: 6.17 "Downslope" should be defined.

DEP response: DEP will add a definition for "downslope" as " The area between the crop line or the proposed mineral seam and the valley floor."

Comment: 7.1.a "Disposal Area" should state those within the permit area.

DEP response: Section 7.1.a is "Location of Disposal Sites" and requires all disposal areas to be within the permit area.

Comment: 7.1.b.1 "The fill [shall] be designed..."

DEP response: This appears to be a typographical error in that the word "shall" was omitted. DEP will revise section 7.1.b.1 to read "The fill shall be designed ..."

Comment: 7.1.c Does the slope found in the disposal area refer to the naturally occurring slope or the fill slope?

DEP response: Section 7.1.c is referring to the slope of the original, natural ground in the area onto which excess spoil will be placed in a controlled manner. The original ground must be properly prepared in order to assure a stable base for the disposal area.

Comment: 7.2.a The location of the spoil area shall be within the permit area.

DEP response: Section 7.2.a is "Location of Excess Spoil Areas". It states "The disposal areas shall be within the permit area ...". DEP does not understand the comment/question.

Comment: 7.2.e.5 Why are drainage pockets required when the site has drainage controls as part of the approved plan?

DEP response: This is a part of the approved fill design. The drainage pocket provides positive drainage control at a specified location for the top of the fill during and after construction in order to direct drainage away from the face of the fill and into and through the rock core.

Comment: 7.3 Define "Durable Rock Fill."

DEP response: According to section 7.3, a "Durable Rock Fill" is a single lift fill consisting of at least eighty (80) percent durable rock.

Comment: 8.1 Pit floors and highwalls should be excluded. Also, it should be acceptable to have crushed stone considered as a method of stabilization for roadways, parking areas, stockpile areas, etc.

DEP response: DEP finds that it is sometimes appropriate to seed highwalls and pit floors. 8.3.i.3.A allows for a lesser standard for vegetation on areas to be used for industrial or residential use.

Comment: 8.3.b Define "Pre-Plan". Is it necessary to have a pre-plan?

DEP response: The "pre-plan" is analogous to "mining and reclamation/restoration plan".

Comment: 8.3.d What does "projected configuration" mean?

DEP response: "Projected configuration" refers to the operator's projection of the final configuration of the mining area after mining.

Comment: 8.3.f Isn't planting a part of the restoration plan?

DEP response: 22-4-9 requires a final planting plan to be prepared.

Comment: 8.3.g.1.a.3 "Adjudged by the Director" should list criteria so that it is an objective decision.

DEP response: Section 8.3.i sets forth criteria for the evaluation of vegetative cover.

Comment: 8.3.g.1.a.3.(a) - (d) How long do these limits have to be in place?

DEP response: According to section 8.3.g.1.A.3, maintenance of the cover crop shall be carried out by the operator until the cover crop is adjudged by the Director (in accordance with section 8.3.i) to be satisfactory. The operator is required to review all areas he has under permit prior to the recognized spring and fall planting seasons and cause those areas deficient in vegetation to be retreated.

Comment: 8.3.g.1.b.1 "...require the following is required." is confusing.

DEP response: DEP agrees and will revise section 8.3.g.1.B.1 to read "Establishment of plant growth for woodland cover on favorable minesoil material prepared for woodland and wildlife use should require the following:"

Comment: 8.3.I.3 Do these requirements pertain to the entire permit area or just the areas planted incrementally?

DEP response: The requirements of section 8.3.i.3 pertain to all areas of the permit for which revegetative efforts are required by the Law and/or Rules. The subject areas are generally the regraded disturbed areas requiring a temporary or permanent vegetative cover as specified in the approved permit.

Comment: 8.3.I.4 Same as 8.3.I.3

DEP response: The requirements of section 8.3.i.4 pertain to all areas of the permit for which revegetative efforts are required by the Law and/or Rules. The subject areas are generally the regraded disturbed areas requiring a temporary or permanent vegetative cover as specified in the approved permit.

Comment: 8.3.I.5 This should include partial releases.

DEP response: There is no statutory provision for partial releases.

Comment: 9.2 What is the purpose of a progress map? How often will they be required? Could air photos be substituted?

DEP response: The purpose of a progress map is to accurately document the mining progress, disturbance, or revisions over a period of time and in a certifiable manner. A progress map is required to accompany each application for permit renewal. Permits are good for one (1) year. Also 22-4-7 requires that a progress map be submitted to the Director within thirty (30) days after the service by certified US Mail of a copy of an order from the Director requiring the progress map. It is possible that aerial photos could be used with prior approval from the agency.

Comment: 10.1.c The type of information that would "preclude approval" should be listed.

DEP response: It would be very difficult, if not impossible, to foresee every possible circumstance that may preclude approval of an application for the transfer or sale of a permit. The DEP prefers to keep the options open. Chapter 22, Article 4 gives opportunity for appeals by any person claiming to be aggrieved or adversely affected by any rule or decision of the Director.

Comment: 11.1.a "Any person" is too broad. This section should agree with the law.

DEP response: The correct and complete term stated in 11.1.a is "any person who may be adversely affected...". Similar wording is used in Chapter 22, Article 4, Section 21 in granting "any person claiming to be aggrieved or adversely affected by any rule or order of the Director" a right to appeal to the Surface Mine Board. Therefore, the DEP does not agree that the term is too broad. The DEP further believes that this section does agree with the law.

Comment: 11.1.d This sentence is confusing. Should it be two sentences with a period after "public hearing"?

DEP response: There appears to be a typographical omission of a comma after "notified". The DEP will revise section 11.1.d to read "Those requesting the public hearing shall be notified, and the date, time, and location of the public hearing shall also be advertised by the director in a newspaper of general circulation in the locality of the proposed mining at least one (1) week prior to the scheduled hearing date."

Comment: 11.2.d Reviewing the mining and restoration each year for the renewal is burdensome, particularly since the site is inspected every 15 days.
Areas disturbed prior to the effective date of this rule should be grandfathered.

DEP response: 22-4-6 allows annual renewal of permits "... if the operation is in compliance with the provisions of this article". 11.2.d assures that all provisions of the law and rules are in compliance by granting another level of review once a year beyond the field inspector and field supervisor. The DEP does not agree that areas disturbed prior to the effective date of this rule should be grandfathered nor exempt from any provision of law or rule. However, DEP will revise 11.2.d with an additional statement to read, "Areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: 11.2.e What is "significant"?

DEP response: Significant revision is defined in section 2.45 of these rules.

Comment: 11.2.e.5 How is this determined as significant?

DEP response: Section 11.3.b.1 requires that public notice be given for significant revisions.

Comment: 11.2.g It will be expensive and redundant to do a progress map yearly.

DEP response: Section 11.2.g provides that operations with no new disturbance or revisions since the last renewal may submit a notarized statement from the permittee stating that fact in lieu of a progress map. Those operations with new disturbance and/or revisions will be required to document and certify as correct the information set forth on the progress map as a part of the permit renewal application.

Jones & Jordan Engineering

"Review of Proposed Quarry Regulations - revised copy of original June 2, 1999 Draft (Rule Title 38CSR2A)"

Comment: 2.5 Approximate Original Contour (AOC) is now defined in the latest revision, but is defined as per coal surface mining regulations. AOC generally cannot be applied to a quarry due to the volume of material removed. The pits in a quarry generally could not be brought back to +/-50' without massive costly earthmoving and adequate supply. This could be applied to ancillary areas though the introduction of the concept is unnecessary. Quarries present a set of unique reclamation requirements that AOC should not be a consideration for.

DEP Response: The section 2.5 definition of Approximate Original Contour (AOC) makes no mention whatsoever of a +/- 50 feet standard. This definition does state that whatever backfilling and grading is done will resemble the general premining surface configuration and will blend into and compliment the surrounding drainage pattern. Requirements for backfilling, grading, and highwall elimination, as well as appropriate exemptions and waiver provisions, are given elsewhere in the rule. Otherwise it is noted that the reference to approximate original contour in 22-4-13 pre-dates the federal coal law by several years.

Comment: 2.12 This time should be increased – two months does not even allow for winter idle time. This reg could cause unnecessary paperwork and enforcement action.

DEP Response: DEP will revise the "Completion of Mining" standard to allow three (3) consecutive months of inactivity without an approved inactive status. Three (3) consecutive months constitute one quarter of a calendar year. After this three (3) month period of inactivity without an approved inactive status, the Agency may issue a notice declaring completion of mining, after which the company has thirty (30) more days in which to respond.

Comment: 2.40 Reclamation should not be tied to AOC for a quarry operation. AOC is now defined in these regulations but with a coal/surface mining philosophy which has little applicability for a quarry due to the large amount of material removed versus the spoil generated. Recommend wording such as "backfilling to meet the reclamation of restoration plan." Additionally, the introduction of the new term "restoration" is disturbing and unnecessary. Reclamation is sufficient to describe all backfilling, grading and revegetation.

DEP Response: DEP recognizes that there are significant differences between coal mining and other types of mining. However, there are also significant similarities. The technology and environmental standards proven to work in the similar aspects of coal and quarries should not be shunned. Otherwise it is noted that the "approximate original contour" concept has been in the current quarry law at 22-4-13 since 1971. This pre-dates the federal coal mining act. 22-4-2(k) exempts limestone, sandstone, and sand from "reclamation" requirements. The term "restoration" is used by the current quarry law in sections 22-4-1, 22-4-9, and 22-4-13. It is not a new term, having also been in the law since 1971.

Comment: 3.3 100' spacing could be excessive here, especially for a long road. This should be site specific and be worded as to be "adequately visible."

DEP Response: DEP does not believe that flagging the centerline of proposed roads at 100 feet intervals in undisturbed area is excessive. This aids the reviewing personnel to better see the proposed path of new transportation facilities. Existing roads are exempt from this requirement.

Comment: 4.3 Written notification is excessive as presented. If this is a one-time notification with the permit application it should so state. Is the intent yearly or prior to each shot? This could be a very expensive and unwieldy regulation.

DEP Response: This section states "...prior to mining operations..." written notification will be given. Proof that this has been accomplished would satisfy this requirement for existing operations. The permit could be issued for many years before mining operations begin. The requirement for written notifications would have to be satisfied before mining operations began.

Comment: 4.4.c.17 This appears to routinely require seismographic and air blast monitoring which should be site specific. This also appears to conflict with 4.5.f.

DEP Response: 22-4-11 provides quarries with the option of using a seismograph. When a seismograph is used, the blast record must contain the required seismograph data required by 22-4-11 and section 4.4.c.17 of the rules. Section 4.5.f says the director may require a seismograph recording of any or all blasts based of certain conditions. DEP sees no conflict between the two sections.

Comment: 5.3.a Though this is waiveable, it should also be site specific to allow for existing operations where above highwall ditching might be unnecessary and dangerous to construct.

DEP Response: Section 5.3.a is waiveable.

Comment: 5.4.a This section appears to preclude the use of pit drainage control though it is later mentioned in 5.6. This section should be reworked to allow the "evaluation of pit storage and monitoring of overall capacity" for site drainage control.

DEP Response: This rule pertains to sediment control from permitted areas. If the permitted area includes disturbed area that is not stabilized, then that area must be accounted for in the sediment control plan with a minimum designed storage capacity of .125 acre-foot per acre of disturbed area. DEP recognizes the value of in-pit drainage control. However, there must be a "pit" before one can have "in-pit" drainage control. Sediment control must be provided for disturbances made prior to the time that a pit of sufficient size to allow in-pit sediment control exists.

Comment: 5.9 Water replacement rights have been strengthened from the first draft. This replacement is now based upon "determination of a hydrologist of the Office of Mining and Reclamation "at the written notice by the Director." This appears to allow a totally in-house agency assessment and decree possibly without consideration of an outside consultant or company assessment. This could be very biased and potentially costly for situations with little background data or hotly contested public participation. This situation could be offset by allowance for company input on the problem and the remedy.

DEP Response: The DEP hydrologist is required to perform the necessary studies and tests to make a determination of proximate cause. The company should have an opportunity to present evidence to the DEP hydrologist, possibly to include outside consultant assessment, during this process. Furthermore, the law provides that any person believing to be aggrieved by a decision of the director may appeal to the Surface Mine Board.

Comment: 6.9 Inactive status of one year is not sufficient. This should be considered on a case by case basis or at least tied to the expected life of the quarry.

DEP Response: 22-4-6 mandates that a permit is valid for one (1) year from date of issue. It is not reasonable to approve an inactive status for a period longer than for which the permit is valid.

Comment: 6.10 This entire section appears to relate to surface coal mining operations (augering, highwall mining?). This method of reclamation timing will not work on a quarry and this section should be deleted or at least revised to match the completion of operations or quarrying or use the reclamation/restoration plan .

DEP Response: DEP chooses not to preclude mining technologies such as augering or highwall mining from possible inclusion at quarry operations. DEP expects each mining and reclamation/restoration plan to be site specific. 6.10.c states "should the particular site conditions... make adherence to these guidelines impractical the period of time or the distance required to be current may be reasonably extended". Additionally, coal removal is legal in WV on quarries so permitted and where coal production is less that sixteen and two-thirds of the commercial production.

Comment: 7.1.B.1 A "professional specialist" is not defined. Fill design is as important as construction and should be carried out by or under the supervision of an RPE. Revision there would make this section correspond with construction sections presented later.

DEP Response: Section 7.1.b.1 speaks about an "approved professional specialist". This term is analogous to "approved person" as defined at section 2.4 of these rules. DEP recognizes the importance of fill design. Section 9.6 provides the requirements for an "approved person" status.

Comment: 7.2.E.1 This area should not be limited to 3.0 acres. This does not allow for difficult foundations or special cases such as soil removal from a broad valley. This should be eliminated or made site specific based on fill size with a waiver option.

DEP Response: A three (3) acre limitation on clearing the valley fill site prevents the entire area from being disturbed before fill construction begins. Special cases will be evaluated in the mining plan as a permit condition, if necessary.

Comment: 7.2.e.2 This type fill core is wasteful of the mineral being mined. This should be handled on a site specific basis with side hill fills or hollow fills constructed as coal refuse disposal types (both are mostly shales and fines) being used as possible. This can further be developed as extensions of the bench for some post mining land uses.

DEP Response: Section 7 is "Excess Spoil Disposal". By definition, spoil is not "the mineral being mined", but is that material of any nature overlying or separated from the mineral being mined as undesirable. Section 7.2.e.2 deals with spoil disposal, not products being produced for the market.

Comment: 7.3 This entire section should be rethought as the 80% durable rock necessary is the marketable commodity. Again, the use of side hill fills, hollow fills of refuse disposal type construction and configuration and creative reclamation and post mining use is preferable.

DEP Response: Section 7 is "Excess Spoil Disposal". By definition, spoil is not "the mineral being mined", but is that material of any nature overlying or separated from the mineral being mined as undesirable. Section 7.3 deals with spoil disposal, not products being produced for the market.

Comment: 7.3 If this section is retained, the wording "single lift fill" should reflect the potential to be a single construction fill with multiple cut-in faces and benches.

DEP Response: Section 7.3.e addresses the requirements for the face and benches.

Comment: 7.3.1.2 This section should consider the use of drying areas atop the current fill lift as done with coal refuse and/or specify preferable locations and options.

DEP Response: Section 7.3 is "Durable Rock Fills", which by definition are 20% or less non-durable rock. This proposes introducing mud, silt, and sediment into the fill. This activity is prohibited by section 7.3.I.2.

Comment: 8.3.e This section is not well defined as to timing though its intent is clear. It would be better suited to quarry operations to be tied to the completion of operations or the reclamation/restoration plan.

DEP Response: Section 8.3.e states that "Seeding shall be concurrent with the operation as mining and restoration progresses." It is tied to the reclamation/restoration plan.

Comment: 11.4.d.5 This section is too restrictive and should allow for situations with no contiguous aspects to allow for future situations that are certain to occur (i.e. ponds, infrequently used access from a county road, office sites, etc.).

DEP Response: DEP does not agree. The purpose of a site specific mining plan is to consider and address the needs of an operation over the operational life span. Off-site offices are not required to be permitted. All roads connecting to the permit would be contiguous by definition; as would all drainage structures, since no drainage may leave a disturbed area of a permit without first passing through an approved drainage structure. Non-contiguous mining areas would need to be addressed through new permit applications.

ESI Engineering Services, Inc.

"Review of Proposed Quarry Regulations - Draft of 6/2/99."

Comment: 2.11 This time should be increased – two months does not even allow for winter idle time. This reg could cause unnecessary paperwork and enforcement action.

DEP Response: Section 2.11 is the definition of a berm. There is no mention of a time standard in the definition of a berm.

Comment: 2.40 Reclamation should not be tied to AOC for a quarry operation. AOC is not even defined in these regulations and has little applicability for a quarry due to the large amount of material removed versus the spoil generated. Recommend wording such as . . . "backfilling to meet the reclamation or restoration plan". Additionally the introduction of the new term "restoration" is disturbing and unnecessary. Reclamation is sufficient to describe all backfilling, grading and revegetation.

DEP Response: Approximate Original Contour (AOC) is defined in the proposed rule at section 2.5 The term "restoration" is used by the current quarry law in sections 22-4-1, 22-4-9, and 22-4-13. It is not a new term, having been in the law since 1971. Additionally, the concept of approximate original contour has been in the current quarry law since 1971 at 22-4-13. This pre-dates the Surface Coal Mining and Reclamation Act.

Comment: 3.3 100' spacing could be excessive here especially for a long road. This should be site specific and be worded as to be "adequately visible".

DEP Response: DEP does not believe that flagging the centerline of proposed roads at 100 feet intervals in undisturbed area is excessive. This aids the reviewing personnel to better see the proposed path of new transportation facilities. Existing roads are exempt from this requirement.

Comment: 4.3 Written notification is excessive as presented. If this is a one-time notification with the permit application it should so state. Is the intent yearly or prior to each shot? This could be a very expensive and unwieldy regulation.

DEP Response: This section states "...prior to mining operations..." written notification will be given. Proof that this has been accomplished would satisfy this requirement for existing operations. This notification may not be required to be submitted with the permit application since the permit could be issued for many years before mining operations begin. The requirement for written notifications would have to be satisfied before mining operations began.

Comment: 4.4.C.17 This appears to routinely require seismographic and air blast monitoring which should be site specific. This also appears to conflict with 4.5.f.

DEP Response: 22-4-11 provides quarries with the option of using a seismograph. When a seismograph is used, the blast record must contain the required seismograph data required by 22-4-11 and section 4.4.c.17 of the rules. Section 4.5.f says the director may require a seismograph recording of any or all blasts based of certain conditions. DEP sees no conflict between the two sections.

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should be deleted or at least revised to match the completion of operations or quarrying, or use the reclamation/restoration plan.

DEP Response: DEP chooses not to preclude mining technologies such as augering or highwall mining from possible inclusion at quarry operations. DEP expects each mining and reclamation/restoration plan to be site specific. 6.10.c states "should the particular site conditions... make adherence to these guidelines impractical the period of time or the distance required to be current may be reasonably extended". Additionally, coal removal is legal in WV on quarries so permitted and where the coal production is less than sixteen and two-thirds of the commercial production.

Comment: 7.1.h.1 A "professional specialist" is not defined. Fill design is as important as construction and should be carried out by or under an RPE. Revision here would make this section correspond with construction sections presented later.

DEP Response: The rules under review do not contain a section 7.1.h.1.

Comment: 7.2.e.1 this area should not be limited to 3.0 acres. This does not allow for difficult foundations or special cases such as soil removal from a broad valley. This should be eliminated or made site specific based on fill size with a waiver option.

DEP Response: A three (3) acre limitation on clearing the valley fill site prevents the entire area from being disturbed before fill construction begins. Special cases will be evaluated in the mining plan as a permit condition, if necessary.

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DEP Response: Section 7 is "Excess Spoil Disposal". By definition, spoil is not "the mineral being mined", but is that material of any nature overlying or separated from the mineral being mined as undesirable. Section 7.2.e.2 deals with spoil disposal, not products being produced for the market.

Comment: 7.3 This entire section should be rethought as the 80% durable rock necessary is the marketable commodity. Again, the use of side hill fills, hollow fills of refuse disposal type construction and configuration and creative reclamation and post mining use is preferable.

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DEP Response: Section 7.3 is "Durable Rock Fills", which by definition are 20% or less non-durable rock. This proposes introducing mud, silt, and sediment into the fill. This activity is prohibited by section 7.3.I.2.

Comment: 8.3.c This section is not well defined as to timing though its intent is clear. It would be better suited to quarry operations to be tied to the completion of operations or the reclamation/restoration plan.

DEP Response: Section 8.3.c is the "Function of Temporary Cover Crops" and states that "...rapid establishment of vegetative cover shall be required." Timing of this is addressed elsewhere in the rules.

Comment: 11.4.d.5 This section is too restrictive and should allow for situations with no contiguous aspects to allow for future situations that are certain to occur. (i.e. infrequently used access from a country road, office sites, etc.).

DEP Response: DEP does not agree. The purpose of a site specific mining plan is to consider and address the needs of an operation over the operational life span. Off-site offices are not required to be permitted. All roads connecting to the permit would be contiguous by definition; as would all drainage structures, since no drainage may leave a disturbed area of a permit without first passing through an approved drainage structure. Non-contiguous mining areas would need to be addressed through new permit applications.

Law Offices, Robinson & McElwee, L.L.P.

"Comments of the West Virginia Crushed Aggregates Council on 38 CSR 2A, Proposed Rules for Mining and Restoration for Sandstone, Limestone, and Sand."

Comment: I) The proposed rules exceeds its statutory authority by imposing reclamation requirements on Limestone, sandstone, and sand quarrying operations. (et al.) [Note: The notation "et al." is meant to recognize that a discussion accompanied the comment, but was left out here for the sake of brevity.]

DEP Response: DEP notes that the very first sentence of the very first paragraph of the very first section of Chapter 22, Article 4, Code of WV (the Act) grants the Division of Environmental Protection "...jurisdiction over all aspects of surface mining and with jurisdiction and control over land, water and soil aspects pertaining to surface-mining operations, and the *restoration* and reclamation of lands surface mined and areas affected thereby." It is also noted that the term "restoration" appears in the Act ahead of the term "reclamation" and that the two terms are separate and distinct. The term "restoration" appears three more times in the Act: 22-4-9, entitled "Alternative Plans; Time" speaks of "...if such *restoration* will be consistent with the purpose of this article." 22-4-9 elsewhere states that "The purpose of this section is to require *restoration* of land disturbed by surface mining to a desirable purpose and use." 22-4-13 entitled "Obligations of the Operator" states that "Additional *restoration* work may be required by the director, according to rules adopted by the director."
(emphases added)

22-4-2(k) exempts limestone, sandstone, and sand operations from reclamation provisions. 22-4-2(k) does not exempt such operations from restoration requirements to return the land to a desirable purpose and use (22-4-9) or other restoration work that may be required by the director, according to

rules adopted by the director. (22-4-13) (emphasis added) DEP distinguishes the two terms by definitions in the proposed rule, by which "restoration" is a much lesser standard than "reclamation". DEP believes that to return disturbed land to a stable, usable condition for future generations is simply a policy of good stewardship of our earth.

Comment: As a general comment, the repeated use of the Surface Coal Mining and Reclamation Act as a model for quarrying operations is disturbing and misplaced. Operators have repeatedly pointed out the distinctions between coal mining and quarrying. We urge the DEP to cease borrowing from statutory and regulatory provisions crafted for coal mining.

DEP Response: DEP recognizes that there are significant differences between coal mining and other types of mining. However, there are also significant similarities. DEP prefers to emphasize the similarities and utilize proven technologies and standards when appropriate and discard the differences as not applicable. The technology and environmental standards proven to be of value for the similar aspects of coal and quarries should not be arbitrarily ignored nor shunned. Additionally, coal removal is legal in WV on quarries so permitted and where the coal production is less than sixteen and two-thirds of the commercial production.

Comment: I.A. The Code's use of the term "reclamation" exempts limestone, sandstone, and sand quarries from all restoration activity. (et al.)

DEP Response: In the previous comment, a general objection was voiced to "borrowing from statutory and regulatory provisions crafted for coal mining." It would now appear that this comment attempts to use the WV Surface Coal Mining and Reclamation Act (SCMRA) and rules to define the term "reclamation" for quarries. The quarry law, 22-4, does not provide nor establish a definition of "reclamation". 22-4 speaks of restoration as well as reclamation. DEP notes that the very first sentence of the very first paragraph of the very first section of Chapter 22, Article 4, Code of WV (the Act) grants the Division of Environmental Protection "...jurisdiction over all aspects of surface mining and with jurisdiction and control over land, water and soil aspects pertaining to surface-mining operations, and the *restoration* and reclamation of lands surface mined and areas affected thereby." It is also noted that the term "restoration" appears in the Act ahead of the term "reclamation" and that the two terms are separate and distinct. The term "restoration" appears three more times in the Act: 22-4-9, entitled "Alternative Plans; Time" speaks of "...if such *restoration* will be consistent with the purpose of this article." 22-4-9 elsewhere states that "The purpose of this section is to require *restoration* of land disturbed by surface mining to a desirable purpose and use." 22-4-13 entitled "Obligations of the Operator" states that "Additional *restoration* work may be required by the director, according to rules adopted by the director."
(emphases added)

22-4-2(k) exempts limestone, sandstone, and sand operations from reclamation provisions. 22-4-2(k) does not exempt such operations from restoration requirements to return the land to a desirable purpose and use (22-4-9) or other restoration work that may be required by the director, according to rules adopted by the director. (22-4-13) (emphasis added) DEP distinguishes the two terms by definitions in the proposed rule, by which "restoration" is a much lesser standard than "reclamation". DEP believes that to return disturbed land to a stable, usable condition for future generations is simply a policy of good stewardship of our earth.

Comment: I.B. All post-mining slope, bench, grade, backfill and revegetation requirements should be deleted since they constitute "reclamation" from which sandstone, limestone, and sand quarrying are exempt. (et al.)

DEP Response: This comment appears to be drawing on SCMRA coal mining definitions to apply to quarries. The coal law and the quarry law are two separate and distinct acts. DEP differentiates between "reclamation" and "restoration" for quarries in that restoration is a lesser standard and simply requires that the disturbed areas of the permit be returned to a stable and useable condition. This is keeping with the tenants of good stewardship of our earth and land resources. Despite a few quarries being in operation for over one hundred years, one day in turn each quarry will cease operations. The concept of restoration simply requires the land to be left in a safe and useable condition for our predecessors. Otherwise, 22-4-10, "Limitations; mandamus" speaks of backfilling, grading , and reclamation as three separate and distinct activities; as does 22-4-13. "Obligations of the Operator."

Comment: I.C. Sections 7.1 and 7.1.E should be deleted since they require sloping and grading activity for spoil piles which was determined by the Surface Mine Board to be "reclamation." (et al.)

DEP Response: Neither WV quarry law nor rules have ever defined or recognized "piles". There are no criteria, construction specifications, or exemptions from law or rule for "piles" in current quarry law or rule. The concept of a "fill" and specifications for the proper construction thereof has been long established in current quarry rules. Section 7.1.e sets forth the construction standards for a fill used for "Disposal of Excess Spoil in Permanent Overburden Disposal Sites by Methods other than Valley or Head-of-Hollow Fills". 22-4-7 requires the operator to indicate the manner in which all permanent overburden disposal sites will be stabilized. The construction specifications outlined in Section 7 are to ensure stability. The DEP fails to see how this activity is prohibited by State Code. If these specifications are not allowed, then it will be difficult for the DEP to approve the construction of fills for excess spoil disposal. DEP will revise Section 11.2.d to say that areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: I.D. The definition for "fill" should be amended to exclude piles and the definition for "berm" should be amended to clarify that it is *not* a type of fill. (et al.)

DEP Response: The concept of a "pile" has never been recognized nor defined by WV quarry law or rules, past or present, in that there are no definitions, criteria, construction specifications, or exemptions from law or rule for "piles". Section 2.11 clarifies that a berm is a type of fill.

Comment: I.E. Removal of reclamation exemptions for limestone, sandstone, and sand mining operations is contrary to statutory authority. (et al.)

DEP Response: DEP disagrees. WV Code at 22-4-2(k) requires limestone, sandstone, and sand to be subject to separate rules to be promulgated by the director. The proposed rule does not remove the reclamation exemption from limestone, sandstone, and sand operations. It does however recognize the Code's requirement for restoration of disturbed lands.

Comment: II. Existing permitted quarry operations should be grandfathered. (et al.)

DEP Response: The DEP does not agree that areas disturbed prior to the effective date of this rule should be grandfathered nor exempt from any provision of law or rule. However, DEP will revise 11.2.d with an additional statement to read, "Areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

Comment: III. "Willfully" and "deliberate" should be redefined to more accurately reflect statutory intent. (et al.)

DEP Response: DEP will delete the definitions of "deliberate" and "willfully".

Comment: IV. The definition "berm" must be clarified to impose erosion requirements only on large, permanent berms. (et al.)

DEP Response: DEP believes that all berms should be protected against erosion by wind and/or water. It is noted that "temporary" berms may be in place for many years. 22-4-9 requires all cut fill slopes of the operation or haulageways to be seeded and planted in the proper season. This would include appropriate types of safety berms as part of a road. It is sound environmental practice to keep material where it is placed.

Comment: V. Period of inactivity for completion of mining and inactive status should be extended to at least 2 years. (et al.)

DEP Response: DEP will revise the "Completion of Mining" standard to allow three (3) consecutive months of inactivity without an approved inactive status. Three (3) consecutive months constitute one quarter of a calendar year. After this three (3) month period of inactivity without an approved inactive status, the Agency may issue a notice declaring completion of mining, after which the company has thirty (30) more days in which to respond. 22-4-6 mandates that a permit is valid for one (1) year from date of issue. It is not reasonable to approve an inactive status for a period longer than for which the permit is valid.

Comment: VI. Frequency of monitoring report submission to the Office of Mining and Reclamation should be every three months. (et al.)

DEP Response: DEP will rewrite section 5.6.a. to read "...A compilation of the foregoing information shall be submitted to the chief of the Office of Mining and Reclamation by the 20th day of the month following the sample period."

Comment: VII. The added definitions for "excess spoil" and the amended definition for "spoil" should be clarified. (et al.)

DEP Response: DEP believes the definitions contain the necessary degree of clarity as proposed.

Comment: VIII. Water replacement rights section should be deleted if unauthorized and, if retained, should be amended to (1) allow for the repair of water supply where appropriate and (2) provide opportunity for appeal. (et al.)

DEP Response: If a water supply is appropriately repaired and returned to former quality and quality, then it has in essence been "replaced". Nothing in section 5.9 would dictate that a water supply has to be replaced from another source if the original source can be made equal to what it was prior to being affected. Section 22-4-21 of the Code grants opportunity for appeal.

Comment: IX. The locations for preliminary tests for water quality should be clarified. (et al.)

DEP Response: DEP believes the sections contain the necessary degree of clarity. Section 5.6.a.1 requires a sample location on natural drainways above the proposed mining operation. Section 5.6.a.3 requires that any natural drainways that enter the stream adjacent to the proposed mining operation have a sample location upstream from the confluence (mouth) where the two drainways join. The location upstream of the confluence is chosen so as to be unaffected by co-mingling of the two waters.

The stream running adjacent to the operation has the potential to be impacted by the operation as it flows past the operation. Therefore, this stream is sampled upstream of any possible influence from the subject mining area to document the water quality before entering the potential mine influence area. These same streams are again sampled below the potential mine influence area to determine before and after quality differences of water flowing past the mine area. Section 5.6.a.3 is designed to document non-mining influenced water quality of any tributaries entering the drainways between the upstream and downstream monitoring points.

Comment: X. Section 5.6.b should be re-titled to better reflect the content of the section. (et al.)

DEP Response: Section 5.6.b is a holdover from current rules and has been in effect since at least 1983. It addresses the process to assess the adequacy of the treatment facilities for permit approval.

Comment: XI. All references to coal and logistics applicable only to coal mining operations should be removed. (et al.)

DEP Response: DEP disagrees. The definition of "surface mining" under the Surface Coal Mining and Reclamation Act (SCMRA), Chapter 22, Article 3, Code of WV, exempts those activities which "include 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" from regulation under SCMRA. There are some permitted quarries with coal on them in the state of WV. Acid producing materials have been found to occur at quarry sites, especially those associated with coal removal. Also, some sandstone, sand and clay mining operations have encountered acid producing materials.

Comment: XII. Objective criteria should be established to determine whether a cover crop is satisfactorily established. (et al.)

DEP Response: Section 8.3.i sets forth criteria for the evaluation of vegetative cover.

Comment: XIII. Vegetative cover evaluation should allow for partial release of the permit. (et al.)

DEP Response: There is no statutory provision for partial releases.

Comment: IX (?) An appeal process should be established for an operator to challenge a decision of the director. (et al.)

DEP Response: 22-4-21 grants "any person claiming to be aggrieved or adversely affected by any rule or order of the Director" a right to appeal to the Surface Mine Board. This provision has been in effect since 1971.

Comment: X. (?) "Significant Revision" definition should be clarified. (et al.)

DEP Response: DEP believes the definition contains the necessary degree of clarity as proposed.

Law Offices, Robinson & McElwee, L.L.P.

"Comments of the West Virginia Crushed Aggregates Council on 38 CSR 2B, Proposed Rules for Mining and Reclamation of Minerals Other than Coal, Limestone, Sandstone, and Sand."

Comment: I. The definition of "mineral" should be amended to mean all minerals *other than* limestone, sandstone, and sand. (et al.) [Note: The notation "et al." is meant to recognize that a discussion accompanied the comment, but was left out here for the sake of brevity.]

DEP Response: The term "minerals" is defined under the Code at 22-4-2(e) as "means clay, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metal or metallurgical ore: Provided that the term "minerals" does not include coal." DEP will delete the definitions of "mineral" from the proposed rules in favor of the definition in the Code.

Comment: II. The definition of reclamation should be broadened to mean "all backfilling, grading, sloping, and revegetation in accordance with the reclamation plan."

DEP Response: DEP believes the definition of reclamation when taken in the entire context of the rule is satisfactory.

Comment: III. Existing permitted quarry operations should be grandfathered. (et al.)

DEP Response: The DEP does not agree that areas disturbed prior to the effective date of this rule should be grandfathered nor exempt from any provision of law or rule. However, DEP will revise 11.2.d with an additional statement to read, "Areas that were disturbed and properly stabilized prior to the effective date of this rule will not be required to be reaffected.

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DEP Response: DEP believes the definition contains the necessary degree of clarity as proposed.

Dr. Jeff Skousen

Comments on proposed quarry rules.

Comment: Table one, Appendix. Sericea is a wonderful plant, but it is generally not used anymore. I would eliminate sericea from mixtures 7, 8, and 9 and substitute Birdsfoot Trefoil.

DEP Response: DEP agrees. Table one, appendix mixtures 7, 8, and 9 will be rewritten to replace sericea with birdsfoot trefoil. Also, Sericea will be replaced with birdsfoot trefoil in mixtures 1,2and3 in Table Three.

Comment: Replace sericea in mixture 4, Table One and Tall Fescue in Mixtures 4 and 5 in Table Three and replace with Orchardgrass.

DEP Response: Tables One and Three will re revised to reflect these changes.

Comment: On Table Three, replace "200 lbs. ammonium nitrate and 200 lbs. of triple super phosphate. " with 600 lbs. per acre of 10-20-10 or 10-20-20.

DEP Response: TableThree will be revised to reflect these changes.