

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #5

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DEC 9 10 12 AM '94

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

*Mining & Reclamation*  
Bureau of Environment/~~Division of Env.~~  
AGENCY: ~~Protection~~ TITLE NUMBER: 38  
CITE AUTHORITY: 22-1-3, 22-1-3a, 22-20  
RULE TYPE: PROCEDURAL INTERPRETIVE ☒  
EXEMPT LEGISLATIVE RULE  
CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES, NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED:

TITLE OF RULE BEING AMENDED:

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 10

TITLE OF RULE BEING ADOPTED:

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS Jan. 9, 1995

*Roger C. Hall*  
Roger C. Hall  
Special Asst. to Director



DIVISION OF ENVIRONMENTAL PROTECTION

10 McJunkin Road  
Nitro, WV 25143-2506

GASTON CAPERTON  
GOVERNOR

DAVID C. CALLAGHAN  
DIRECTOR

November 30, 1994

Ms. Judy Cooper  
Director, Administrative Law Division  
Secretary of State's Office  
Building 1, Suite 157K  
Charleston, West Virginia 25305

RE: 38CSR10 - Office of Environmental Advocate

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned Interpretive Rule with your Office.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "David C. Callaghan", written over a horizontal line.

David C. Callaghan  
Commissioner  
Bureau of Environment

DCC;RTH:cc

Attachment

*Interpretive*

FILED

TITLE 38

LEGISLATIVE RULE

DIVISION OF ENVIRONMENTAL PROTECTION  
BUREAU OF ENVIRONMENT

DEC 9 10 13 AM '94

SERIES 10

OFFICE OF ENVIRONMENTAL ADVOCATE

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**§38-10-1 General**

*Interpretive*  
**1.1. Scope** - This ~~legislative~~ rule governs and controls the qualifications, powers, and duties of the position of Environmental Advocate within the Division of Environmental Protection.

**1.2. Authority** - West Virginia Code §22-1-3, 22-1-3a, 22-20

**1.3. Filing Date** - December 9, 1994

**1.4. Effective Date** -

*Jan. 9, 1995*

**1.5. Incorporation by Reference - Federal Counterpart Regulations** - The Director has determined that there is no counterpart federal regulation. Due to the absence of a counterpart federal regulation, a determination of whether or not to incorporate by reference is not required, and the Director is not required to consult with the Environmental Protection Advisory Council on this rule.

**1.6. Determination of Stringency - Federal Counterpart Regulations** - The Director has determined that there is no counterpart federal regulation, and that the absence of a federal regulation is not the result of a specific federal exemption. This rule is not construed to be more or less stringent than federal regulations.

**1.7. Constitutional Takings Determination** - The Director has determined and does state that this rule does not constitute a constitutional taking of real property.

**§38-10-2 Appointment, Salary, and Qualifications**

**2.1. Appointment** - The position of Environmental Advocate will be a full-time position, will be appointed by the Director, and will serve at the will and pleasure of the Director of the Division of Environmental Protection in accordance with West Virginia Code §22-20-1.

**2.2. Salary** - The salary of the position of Environmental Advocate will be set by the Director and is subject to future adjustments at the discretion of the Director.

**2.3. Qualifications** - The Director will receive or solicit

applications for the position of Environmental Advocate from persons having the following minimum qualifications:

2.3.1. A citizen and resident of the State of West Virginia.

2.3.2. A graduate from an accredited college or university with a four-year degree in a field of study directly related to the qualifications, powers, and duties of the position as set forth in this rule.

2.3.3. A minimum of two years full-time or cumulative experience in work directly relating to environmental protection, or other public service work or experience which demonstrates the ability to carry out the powers and duties of the position as set forth in this rule.

2.3.4. A working familiarity with some of the legal requirements and programmatic functions of the Division of Environmental Protection.

2.3.5. A demonstrated ability to skillfully communicate (both written and verbal) in a public forum.

2.3.6. A demonstrated ability to use word processing software in a micro-computer environment.

2.3.7. A valid West Virginia driver's license.

#### **§38-10-3 Assignment of Duty Station and Support**

3.1. **Assignment** - The Environmental Advocate will be assigned by the Director to an Office within the Division of Environmental Protection.

3.2. **Support** - The Environmental Advocate will be provided with logistical support as follows:

3.2.1. Suitable office space within the Division of Environmental Protection Headquarters' Office.

3.2.2. Basic complement of office equipment and supplies.

3.2.3. Secretarial/clerical support as necessary to carry out the duties of the position.

3.2.4. Per-diem and travel expenses, in accordance with the rules of the Governor's Travel Management Office, as necessary to carry out the duties of the position.

3.2.5. Training and educational tuition, fees, and expenses as necessary to carry out the duties of the position.

3.2.6. Use of pool vehicles as available and as necessary to carry out the duties of the position.

**§38-10-4 Powers and Limitations** - The Environmental Advocate will carry out the duties of the position as set forth in this rule, and as prescribed by the Director in accordance with the following:

4.1. The Environmental Advocate will have direct access to the Director and may direct inquiries to and receive responses from the Director's executive staff and the Chief of each Office as necessary to carry out the duties of the position. The Environmental Advocate will also have access to technical information and be provided with technical assistance from DEP staff as necessary to carry out the duties of the Office. The Environmental Advocate will not request any information which is confidential, i.e., personnel records, corporate or trade secrets protected by statute, work product, etc., except as authorized by the Director. Any confidential information acquired by or in the possession of the Environmental Advocate will be kept in confidence, and the Environmental Advocate is subject to all statutes and regulations protecting such information from unlawful disclosure.

4.2. The Environmental Advocate ~~will~~ may consult with and request information from other agencies of state or federal government, as necessary to carry out the duties of the position.

4.3. The Environmental Advocate may make accessible to the public any information requested except confidential information as described in subsection 4.1 of this section.

4.4. The Environmental Advocate may attend open meetings, hearings, proceedings, etc., as necessary to carry out the duties of the position.

4.5. The Environmental Advocate may take such actions as deemed appropriate on behalf of any person, provided, That such action is lawful and is not in conflict with subsections 4.9 and 4.10 of this section.

4.6. The Environmental Advocate may provide advice and counsel to any person as necessary to carry out the duties of the position.

4.7. The Environmental Advocate will in cooperation with the Public Information Office prepare and/or distribute correspondence, documents, records, reports, etc., as appropriate and necessary to carry out the duties of the position.

4.8. The Environmental Advocate will be guided in all actions by the policy statement and the nine purposes set forth in West Virginia Code §22-1-1 (b).

4.9. The Environmental Advocate may not in any official capacity represent any person in, or file on behalf of any person, legal or quasi-legal actions, either in support of or opposed to the Division of Environmental Protection without the expressed approval of the Director, and under the supervision of the Division of Environmental Protection's General Counsel.

4.10. The Environmental Advocate may not in any official capacity organize public campaigns in support of, or in opposition to official positions taken by the Division of Environmental Protection on environmental matters, and will not in any official capacity actively participate in any such organized campaign.

**§38-10-5 Duties of the Environmental Advocate Office -** The Environmental Advocate will perform the duties of the position as follows:

5.1. Implement a process to evaluate public opinion on the quality and effectiveness of the functions of the Division of Environmental Protection. The evaluation process should be completed within six (6) months of the date of appointment to office and updated periodically.

5.2. Attend open meetings, public hearings, proceedings, and conferences to collect and distribute information on a range of environmental issues.

5.3. Systematically become familiar with, and acquire a working knowledge of all programmatic functions of the Division of Environmental Protection.

5.4. Provide advice and assistance to citizens seeking resolution of environmental problems. To conserve resources, the Environmental Advocate should concentrate on issues that have wide-ranging, state-wide implications, rather than on isolated or local issues unless they are of a precedent-setting nature.

5.5. Assist the Division of Environmental Protection to develop brochures outlining the services of the position, as well as other information efforts that are appropriately conducted in concert with the Public Information Office or the Director.

5.6. Participate in public service media programming on environmental issues.

5.7. Assist citizens with obtaining information, interpreting information, and directing citizens to sources of technical

information.

5.8. Assist and advise citizens on how to participate in state agency processes, such as public comments on rules, statutory amendments, draft permits etc..

5.9. Write articles for publication by the Public Information Office and other print media regarding advocate activities or areas of environmental interest.

5.10. Direct citizens to appropriate public legal resources such as referral services provided by legal services associations.

5.11. Attend executive and other agency staff meetings, where appropriate, and share information as appropriate.

5.12. Cooperate with the Director and the Division of Environmental Protection in reaching negotiated settlement of issues in dispute between the Division of Environmental Protection and citizens or citizens' groups.

5.13. Develop and submit to the Director an annual action plan for the coming year of position operation which contains realistically achievable objectives. The first year plan of operation will be completed within six (6) months of appointment. Each plan will be revised quarterly to accommodate changes in focus arising from public interest or programmatic needs.

5.14. Prepare an annual statement summarizing the accomplishments of the position to be published by the Public Information Office in the Division of Environmental Protection's annual report.

5.15. The Environmental Advocate will provide the Director with current information relating to citizens' environmental concerns. Such information may be of a general nature which is important to the State but should primarily be related to issues that are precedent setting and having state-wide implications.

**DIVISION OF ENVIRONMENTAL PROTECTION**  
**PUBLIC HEARING ATTENDANCE RECORD**  
**ENVIRONMENTAL ADVOCATE**

July 18, 1994  
Training Center, #10 McJunkin Road  
Nitro, West Virginia

| <u>Name</u>       | <u>Address</u>                               | <u>Comment</u> |
|-------------------|----------------------------------------------|----------------|
| Missy Woolverton  | 909 Somerset Drive, Charleston, WV 25302     | N              |
| Marta Steenstra   | 1001 Valley Road, Charleston, WV 25302       | Y              |
| K. O. Damron      | 203 Carrington Drive, Hurricane, WV 25526    | Y              |
| Steve White       | 523 Central Avenue, Charleston, WV 25302     | Y              |
| Karen Price       | 2001 Quarrier St., Charleston, WV 25302      | Y              |
| Joy Allison       | Rt. 1 Box 855, Chester, WV 26034             | Y              |
| Norm Steenstra    | 1324 Virginia Street, East, Charleston, WV   |                |
| Shirley Skaggs    | 209 28th Street, S.E., Charleston, WV 25304  | Y              |
| Ken Ward          | 1001 Virginia Street, Charleston             | N              |
| Chris Stadel      | 1001 Virginia Street, Charleston             | N              |
| Norman Kilpatrick | Box 5024, Charleston, WV 25361               | Y              |
| Jennifer Pauer    | 19 Bridlewood Road, Charleston, WV 25314     | N              |
| Mary Pauer        | 19 Bridlewood Road, Charleston, WV 25314     | N              |
| Mike McThomas     | Robinson & McElwee, Box 1791, Charleston, WV | N              |



Transcript of Public Hearing  
Office of Environmental Advocate  
July 18, 1994

**Farkas:** . . . hearing is on rules and regulations dealing with the Office of Environmental Advocate, Title 38, Interpretive Rule, Division of Environmental Protection, Bureau of Environment, Series 10, Office of Environmental Advocate. Before I go any further, I want to make a couple of introductions. To my far right is Laidley Eli McCormick, Deputy Chief of the Division of Environmental Protection. Coming back towards me is Roger Hall. Roger's Special Assistant to the Director. Sitting to my left is Bill Adams, who's General Counsel for the Division of Environmental Protection. Sitting in the audience is Wendy Radcliff, the Environmental Advocate for the Division of Environmental Protection.

Before I begin, just a couple of announcements. If anybody needs to use the bathroom, down the hall. First hall on the left before you get to the steps. If we run into any problems tonight and we have to leave the building, the door in the back ... well, that door's been closed. That door to the back. Or just throw that thing away over there. Anyway those are two exits over here. Or there's an exit to the outside of the building here down the end of the hallway. Out front on the table there was a sign-in, where you signed in there were two pieces of ... two documents for you. One is just a very quick abstract of what tonight's hearing is. The other's a copy of the proposed rules. Those are available for you if you'd like one. What we also have is a directory of the Division of Environmental Protection,

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Quick Guide to the DEP, listing the telephone numbers of district field offices and a organizational chart. This is available to you, and you can have it after the hearing.

We are going to conduct tonight's hearing in two phases. First will be the formal hearing. At that point, what the DEP will be doing is accepting your comments. At that stage of the hearing, you will be talking on the record, and the DEP will not be responding. We are just here to listen at that point, and everything will be put on tape. We will then close the formal hearing, and then we will conduct what we call an informal meeting. That is the opportunity for you to ask questions and for us to answer you. So the first part of the hearing, you talk to us, put your comments on the record. Second part of the meeting, it's an informal meeting, not on tape, not on the record, and we'll just engage in the conversation, question, and answer.

We have several people who have indicated a desire to speak tonight. And the first person who signed up to speak is Marta Steenstra. And when you come to the microphone, please state your name for the record.

**Steenstra, M.:** My name is Marta Steenstra, and I am a West Virginia coordinator for the Sierra Student Coalition. I attended the Sierra Club (Excomm ??) meeting last weekend, and they asked me to read these comments on their behalf.

Please consider these comments on behalf of the West Virginia Chapter of the Sierra Club regarding proposed regulations for the Office of Environmental Advocate. The Sierra Club has long advocated for an

environmental advocate position to help citizens respond to environmental issues, to represent our views, and to advocate on behalf of environmental protection. Unfortunately, the position described in these rules does not meet our idea of an advocate. Nor does it meet with the definition of an advocate under the concept that could be implied to Article 20 of Chapter 22 of the West Virginia Code. While that section of the Code does not have the clear and specific detail of earlier versions of the legislation, and nothing in the existing statute precludes the original concept adopted initially by the State Senate, the statute, nevertheless, clearly specifies that the office to be created is that of advocate. The powers and limitations, Section 4, and the duties, Section 5, lack any specific direction as to what the office shall advocate. Section 4.8 provides very general guidance but does not provide any direction beyond that provided to every other employee of the Division of Environmental Protection. Section 4.9 and 4.10 prohibits the advocate from legal and public advocacy or participation in any such advocacy. The duties of the advocate appear to be entirely duplicate of the DEP Public Information Office. I do not believe it was the intent of the legislature to create a duplication of effort since the DEP reorganization bill was specifically intended to eliminate unnecessary duplication. I suggest that the legislature intended to create an advocate for environmental protection because of their recognition that such an entity and such an attitude is currently lacking within the agency charged with environmental protection in West Virginia. Therefore, I recommend that the following changes be made

to these rules.

Section 2.3.3 - A minimum of two years full-time experience in work directly related to advocacy and environmental protection. This position is intended to be an advocate for environmental protection. Experience in (avoiding ??) environmental protection should not be counted toward this position. Since virtually all advocates of environmental protection are volunteers, the requirement for full-time experience should be stricken to prevent unnecessary restricting of the applicant pool.

Section 3.2 should be rewritten to set up careful boundaries to prevent a conflict of interest or appearance of political pressure in the director and/or other staff members of the DEP. This insulation from direct pressure is essential to the ability of the office to act as an independent advocate and has been a fundamental hallmark to the successful advocate positions in other states.

Section 4.8 should be expanded to add an explicit purpose statement defining the authority and duty to advocate on behalf of environmental protection. Currently, no such direction exists in these rules.

Section 4.9 and 4.10 should be deleted or at least should expressly (exempt ??) to advocacy actions. As currently written, the advocate is given the conflicting mission of being an advocate without being permitted to advocate either in court or in public.

Section 5.1, 5.5, 5.6, 5.7, 5.8, and 5.10 are primarily the responsibility of the Public Information Office created under Section 22-12.

Language should be added to specify that these duties of the advocate do not relieve any responsibility of the Public Information Office as the Lead Officer in this regard, and action by the advocate in this regard should be oriented toward the primary mission of environmental protection advocacy.

Section 5 should also include direct, explicit instructions to work with citizens and to advocate environmental protection in various local, state, and federal proceedings, including, but not limited to, permit application reviews, rules development and public hearings, monitoring, and enforcement actions, appeals, etc. Failure to resolve these issues will leave the Office of Environmental Advocate in the untenable position with conflicting guidance, inequitable resources, and an impossible mission. In short, unless repaired, these rules are a recipe for our failure. Responsibility for such failure cannot be avoided by those managing the DEP.

These comments were written by Jim Coates of the Legislative Chair of the Sierra Club. But as the coordinator for the West Virginia Sierra Student Coalition, I would like to add that the SSC would also like to see the position of environmental advocate free from political pressure and influence, financed through its own budget, and free to protect West Virginia from bad politics as well as environmental degradation. Thank you.

**Farkas:** Thank you. These microphones are a little sensitive, so you can back up just a bit. The next speaker is K. O. Damron.

**Damron:** Thank you for this opportunity to comment on the proposed rules relating to the Office of Environmental Advocate. I'm K. O. Damron, Vice President

of the Mining Reclamation Association. My comments tonight are on behalf of the more than 125 member coal companies and 200 associate member companies of the association. Since I'm submitting written comments, I'll be brief in my oral remarks.

First, let me remind you of the importance of coal mining to the residents of the state of West Virginia. A recent survey revealed that one out of every ten dollars in total wages paid in our state is paid by the coal industry. Also, one out of every three dollars of business tax collected in West Virginia comes from the coal industry. Therefore, every change in mining law or the staffing of the agencies enforcing mining law potentially could impact the coal industry negatively. That's why we pay close attention to every change in law or policy.

Our proposed amendments to the proposed rule, which are being furnished in written form, include the following:

First, relating to qualifications, we believe it is impossible for any candidate to be fully knowledgeable about the legal requirements and programmatic functions of this large and complex agency, therefore we recommend striking this requirement.

Next, relating to the expense reimbursement, we recommend inserting, "as approved by the director" to prevent this section from being interpreted as a blank check. We also apply the same logic to the topic of training and education by having all such activities to be approved by the director.

Our next eight amendments relate to the use of the word "will" in the section dealing with the duties of the advocate. We recommend the use of the word "may" in order to provide more flexibility for the director to utilize the advocate.

Our next two comments are interrelated. The advocate's duties should not include either gathering public opinion or serving as a legal referral agency. Since the job qualifications do not call for any background in public affairs, then why is this person to function as a public opinion clearing house? On the legal issue, let's let the Attorney General's Office serve as the State's law office. As to the development of a yearly plan, we recommend a quarterly plan instead, under the direction of the director.

The last duty we recommend you consider is the use of the advocate as a facilitator within the division, promoting the practice of remining and helping coal operators get remining permits. Since remining activities produce a post-mining plan that is more appealing in appearance of vegetation and always with permanent improvements to the quality of water discharged from the property, we think promoting remining activities would be the best use of the advocate.

Our last two comments relate to the process and the salary of the advocate. First, the process. The Division should have perfected these rules prior to the hiring of the first advocate. About the salary, at \$40,000 the advocate will be paid higher than any of your current service mining reclamation inspectors and higher than most, if not all, of your reclamation

supervisors. Due to the fact that the salary expense of the advocate are to come from existing appropriations to the Division this high salary may actually leave less money to pay the other employees and, therefore, may create a morale problem among the other employees.

Thank you again for this opportunity to comment on the proposed rules.

**Farkas:** Thank you. The question was asked, when does the comment period end.

At the conclusion of this hearing.

?: The written comment period?

**Farkas:** Yes. Regulations were filed in the Secretary of State's Office on June 16 and the written and oral period ends at the conclusion of the hearing. The next speaker is Steve White.

**White:** Hi, my name is Steve White, I'm the Director of the Affiliated Construction Trades Foundation. I've got a few brief comments in regard to these rules. First of all, I'm in favor of the environmental advocate position, however, as was stated in previous comments, I find that role of that ... the term advocate is not found in these rules and regulations. It seems that most of what's there with what DEP I would expect had not received from DEP employees already. That is, answers to questions, how to fill out a form or where to get a form, and that type of information the advocate position needs to be put into these rules. Specifically, Sections 4.9 and 4.10, of all these sections that are, seem to be contrary to the role of an advocate. They seem to tie the advocate's hands to be anything but an advocate. So I



strongly suggest that those be eliminated. If they weren't eliminated, then it would appear to me the advocate would have to be under some other office in the DEP to function as an advocate.

Also, the idea of employment at will under the director, I feel is a problem for the independence of the advocate, and I would suggest that some sort of term be set so that that person be appointed for a period of time and have ability to operate within that period of time without fear of being terminated other than for doing some other acts, illegal, or something that could be spelled out in their contract. Finally, I'd suggest that the rules need to be strengthened a little bit in terms of the advocate's access to the technical resources that the department has. The DEP has a lot of technical expertise. An advocate will never be able to form opinions or assist people from their own experience. They'll need to call on that expertise. It wasn't quite clear to me that the advocate would be able to ask staff to perform tasks for the advocate, or to form opinions, or carry out the advocate's duties. So, I think that should be a little clarified.

That's the gist of my comments. The rest of it's in writing here, so I would thank you.

**Farkas:** Thank you. The next person to speak is Karen Price.

**Price:** Thank you. I'm Karen Price, President of West Virginia Manufacturers' Association, and we appreciate the opportunity to comment on these regulations. Both the powers and duties of the environmental advocate resemble and duplicate what would normally be considered the requirements

of a public information officer. That is, collection and dissemination of information available from the agency in the form of assistance to citizens, response to complaints, preparation of press releases, and response to freedom of information requests. On the contrary, the WVMA believes that the statute contemplates and intends a very different role for the environmental advocate, mainly to acquire information from the public, from interest groups, national trends, and the like and condense and consolidate this information into a coherent package to present to the director. We have additional concerns with the broad authority granted to the advocate to request confidential information, trade secrets, etc. that may affect the economic development projects within the state.

We have several other concerns within the regulations that are delineated within our written comments, and we will submit those to you at this time. Thank you very much.

**Farkas:** Thank you. Shirley Skaggs.

**Skaggs:** Good evening, my name's Shirley Skaggs, and I would like to make a couple brief comments regarding the proposed interpretive regs. First of all, I'd like to make a comment that I would like to see added into this list a 1-800 number to be available to citizens throughout this state to have access when they cannot afford long distance phone calls to the environmental advocate's office. And that's based on a couple of personal experiences in the practice of law wherein I frequently, working in the environmental area, screen out calls for people who need help and have expressed their problems

with finances and asked direction for how to contact the DEP. And I think based on their own representations to me that they are in financial dire straits so to speak, that that would be a positive aspect that that office could offer individuals. And if that would be expensive to the agency, I might also suggest that maybe a general 1-800 number if there is one, it could be used for that purpose.

On to the written regs that are before us. I'm talking specifically with regard to two regs, 4.9 first, wherein it sets out some restrictions on the environmental advocate's position that says they, "shall not file in behalf of any person, legal or quasi, shall not represent any person in or file on behalf of any person whose legal or quasi-legal actions without express approval of the director or the Division of Environmental Protection. I'm wondering if that's a very expedient way to handle some of the problems that may be brought to the attorney ... the advocate's office because I know the DEP is a very large organization, and that the environmental advocate will receive just tons and tons of requests for help. And the way environmental cases are very often complicated and fast-breaking, this may be an incredible amount of bottleneck to any kind of expediency that may need to be taken on behalf of the advocate. So I'm wondering if those are maybe stumbling blocks to the advocate in that office and its assistance to the public. I would suggest instead that the environmental advocate have an independent judgment provision placed instead of the one in this proposed reg to discriminate which matters they would become involved in in behalf of

citizens asking for their assistance.

And again on 4.10, there isn't even a provision for the advocate to approach any kind of administrative entity, be it the director or the general counsel, to purchase [inaudible] organize campaigns in support of or in opposition to official positions taken by the DEP. It says, "In support of or in opposition to," so that seems extremely limiting. And again might be a tremendous bottleneck to any effectiveness that the advocate's office may have in representing the citizens. And that's the summary of my comments at this time. Thank you.

**Farkas:** Thank you. Norman Kilpatrick.

**Kilpatrick:** I'd like to present two pages of comment and a number of exhibits to support these comments. I have copies for the press if there's any press here. The exhibits I'd like to mention for the record are an article about the National Coal Policy Project from *Fortune* magazine, a *West Virginia Hillbilly* article about the National Coal Policy Project, a roster from one of the (tours ??) of the National Coal Policy Project, a newsletter from the National Coal Policy Project, a letter to me from the head of the National Coal Policy Project, a letter from the US Environmental Protection Agency to the head of the National Coal Policy Project, a *Gazette* newspaper article about the advocate office being filled, the State Code that refers to the advocate office, which is the purpose of this hearing as I understand it.

My name is Marvin Kilpatrick, I'm the Director of the Surface Mining Research Library, Box 5024, Charleston, West Virginia, 25361. I've held

this position since the library was established by the Conservation Foundation in 1971. I would like to propose a significant addition to the duties of the environmental advocate office within the West Virginia Division of Environmental Protection. After having gone over the new rule proposed by the DEP to cover the new position, I'm confident that nothing in that portion of the state law establishing this post would prohibit the director from adopting this addition to the duties and required background of the environmental advocate as set forth in Chapter 22, Article 20 of the West Virginia Code. I'm also encouraged because this position and its related duties are not required by any federal law or regulation that requires approval of the US Environmental Protection Agency, the Office of Surface Mining, or some such other agency.

Thus, my proposal can be adopted immediately by the DEP and help improve the environment of West Virginia as well as shape the history of the environmental advocate from its start. My proposal is based on my experience as the only West Virginian serving on the National Coal Policy Project from 1977 to 1980, also from my experience since then as an independent coal consultant [inaudible]. All this has convinced me that it is possible to eliminate some of the harsh statements and ill feelings between industry representatives regulated by the DEP and the environmental and citizens groups that often have concerns about projects proposed by the regulated industries. My experience has convinced me that most environmental groups at the grassroots are not seeking to force those

looking for new or expanded job opportunities to move to North Carolina as some industry representatives seem to believe. Nor are most landfill developers waiting to slip toxic waste or some such thing into a landfill not intended to contain such items, as some environmentalists may believe. I am convinced that in a number of cases what citizen groups with environmental concerns want may be agreeable to the industry or businesses involved if a proper discussion between the two camps can be arranged. The shortcoming of these regulations is that it doesn't provide for that. When you read them carefully, it just doesn't.

This is most important when environmental groups seek something that goes beyond the maximum requirements the DEP can require for a particular disposal operation, mine site, or well. Thus, I propose the environmental advocate position include a conflict resolution duty and add a requirement for experience in this method of promoting environmental concerns. Conflict resolution stimulators have a long and honored history as far as I can see. The National Coal Policy Project dealing with environmental groups and coal producing groups was one example. More recently the US government utilized a top negotiator to help end the last Bituminous Coal Operators United Mine Workers of America national strike. You may recall that. I can see the problems the environmental advocate dealing with often coming down to a situation where that [inaudible] has to say, "Look, the DEP cannot require the industry in question to do what you want. You will have to sue or go home." I believe this state would be well served, and the

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environmentalists and the industry representatives involved better served, by the environmental advocate being able to in charge to go beyond the letter of the law type of answers to try and develop negotiated settlements where they're possible. The National Coal Policy Project was governed by the rule of reason and an agreement that coal mining in a reasonable manner was to be encouraged. It produced several documents related to the 1977 National Surface Coal Mining Act and related issues entitled, "Where We Agree." Some of these agreements were brought to the Congress for legislative action. It also produced a list of items where it was determined that the environmental forces—I was a member of the environmental side, I should note—and the coal producers and their associations could not agree. In fact, some groups that want to block proposed projects at all costs are not candidates for conflict resolution, it should be stated. Nor will negotiations always reach a successful compromise or result. I certainly am not suggesting lawyers will go out of business if my proposal is adopted. But if a local group wants to see treaties on land to be disturbed by a project subject to DEP review, yet the division can only require vegetative cover of grass, surely it would be to the advantage of all to allow the environmental advocate to bring the two parties together for discussions. Creating wet lands or providing wild animal cover from project sites are other examples where a company might agree to spend more money to meet the environmental group's demands under the proper circumstances.

I enclosed an article from *Fortune* magazine about the National Coal

Policy Project for your consideration. Although it deals with coal mining, the approach represented here surely can be applied to other industries as well, which the DEP regulates. The DEP is limited by the law and the courts in what it can do and not do. Thus, some of the criticisms of it are unfair, it seems to me. Involvement of the environmental advocate in bringing the condemning parties—environmental-citizen groups and industry—together in negotiations surely has to be to the division's advantage. And it will, as the National Coal Policy Project did, allow the parties to start seeing each other as human beings, not devils whose only goal is to do the others in. It also should help both sides understand the others' concerns outside of the legal framework that [inaudible] requests the DEP, etc., must be broadened and opposition must also be presented. West Virginia needs more light on such environmental conflicts and less heat. Thus, I urge the DEP to amend the rules for this position to include a strong conflict resolution and a [inaudible] job requirements and a requirement that the holder of the position have a background that allows him or her to be credible with both environmental groups and industry organizations as well as having experience in this approach to help improve the environment. Surely this will be in the best interest in the state of West Virginia and its people.

**Farkas:** Thank you. With that, that concludes the list of speakers that we have.

Wait a second. Wait a second. I am now going to open it up for those people who did not sign up prior to the hearing. Those people who wish to make a comment may come forward one at a time, announce who they are



in the microphone, and please present their comments. I guess you're first.

Please announce who you are.

**McThomas:** My name is Michael McThomas.

**Farkas:** You said no ... you said no.

**McThomas:** I said no. I just don't want to get this off the record. I have problems with the Oil and Gas Association investigation.

**Farkas:** Okay. All right. Next.

**Grubb:** My name is David Grubb. I am the Executive Director of the West Virginia Citizen Action Group. Eli, you're not going to turn the mike off, are you?

**Eli:** I can.

**Grubb:** What's the time limit here?

**Farkas:** I'm in charge of the microphones.

**Grubb:** I'm also State Senator representing the eighth senatorial district, which is all of Kanawha County. I'll start out by saying to my friend K. O. Damron, who's probably surprised to see me here because I think he was under the impression that somehow my head was severed from my body at the end of the last session.

**??:** Wishful thinking.

**Grubb:** Yes, I guess it must be wishful thinking. I don't know how many saw the cover illustration on the last issue of the *Coal Bell*. It was perhaps one of the more gory, gruesome things that my children have seen in recent memory. I'm going to start out with my comments by just saying the obvious, and that is ... and it's obviously a conclusion of how the legislation

developed and how it ultimately passed, that this is not an advocate position. This is a position that is something short of that. It's a liaison, it's perhaps an ombudsman, perhaps an office of public information ... not to tread on your turf, Mr. Farkas. But let me just say that, having said that, I think that's the product of what happened in the session. I do want to go back and review very briefly the legislative history. Not so much as it impacts this rule but simply because in several years there will be an opportunity to reevaluate and to analyze the success of this office, and I hope that when we're dealing with this in the legislature in 1997 or sometime thereafter, that the agency will perhaps have a more favorable of the idea, the original idea, of an environmental advocate. And let me say that that original idea was encompassed in legislation that dates back many years. Back when I was a member of the House of Delegates, House Speaker Chuck Chambers and I introduced a piece of legislation that would have created an Office of Environmental Advocate. The concept then—and some of you may recognize these comments, too—I was in the midst of these comments the last night of the session and got cut off, so I'm actually picking up where I left off that night. The gist of the concept was that citizens, time and time and time again are outgunned. They're outgunned before regulatory agencies—it doesn't make any difference whether it's a water issue or an air issue. The fact is that the regulated industries have far more resources, and citizens find themselves at a tremendous disadvantage. Now every now and then on a celebrated case, a high profile case, the

environmental communities will muster a little resource, and they get some people together and mobilize grassroots support and put together a fairly credible, professional representation. However, by and large, when you look at what happens day in and day out, permit after permit, the citizens do not have that much representation. And the agency is acting many times like a fact finder. You're evaluating views from one side, views from another side, balancing those views and making a decision, rendering a decision consistent with the purposes of the statute. Well, the problem is is that in that process, one side has a lot more info going in than the other side, and it's just just balance, this lack of balance that was attempted to be addressed by legislation that was introduced many years ago. It was modeled after legislation, or what was at one time legislation but became simply a rule and a regulation of the Public Service Commission to establish a Consumer Advocate Division. For those of you that were active in the state back in the '70s, remember how contentious utility issues were. The consumer groups organized, tried to get involved, senior organizations, and intervened in case after case, but usually just the high profile cases. Again, very similar to the kinds of situations we have in the environmental sector.

In those cases where we were able to intervene, we would have an impact. The problem is that we would intervene in one case out of ten. The vast majority of cases we weren't able to intervene because we just didn't have the legal resources or the staff resources, the expertise on hand to be able to do a credible job. As a consequence, we began pushing for an

institutionalization of the process of advocacy, and that led to ... the culmination of that was the creation of the Consumer Advocate Division of the Public Service Commission, which has worked extremely well. And I think it served all parties. I think if you talk to regulated industries, they feel that the quality of information coming in is better than it has ever been before, that the fact finder was given more information and therefore able to make a more valid decision, a better decision, for the general public. And so it was with that in mind, and that experience in mind, that we offered the legislation. And it's important to understand that that position, the Office of Consumer Advocate of the Public Service Commission was very controversial at the time. Many PSC commissioners said it would never work, it would be terrible, it would be awful, can you imagine having an office within our division that can actually challenge us, can appeal our rulings to the Supreme Court. But that's exactly the kind of division they created. The ability to intervene, to take concrete (revisions ??) to staff, to take concrete (revisions ??) from the ultimate decision to be entered into by the Public Service Commission. To appeal those decisions to the state Supreme Court and ultimately, in some cases, the ability to appeal them to the US Supreme Court. It's that kind of flexibility that we felt was essential in the environmental advocate office. And that's why the original bill did not create the office within the DEP. Of course, at the time, there wasn't a DEP per se, a broad reorganized DEP. The idea was to put it within the Attorney General's Office. Now, from the time of introducing that legislation and the

point in this session when we started seriously considering the environmental advocate, a lot of things took place. But one of the most ... one of the events that led to the decision to push this during the session was an amendment that was offered by Senator McNaghten to create that exact position in the Attorney General's Office, an amendment offered to the DEP bill in the Senate Judiciary Committee. That amendment failed, and several senators came up to me afterwards saying if it wasn't within the AG's office, they'd be willing to support it.

So we went back, many of us in the environmental community and other senators, and sat down and said, "How can we structure this thing so that it would still be independent and have the features that we liked about it being within the AG's office but have it within the DEP because that's what many senators said to me they would support." We came up with the idea of an independent office within DEP, still appointed by the director so the director would still have some control, but with statutory functions delineated so that whoever the advocate was, they would have certain requirements, certain duties they would have to perform. And if they weren't performing those duties, they would be mandamus to do so. So we felt like that would provide the kind of independence that we were looking for. We offered ... I offered that amendment on the floor, it was adopted, and at that point pretty much the sky broke, and the ceiling started falling in, and it seemed like every lobbyist for every regulated industry in the state descended upon the capitol, and pretty soon we saw a movement to try to

modify the original legislation. And in the Senate we did modify it, but we kept one [inaudible] feature, which was that it would still be an attorney, but when the legislation and the finalized session came back over to us from the House, they had deleted that and had come up with the language that is currently the statutory law. I think that that change so changed the basic intent of the environmental advocate position, that it no longer even resembles that. It is not that original position. It is something different. However, the name stuck, and that's what we're dealing with today. I'm not going to reargue that. I just say these things to try to set the tone for what I hope will be future discussions with the agency and with the environmental community and with the regulated industry, for that matter, concerning the proper role of this sort of office in the future. Specifically turning to the language that has been presented, I could go through and cite hundreds of items that I would like to see changed, but they would again be going back to the original issue of what we thought we were going to get in an environmental advocate versus what we ultimately did get. And we lost that battle. So dealing with what we are dealing with now, I think there are a couple of changes that will make this position more worthwhile.

The first is looking at Section 4.10. I realize other commentators have discussed that. I think that the idea, of course, is one that gets at the independence and the idea is, do you want to have an environmental advocate that can organize public campaigns in support of or in opposition to official positions. Okay, granted, we lost that. Let's leave it at that. No,

we're not going to allow the person to organize public campaigns. But the latter part of that goes on to say, he will not participate in any such organized campaign. Now, the problem I have with that language is that I think it's ambiguous. It's not clear how that language will relate to the duties spelled out in Section 5. In fact, if you look at 5.4, 5.5, 5.6, 5.7, 5.8—all of those—in order to do those, it's very likely that that will be construed to be active participation in an organized campaign. In fact, when you think about what this uh person do that's an environmentalist when someone calls up and says, "I need help on this campaign to fight whatever or work on whatever." Really, the kinds of things that we do as environmentalists are the things that are spelled out in 5.4, 5.5, on to 5.8. Those are the kinds of things—providing assistance, advice—that is what I would think of as active participation. So I think you have two choices. One is to live with the inconsistency. Or three choices. One is to live with the inconsistency, which I think is ... is, uh, not acceptable. The second is to modify the language "active participation" and come up with some other word, or some other phrase that doesn't so narrowly tie the hands of the advocate that if they're doing their duties, they could actually conflict with 4.10. The third and preferable course, I think, would just be to eliminate that last, uh, uh, uh, clause, the conjunctive clause, "and will not actively participate in such organized campaigns." I think that if you leave it at "will not organize the public campaigns," that gets at what you're really concerned about. And it doesn't then raise the question of, "Has the

advocate gone over the line?" Well, somebody's involved in an organized campaign, and they call the advocate and they ask for assistance. It says they can give assistance. It says they can participate and do media things. They can develop and publish brochures on, on the position. They can assist citizens in obtaining information, interpreting information. They can guide citizens to proper legal resources. All of those things could be, could be considered to be active participation. Therefore, I think the best course of action would simply be to delete that.

The second comment, uh, is on 5.12. The language says, "Assisted Division of Environmental Protection in reaching and negotiating settlements." You know, I think all of those kinds of things are fine. The problem I have with that is that it adds the clause, "as required by the director." And I wonder what happens when, um, the environmental advocate believes that, uh, the negotiated settlement is inappropriate but is directed by the director to, in fact, negotiate the settlement. Um, it's not clear what would happen in that case if the advocate said, "Gee, I don't think that's an appropriate position or that's an appropriate settlement in this case." It seems to me, uh, to leave open the possibility of working on negotiated settlements without the clause "as required by the director" is really the intent, and I think would be more in keeping with the scope and the context of, uh, this regulation, um. Those are the only specific comments I have regarding the language.

I would like to make it clear, even though I've been somewhat critical



of the DEP in the past and perhaps critical of the way in which DEP played a role in the development of this position, the statutory language. I do want to say that every now and then you have to applaud someone when they do something right. And I think the appointment of Wendy Radcliff was a very, very good appointment. I think there was a temptation, and there must have been a temptation to not have appointed somebody that had the credibility that Wendy has. She, as you know, worked for Citizen Action Group, worked as my legislative aide and as a volunteer worked in my campaign for the state senate. She's somebody I know very well. And I think you couldn't have picked a better person, from the environmental community standpoint, to give credibility to this office. I dare say that had the appointment been of someone not of Wendy's caliber and we'd been here today discussing these, uh, regulations, I think the uh, tone of the presentations would have been a lot different. So, a lot of us, because of that appointment, are willing to give the agency the benefit of the doubt, and say, "Let's try to work through this." But in so doing, I hope that the agency will keep an open mind, and I hope that you will provide the flexibility to Wendy to do her job, but also to look at the regulation and the statute itself as we come up toward reevaluation, uh, and hopefully join in a dialogue which can lead to support for a change in the statute that will allow this office to be more independent in the future. Thank you very much.

**Farkas:** Anybody else wish to make a comment? Senator, did you have any written comments you wanted to submit?

Grubb: Uh, no.

Farkas: Uh, but you didn't indicate a desire to speak.

Steenstra, N.: My name is Norm Steenstra. I'm representing the West Virginia Highlands Conservancy and, uh, particularly will be paraphrasing our president Cindy Rank's comments in just a minute. Cindy writes: Being asked to comment on the interpretive rules governing the Office of the Environmental Advocate is like having asked for a cake, being served a pie, told it was a cake, and then asked what color of frosting you want on the cake. Commenting on the frosting implies that you think the pie is really a cake, when it isn't a cake at all and it will never be a cake. Yet, to refrain from commenting on the frosting or to object to the illusion of the cake implies no interest whatsoever in the pie itself. Ms. Rank goes on to mention four different points. I think we've covered most of those. I'll be very brief.

What is it she'd advocate or suggests a name change, other than the word advocate because I think everyone here believes that it is not, uh, what anyone thinks is the advocate, even if we went to Webster's or Funk and Wagnall's and looked up the definition of advocate. Ms. Rank is also very concerned about the interdependence and lack of independence from the director and political pressure and offers several comments in writing. She suggests that the qualification for four years of college degree for the position be dropped because many of the citizens who are, indeed, experienced in environmental advocacy have not had that benefit of of an

education, and that a four-year college degree, though helpful at times, is certainly not necessary to be an advocate for the environmental community.

She also suggests that you drop the section referring to negotiated settlements. Um, I'd like to end with her comment and then give you a bit from environmental community, uh, environmental council's respect .... Ms. Rank concludes her remarks: Thank you for the opportunity to comment on this rule. Our statements are made with the desperate hope that DEP officials, current and future, will not use the discretionary powers, the wide discretionary powers this rule confirms, confirms on them to abuse the position or persons appointed to the position of Environmental Advocate and further with the hope that the future administrations and legislators will see through the current film of deceit and create an independent Office of Environmental Advocacy as described in the attached copy of 1993's Senate Bill 262, which is, I believe [inaudible].

Um, on behalf of the West Virginia Environmental Council, I would just like to add a couple of points. I think you've heard a theme here today, um, that advocacy is not really the right way to term this. Um, that it certainly is a watered down version of what the Senate and House debated over the last several years and that the thread of credibility is basically who you picked and, um, also applaud the fact that you did pick Wendy Radcliff, and I believe that given the opportunity to act independently and to begin to redefine advocacy within the DEP, there will be additional credibility to that position.

One last thing I'd like to say is basically to comment further on a comment today, and that is the idea of including conflict resolution in the job description or in the rules. I hope you don't do that. We can't ... this is not perhaps an environmental advocate, but it certainly is not an environmental arbitrator, too. And that there's plenty of work to do as someone representing the environmental community or representing citizens without them being in that position to be an arbitrator. Thank you.

**Farkas:** I have a correction. I missed Joy Allison's name on this list. I apologize.

[Inaudible]

**Farkas:** Humm? All the way from Chester, West Virginia?

**Allison:** See, I'm still having problems dealing with the agency.

**Farkas:** At least we didn't forget you.

**Allison:** Well, I appreciate that. Um, listening to all this, and you do have my written comments, I just have a couple things that I would like to add to this. First, I guess, is a question, will the legislators, uh, receive a copy of the comments from this hearing? And I would like to put that in a request form that, in fact, there are minutes or notes written up and mailed to each and every one of them because I think this is . . . the opening across this state for probably some serious, uh, considerations for the citizens. And I'm just sitting here listening and thinking what, you know, what I've been through the last few years. I wish that this had been, like public meetings across the state for input because, and a lot of the citizens have, indeed, educated themselves in a lot of different areas in working with different

divisions and agencies and um, I think there has been a lot of input, valuable input, that could have helped ... and, you know, write a ... a good program here so that, in fact, the real purpose for I think this, uh, division or this department, uh, the advocate, could have been what it should have been, which was, indeed, to give the citizens someone to turn to to get that help that we so desperately need. Um, because in my personal experience, uh, if you pardon me, I think the "P" should be taken out of the DEP, and it should be called the ERA. I think it should ... Environmental Regulation Agency. Because from my experience, once a facility or whoever has went to the DEP for permits, then the agency evidently is required to get them in business, no matter what. No matter what the citizens say. So I think there is some serious lapse here that, you know, the DEP and whatever division it is, it's time to start seriously listening to the citizens. And, uh, the people, the most of the people across the state of West Virginia are only concerned about the environment and their environment around them. Uh, we're not enemies of industry. We're not trying to stop somebody from getting into business and providing jobs. But what we are trying to do is to take a real sensible approach to that and the first duty then for the DEP should be to look at, "Is this going to be a good location for this business? Should we just cut to the quick real fast and say, 'You can't locate 25 foot from a house if it's going to have an adverse effect on the citizen.'" And there's got to be then, in this structure of this advocate ... some kind of an open language for them to be able to get back to you. And I, if I understand

correctly, you're going to be able to make changes in this bill or in this position, is that correct? You know, I think there has to be real serious changes made so that, you know, the guy wanting to set up business down the street from the persons that live there or the farmer that lives, you know, within distance where he could be impacted whatever way, whether it's the groundwater, the well water, whatever. That has got to be the approach that we take to this. You know, West Virginia ... has to have, set a program that, you know, something was mentioned about the Attorney General's Office, but when I appeal a permit, actually the Attorney General is representing the person that issued that permit, which would be the DEP, so I have no help whatsoever from the Attorney General's office. So what I'm saying is that there has to be someone in that advocate position that, if they do not know the laws, that can research those laws, get that information, tell me where to turn, you know, give me a phone number so that I don't make six different phone calls and end up with the same phone number to call that I started with. And this happens. And what it does is discourage the citizen's participation in trying to protect their own health and their own environment and their families. We've got to get an openness about this whole program and, uh, let the people know that you're not going to get, um, turned down, stampeded, or whatever. That indeed there is, is, there is being set up in this state where all citizens are, are, are looked at equally and have that right, or someone to help them. And, um, you know, again, I think the common sense approach has to be the one that we take on

this. And if there's changes that needs made in there. You know, there's been a lot of good comments made here tonight, and I think that, that the changes that needs made has to seriously be taken and made and then let the people know that this is out there for them. Let's open up the environmental language in the state of West Virginia. Thank you.

**Farkas:** Is there anybody else who wishes to make a comment on the record?

[Pause] Anybody? Okay, with that we're going to conclude the formal hearing.

Post Office Box 1091  
Shepherdstown, WV 25443

June 27, 1994

WV Division of Environmental Protection  
10 McJunkin Road  
Nitro, WV 25143

Attn: Roger T. Hall

Sir:

This is in response to your notice of public hearing on July 18, 1994 regarding the establishment of an Office of Environmental Advocate.

Regrettably, I shall be unable to attend this hearing, but I do have some comments on the qualifications, duties and other factors about this position that I would like to have officially entered into the record.

First, I would like to ask whether other states have such positions in state government and whether copies of their regulations concerning duties, qualifications, etc. of such advocates have been obtained and studied prior to the rules for our state being firmed up. If not, then such a move is strongly recommended, as well as commentary on "what works, and what doesn't" from officials in those states.

My comments on the specific interpretative rule are as follows:

Section 38-10-2; Paragraph 2.3.4:  
The sentence, which includes the words "of the legal requirements" (of the DEP), is not understood. What legal requirements are meant, and, for clarity, a reference or explanatory sentence should be included.

Paragraph 2.3.5:  
Suggest the following be substituted as a more workable qualification: "A demonstrated ability to communicate skillfully by writing and speaking effectively." The sentence, as written, is poor grammar, syntax and word choice.

Section 38-10-3; Paragraph 3.1:  
The Environmental Advocate should not just be assigned by the Director of DEP, but in fact should report to the Director and have access to the Director, with no intermediary.

Paragraph 3.2.2  
There should be a ~~dedicated "800" telephone line~~ in the Environmental Advocate's office for incoming calls from around the state. It should be for incoming calls only. (In fact, all the

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regulatory offices; air, water, solid waste, etc. should have the same kind of dedicated lines.)

Section 38-10-4; Paragraph 4.6:

The word "council" should be changed to "counsel" for proper meaning.

Paragraph 4.8:

The nine purposes set forth in 22-1-1 should be listed here to create a better understanding by the reader as to the intent of this paragraph.

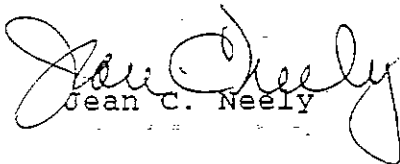
Paragraph 4.10:

The sentence should have a phrase added at the end ", when acting in an official capacity." This needs to be there to show that no infringement upon the individual's freedom of speech when acting as a private citizen is intended.

Section 38-10-5; Paragraph 5.4:

The way the paragraph is written now is too restrictive. The Environmental Advocate should be able to assist citizens on any issue with a state impact, not state-wide -- a considerable difference. Further, isolated issues may be very germane to the job; they do not need to be precedent-setting. I recommend that the last sentence be re-worded to this effect: "The Environmental Advocate should concentrate on issues that have state implications, rather than local issues unless they are of a precedent-setting nature." --

Finally, I would like to encourage the DEP to publish a regular newsletter to acquaint everyone with its work, and as part of that publication, the Environmental Advocate have a regular column, not just write articles for publications by the PIO, as called for in paragraph 5.9.

  
Jean C. Neely

Copy to: Wendy Radcliff

**§ 29A-3-10**      STATE ADMINISTRATIVE PROCEDURES ACT

Cited in *Fourco Glass Co. v. West Virginia Human Rights Comm'n*, 181 W. Va. 432, 383 S.E.2d 64 (1989).

**§ 29A-3-10. Creation of a legislative rule-making review committee.**

(a) There is hereby created a joint committee of the Legislature, known as the legislative rule-making review committee, to review all legislative rules of the several agencies and such other rules as the committee deems appropriate. The committee shall be composed of six members of the Senate, appointed by the president of the Senate, and six members of the House of Delegates, appointed by the speaker of the House of Delegates. In addition, the president of the Senate and the speaker of the House of Delegates shall be ex officio nonvoting members of the committee and shall designate the cochairmen. Not more than four of the voting members of the committee from each house shall be members of the same political party: Provided, That in the event the membership of a political party is less than fifteen percent in the House of Delegates or Senate, then the membership of that political party from the legislative house with less than fifteen percent membership may be one from that house. The members shall serve until their successors shall have been appointed as heretofore provided. Members of the committee shall receive such compensation and expenses as provided in article two-a [§ 4-2A-1 et seq.], chapter four of this code. Such expenses and all other expenses, including those incurred in the employment of legal, technical, investigative, clerical, stenographic, advisory and other personnel shall be paid from an appropriation to be made expressly for the legislative rule-making review committee, but if no such appropriation be made, such expenses shall be paid from the appropriation under "Account No. 103 for Joint Expenses," but no expense of any kind whatever payable under said Account No. 103 for joint expenses shall be incurred unless first approved by the joint committee on government and finance. The committee shall meet at any time, both during sessions of the Legislature and in the interim.

(b) The committee may adopt such rules of procedure as it considers necessary for the submission, presentation and consideration of rules. (1982, c. 121; 1989, c. 113.)

Textbooks. — *Administrative Law in West Virginia* (Neely), §§ 4.19, 4.22, 4.29.      *Inc. v. Merritt*, 178 W. Va. 173, 358 S.E.2d 432 (1987).  
Stated in *West Virginia Chiropractic Soc'y*,

**§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.**

(a) When an agency finally approves a proposed legislative rule for submission to the Legislature, pursuant to the provisions of section nine [§ 29A-3-9] of this article, the agency shall submit to the legislative rule-making review committee at its offices or at a regular meeting of such committee fifteen copies of (1) the full text of the legislative rule as finally approved by the



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June 27, 1994

Dave-

Please take a look at the enclosed material. I think it would be a good idea for us to talk about it.

*JM*  
Joe Martin

*Roger*  
*Ali*  
*pls see me*  
*DC*

*I need to*  
*call Joe M,*  
*[initials]*

M E M O R A N D U M

TO: Joe Martin, Chairman, Government Organization

FROM: Marjorie Martorella, Counsel

DATE: June 27, 1994

RE: D.E.P. implementation, Environmental Advocate

At your request, I have reviewed statutory and other authority to determine whether the refiling of the D.E.P.'s Environmental Advocate rule as an interpretive rule is appropriate, and it is my opinion that the rule may not be appropriately filed as an interpretive rule. The following considerations support this conclusion:

1. Code §29A-1-2 defines "interpretive rule" as "every rule...adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public..." (emphasis supplied) The rule in question is not independent of a delegation of legislative power; rather the rule serves to satisfy the legislative mandate under §22-20-1 of the D.E.P. bill that the qualifications, powers and duties of the environmental advocate be established by rule. An interpretive rule is merely a statement of administrative intent as to how it intends to administer the law. While an interpretive rule may arise from a general rule-making powers or powers implied from the general purposes of the agency, an interpretive rule will not satisfy a

statutory mandate that a substantive matter be determined by rule. See Administrative Law in West Virginia, A.S. Neely, IV.

2. Code §29A-1-2 provides that the term "legislative rule" includes "every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law..." and "every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests..." The power of the Legislature to create administrative agencies, and to grant statutory powers and authority to statutory officers is not in question. In this case, the legislature chose to permit the agency to define the qualifications, powers and duties of the environmental advocate by rule. Once adopted, those rules have the force of law. Your memorandum of June 16 describes the impact on private rights, privileges or interests.

Further, I would question the decision of the agency to promulgate an interpretive rule on the basis of policy. By definition, an interpretive rule does not have the force of law. It cannot serve, therefore, as a legal grant of any power or authority to the environmental advocate. In choosing to promulgate an interpretive rule, the agency is putting itself in a position where any action of the environmental advocate may be challenged as outside the law (*ultra vires*) and the standing of the environmental advocate may be questioned in any legal proceeding. 7

I am, therefore, of the opinion that the qualifications, powers and duties of the environmental advocate must properly be determined by legislative rule.



HOUSE OF DELEGATES  
WEST VIRGINIA LEGISLATURE  
STATE CAPITOL, ROOM 213, EAST WING  
1900 KANAWHA BLVD., EAST  
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JOE MARTIN, Chairman  
COMMITTEE ON GOVERNMENT ORGANIZATION  
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ELKINS, WV 26241  
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Other Committees:  
House Rules

M E M O R A N D U M

TO: Chuck Chambers, Speaker, House of Delegates

FROM: Joe Martin, Chairman, Government Organization

DATE: June 16, 1994

RE: D.E.P. implementation, Environmental Advocate

On June 13th, the Division of Environmental Protection filed procedural rules with the Secretary of State implementing the environmental advocate provisions contained in the D.E.P. reorganization bill. By filing these rules as procedural rules, effective without legislative review, the agency is attempting to circumvent the clear intent expressed in the legislation that the powers, duties and qualifications of the environmental advocate be filed as legislative rules to be reviewed by the Legislative Rule-Making Review Committee and the full Legislature prior to the time of implementation.

I am enclosing with this memorandum a copy of the rule filed by the agency; a copy of the environmental advocate provisions of the D.E.P. bill as passed by the legislature; a transcript of my remarks on the floor of the House regarding the amendment which included the adopted environmental advocate provisions; and a copy of the environmental advocate provisions contained in an earlier form of the bill, offered by Senator Grubb as a Senate floor amendment.

The action of the agency in filing the rule as a procedural rule (as opposed to a legislative rule) is improper because

(1) the rule contains substantive policy determinations and is not, therefore, merely procedural; and (2) the intent of the Legislature was clearly that the rule go through the standard rulemaking review process.

West Virginia Code §29A-3-3 provides that each agency shall adopt procedural rules "governing the formal and informal procedures prescribed or authorized by this chapter. Procedural rules shall include rules of practice before the agency, together with forms and instructions." Forms and procedures for citizens dealing with the agency are properly the subject of a procedural rule. However, the rule relating to the office of environmental advocate contains substantive policy determinations and is not properly the subject of a procedural rule.

(You may recall that an analagous situation was dealt with during the 1993 interim of the Legislature by the Rulemaking Review Committee. The Child Advocate Office sought to amend a previously filed legislative rule by striking from the rule the calculation of child support guidelines. The agency proposed that child support calculations be included in a procedural rule so the guidelines could be changed without legislative review. The Rulemaking Review Committee determined that child support guidelines were not merely procedural -- they substantively impacted the legal rights and obligations of citizens of the state. The committee asked the agency to withdraw both the legislative rule and the procedural rule containing the guidelines, and subsequently both rules were withdrawn.)

The D.E.P.'s environmental advocate rule filed on June 13th contains numerous substantive policy determinations, most notably:

- the environmental advocate may not represent the legal interests of any person in legal or quasi-legal actions without the expressed approval of the director;

- the environmental advocate may not request confidential information without the authorization of the director;
- the environmental advocate may take any lawful action "deemed appropriate" not otherwise prohibited;
- the environmental advocate need not be a lawyer; and
- the environmental advocate may not organize or participate in organized campaigns on environmental matters.

The environmental advocate's powers (and limitations on those powers) impact the interests of citizens who may seek the assistance of the environmental advocate or who may be obligated to defend against actions of the environmental advocate. I believe that a comparison of the original Senate floor amendment offered by Senator Grubb and adopted by the Senate and the rule offered by the agency will serve to demonstrate the weight of the issues to be determined. I further believe that those issues should be considered by the Legislature in an open forum with full and free debate.

The language contained in §22-20-1 of H.B. 4065, the D.E.P. bill, provides that the director "shall adopt and promulgate rules in accordance with the provisions of article three, chapter twenty-nine-a of this code governing and controlling the qualifications, powers and duties of the person to be appointed to the position of environmental advocate." This language tracks language found in numerous code provisions which authorize rules to be filed with the Legislative Rulemaking Review Committee. Instances where "legislative" (as opposed to procedural) rules are specifically alluded to in code occur, but those instances are vastly outnumbered by language simply requiring that rules be promulgated "pursuant to chapter twenty-nine-a of this code." The legislative intent contained in the clear wording of the statute is supported by my explanation to members voting on the environmental advocate provisions (see enclosed).

If this rule had been properly submitted through the regular rulemaking review process, I might not object to its substance. Nor might I object to an accompanying procedural rule adopting,



for example, a form to be filled out by persons seeking the assistance of the environmental advocate.

In this instance, however, it appears that the agency intends to circumvent both the statutory intent and the legislative process -- a legislative process which I firmly believe operates to the benefit of the state and its citizens.

I would therefore request that the agency be asked to withdraw the procedural rule and then in turn submit the proposed rule to legislative scrutiny in the regular rulemaking review process.

TITLE 38  
PROCEDURAL RULE  
DIVISION OF ENVIRONMENTAL PROTECTION  
BUREAU OF ENVIRONMENT

SERIES 10  
OFFICE OF ENVIRONMENTAL ADVOCATE

§38-10-1      General

1.1.    Scope - This procedural rule governs and controls the qualifications, powers, and duties of the position of Environmental Advocate within the Division of Environmental Protection.

1.2.    Authority - West Virginia Code §22-1-13

1.3.    Filing Date -

1.4.    Effective Date -

1.5.    Incorporation by Reference - Federal Counterpart Regulations - The Director has determined that there is no counterpart federal regulation. Due to the absence of a counterpart federal regulation, a determination of whether or not to incorporate by reference is not required, and the Director is not required to consult with the Environmental Protection Advisory Council on this rule.

1.6.    Determination of Stringency - Federal Counterpart Regulations - The Director has determined that there is no counterpart federal regulation, and that the absence of a federal regulation is not the result of a specific federal exemption. This rule is not construed to be more or less stringent than federal regulations.

1.7.    Constitutional Takings Determination - The Director has determined and does state that this rule does not constitute a constitutional taking of real property.

§38-10-2      Appointment, Salary, and Qualifications

2.1.    Appointment - The position of Environmental Advocate will be appointed by, and will serve at the will and pleasure of, the Director of the Division of Environmental Protection in accordance with West Virginia Code §22-20-1.

2.2.    Salary - The salary of the position of Environmental Advocate will be set by the Director, and is subject to future adjustments at the discretion of the Director.

2.3.    Qualifications - The Director will receive or solicit applications for the position

of Environmental Advocate from persons having the following minimum qualifications:

- 2.3.1. A citizen and permanent resident of the State of West Virginia.
- 2.3.2. A graduate from an accredited college or university with a four-year degree in a field of study directly related to the qualifications, powers, and duties of the position as set forth in this rule.
- 2.3.3. A minimum of two years full-time experience in work directly relating to environmental protection, or other public service work or experience which demonstrates the ability to carry out the powers and duties of the position as set forth in this rule.
- 2.3.4. A working knowledge of the legal requirements and programmatic functions of the Division of Environmental Protection.
- 2.3.5. A demonstrated ability to skillfully communicate (both written and verbal) in a public forum.
- 2.3.6. A demonstrated ability to use word processing software in a micro-computer environment.
- 2.3.7. A valid West Virginia driver's license.

#### §38-10-3 Assignment of Duty Station and Support

3.1. Assignment - The Environmental Advocate will be assigned by the Director to an Office within the Division of Environmental Protection.

3.2. Support - The Environmental Advocate will be provided with logistical support as follows:

- 3.2.1. Suitable office space within the Division of Environmental Protection Headquarters' Office.
- 3.2.2. Basic complement of office equipment and supplies.
- 3.2.3. Secretarial/clerical support as necessary to carry out the duties of the position.
- 3.2.4. Per-diem and travel expenses, in accordance with the rules of the Governor's Travel Management Office, as necessary to carry out the duties of the position.

3.2.5. Training and educational tuition, fees, and expenses as necessary to carry out the duties of the position.

3.2.6. Use of pool vehicles as available and as necessary to carry out the duties of the position.

§38-10-4 Powers and Limitations - The Environmental Advocate will carry out the duties of the position as set forth in this rule, and as prescribed by the Director in accordance with the following:

4.1. The Environmental Advocate will make inquiries and receive responses from the Director's executive staff and the Chief of each Office as necessary to carry out the duties of the position. The Environmental Advocate will not request any information which is confidential, i.e., personnel records, corporate or trade secrets protected by statute, work product, etc., except as authorized by the Director.

4.2. The Environmental Advocate will consult with and request information from other agencies of state or federal government, as necessary to carry out the duties of the position.

4.3. The Environmental Advocate will make public any available information except confidential information as described in subsection 4.1 of this section.

4.4. The Environmental Advocate will attend meetings, hearings, proceedings, etc., as necessary to carry out the duties of the position.

4.5. The Environmental Advocate will take such actions as deemed appropriate on behalf of any person, *provided*, That such action is lawful and is not in conflict with subsections 4.9 and 4.10 of this section.

4.6. The Environmental Advocate will provide advice and council to any person as necessary to carry out the duties of the position.

4.7. The Environmental Advocate will prepare and/or distribute correspondence, documents, records, reports, etc., as appropriate and necessary to carry out the duties of the position.

4.8. The Environmental Advocate will be guided in all actions by the nine purposes set forth in West Virginia Code §22-1-1 (b).

4.9. The Environmental Advocate will not represent any person in, or file on behalf of any person, legal or quasi-legal actions, either in support of or opposed to the Division of Environmental Protection without the expressed approval of the Director, and under the supervision of the Division of Environmental Protection's General Counsel.

4.10. The Environmental Advocate will not organize public campaigns in support of, or in opposition to official positions taken by the Division of Environmental Protection on environmental matters, and will not actively participate in any such organized campaign.

§38-10-5 Duties of the Environmental Advocate Office - The Environmental Advocate will perform the duties of the position as follows:

5.1. Develop and implement a process to evaluate public opinion on the quality and effectiveness of the functions of the Division of Environmental Protection. This process will utilize customer survey forms, or other suitable and appropriate methods. The development of this evaluation process should be completed within six (6) months of the date of appointment and updated periodically.

5.2. Attend meetings, public hearings, proceedings, and conferences to collect and distribute information on a range of environmental issues, and to acquire knowledge and skills required to carry out the duties of the position.

5.3. Systematically become familiar with, and acquire a working knowledge of all programmatic functions of the Division of Environmental Protection.

5.4. Provide advice and assistance to citizens seeking resolution of environmental problems. To conserve resources, the Environmental Advocate should concentrate on issues that have wide-ranging, state-wide implications, rather than on isolated or local issues unless they are of a precedent-setting nature.

5.5. Assist the Division of Environmental Protection to develop and publish brochures outlining the services of the position, as well as other information efforts that are appropriately conducted in concert with the Public Information Office or the Director.

5.6. Participate in or sponsor public service media programming on a variety of environmental issues.

5.7. Assist citizens with obtaining information, interpreting information, and directing citizens to sources of technical information.

5.8. Assist and advise citizens on how to participate in state agency processes, such as public comments on rules, statutory amendments, draft permits etc..

5.9. Write articles for publication by the Public Information Office and other print media regarding a variety of advocate activities or areas of environmental interest.

5.10. Direct citizens to appropriate public legal resources.

5.11. Attend executive and other agency staff meetings, where appropriate, and share

information as appropriate.

5.12. Assist the Division of Environmental Protection in reaching negotiated settlement of issues in dispute between the Division of Environmental Protection and citizens or citizens' groups as required by the Director.

5.13. Develop annually an action plan for the coming year of position operation which contains realistically achievable objectives. The first year plan of operation will be completed within six (6) months of appointment. Each plan will be revised quarterly to accommodate changes in focus arising from public interest or programmatic needs.

5.14. Prepare an annual statement summarizing the accomplishments of the position to be published in the Division of Environmental Protection's annual report.

- 22 (e) Methods to identify the most appropriate and cost-  
23 effective emergency and remedial actions in view of the  
24 relative risk or danger presented by each case or event.

ARTICLE 20. ENVIRONMENTAL ADVOCATE.

§22-20-1. Appointment of environmental advocate; powers and duties; salary; continuation of position.

- 1 The director of the division of environmental protec-  
2 tion shall appoint a person to serve as the environmental  
3 advocate within the division of environmental protec-  
4 tion, and shall adopt and promulgate rules in accor-  
5 dance with the provisions of article three, chapter  
6 twenty-nine-a of this code governing and controlling the  
7 qualifications, powers and duties of the person to be  
8 appointed to the position of environmental advocate. The  
9 environmental advocate shall serve at the will and  
10 pleasure of the director, who shall also set the salary of  
11 the environmental advocate. All funding for the office  
12 of environmental advocate shall be from existing funds  
13 of the division of environmental protection. The director  
14 shall provide an office and secretarial and support staff  
15 as needed. The position of environmental advocate shall  
16 continue to exist until the first day of July, one thousand  
17 nine hundred ninety-seven, to allow for the completion  
18 of a preliminary performance review pursuant to article  
19 ten, chapter four of this code.

CHAPTER 22A. MINERS' HEALTH, SAFETY  
AND TRAINING.

ARTICLE 1. OFFICE OF MINERS' HEALTH, SAFETY AND  
TRAINING; ADMINISTRATION; ENFORCE-  
MENT.

§22A-1-1. Continuation of the office of miners' health,  
safety and training; purpose.

- 1 (a) The office of miners' health, safety and training is  
2 continued and is a separate office within the department  
3 of commerce, labor and environmental resources. The  
4 office shall be administered, in accordance with the  
5 provisions of this article, under the supervision and  
6 direction of the director of the office of miners' health,

HOUSE BILL 4065  
REORGANIZATION OF THE DIVISION OF ENVIRONMENTAL PROTECTION

FLOOR DEBATE ON HOUSE CONCURRENCE TO SENATE AMENDMENT WITH  
FURTHER AMENDMENT (OFFICE OF THE ENVIRONMENTAL ADVOCATE)

APPROXIMATELY 11:40 P.M., MARCH 12, 1994

MR. SPEAKER: "Gentleman from the thirty-seventh, Mr. Martin.

MR. MARTIN: Mr. Speaker, the Senate's inclusion of provisions that created an office of environmental advocate raised concern on the part of quite a number of people, including myself. After some discussions, that language was rewritten as Judiciary Chairman has indicated. It provides or allows for the creation of that office but requires that it be done through the rule-making process that we all understand, a process that brings the creation of that office, its powers and duties, back to House for its review -- to the full Legislature actually -- for its review and approval and provides further that two years after the creation of that office it comes under Sunset for a full performance review, performance audit. I urge adoption of the amendment."



sfa HB4065 Grubb 3/10

On page eight hundred forty-seven, section six, after line twenty by inserting the following:

**ARTICLE 20. ENVIRONMENTAL ADVOCATE.**

**§22-20-1. Short title.**

This article shall be known and cited as the "Environmental Advocate Act."

**§22-20-2. Legislative findings and purpose.**

The Legislature finds that West Virginia's natural environment is threatened by a myriad of pollution sources.

The Legislature further finds that:

(a) The protection and preservation of the state's natural environment is a fundamental responsibility of state government.

(b) A clean environment is one of the cornerstones of current and future economic development activities.

(c) State agencies and instrumentalities must often balance competing interests in evaluating practices and policies that impact the natural environment.

(d) Many times citizens are unable to afford the representation necessary to adequately defend a threatened and valuable environmental resource.

Therefore, it is the purpose of the Legislature to establish an office of environmental advocate to ensure, to the maximum extent possible, that the state's natural environment is defended whenever and wherever necessary.

**§22-20-3. Environmental advocate; oath of office; salary; office location.**

There is hereby created, under the authority of the director of the division of environmental protection, the office of environmental advocate. Before entering upon the duties of this office, the environmental advocate shall subscribe to an oath of office, which shall be filed in the office of the secretary of state. The salary of the environmental advocate shall be fifty thousand dollars annually. The office of the environmental advocate shall be located in Charleston.

The director shall hire the environmental advocate no later than the first day of July, one thousand nine hundred ninety-four.

**§22-20-4. General powers of advocate.**

The environmental advocate has the powers and duties granted under this article and all other powers necessary to carry out the purposes of this article. Any enumeration of powers is not intended to restrict the general powers of the environmental advocate.

**§22-20-5. Authority of advocate.**

The environmental advocate has the authority to:

(a) Institute, intervene in, or otherwise participate in, proceedings in state and federal courts, before administrative agencies, and before any other body, concerning any act, order, bill, resolution, practice, activity, or failure to act, that will have an impact on the state's natural environment.

(b) Take any action he considers appropriate with respect to environmental complaints.

(c) Institute, participate as an additional party in, or intervene as a friend of the court in any proceeding involving an impact on the state's natural environment.

(d) At the request of one or more citizens, or whenever in the advocate's opinion the public interest is served, represent said citizens in proceedings arising out of actions impacting the natural environment.

(e) Exercise all the same rights and powers regarding examination and cross-examination of witnesses, presentation of evidence, and other matters as any party in interest appearing before the agency or body in question.

(f) Educate the general public concerning environmental protection; and

(g) Conduct studies and issue reports concerning various topics relevant to protecting and preserving the state's natural environment.

**§22-20-6. Qualifications of advocate and employees of advocate.**

(a) No person may be appointed environmental advocate unless he or she is admitted to practice law in this state.

(b) The environmental advocate shall be a resident of this state during the term of office, and shall not, during such period, hold any other office of either trust or profit under the government of the United States, this state, or any political subdivision thereof. This section shall not be construed to preclude the advocate from serving as a member of the reserve of the armed forces of the United States, the West Virginia national guard, the air national guard, or the naval militia. The environmental advocate shall not engage in any other occupation



Roger Hall  
WV-DEP  
10 McJunkin Road  
Nitro, WV 25143

# SIERRA CLUB

## WEST VIRGINIA CHAPTER

July 18, 1994 P.O. Box 4142  
Morgantown, WV 26504

Director's Office  
JUL 19 1994  
WV Division of  
Environmental Protection

Dear Mr. Hall:

Please consider these comments on behalf of the WV Chapter of Sierra Club regarding the proposed regulations for the Office of Environmental Advocate. The Sierra Club has long advocated for an Environmental Advocate position to help citizens respond to environmental issues, to represent our views, and to advocate on behalf of environmental protection. Unfortunately, the position described in these rules does not meet our idea of an Advocate, nor does it meet the definition of an advocate under any concept that could be applied to Article 20 of Chapter 22 of West Virginia code. While that section of code does not have the clear and specific detail of earlier versions of the legislation (and nothing in the existing statute precludes the original concept adopted initially by the State Senate), the statute nevertheless clearly specifies that the Office to be created is that of Advocate!

The powers and limitations (Section 4) and the Duties (Section 5) lack any specific direction as to what the Office shall advocate. Section 4.8 provides very general guidance, but does not provide any direction beyond that provided to every other employee of the Division of Environmental Protection. Section 4.9 and 4.10 prohibits the Advocate from legal and public advocacy or participation in any such advocacy. The duties of the Advocate appear to be entirely duplicative of the DEP Public Information Office. I do not believe that it was the intent of the Legislature to create a duplication of effort, since the DEP reorganization bill was specifically intended to eliminate unnecessary duplication. I suggest that the Legislature intended to create an Advocate for environmental protection because of their recognition that such an entity and such an attitude is currently lacking within the agency charged with environmental protection in West Virginia.

Therefore, I recommend that the following changes be made to these rules:

Section 2.3.3 A minimum of two years ~~full-time~~ experience in work directly related to advocacy of environmental protection... This position is intended to be an advocate for environmental protection. Experience in avoiding environmental protection should not be counted toward this position. Since virtually all advocates of environmental protection are volunteers, the requirement for full-time experience should be stricken to prevent unnecessarily restricting the applicant pool.

Section 3.2 should be rewritten to set up careful boundaries to prevent a conflict of interest or the appearance of political pressure from the Director and/or other staff of DEP. This insulation from direct pressure is essential to the ability of the Office to act as an independent advocate and has been a fundamental hallmark of the successful advocate positions in other states.

Section 4.8 should be expanded to add an explicit purpose statement defining the authority and duty to advocate on behalf of environmental protection. Currently, no such direction exists in these rules.

*"Not blind opposition to progress, but opposition to blind progress."*

Section 4.9 and 4.10 should be deleted or at least, should expressly exempt advocacy actions. As currently written, the Advocate is given the conflicting mission of being an Advocate without being permitted to advocate either in court or in public.

Section 5.1, 5.5, 5.6, 5.7, 5.8, and 5.10 are primarily the responsibility of the Public Information Office created under 22-1-12. Language should be added to specify that these duties of the Advocate do not relieve any responsibility of the Public Information Officer as the lead officer in this regard and action by the Advocate in this regard should be oriented toward the primary mission of environmental protection advocacy.

Section 5 should also include direct and explicit instructions to work with citizens and to advocate environmental protection in various local, state, and federal proceedings including but not limited to permit application reviews, rules development and public hearings, monitoring and enforcement actions, and appeals, etc.

Failure to resolve these issues will leave the Office of Environmental Advocate in an untenable position, with conflicting guidance, inadequate resources, and an impossible mission. In short, unless repaired, these rules are a recipe for failure. Responsibility for such failure cannot be avoided by those managing DEP.

Sincerely,



James Kotoon  
Legislative Chair



West Virginia  
University

College of Agriculture and Forestry

Division of Plant and Soil Sciences  
401 Brooks Hall--P.O. Box 6057  
Morgantown, WV 26506-6057  
FAX 304 293-2872  
Phone 304 293-3911

RECEIVED  
Director's Office

JUL 19 94

WV Division of  
Environmental Protection

## FAX TRANSMITTAL SHEET

DATE: JULY 18 1994PAGES: 3

TO:

Name

DEP  
Organization759-0515  
Office Telephone #759-0528  
Fax Telephone #

Including Transmittal Sheet

FROM:

Name

Organization

(304) 293-3911  
Office Telephone #(304) 293-2872  
Fax Telephone #

## COMMENTS:

THESE ARE COMMENTS ON THE ENVIRONMENTAL  
ADVOCATE RULE. ORIGINALS WILL BE MAILED  
TODAY.

Please call  
when received

Yes

No

## NOTE:

If you do not receive all pages noted above, please call  
the sender as soon as possible.





Roger Hall  
WV-DEP  
10 McJunkin Road  
Nitro, WV 25143

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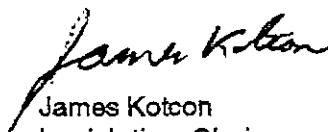
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Sincerely,



James Kotson  
Legislative Chair



SUBMIT



west  
virginia  
highlands  
conservancy

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Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

July 18, 1994

Mr. Roger T. Hall  
W.V. DEP  
10 McJunkin Road  
Nitro, W.V. 25143

RE: Interpretive Rule  
(Title 38, Series 10)  
Office of Environmental Advocate

Being asked to comment on the interpretive rule governing the Office of Environmental Advocate (OEA) is like having asked for a cake, being served a pie, told it is a cake, then asked what color frosting you want on the cake. ...Commenting on the frosting implies that you think the pie is really a cake when it isn't a cake at all and will never be a cake. Yet, to refrain from commenting on the frosting or to object to the illusion of the cake implies no interest whatsoever in the pie itself.

As ridiculous as this conundrum may seem, it is likely to be typical of the enigmatic and puzzling situations citizens and the environmental community in general will be asked to face over and over again in the coming months and years when dealing with this administration's brainchild Division of Environmental Protection. Hence, it is out of necessity but with great reluctance that I offer comments on all three of the subjects at hand - the cake, the pie and the frosting as well.

1) THE so-called CAKE

To call an ombudsman-public information person an "advocate" (i.e. to call a pie a cake) flies in the face of any principles of good government or standards of truth in advertising that one might reasonably assume should be inherent in the actions of the Division of Environmental Protection (DEP). And yet, both current code (through the insistence of DEP representatives to the legislature) and this proposed regulation do just that.

As I stated publicly on several occasions during discussions of the legislation that created this position, WVHC objects to this office, not because the position itself is bad, but because the position is not what the title implies. As defined by that legislation, and the further refinements of this rule, the title "ADVOCATE" is deceptive, inappropriate, misleading and does a disservice to the public and environment it is meant to defend.

Although there is value in the powers and duties of the office described in this rule, the authority vested in the office is substantially limited by the underlying control of the Director who has final say over the "advocate" who is hired and fired by that Director, who serves "at the will and pleasure of that Director", who performs "as prescribed" and "as required" by that Director, and who cannot challenge official positions of the Division or that Director even if those positions are in conflict with the Advocate's own beliefs or the beliefs of citizen clients (See sections 2.1, 4.1, 4.4, 4.9, 4.10, 5.12, etc.).

The Office of Environmental Advocate as defined in current code and this rule offers only the illusion of advocacy. It may provide good press for DEP in its attempt to appear supportive of citizens and strong environmental protection, but it raises false hopes for members of the public who will turn to the OEA for support only to find the Advocate forbidden to defend any position that might be in conflict with the Division -- an all too familiar situation in communities where agency decisions are often the root of a problem.

Actually, since it is improbable that a true advocate position can ever be established within the Division, WVHC will continue to encourage and lobby for the creation of an independent and fully staffed office of environmental advocate similar to the one proposed for the Attorney General's office in S.B. 262 introduced to the 93-94 Legislature. (Copy attached.)

Short of a complete overhaul of this position, WVHC suggests a more appropriate title for the current position is Office of Environmental Affairs, or Office of Environmental Ombudsman.

## 2) THE PIE

As stated above, there IS VALUE to the office described in this rule, despite the deceptive title. Providing access to information and process, developing brochures, articles, outreach programs and direction to legal and technical sources, etc., etc. are all helpful and needed activities to aid citizens in dealing with environmental concerns that effect their lives. (In fact, I asked about and urged consideration of such a position at the public meeting in Fairmont early on in the process of the development of the DEP legislation.)

There is also value to this office as long as the Division continues to hire people of the caliber and character of the Director's first choice of advocates, i.e. Wendy Radcliff.

WVHC RE: DEPOEA rule 7/18/94 p. 3.

There is, however, great potential for abuse of this position and the persons selected to fill the position by any Director (present or future) for there is nothing in code or this rule to preclude using the Advocate to short circuit direct individual citizen participation in DEP actions, to divert unwanted criticism or the perceived disruptive presence of diverse individual advocates from a wide variety of community, citizen, and environmental groups to a single central 'office of complaints', or to negate or stifle the objections of citizens by requiring the Advocate to defend DEP positions in "negotiating settlements" with citizens (Section 5.12).

Whether or not the job title is changed, the possibility of potential abuse should be eliminated by providing the OEA more independence from the Director.

### 3) THE FROSTING

a) Section 2.3.2 The Qualifications section of this rule require that the advocate must have a 4 year degree from an accredited college or university in a field of study directly related to the position.

While the college experience may instill a greater degree of tolerance for time-consuming and rigorous review of regulations, endless meetings and bureaucratic process, and while some related fields of study may instill a sense of advocacy, nevertheless, intelligence, wisdom, the power of reason and a reasonable attitude are not guaranteed by a 4 year degree. Nor does a lack of a degree imply an inability to deal with the requirements of the Advocate's job as described in this rule. Indeed, some of the strongest, most knowledgeable, well spoken and reasonable advocates for the environment in the state would not qualify under this provision. Experience has shown that many people come to the foreground of environmental protection as a result of sheer desperation and a dogged determination to educate themselves in precisely those skills needed for the OEA job.

Section 2.3.2 should be deleted and the remaining subsections relied on for demonstration of an applicant's abilities and qualifications for the job.

b) Section 4.8 states that the Environmental Advocate be guided by the nine purposes set forth in WV Code 22-1-1(b). While these purposes apply to all of DEP's actions, the duties of the OEA should put special emphasis on (b)(1) "to strengthen the commitment of this state to restore, maintain and protect the environment" and on state policy as declared immediately preceding the purposes in 22-1-1(b):

"It is the policy of the state of West Virginia ...to use all practicable means and measures to prevent or eliminate harm to the environment and biosphere, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations."

WVHC therefore recommends adding explicit reference to state policy in Section 4.8 by adding the words "policy and" before the words "nine purposes" in 4.8.

c) Sections 4.9 and 4.10. The restrictive provision of 4.9 (no legal actions without expressed approval of Director) and 4.10 (no opposition to official DEP positions) must be removed for the position to be true to its title of advocate.

d) Section 5.12 directing the environmental advocate to assist DEP in reaching negotiated settlements with citizens "as required by the Director" must be stricken/deleted.

- An Environmental Advocate cannot be expected to defend environmental and citizen interests only when those interests are not in conflict with the position of the Division, and even worse to defend DEP's position when those conflicts arise. Yet, it is conceivable under the provisions of Section 5.12 that the Advocate could defend a particular position or citizens group up to a point when the Director or the Division choose to take an opposing stand at which point the Director could require the Advocate basically to switch sides and defend the Division.

- Also, the advocate should be able to choose if and when it is in his or her, or his or her clients', best interest to be involved at all in negotiations of settlements of disputes between the DEP and those clients. Yet, Section 5.12 allows the Director to require the Advocate's participation in such settlement negotiations.

\*\*\*\*\*

Thank you for the opportunity to comment on this rule. Our statements are made with the desperate hope that DEP officials - current and future - will not use the discretionary powers this rule confers upon them to abuse the position or persons appointed to the position of Environmental Advocate. And further, with the hope that future administrations and legislators will see through the current film of deceit and create an independent office of environmental advocacy as is described in the attached copy of the 1993 S.B. 262.

Cindy Rank, President

# COMMENTS OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION

## TITLE 38 INTERPRETATIVE RULE

### DIVISION OF ENVIRONMENTAL PROTECTION

#### BUREAU OF ENVIRONMENT

#### SERIES 10 OFFICE OF ENVIRONMENTAL ADVOCATE

### INTRODUCTION

The West Virginia Division of Environmental Protection filed a interpretative rule<sup>1</sup> designated Series 10 setting forth the qualifications, powers, duties, and limitations of the position of environmental advocate within the Division of Environmental Protection ("DEP") pursuant to W. Va. Code § 22-20-1 effective June 10, 1994 (H.B. 4065 1994 Reg. Sess.). The DEP Reorganization Bill contained a new provision which requires the Director of the DEP to appoint a person to serve as environmental advocate within the Division. The statutory authority also requires the promulgation of a rule governing and controlling the qualifications, powers, and duties of the person to be appointed to the position. The statutory authority is not specific as to the scope of the duties of the environmental advocate, but the person appointed to the position will serve at the will and pleasure of the Director. The comments outlined below are intended to be constructive suggestions to address the parameters of the new position in the context of existing federal and state laws and

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<sup>1</sup> This rule was originally filed as a procedural rule by the Division of Environmental Protection. Pursuant to a legal interpretation by Renee Coe, Deputy Secretary of State, the DEP withdrew the procedural rule that was filed on June 13, 1994 and refiled the Office of Environmental Advocate rule as an interpretative rule on June 16, 1994.

regulations. For simplicity and reference, the comments will be presented in a section-by-section format. The WVMA appreciates the opportunity to comment on the above-referenced proposed rule.

### **GENERAL COMMENTS**

Both the powers and duties of the environmental advocate resemble and duplicate what would normally be considered the requirements of a public information officer; that is, collection and dissemination of information available from the agency in the form of assistance to citizens, response to complaints, preparation of press releases and response to freedom of information requests. On the contrary, the WVMA believes that the statute contemplates and intends a very different role for the environmental advocate; namely, to acquire information from the public, from interest groups, national trends and the like and condense and consolidate this information into a coherent package to present to the Director. The WVMA would suggest an entire rewrite of the proposed rule to reflect the parameters of the role of the environmental advocate. Accordingly, the WVMA offers its assistance in preparing a draft alternative upon the request of the DEP. In the alternative, specific comments are provided below to cure the major the defects identified in the rule.

## **SPECIFIC COMMENTS**

### **SECTION 2**

#### **Section 2.1**

Either Section 2.1, relating to appointment, or a new Section 2.4 should be added which addresses the full-time nature of the position. This person who is appointed to serve as the environmental advocate should not have income or otherwise be compensated by another organization. In other words, the environmental advocate should not be paid by the state and also be paid by a separate organization to perform other functions which may conflict with the official position of the Division of Environmental Protection.

The following language is suggested to be set forth in either Section 2.1 or in a new Section 2.4 of the rule:

2.4 The environmental advocate is a full-time position and the person appointed to the position shall dedicate full time service to the duties and responsibilities attendant to and incumbent upon the environmental advocate.

So long as the environmental advocate is responsible solely to the Director of the Division of Environmental Protection and is not receiving income from outside sources, the integrity and credibility of the position will be enhanced and office of environmental advocate will avoid the appearance of impropriety and any conflict of interest which may arise.

#### **Section 2.3.1**

The question arises regarding the requirements of residency of West Virginia of whether demanding the applicant be a "citizen and permanent resident" is

lawful or advisable. Although the legislature routinely requires those holding policy making decisions in state government be residents of West Virginia, there is no statutory requirement of citizenship or residency for the environmental advocate. While the statute provides that the Director of DEP establish the qualifications of the environmental advocate, the rule should not prevent non-residents from being appointed. The terms "citizen" and "resident" have specific legal meanings in other contexts that need not be discussed here. Suffice it to say that once appointed the environmental advocate should become a resident of West Virginia. The term "permanent" should be deleted because it is devoid of concrete meaning and subject to interpretation. Presumably, it would also preclude the appointment of an expert who hails from another state or who was born and raised in West Virginia but happens to live elsewhere due to economic conditions. The rule should not prevent the Director from appointing a current out-of-state resident who is qualified and seeks to return to West Virginia. Therefore, the WVMA suggests that Section 2.3.1 be deleted or read as follows:

**2.3.1 A resident of West Virginia.**

#### **Section 2.3.4**

This section conflicts with Sections 5.2 and 5.3 which state that the environmental advocate must "acquire a working knowledge and skills required to carry out the duties of the position" and must "systematically become familiar with, and acquire a working knowledge of all programmatic functions" of the DEP. On the other hand, Section 2.3.4 makes "knowledge of the legal requirements and



programmatic function "of the DEP a condition of appointment by requiring such knowledge as a minimum qualification. Thus, an internal conflict in the language is created by stating essentially the same requirements first as a condition and second as a duty. The WVMA therefore suggests that knowledge of the legal requirements and programmatic functions of DEP be a condition of appointment to the position and that Sections 5.2 and 5.3 be combined in Section 2.3.4.

#### **Section 2.3.7**

In line with the comment provided for Section 2.3.1, a driver's license is sufficient and there is no reason to require a West Virginia driver's license especially if the environmental advocate applicant lives out-of-state at the time of selection to the position.

### **SECTION 3**

#### **Section 3.2.4**

Section 3.2.4 addresses per diem and travel expenses that the environmental advocate may incur as necessary to carry out the duties of the position in accordance with the Governor's Travel Management Office regulations. Based on the rule statement alone, it would appear that the environmental advocate would have free will to travel throughout the state, or elsewhere. In order to forestall any potential abuse of Section 3.2.4, an additional check should be placed upon the environmental advocate to prevent unlimited travel. Therefore, it is suggested that the word "necessary" be stricken and in lieu thereof "as approved by the director" be

inserted in its place. This language will ensure accountability on the part of the environmental advocate for travel and per diem expenses.

#### **Sections 3.2.5 and 3.2.6**

Similarly, the same change should be implemented in Sections 3.2.5 and 3.2.6 relating to training and educational tuition fees and expenses and the use of state vehicles, respectively. In both instances, the potential for excessive expenses or abuse of state property is presented where there is no apparent accountability for the office. The Director should be required to approve all expenditures for these items in advance of the expenditure.

#### **SECTION 4**

In all the subsections of Section 4 where the language reads "will not" the correct language should be "may not". In the context of "will not" the "not" negates an obligation whereas replacing that language with "may not" creates a prohibition. For example, in Section 4.9, the environmental advocate "will not" represent any person in legal action. This language should read such that the environmental advocate "may not", or otherwise is prohibited from, representing any person in a legal action either in support or opposition to the positions of the DEP.

#### **Section 4.1**

In Section 4.1, an environmental advocate may not request any information which is confidential, except as approved by the Director. The WVMA believes it imperative to delete the phrase "except as authorized by the Director."

There is no reason, nor viable justification, that confidential and trade secret information should be released. To do so would totally controvert the basis for allowing confidential and trade secret information status to material submitted to the agency; that is, protection of competitive position and designed processes that are a capital investment. Moreover, trade secret and confidential information is protected by other agencies within state government, such as the development office, from release to persons who do not have a need to know. Thus, the WVMA urges the agency to continue to restrict access to confidential and trade secret information.

Furthermore, the rule sets forth examples of confidential information, but Section 4.1 should also include specific state and federal code citations as examples of records and information which the environmental advocate may not release to the public. Additions of specific code sections should include, but not be limited to, examples such as the Freedom of Information Act, W.Va. Code § 29B-1-1 et seq. will put the environmental advocate and the public on notice of the extent of information to be disseminated and its availability (and limitations of availability) upon request.

In addition, a new sentence should be added to Section 4.1 requiring the environmental advocate to be subject to the same confidentiality rules as the director is subject regarding trade secret information, etc., as may be required under the various regulatory programs. Thus, the WVMA suggests adoption of the following sentence to be added to Section 4.1:

In the event the environmental advocate comes into possession of confidential information, the environmental advocate shall be held to the same standard to protect the confidentiality of the information as required of the director

and as required by any applicable state statutes, regulation, policies, or other ethical obligations.

#### **Section 4.2**

This Section allows the environmental advocate to request information from other agencies, etc. The query that must be asked is whether the intent of this provision is to allow the environmental advocate to acquire information in the same manner as a member of the public or to offer a heightened status that would allow the environmental advocate to obtain information as a agency representative that would not necessarily be available to the public such as an industrial development proposal that is currently being evaluated by the economic development office. Information that is routinely confidential to the public may be accessible by other governmental personnel who have cause to be privy to the information. The intent should not be to allow the environmental advocate to use the position to gain information from other agencies that the advocate would not otherwise be privileged to obtain. Thus, the WVMA suggests that Section 4.2 be rewritten to allow the environmental advocate to seek information otherwise available to the public and to not divulge any information acquired because it was forwarded by virtue of the status of an employee in a sister agency.

#### **Section 4.3**

This section seems to be a sentence from the public information officer's job description; that the environmental advocate may make public any available information except confidential information. This is contrary to the role of the environmental advocate as contemplated by the WVMA. In contrast, the

environmental advocate should collect information and provide it to the agency. Instead, this section should read that the environmental advocate will provide information to the DEP information officer for approval for dissemination to the public.

#### **Section 4.4**

Section 4.4 allows the environmental advocate to attend meetings, etc., as is necessary to carry out the duties of the office. This language should be rewritten to limit the meetings to those that are within the agency (that do not entail internal meetings to which the environmental advocate is not invited or privileged), to open meetings, and public hearings. The WVMA does not believe that the intent of this provision is to allow the environmental advocate access to all meetings because the office exists. Rather, the role of the advocate should be refined in this regard. The environmental advocate should not by virtue of the office have the ability to demand entry into meetings in the Governor's office or any other agency because the language of the rule allows the advocate to attend.

#### **Sections 4.5. and 4.6**

Section 4.5 should be deleted or combined with Section 4.6 to state that "the environmental advocate may assist persons as appropriate in carrying out the duties of the position provided that such assistance is not in conflict with any other provision of this rule or state or federal law." As currently written, Section 4.5 is vague and overreaching. There is no description of what types of actions the environmental advocate may take on behalf of any person except as is limited by the other provisions of the rule. The rule should specifically state those actions that are

allowed instead of creating a blanket grant of authority limited only by specific restrictions. Changing the language makes it clear that the environmental advocate's role is to assist citizens of the state and its various organizations and to have access to agency information regarding environmental matters, but it also must be clear that the environmental advocate is limited to some degree in his or her ability to make this information public or intervene on behalf of any person in conflict of another section of the rule. So, in addition to the limitations set forth in Section 4.9 and 4.10 of Section 4, the environmental advocate could not release information to individuals in violation of Section 4.1. Therefore, the language addressing the parameters in which the environmental advocate may operate, should be broad enough to include other aspects of the rule which limit the ability of the environmental advocate to release information or to take affirmative action.

#### **Sections 4.9 and 4.10**

To reiterate the suggestion above, in both Section 4.9 and 4.10, the words "will not" should be changed to "may not" to ensure that the environmental advocate is not filing or otherwise engaged in legal actions in support or opposition to the official position of the DEP. In other words, the environmental advocate "may not" (is expressly prohibited from) be involved in outside public campaigns in support or opposition to the positions of the DEP.

## **SECTION 5**

### **Sections 5.2 and 5.3**

These sections should be deleted in favor of combining the requirements into requisite qualifications of employment. See Section 2.3.4 above.

### **Section 5.10**

One of the duties of the position of environmental advocate is set forth in Section 5.10 which states that the advocate is to direct citizens to appropriate public legal resources. This function seems to be beyond the scope of what the duties of the environmental advocate's office should be in providing a legal referral service to citizens. This provision also has potential for abuse by directing legal work to various individual attorneys throughout the state to the detriment of others and it is otherwise questionable what the term "appropriate public legal resources" means. The West Virginia State Bar is available to serve citizens and requests for information regarding public legal services as well as private legal services. Otherwise, with respect to the positions of the Division of Environmental Protection, it is the Attorney General's Office who represents the state. It does not seem appropriate for the DEP to provide legal referral services to citizens who may have a dispute with the DEP. Therefore, it is urged that Section 5.10 be deleted.

### **Section 5.13**

Additional language should be added which requires approval of the plan by the Director of DEP. As stated, the proposed rule requires the environmental advocate to prepare a plan for the coming year of the position's operations and

achievable objectives. The plan should be created in conjunction with the Director, and approved by the Director, prior to publication and implementation.

#### **Section 5.\_\_\_\_**

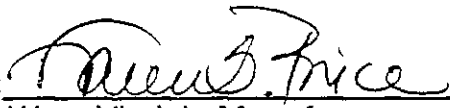
A new section should be added which states that the environmental advocate will provide the Director of the DEP with citizens' environmental concerns, primarily concentrating on issues having statewide implications, and to provide the Director with general information regarding environmental matters of importance to the state of West Virginia. Principally, the environmental advocate would seek to acquire the information from both recognized organizations and individual citizens regarding environmental problems and potential solutions to environmental problems and present the information acquired to the Director in an appropriate manner. One of the goals of the environmental advocate is to assist the DEP in reaching negotiated settlement of issues in dispute between the DEP and citizens. In this context the environmental advocate should acquire information and receive complaints from a disgruntled constituency and relay this information to the Director to assist in reaching negotiated settlements.

#### **CONCLUSION**

In summary, the role of the environmental advocate should be to assist the Director of DEP by providing the Director with poignant remarks and concerns of the citizens of West Virginia. To the contrary, the environmental advocate should not be a duplicate public information officer or an investigator. The WVMA would



suggest an entire rewrite of the proposed rule to reflect the parameters of the role of the environmental advocate. Accordingly, the WVMA offers its assistance in preparing a draft alternative upon the request of the DEP. In the absence of a total rewrite, these comments suggest several ways to refine the parameters of the office of environmental advocate. The WVMA appreciates the opportunity to comment on the proposed rules and respectfully submits the same the 18th day of July, 1994.

By:   
West Virginia Manufacturers Association



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Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

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WV Division of  
Environmental Protection

July 18, 1994

Mr. Roger T. Hall  
W.V. DEP  
10 McJunkin Road  
Nitro, W.V. 25143

RE: Interpretive Rule  
(Title 38, Series 10)  
Office of Environmental Advocate

Being asked to comment on the interpretive rule governing the Office of Environmental Advocate (OEA) is like having asked for a cake, being served a pie, told it is a cake, then asked what color frosting you want on the cake. ...Commenting on the frosting implies that you think the pie is really a cake when it isn't a cake at all and will never be a cake. Yet, to refrain from commenting on the frosting or to object to the illusion of the cake implies no interest whatsoever in the pie itself.

As ridiculous as this conundrum may seem, it is likely to be typical of the enigmatic and puzzling situations citizens and the environmental community in general will be asked to face over and over again in the coming months and years when dealing with this administration's brainchild Division of Environmental Protection. Hence, it is out of necessity but with great reluctance that I offer comments on all three of the subjects at hand - the cake, the pie and the frosting as well.

#### 1) THE so-called CAKE

To call an ombudsman-public information person an "advocate" (i.e. to call a pie a cake) flies in the face of any principles of good government or standards of truth in advertising that one might reasonably assume should be inherent in the actions of the Division of Environmental Protection (DEP). And yet, both current code (through the insistence of DEP representatives to the legislature) and this proposed regulation do just that.

As I stated publicly on several occasions during discussions of the legislation that created this position, WVHC objects to this office, not because the position itself is bad, but because the position is not what the title implies. As defined by that legislation, and the further refinements of this rule, the title "ADVOCATE" is deceptive, inappropriate, misleading and does a disservice to the public and environment it is meant to defend.

Although there is value in the powers and duties of the office described in this rule, the authority vested in the office is substantially limited by the underlying control of the Director who has final say over the "advocate" who is hired and fired by that Director, who serves "at the will and pleasure of that Director", who performs "as prescribed" and "as required" by that Director, and who cannot challenge official positions of the Division or that Director even if those positions are in conflict with the Advocate's own beliefs or the beliefs of citizen clients (See sections 2.1, 4.1, 4.4, 4.9, 4.10, 5.12, etc.).

The Office of Environmental Advocate as defined in current code and this rule offers only the illusion of advocacy. It may provide good press for DEP in its attempt to appear supportive of citizens and strong environmental protection, but it raises false hopes for members of the public who will turn to the OEA for support only to find the Advocate forbidden to defend any position that might be in conflict with the Division -- an all too familiar situation in communities where agency decisions are often the root of a problem.

Actually, since it is improbable that a true advocate position can ever be established within the Division, WVHC will continue to encourage and lobby for the creation of an independent and fully staffed office of environmental advocate similar to the one proposed for the Attorney General's office in S.B. 262 introduced to the 93-94 Legislature. (Copy attached.)

Short of a complete overhaul of this position, WVHC suggests a more appropriate title for the current position is Office of Environmental Affairs, or Office of Environmental Ombudsman.

## 2) THE PIE

As stated above, there IS VALUE to the office described in this rule, despite the deceptive title. Providing access to information and process, developing brochures, articles, outreach programs and direction to legal and technical sources, etc., etc. are all helpful and needed activities to aid citizens in dealing with environmental concerns that effect their lives. (In fact, I asked about and urged consideration of such a position at the public meeting in Fairmont early on in the process of the development of the DEP legislation.)

There is also value to this office as long as the Division continues to hire people of the caliber and character of the Director's first choice of advocates, i.e. Wendy Radcliff.

There is, however, great potential for abuse of this position and the persons selected to fill the position by any Director (present or future) for there is nothing in code or this rule to preclude using the Advocate to short circuit direct individual citizen participation in DEP actions, to divert unwanted criticism or the perceived disruptive presence of diverse individual advocates from a wide variety of community, citizen, and environmental groups to a single central 'office of complaints', or to negate or stifle the objections of citizens by requiring the Advocate to defend DEP positions in "negotiating settlements" with citizens (Section 5.12).

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Section 2.3.2 should be deleted and the remaining subsections relied on for demonstration of an applicant's abilities and qualifications for the job.

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WVHC therefore recommends adding explicit reference to state policy in Section 4.8 by adding the words "policy and" before the words "nine purposes" in 4.8.

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- Also, the advocate should be able to choose if and when it is in his or her, or his or her clients', best interest to be involved at all in negotiations of settlements of disputes between the DEP and those clients. Yet, Section 5.12 allows the Director to require the Advocate's participation in such settlement negotiations.

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Thank you for the opportunity to comment on this rule. Our statements are made with the desperate hope that DEP officials - current and future - will not use the discretionary powers this rule confers upon them to abuse the position or persons appointed to the position of Environmental Advocate. And further, with the hope that future administrations and legislators will see through the current film of deceit and create an independent office of environmental advocacy as is described in the attached copy of the 1993 S.B. 262.

Cindy Rank, President

SENATE BILL NO. 262

(By Senators Grubb, Macnaughtan and Withers)

[Introduced March 3, 1993; referred to the  
Committee on Natural Resources.]

A BILL to amend chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twelve, relating to environmental protection; creating the office of environmental advocate within the attorney general's office; providing for the appointment of an advocate; prescribing the powers and qualifications of the advocate; providing for the administration and staffing of the advocate's office; and authorizing an assessment against permit holders to generate funds for the implementation of this article.

Be it enacted by the Legislature of West Virginia:

That chapter twenty of the code of West Virginia, one thousand nine hundred and thirty-one, as amended, be amended by adding thereto a new article, designated article twelve, to read as follows:

ARTICLE 12. ENVIRONMENTAL ADVOCATE.

§20-12-1. Short title.

This article shall be known and cited as the "Environmental Advocate Act."

1 §20-12-2. Legislative findings and purpose.

2 The Legislature finds that West Virginia's natural  
3 environment is threatened by a myriad of pollution sources.

4 The Legislature further finds that:

5 (a) The protection and preservation of the state's natural  
6 environment is a fundamental responsibility of state government.

7 (b) A clean environment is one of the cornerstones of current  
8 and future economic development activities.

9 (c) State agencies and instrumentalities must often balance  
10 competing interests in evaluating practices and policies that  
11 impact the natural environment.

12 (d) Many times citizens are unable to afford the  
13 representation necessary to adequately defend a threatened and  
14 valuable environmental resource.

15 Therefore, it is the purpose of the Legislature to establish  
16 an office of environmental advocate to ensure, to the maximum  
17 extent possible, that the state's natural environment is defended  
18 whenever and wherever necessary.

19 §20-12-3. Environmental advocate; oath of office; salary; office  
20 location.

21 There is hereby created, under the authority of the attorney  
22 general of the State of West Virginia, the office of  
23 environmental advocate. Before entering upon the duties of this  
24 office, the environmental advocate shall subscribe to an oath of  
25 office, which shall be filed in the office of the secretary of  
26 state. The salary of the environmental advocate shall be  
27 determined by the attorney general. The office of the  
28 environmental advocate shall be located in Charleston.

1 §20-12-4. General powers of advocate.

2 The environmental advocate has the powers and duties granted  
3 under this article and all other powers necessary to carry out  
4 the purposes of this article. Any enumeration of powers is not  
5 intended to restrict the general powers of the environmental  
6 advocate.

7 §20-12-5. Authority of advocate.

8 The environmental advocate has the authority to:

9 (a) Institute, intervene in, or otherwise participate in,  
10 proceedings in state and federal courts, before administrative  
11 agencies, and before any other body, concerning any act, order,  
12 bill, resolution, practice, activity, or failure to act, that  
13 will have an impact on the state's natural environment.

14 (b) Take any action he considers appropriate with respect to  
15 environmental complaints.

16 (c) Institute, participate as an additional party in, or  
17 intervene as a friend of the court in any proceeding involving an  
18 impact on the state's natural environment.

19 (d) At the request of one or more citizens, or whenever in  
20 the advocate's opinion the public interest is served, represent  
21 said citizens in proceedings arising out of actions impacting the  
22 natural environment.

23 (e) Exercise all the same rights and powers regarding  
24 examination and cross-examination of witnesses, presentation of  
25 evidence, and other matters as any party in interest appearing  
26 before the agency or body in question.

27 (f) Educate the general public concerning environmental  
28 protection; and



1 (g) Conduct studies and issue reports concerning various  
2 topics relevant to protecting and preserving the state's natural  
3 environment:

4 §20-12-6. Qualifications of advocate and employees of advocate.

5 (a) No person may be appointed environmental advocate unless  
6 he or she is admitted to practice law in this state.

7 (b) The environmental advocate shall be a resident of this  
8 state during the term of office, and shall not, during such  
9 period, hold any other office of either trust or profit under the  
10 government of the United States, this state, or any political  
11 subdivision thereof. This section shall not be construed to  
12 preclude the advocate from serving as a member of the reserve of  
13 the armed forces of the United States, the West Virginia national  
14 guard, the air national guard, or the naval militia. The  
15 environmental advocate shall not engage in any other occupation  
16 or business, but shall devote his or her entire time to the  
17 duties of his or her office.

18 (c) No person who is in the employ of or acting in an  
19 official capacity with any company subject to a proceeding within  
20 which the environmental advocate could become involved, or who is  
21 pecuniarily interested in, or holds stocks or bonds of any such  
22 company, or is a candidate for elective public office may be  
23 appointed as advocate or be appointed or employed by the  
24 advocate. If any such appointed or employed person becomes,  
25 subsequent to his or her initial appointment or employment, the  
26 owner of such stocks or bonds, or otherwise becomes pecuniarily  
27 interested in such company, he or she shall divest himself or  
28 herself, within a reasonable time period, of such ownership or

1 interest. If he or she fails to do so, his appointment or  
2 employment shall be terminated. If any such appointed or  
3 employed person becomes a candidate for elective public office  
4 his or her tenure shall be terminated.

5 §20-12-7. Employees of environmental advocate; salaries;  
6 contracts for outside services; funds.

7 (a) The environmental advocate may, during the term of  
8 office, employ and fix the salaries of such lawyers, scientists,  
9 engineers, geologists, statisticians, economists, clerks,  
10 secretaries, stenographers, and other employees as are necessary  
11 to carry out the purposes of this article. All employees of the  
12 advocate and the expenses of the office of the environmental  
13 advocate, shall be paid by the treasurer from the funds  
14 appropriated for the use of the advocate after payment has been  
15 approved by the advocate.

16 (b) The advocate may contract for the services of technically  
17 qualified persons in the area of environmental protection to  
18 assist in carrying out the purposes of this article. Such  
19 persons shall be paid from funds appropriated for the use of the  
20 advocate after payment has been approved by the advocate.

21 §20-12-8. Assessment for payment of all expenses incurred by the  
22 advocate's office and the committee; adjustment of  
23 assessments from surplus.

24 (a) For the sole purpose of paying salaries and expenses of  
25 the office of environmental advocate, the attorney general shall  
26 establish by rule an assessment or fee, and penalties for  
27 nonpayment thereof, utilizing an equitable formula by which an  
28 amount, based on pollution discharge permits and other

1 environmental permits, shall be assessed on every such permit  
2 holder operating in this state. Such assessment shall be an  
3 amount calculated to produce five hundred thousand dollars for  
4 the fiscal year ending the thirtieth day of June, one thousand  
5 nine hundred and ninety-one. Thereafter, such assessment shall  
6 be in an amount equal to the appropriation for the office in each  
7 fiscal year.

8 (b) Such fees shall be deposited in a special fund in the  
9 state treasury designated the "Environmental Advocate Fund," to  
10 be appropriated as provided by law for the purpose of paying the  
11 salaries and expenses of the office of environmental advocate.  
12 Any balance remaining in the fund at the end of any fiscal year  
13 shall not revert to the treasury but shall remain in the fund and  
14 may be appropriated and used as provided above in the ensuing  
15 fiscal years.

16

17

18 NOTE: The purpose of this bill is to establish an office of  
19 environmental advocate within the attorney general's office.

20

21 This is a new article, therefore strike-throughs and  
22 underscoring have been omitted.

## NATIONAL COAL POLICY PROJECT

Center for Strategic and International Studies  
Georgetown University  
1800 K Street N.W.  
Washington, D.C. 20006  
(202) 833-1930  
Cable: CENSTRAT

MARCH 1979



### NEWSLETTER

During the last few weeks there have been many new developments which provide a good opportunity to bring you up-to-date on project activities. The December Plenary set the task forces in motion with the mandate to look at new issues but, equally important, instructed them to get involved in policy implementation. Responding to this charter the task forces have been actively searching out targets of opportunity.

#### SUMMARY OF TASK FORCE ACTIVITIES:

The Fuel Utilization and Conservation Task Force is submitting comments to the Department of Energy on the proposed regulations for the Powerplant and Industrial Fuel Use Act. In their paper the task force stresses that mandatory coal conversion regulations may in some circumstances cause a premature shift to coal, thereby closing out opportunities for using new coal burning technologies which are just a few years off. In addition, the task force noted the proposed regulations would also stifle the use of conservation measures and renewable energy forms which would be compatible with conventional non-coal systems. Modifications to the proposed regulations intended to ameliorate these problems were suggested.

The Mining Task Force is submitting testimony to the House Interior Committee Oversight Hearings calling for consideration of three of its recommendations in their review of the SMCRA. The first calls for the development of a program to assist small surface mine operators in improving their mining and reclamation techniques. The second recommended that regional and watershed planning be used to minimize the adverse impacts of mining on water quality. The task force further recommended that the federal government or regional bodies should be responsible for such assessments because watersheds usually extend beyond state boundaries. Finally, the third recommendation advanced by the task force calls for limited use of experimental mining permits where successful reclamation had not been demonstrated, such as alluvial valleys, Ponderosa Pine forests or other environmentally sensitive areas. The purpose of such experimental permits would be to demonstrate whether or not such areas could be mined without undue damage to the environment. The recommendation delineates the criteria to be used for selection, design, and operation of experimental mines.

---

## NATIONAL COAL POLICY PROJECT

Center for Strategic and International Studies  
Georgetown University  
1800 K Street N.W.  
Washington, D.C. 20006  
(202) 833-1930  
Cable: CENSTRAT

---



October 4, 1977

Mr. Norman Kilpatrick  
Surface Mining Research Library  
Box 5024  
Charleston, West Virginia 25311

Dear Norman:

I just wanted to take this opportunity to drop you a short note to say thank you for a job well done in organizing our trip in the Southern Appalachian area. I believe we had the opportunity to see a good array of various types of mining problems and techniques. I know everyone felt this was a very worthwhile trip.

I trust you will be sending me a list of the company representatives which we met during the tour. I would like to send them a letter to thank them for the time and effort extended in providing us a tour of their facilities.

I look forward to seeing you at the October Task Force meeting. Once again, thanks for a job well done.

Sincerely,

A handwritten signature in cursive script, reading "Francis X. Murray".

Francis X. Murray  
Project Director  
National Coal Policy Project

FXM:jdp



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 13 1978

THE ADMINISTRATOR

Mr. Francis X. Murray  
Center for Strategic and  
International Studies  
Georgetown University  
1800 K Street, N. W.  
Washington, D. C. 20006

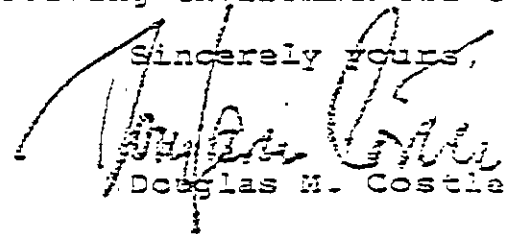
Dear Mr. Murray:

We at EPA have sensed the great frustration of all interested parties in trying to resolve environmental disputes. The National Coal Policy Project represents an approach that I believe will have major impact.

Your project has brought the parties of interest together on an equal footing, in a private, neutral setting. In this atmosphere, they have avoided rhetoric, investigated the facts, and discovered surprisingly broad areas of agreement. By telling us where they agree, they can also clear up the court and legislative calendars for those remaining conflicts between deeply held values that only the political process can reconcile.

The Government should be well served by the recommendations of the National Coal Policy Project and, hopefully, other institutions will explore opportunities for similar approaches to solving environmental challenges.

Sincerely yours,

  
Douglas M. Costle

# DEP names labor activist as environmental advocate

By Ken Ward Jr.  
STAFF WRITER

An environmental and labor activist was named Thursday to head the state Division of Environmental Protection's new Office of Environmental Advocate.

Wendy Radcliff, 25, was chosen for the post by DEP Director David C. Callaghan, who announced the move in a Thursday news release.

"It's a pleasure to announce that Wendy Radcliff will join the DEP as our first environmental advocate," Callaghan said. "Wendy has a wealth of experience dealing with environmental issues in both the private and non-profit sectors."

Radcliff, a Putnam County native, holds a political science degree from Fairmont State College, where she was student body president.

She spent the last two years working as a paralegal on environmental and labor issues for the Charleston law firm Calwell and McCormick. Prior to that, she was toxic coordinator for the West Virginia-Citizen Action Group.

Radcliff has been active in the state Democratic Party and worked with the Affiliated Construction Trades Foundation on a number of issues.

She was also active in the recent political campaigns of state Sen. David Grubb, D-Kanawha, and executive director of WV-CAG.

It was Grubb who forced creation of the environmental advo-

cate earlier this year. He threatened to kill a massive DEP reorganization bill if lawmakers didn't include the post in the legislation.

In her new job, Radcliff will be paid \$40,000 a year.

Radcliff said she hopes to be able to make DEP more responsive to citizen concerns about a wide variety of environmental issues.

She said Thursday that the much-criticized agency needs to allow more citizen input into the development of statewide regulations.

"I'm excited about the opportunity to finally give [DEP] an outside environmental opinion ... to show what it's like to be an outsider to the agency," Radcliff said.

"There are a lot of people at the agency who are trying to do a good job, but they don't always get a chance to talk to citizens," she said. "I hope to bring the public's concerns to their attention."

Callaghan refused earlier this week to release a list of those who applied for the environmental advocate post.

Many saw creation of the position as an effort to blunt the power of Callaghan, who has clashed often with environmentalists over landfill and coal mining issues.

Proposed regulations to govern the advocate post say Radcliff will not be able to take part in organized campaigns against any position taken by Callaghan or DEP.

to oversee voter's registration and the record room.

The women have become poor employees since filing the complaints, Summers said.

"This has made those employees unmanageable," Summers said. "They thumb their noses at me and dare me to fire them. They know they're protected."

Erwin declined to comment Thursday. "It'll all come out in court," she said.

Dean suffers from a heart con-

## LEGAL ADVERTISEMENT

particularly described with reference to that certain plat dated October 21, 1951, made by J. Lewis Mark, Engineer, and duly of record in the aforesaid Clerk's office in Deed Book 784, at page 88, which plat is attached to that certain deed dated November 20, 1951, from Forest Hills Company, a corporation, to Clyde M. Vaughan, a prior owner of the property herein conveyed, and being more particularly bounded and described as follows: BEGINNING at an iron pin in the southerly line of Wilkie Drive near the intersection of South Homewood Drive, and being the common front corner of Lots 174 and 175 of said Forest Hills Section Five Addition; thence running with the common line between Lots 174 and 175, S. 0° 14' E. 131.2 feet to an iron pin at the common rear corner of said Lots 174 and 175; thence with the rear line of Lot 174 S. 67° 40' W. 22.98 feet to an iron pin in the common rear corner of Lots 174 and 175 of said Addition; thence with the rear line of said Lot 173 S. 74° 10' W. 15 feet to an iron pin in said rear lot line; thence running across said Lot 173 N. 13° 34' W. 119.64 feet to an iron pin in the southerly line of Wilkie Drive, said iron pin being located S. 74° 10' W. a distance of one foot from the front common corner of Lots 173 and 174; thence with Wilkie Drive, N. 70° 10' E. one foot to the front common corner of said Lots 173 and 174; thence with Wilkie Drive N. 68° 24' E. 16.8 feet to an iron pin; thence with Wilkie Drive N. 68° 24' E. 16.8 feet to an iron pin; thence continuing with Wilkie Drive N. 50° 15' E. 23.5 feet to an iron pin; thence following Wilkie Drive on a curve to the right the chord distance of which is N. 69° 26' E. 28.25 feet to the place of beginning.

AND BEING the same real estate conveyed to John W. Frost and Blanche H. Frost, his wife, by deed dated September 1, 1937, from Sally A. Tenda Markle and John R. Markle, her husband, and recorded in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, in Deed Book 2193 at page 219.

The above described property will be sold subject to any covenants, restrictions, easements, leases and conditions of record and subject further to any unpaid real estate taxes or lienable assessments.

The subject property will be sold in "AS IS" condition. The Substitute Trustees shall be under no duty to cause any existing tenant or person occupying the subject property to vacate said property.

TERMS: Cash on date of sale to the highest bidder.

Randall R. Conrad, II  
Substitute Trustee  
Richard A. Phil  
Substitute Trustee  
P.O. Box 440  
1344 Edwin Miller Blvd.  
Martinsburg, WV 25401  
(304) 263-1971

(228645)

Order of Publication  
Commonwealth of Virginia  
Washington County, VA  
Juvenile and Domestic  
Relations District Court

Department of  
Social Services  
Washington County  
P.O. Box 808  
Abingdon, VA 24210

Donald Jesse  
General Delivery  
Cedar Grove, West Virginia  
26039

## LEGAL ADVERTISEMENT

the right to bid.  
THE MERCHANTS  
NATIONAL BANK  
By: Steve Nunley  
Vice President  
(228779)

### NOTICE OF PUBLIC SALE

Notice is hereby given that on the 21st day of July, 1994 at 10:00 o'clock A.M. a public sale will be held at C.J.'s Auto Sales, 110 Virginia Ave., N.W. St. Albans, West Virginia, to separately sell for cash the following items:

Storage Box Trailer Miller Transfer, Inc. Serial #422041; Miller Spectrum 15000-DC Plasma Cutting System Serial #JJ322163; Ingersoll Rand T30 Air Compressor Model #2425N Serial #3DT631922; 10 Fire Extinguishers - 10BC & 20BC; 2 Electric Heaters 440 Volts Model #SH 135431 Air-Ken Products, Inc.; 1 Lot Acetylene and Oxygen Hoses; 1 Lot Electric Welding Cables; 2 Sets Acetylene and Oxygen Welding and Cutting Tapes; 1 Square D single phase insulated Transformers Sylvania #13951-1212-010 Catalog #50S3H-50KVA; 1 Sargel Electric Corp. Transformers Style #33549-17212 012 480 Volts Catalog #30TKH; 1 School Foot Locker; 1 Desk Chair; 1 Small Metal Work Table; 1 International Hough 4 Wheel Drive Loader Stock 3805-995-3226 Serial #27MAC1672 with 3 in Bucket Serial #A9GG9715 Model #32725; 1 International Loadstar 1900 Tandem Dump Truck Serial #15682DCA 14929; 1 Chevy 1/2 ton Flat Bed Truck Serial #CCV744 PY33943 with 2 work saw tool boxes with master lock; 2635; 1 Ideal Arc Welder Model #R35400 Serial #AC50 1303; 1 Diesel generator; 3 Misc. Electric Motors with Pump Labour Serial #F172 0761-21; 1 Truck Frame (Serial #5869851).

These subject items are being sold pursuant to the Uniform Commercial Code Chapter 46, Article 7, Section 201, in order to enforce the warehouseman's lien held by Rod Vannoy, Cecilia Sanson and C.J.'s Auto Sales against the above described items held on account of John Hastings and/or Martec Inc.

Rod Vannoy  
Cecilia Sanson  
C.J.'s Auto Sales  
By: William W. Pepper  
Attorney at Law  
8 Hale Street  
Charleston, WV 25301  
(304) 346-0361  
(228783)

### Notice of Request For Engineering Services

The Putnam Union Public Service District wishes to obtain engineering services to provide design and construction services for the following project:

Matthews Road Extension

Installation of approximately 3500 L.F. of 3" PVC waterline, 2 Fire Hydrants and all other necessary appurtenances.

Engineering services required include design and services during construction.

Contracts are to be awarded on a lump sum basis. All consultants interested in being considered for this project must submit a proposal detailing qualifications, technical expertise, management and staffing capabilities and related prior experience. The goal of the competitive procurement process is to objectively select the firm who will provide the highest quality of service at a realistic fee. Accordingly, technical qualification and related prior experience will be

## LEGAL ADVERTISEMENT

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744-3409 betw

8:00 a.m. any

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South Cha

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Bridge & Mc

All bids sh

no later than

2, 1994.

# Four Putnam courthouse workers get day in court

By Greg Stone  
STAFF WRITER

WINFIELD — An administrative law judge will listen to the complaints of four female courthouse employees who allege that Putnam County Clerk Harold Summers discriminated against them in favor of another worker.

Administrative law judge Gail Ferguson will hear the case between July 27 and July 29, said assistant Human Rights director Norman Lindell. A location has not been determined

to oversee voter's registration and the record room.

The women have become poor employees since filing the complaints, Summers said.

"This has made those employees unmanageable," Summers said. "They thumb their noses at me and dare me to fire them. They know they're protected."

Erwin declined to comment Thursday. "It'll all come out in court," she said.

Dean suffers from a heart con-

- 22 (e) Methods to identify the most appropriate and cost-  
23 effective emergency and remedial actions in view of the  
24 relative risk or danger presented by each case or event.

#### ARTICLE 20. ENVIRONMENTAL ADVOCATE.

##### §22-20-1. Appointment of environmental advocate; powers and duties; salary; continuation of position.

- 1 The director of the division of environmental protec-  
2 tion shall appoint a person to serve as the environmental  
3 advocate within the division of environmental protec-  
4 tion, and shall adopt and promulgate rules in accor-  
5 dance with the provisions of article three, chapter  
6 twenty-nine-a of this code governing and controlling the  
7 qualifications, powers and duties of the person to be  
8 appointed to the position of environmental advocate. The  
9 environmental advocate shall serve at the will and  
10 pleasure of the director, who shall also set the salary of  
11 the environmental advocate. All funding for the office  
12 of environmental advocate shall be from existing funds  
13 of the division of environmental protection. The director  
14 shall provide an office and secretarial and support staff  
15 as needed. The position of environmental advocate shall  
16 continue to exist until the first day of July, one thousand  
17 nine hundred ninety-seven, to allow for the completion  
18 of a preliminary performance review pursuant to article  
19 ten, chapter four of this code.

#### CHAPTER 22A. MINERS' HEALTH, SAFETY AND TRAINING.

##### ARTICLE 1. OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING: ADMINISTRATION; ENFORCEMENT.

##### §22A-1-1. Continuation of the office of miners' health, safety and training; purpose.

- 1 (a) The office of miners' health, safety and training is  
2 continued and is a separate office within the department  
3 of commerce, labor and environmental resources. The  
4 office shall be administered, in accordance with the  
5 provisions of this article, under the supervision and  
6 direction of the director of the office of miners' health.





# Independent Oil & Gas Association of West Virginia

410 Washington Street, East • Suite 301 • Charleston, West Virginia 25301-1522  
Phone (304) 344-9867 Fax (304) 344-5836

July 15, 1994

Mr. Roger T. Hall  
West Virginia Division of Environmental Protection  
10 McJunkin Road  
Nitro, West Virginia 25143

Re: Interpretive Rule Office of  
Environmental Advocate

Dear Roger:

In accordance with the notice filed in the State Register on June 16, 1994, the Independent Oil & Gas Association ("IOGA") submits the following comments regarding the Division of Environmental Protection ("DEP") proposed rule on the Office of Environmental Advocate interpretive rules. The Independent Oil and Gas Association appreciates the opportunity to provide input on the proposed rules and urges the DEP to carefully consider these comments and the potential shortcomings of the proposed rule.

Several issues immediately surface that warrant comment. First, the rule allows for the Environmental Advocate ("EA") to attend meetings of the executive staff, as appropriate, attend other agency meetings, assist in negotiating settlements and collect and distribute information. See Sections 4.4, 5.11 and 5.12. IOGA urges the agency to place greater restrictions and limitations within the rule regarding the ability of the EA to attend meetings. Settlement negotiations are not usually public and may lead to premature public disclosure of information that is not public. The EA could intrude on meetings to which the EA was not invited thereby having a chilling effect on successful communication with appropriate agency personnel and contravene the constitutional right of citizens to petition the government for redress of grievances.

The limitation should particularly apply where corporate, trade secret or confidential information will be discussed or is in issue. Thus, not only should the EA be limited to attending meetings that are open to the public, but also, the EA

Mr. Roger T. Hall  
July 15, 1994  
Page 2

should be restricted in the EA's ability to obtain or review confidential information, trade secrets and the like. Therefore, IOGA suggests the elimination of the phrase "except as authorized by the Director" in Section 4.1.

Another concern of the members of IOGA is the apparent unbridled opportunity to expend state tax dollars for travel expenses, training, educational tuition, fees, and expenses and the use of state vehicles. See Sections 3.2.4, 3.2.4 and 3.2.6. There should be some limitation requiring authorization by the Director prior to expenditure of moneys on these activities. If the EA were so inclined, the EA could travel around the state at taxpayers expense to collect information, for example, without any accountability. Likewise, the EA could take a trip to Las Vegas to attend a conference without prior authorization, or attend graduate studies at night at state expense. IOGA does not mean to imply that such an abuse would happen, IOGA only seeks to tighten the language to remove any question that such discretionary type expenditures should be approved first.

Similarly, the rule should state that the EA is a full-time dedicated position so that the EA does not moonlight for a law firm or other organization that may have positions adverse to DEP. Language should be added that makes the full-time nature of the position clear and not allow the prohibition from taking an position adverse to the DEP to extend only during working hours. For example, despite the language in Section 4.10, prohibiting organization of public campaigns in support or in opposition to DEP's official position, there is no limitation that the EA could not otherwise participate in such activities after normal work hours. The rule should be clear that the EA is a full-time job and thus restricts the ability to participate in public opinion persuasion exercises.

Additionally, Section 5.10 should be stricken in its entirety. There is absolutely no cause for the EA to be directing people to legal services public or private. Instead, the EA should be prohibited from directing people to legal services other than the West Virginia State Bar Referral Service. Section 5.7 should also be amended to delete the phrase "interpreting information" because of the connotation that the EA's interpretation is the official interpretation of the DEP.

Overall, the EA should collect information from a variety of citizenry, interest groups and writings and relay that information to the Director as an assistance to both the agency and the public. The manner in which the rule is currently focused is that of an information dissemination specialist, similar to a public information officer. IOGA believes that the Legislature's intent was to create a position such that

# **The West Virginia Mining & Reclamation Association**

1624 Kanawha Blvd., East  
Charleston, WV 25311

\*\*\*\*\*

Mr. K.O. Damron, Vice President,  
West Virginia Mining & Reclamation Association  
submits the following comments  
this 18th day of July, 1994  
to supplement verbal comments  
presented during a formal

Public Hearing  
in Charleston, West Virginia  
today, in response to

\*\*\*\*\*

Proposed Procedural Rule

## **Division of Environmental Protection**

Series 10  
Office of Environmental Advocate

---

Mr. K.O. Damron, Vice President, West Virginia Mining & Reclamation Association  
submits the following comments, this 18th day of July, 1994, to supplement verbal comments presented during a formal Public Hearing  
in Charleston, West Virginia, today, in response to  
Proposed Procedural Rule, Division of Environmental Protection, Series 10, Office of Environmental Advocate:

Page 1 of 6

## **I. ABOUT THE PUBLIC HEARING:**

### **A. OUR REPRESENTATION:**

The West Virginia Mining and Reclamation Association represents over 125 coal producing member companies and over 200 associate member companies who provide products and services to the coal industry. Our comments on this proposed rule are on behalf of all of the members of our Association.

### **B. OUR APPRECIATION FOR THIS OPPORTUNITY:**

Our Association is grateful for this opportunity to offer suggested improvements to this rule. We DO NOT understand, however, why the DEP filled the position of advocate before perfecting the qualifications and before finalizing the duties of this position, as published in these proposed rules.

## **II. BACKGROUND:**

### **A. THE INDUSTRY:**

The coal mining industry in West Virginia produces hundreds of millions of tons of high quality coal for domestic and foreign use as an energy source for the production of electricity, steel and a host of other applications. Employment directly in West Virginia mines and indirectly in the mining support trades and the hundreds of millions of dollars of taxes generated by coal related sources are the **economic backbone** of the Mountain State.

A recent study found that one out of every ten payroll dollars in West Virginia comes from the coal industry. It was further revealed that one of every three business tax dollars being collected by the State comes directly from the coal industry.

Mr. K.O. Damron, Vice President, West Virginia Mining & Reclamation Association  
submits the following comments, this 18th day of July, 1994, to supplement verbal comments presented during a formal Public Hearing  
in Charleston, West Virginia, today, in response to  
Proposed Procedural Rule, Division of Environmental Protection, Series 10, Office of Environmental Advocate:

Page 2 of 6

Every influence which alters the production of West Virginia coal changes the fragile **competitive balance** between coal mines here and coal mines in other coal producing states and other nations. Therefore, changes in the staffing of the state governmental agency that enforces environmental matters (DEP) must be made with the potential negative impacts of those changes foremost in the minds of those considering such changes.

### **III. SUGGESTED AMENDMENTS TO THE PROPOSED RULE:**

#### **A. ABOUT OUR WRITTEN COMMENTS:**

The following suggested amendments are intended to improve the language of the proposed rule.

#### **B. SPECIFIC AMENDMENTS RECOMMENDED:**

##### **AMENDMENT NUMBER 1:**

On Page 2, Section 38-10-2, Paragraph 2.3.4, by **STRIKING** the entire paragraph and renumbering the remaining paragraphs.

##### **JUSTIFICATION FOR AMENDMENT 1:**

Inclusion of this qualification would greatly restrict the Director's choice of candidates for this position. There are probably a number of professional employees of the Division, today, who do not know the "legal requirements and programmatic functions" of the DEP. Then, how can we expect a newcomer to the Division to bring that knowledge on board? Aptitude to learn the legalities and systems should be considered, not a past familiarity to this specific agency.

##### **AMENDMENT NUMBER 2:**

On page 2, Section 38-10-3, Paragraph 3.2.4, by **INSERTING** after the word "expenses" and before the ",", on line one, the following:

"as approved by the Director"

Mr. K.O. Damron, Vice President, West Virginia Mining & Reclamation Association  
submits the following comments, this 18th day of July, 1994, to supplement verbal comments presented during a formal Public Hearing  
in Charleston, West Virginia, today, in response to  
Proposed Procedural Rule, Division of Environmental Protection, Series 10, Office of Environmental Advocate:

Page 3 of 6

## **JUSTIFICATION FOR AMENDMENT 2:**

Absent supervision of expenses both before and after making expenditures, the advocate could possibly abuse the privileges of travel and incur expenses not related to missions outlined in this rule and as directed by the Director.

## **AMENDMENT NUMBER 3:**

On Page 3, Section 38-10-3, Paragraph 3.2.5, by **STRIKING** the entire paragraph and **INSERTING** the following paragraph:

"Training and educational tuition, fees and expenses as approved by the Director."

## **JUSTIFICATION FOR AMENDMENT 3:**

There should not be a blank check for the advocate to attend any conference or other educational program as the individual may personally choose. Unless closely supervised, the draft language might be interpreted to permit the advocate to attend the college of his or her choice at full state expense. With state budget dollars at a premium, this benefit should be supervised.

## **AMENDMENTS NUMBER 4 THRU 11:**

On Page 3, Section 38-10-4, Paragraphs 4.1 thru 4.8, by **STRIKING** the word "**will**" and **INSERTING** the word "**may**".

## **JUSTIFICATION FOR AMENDMENTS NUMBER 4 THRU 11:**

This may have been an oversight by the drafter. Inclusion of the word "will" mandates that the advocate must perform these duties. If not amended, the advocate may be left with little time to perform duties and establish priorities as prescribed by the Director.

Mr. K.O. Damron, Vice President, West Virginia Mining & Reclamation Association  
submits the following comments, this 18th day of July, 1994, to supplement verbal comments presented during a formal Public Hearing  
in Charleston, West Virginia, today, in response to  
Proposed Procedural Rule, Division of Environmental Protection, Series 10, Office of Environmental Advocate:

Page 4 of 6

## **AMENDMENT NUMBER 12:**

On Page 4, Section 38-10-5, Paragraph 5.1, by striking the first sentence in the paragraph, and replacing it with the following:

**Evaluate the process by which public comments and input are received by the Division of Environmental Protection, and report the findings and recommendations to the Director.**

## **JUSTIFICATION FOR AMENDMENT 12:**

The office of environmental advocate was created for the purpose of improving the protection of the environment, not evaluating public opinion. Further, there is nothing in the qualifications section (2.3) of this rule requiring the advocate to have any professional background in public relations or other skills necessary to evaluate public opinions.

## **AMENDMENT NUMBER 13:**

On Page 4, Section 38-10-5, Paragraph 5.10, by **STRIKING** the entire paragraph and **RENUMBERING** the paragraphs that follow.

## **JUSTIFICATION FOR AMENDMENT 13:**

The Legislature did not intend for the environmental advocate to be an attorney, nor to assist with legal proceedings in support of or in opposition to the Division. The office of the Attorney General is the State's legal services branch. Therefore, this paragraph is unnecessary.

## **AMENDMENT NUMBER 14:**

On Page 5, Section 38-10-5, Paragraph 5.13, by **STRIKING** the entire paragraph and **INSERTING** the following replacement paragraph:

**"Develop quarterly and submit to the Director for approval a proposed action plan which will contain realistically achievable action items. The first such plan will be submitted to the Director within three (3) months of appointment.**

Mr. K.O. Damron, Vice President, West Virginia Mining & Reclamation Association  
submits the following comments, this 18th day of July, 1994, to supplement verbal comments presented during a formal Public Hearing  
in Charleston, West Virginia, today, in response to  
Proposed Procedural Rule, Division of Environmental Protection, Series 10, Office of Environmental Advocate:

Page 5 of 6

#### **JUSTIFICATION FOR AMENDMENT 14:**

If the plan is to be adjusted quarterly, then why not just call it a quarterly action plan? It should not take the appointee six months to develop an initial plan. If the advocate is truly a needed position, then there must be some obvious early missions for this new employee. Also, this new language provides clear oversight by the Director.

#### **AMENDMENT NUMBER 15:**

On Page 5, Section 38-10-5, after Paragraph 5.14, by **ADDING** the following new paragraph, numbered 5.15:

"Promote the practice known as "remining", including helping mine operators facilitate permits to remine.

#### **JUSTIFICATION FOR AMENDMENT 15:**

"Remining" occurs when a coal operator revisits a previously mined area, recovering coal left by the former operator, and leaving the land greatly improved. Remining activities produce a post mining land that is more appealing in appearance and vegetation, always with permanent improvements to the quality of water discharge from the property. In addition, Abandoned Mine Land funds which may have been used to improve this same property are freed for uses in other areas not appropriate for remining. We feel the advocate's efforts in this area should be declared the advocate's number one priority, since there is no one at the DEP who currently expedites the permitting process for remining opportunities.



Mr. K.O. Damron, Vice President, West Virginia Mining & Reclamation Association  
submits the following comments, this 18th day of July, 1994, to supplement verbal comments presented during a formal Public Hearing  
in Charleston, West Virginia, today, in response to  
Proposed Procedural Rule, Division of Environmental Protection, Series 10, Office of Environmental Advocate:

Page 6 of 6

## **IV. ABOUT THE FISCAL NOTE:**

### **A. ESTIMATED SALARY:**

The Code (22-20-1) directs the Director to set the salary of the Advocate. The fiscal note attached to the front of the proposed procedural rule indicates the salary of the advocate is estimated to be \$40,000 per year. If this salary is actually awarded to the Advocate it will far exceed the salaries currently paid to the Surface Mining Reclamation Inspectors and the Reclamation Supervisors employed at the DEP. We feel the role of these individuals is far more critical to the environment in West Virginia, and that their duties are far in excess of the duties proposed for the advocate, therefore, we propose the estimated salary be reconsidered and lowered to an amount that will not damage the morale of the existing employees of the DEP. Further, according to the Code, the cost of paying the salary and expenses of the Advocate must come from existing sources in the DEP, not from new appropriations, therefore a high salary and expenses for the Advocate could potentially draw from monies available for the salaries of the rest of the DEP employees.

### **U. SUMMARY:**

We hope you will agree the fourteen amendments suggested herein will improve the language of the proposed procedural rule and more accurately reflect the intent of the Legislature in the creation of this new position.



**K.O. DAMRON  
VICE PRESIDENT  
WEST VIRGINIA MINING &  
RECLAMATION ASSOCIATION**



**FAX**

**DATE**: 7/18/94

**TO**: ROGER HALL

**FROM**: CINDY RANK

759-0528

**RE**: Rule RE OEA  
Title 38 Series 10

**Pages**: 5 including this one

## Comments

ROGER —

① Would you PLEASE  
GET A COPY OF These comments  
TO WENDY RAOCLIFF — Thanks

② THE ORIGINAL IS IN  
THE MAIL TO YOU.

—Cindy

—I doubt seriously that  
I can be there tonight



west  
virginia  
highlands  
conservancy

MAILING ADDRESS • P. O. Box 306 • Charleston, West Virginia 25321

Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

July 18, 1994

Mr. Roger T. Hall  
W.V. DEP  
10 McJunkin Road  
Nitro, W.V. 25143

RE: Interpretive Rule  
(Title 38, Series 10)  
Office of Environmental Advocate

Being asked to comment on the interpretive rule governing the Office of Environmental Advocate (OEA) is like having asked for a cake, being served a pie, told it is a cake, then asked what color frosting you want on the cake. ...Commenting on the frosting implies that you think the pie is really a cake when it isn't a cake at all and will never be a cake. Yet, to refrain from commenting on the frosting or to object to the illusion of the cake implies no interest whatsoever in the pie itself.

As ridiculous as this conundrum may seem, it is likely to be typical of the enigmatic and puzzling situations citizens and the environmental community in general will be asked to face over and over again in the coming months and years when dealing with this administration's brainchild Division of Environmental Protection. Hence, it is out of necessity but with great reluctance that I offer comments on all three of the subjects at hand - the cake, the pie and the frosting as well.

1) THE so-called CAKE

To call an ombudsman-public information person an "advocate" (i.e. to call a pie a cake) flies in the face of any principles of good government or standards of truth in advertising that one might reasonably assume should be inherent in the actions of the Division of Environmental Protection (DEP). And yet, both current code (through the insistence of DEP representatives to the legislature) and this proposed regulation do just that.

As I stated publicly on several occasions during discussions of the legislation that created this position, WVHC objects to this office, not because the position itself is bad, but because the position is not what the title implies. As defined by that legislation, and the further refinements of this rule, the title "ADVOCATE" is deceptive, inappropriate, misleading and does a disservice to the public and environment it is meant to defend.

WVHC RE: DEPOEA rule 7/18/94 p. 2.

Although there is value in the powers and duties of the office described in this rule, the authority vested in the office is substantially limited by the underlying control of the Director who has final say over the "advocate" who is hired and fired by that Director, who serves "at the will and pleasure of that Director", who performs "as prescribed" and "as required" by that Director, and who cannot challenge official positions of the Division or that Director even if those positions are in conflict with the Advocate's own beliefs or the beliefs of citizen clients (See sections 2.1, 4.1, 4.4, 4.9, 4.10, 5.12, etc.).

The Office of Environmental Advocate as defined in current code and this rule offers only the illusion of advocacy. It may provide good press for DEP in its attempt to appear supportive of citizens and strong environmental protection, but it raises false hopes for members of the public who will turn to the OEA for support only to find the Advocate forbidden to defend any position that might be in conflict with the Division -- an all too familiar situation in communities where agency decisions are often the root of a problem.

Actually, since it is improbable that a true advocate position can ever be established within the Division, WVHC will continue to encourage and lobby for the creation of an independent and fully staffed office of environmental advocate similar to the one proposed for the Attorney Generals office in S.B. 262 introduced to the 93-94 Legislature. (Copy attached.)

Short of a complete overhaul of this position, WVHC suggests a more appropriate title for the current position is Office of Environmental Affairs, or Office of Environmental Ombudsman.

## 2) THE PIE

As stated above, there IS VALUE to the office described in this rule, despite the deceptive title. Providing access to information and process, developing brochures, articles, outreach programs and direction to legal and technical sources, etc., etc. are all helpful and needed activities to aid citizens in dealing with environmental concerns that effect their lives. (In fact, I asked about and urged consideration of such a position at the public meeting in Fairmont early on in the process of the development of the DEP legislation.)

There is also value to this office as long as the Division continues to hire people of the caliber and character of the Director's first choice of advocates, i.e. Wendy Radcliff.

WVHC RE: DEPOEA rule 7/18/94 p. 3.

There is, however, great potential for abuse of this position and the persons selected to fill the position by any Director (present or future) for there is nothing in code or this rule to preclude using the Advocate to short circuit direct individual citizen participation in DEP actions, to divert unwanted criticism or the perceived disruptive presence of diverse individual advocates from a wide variety of community, citizen, and environmental groups to a single central 'office of complaints', or to negate or stifle the objections of citizens by requiring the Advocate to defend DEP positions in "negotiating settlements" with citizens (Section 5.12).

Whether or not the job title is changed, the possibility of potential abuse should be eliminated by providing the OEA more independence from the Director.

### 3) THE FROSTING

a) Section 2.3.2 The Qualifications section of this rule require that the advocate must have a 4 year degree from an accredited college or university in a field of study directly related to the position.

While the college experience may instill a greater degree of tolerance for time-consuming and rigorous review of regulations, endless meetings and bureaucratic process, and while some related fields of study may instill a sense of advocacy, nevertheless, intelligence, wisdom, the power of reason and a reasonable attitude are not guaranteed by a 4 year degree. Nor does a lack of a degree imply an inability to deal with the requirements of the Advocate's job as described in this rule. Indeed, some of the strongest, most knowledgeable, well spoken and reasonable advocates for the environment in the state would not qualify under this provision. Experience has shown that many people come to the foreground of environmental protection as a result of sheer desperation and a dogged determination to educate themselves in precisely those skills needed for the OEA job.

Section 2.3.2 should be deleted and the remaining subsections relied on for demonstration of an applicant's abilities and qualifications for the job.

b) Section 4.8 states that the Environmental Advocate be guided by the nine purposes set forth in WV Code 22-1-1(b). While these purposes apply to all of DEP's actions, the duties of the OEA should put special emphasis on (b)(1) "to strengthen the commitment of this state to restore, maintain and protect the environment" and on state policy as declared immediately preceding the purposes in 22-1-1(b);

WVHC RE: DEPOEA rule 7/18/94 p. 4.

"It is the policy of the state of West Virginia ...to use all practicable means and measures to prevent or eliminate harm to the environment and biosphere, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations."

WVHC therefore recommends adding explicit reference to state policy in Section 4.8 by adding the words "policy and" before the words "nine purposes" in 4.8.

c) Sections 4.9 and 4.10. The restrictive provision of 4.9 (no legal actions without expressed approval of Director) and 4.10 (no opposition to official DEP positions) must be removed for the position to be true to its title of advocate.

d) Section 5.12 directing the environmental advocate to assist DEP in reaching negotiated settlements with citizens "as required by the Director" must be stricken/deleted.

- An Environmental Advocate cannot be expected to defend environmental and citizen interests only when those interests are not in conflict with the position of the Division, and even worse to defend DEP's position when those conflicts arise. Yet, it is conceivable under the provisions of Section 5.12 that the Advocate could defend a particular position or citizens group up to a point when the Director or the Division choose to take an opposing stand at which point the Director could require the Advocate basically to switch sides and defend the Division.

- Also, the advocate should be able to choose if and when it is in his or her, or his or her clients', best interest to be involved at all in negotiations of settlements of disputes between the DEP and those clients. Yet, Section 5.12 allows the Director to require the Advocate's participation in such settlement negotiations.

\*\*\*\*\*

Thank you for the opportunity to comment on this rule. Our statements are made with the desperate hope that DEP officials - current and future - will not use the discretionary powers this rule confers upon them to abuse the position or persons appointed to the position of Environmental Advocate. And further, with the hope that future administrations and legislators will see through the current film of deceit and create an independent office of environmental advocacy as is described in the attached copy of the 1993 S.B. 262.

Cindy Rank, President

or business, but shall devote his or her entire time to the duties of his or her office.

(c) No person who is in the employ of or acting in an official capacity with any company subject to a proceeding within which the environmental advocate could become involved, or who is pecuniarily interested in, or holds stocks or bonds of any such company, or is a candidate for elective public office may be appointed as advocate or be appointed or employed by the advocate. If any such appointed or employed person becomes, subsequent to his or her initial appointment or employment, the owner of such stocks or bonds, or otherwise becomes pecuniarily interested in such company, he or she shall divest himself or herself, within a reasonable time period, of such ownership or interest. If he or she fails to do so, his appointment or employment shall be terminated. If any such appointed or employed person becomes a candidate for elective public office his or her tenure shall be terminated.

**§20-20-7. Employees of environmental advocate; salaries; contracts for outside services; funds.**

(a) The environmental advocate may, during the term of office, employ and fix the salaries of such lawyers, scientists, engineers, geologists, statisticians, economists, clerks, secretaries, stenographers, and other employees as are necessary to carry out the purposes of this article. All employees of the advocate and the expenses of the office of the environmental advocate, shall be paid by the treasurer from the funds appropriated for the use of the advocate after payment has been approved by the advocate.

(b) The advocate may contract for the services of technically qualified persons in the area of environmental protection to assist in carrying out the purposes of this article. Such persons shall be paid from funds appropriated for the use of the advocate after payment has been approved by the advocate.

§22-20-8. Assessment for payment of all expenses incurred by the advocate's office and the committee; adjustment of assessments from surplus.

(a) For the sole purpose of paying salaries and expenses of the office of environmental advocate, the director of the division of environmental protection shall establish by legislative rule an assessment or fee, and penalties for nonpayment thereof, utilizing an equitable formula by which an amount, based on pollution discharge permits and other environmental permits, shall be assessed on every such permit holder operating in this state: Provided, That the director shall promulgate an emergency rule to provide an assessment or fee to cover the environmental advocate's costs for the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-five: Provided, however, That such assessment shall be an amount calculated to produce five hundred thousand dollars for the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-five. Thereafter, such assessment shall be in an amount equal to the appropriation for the office in each fiscal year.

(b) Such fees shall be deposited in a special fund in the state treasury designated the "Environmental Advocate Fund," to be appropriated as provided by law for the purpose of paying the



salaries and expenses of the office of environmental advocate. Any balance remaining in the fund at the end of any fiscal year shall not revert to the treasury but shall remain in the fund and may be appropriated and used as provided above in the ensuing fiscal years.

**RECEIVED**

Director's Office

JUL 13 94

July 7, 1994

WV Division of  
Environmental Protection

page 1 of 3

Re: Office of Environmental Advocate  
From: Joy Allison, Comments for hearing

The idea of Environmental Advocate  
(E.A.) is excellent and long over due.

But must be established in a manner  
in which the citizens feel totally  
free in seeking information and help  
AND the advocate must like wise  
have the freedom in providing not  
only rules and regulations but also  
directions for the citizen.

The position of E.A. will not best  
serve the public if the appointment  
and service is at the pleasure of the  
Director of the DEP.

38-10-2:2.1. This person may/will be restrained  
and suppressed, and would not be  
or feel free to provide information  
that could be a direct challenge to  
the Directors or other agency's  
decisions and actions.

This will only establish another  
layer of bureaucracy.

38-10-4 : 4.1 . More clearly defines an Information Director.

> The definition of an advocate - one who pleads another's cause or provides support.

38-10-5: 5.4 : 5.7 : 5.8 : 5.10 : and 5.12 are much needed but will not best serve the public in this format.

Also there needs to be added public protection that would not permit the E.A. to be hired into the DEP for at least a period of two years.

I know first hand the need of a true Environmental Advocate. In my preparation for an appeal of a DEP permit I found the task near impossible in getting the rules and regulations, etc; different divisions within the agencies involved in permitting facilities often do not know the actions of others,

And in fact, I am Challenging  
their action, and who likes  
to help someone who says  
you made a wrong decision.

I pray you take my comments  
with the Sincerity intended.

Response requested.

Sincerely

Joy Allison

Joy Allison

Rt #1, Box 855

Chester, WV 26034

304-387-2259

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Division of Environmental Protection TITLE NUMBER: 38  
RULE TYPE: Interpretative; CITE AUTHORITY W. Va. Code 22-1-3, 22-1-3a,  
22-20  
AMENDMENT TO AN EXISTING RULE: YES NO XX

IF YES, SERIES NUMBER OF RULE BEING AMENDED: N/A

TITLE OF RULE BEING AMENDED: N/A

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 10

TITLE OF RULE BEING PROPOSED: Office of Environmental Advocate

DATE OF PUBLIC HEARING: July 18, 1994 TIME: 7 p.m.

LOCATION OF PUBLIC HEARING: First Floor Training Room

WV Division of Environmental Protection

10 McJunkin Road

Nitro, West Virginia 25143

COMMENTS LIMITED TO: ORAL WRITTEN XX

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Roger T. Hall

WV DEP

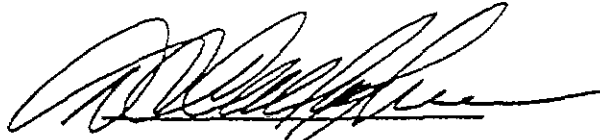
10 McJunkin Road

Nitro, WV 25143

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

  
Authorized Signature



Gaston Caperton, Governor

Dyan Brasington, Executive Director

WEST VIRGINIA DEVELOPMENT OFFICE  
CHARLESTON, WV 25303-0211

FACSIMILE TRANSMISSION SHEET

DEVELOPMENT SERVICES  
BUILDING 5, ROOM B-525  
CHARLESTON, WEST VIRGINIA 25305  
PHONE: (304) 558-2234  
FAX: (304) 558-1189

July 18, 1994

TO: Roger T. Hall  
FROM: Dyan Brasington



Gushee Caperton, Governor

Dyan Brasington, Executive Director

WEST VIRGINIA DEVELOPMENT OFFICE  
CHARLESTON, WV 25305-0211

## MEMORANDUM

TO: Roger T. Hall  
FROM: Dyan Brasington DB  
DATE: July 18, 1994  
RE: Office of Environmental Advocate

We have two concerns regarding the Office of Environmental Advocate:

1. The environmental advocate is not directed to keep economic development prospects confidential and this is necessary for our work to help bring jobs to West Virginia.
2. On a related matter, the environmental advocate appears to have the ability to attend any meeting for the purpose of collecting and distributing information. Again, we have concerns regarding the release of potential prospect information or meetings prior to a time that would be prudent or jeopardize an economic development project in West Virginia.

Thank you very much for your consideration. We look forward to working with the environmental advocate.

DB:jk



## WEST VIRGINIA FORESTRY ASSOCIATION

P.O. BOX 488  
RAVENSWOOD, W. VA. 26164  
PHONE (304) 273-8164

July 18, 1994

Roger T. Hall  
WV DEP  
10 McJunkin Rd.  
Nitro, WV 25143

Dear Sir:

I would like to submit the following comments pertaining to the Environmental Advocate.

3.2.5 - Person should be qualified prior to being hired, not educated afterward.

4.1 - The Director can not authorize any review of records that are protected by statute.

4.2 - Confidential information from any agency must not be given.

4.2 - 4.8 - The word "will" in each of these should be changed to "shall".

5.11 - The words "where appropriate" needs to be defined and limited.

5.13 - Does the Director approve the plan?

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dick Waybright".

Dick Waybright  
Executive Director



July 18, 1994

Mr. Roger T. Hall  
WVDEP  
10 McJunkin Road  
Nitro WV 25143

RE: Comments on the Office of Environmental Advocate

2-3.1 ~~permanate~~ resident

long term resident

2-3.5 ~~demonstrated~~ ability

show ability to

4-1through 4-9 ~~will~~

May

5.12 ~~as-required-by-the-director~~

in cooperation with the director

Respectfully submitted by

Anne Spaner.

**COLUMBIA GAS**

Transmission



July 11, 1994

**RECEIVED**

Director's Office

JUL 13 94

WV Division of  
Environmental Protection

Roger T. Hall  
West Virginia DEP  
10 McJunkin Road  
Nitro, West Virginia 25143

Dear Mr. Hall:

Columbia Natural Resources has reviewed proposed Title 38, Interpretive Rule, Series 10, in advance of the July 18 public hearing.

We suggest one minor change in the proposed rule to avoid a misinterpretation. At Rule 4.1, we ask that you amend the language to read as follows:

"The Environmental Advocate will direct (substituting the word "direct" for the word "make") inquiries to (add) and receive responses from the . . ."

I have attached a copy of the proposed rule for your reference.

While this suggestion is technical in nature, CNR believes it will strengthen the intent of the rule.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, reading 'Brentley K. Archer'.

Brentley K. Archer  
Manager, State Government Affairs

/se

Enclosure

c: Ben Snyder, CNR

11Jul194.BKA

3.2.5. Training and educational tuition, fees, and expenses as necessary to carry out the duties of the position.

3.2.6. Use of pool vehicles as available and as necessary to carry out the duties of the position.

§38-10-4 Powers and Limitations - The Environmental Advocate will carry out the duties of the position as set forth in this rule, and as prescribed by the Director in accordance with the following:

4.1. The Environmental Advocate will <sup>direct</sup>~~make~~ inquiries <sup>to</sup>and receive responses from the Director's executive staff and the Chief of each Office as necessary to carry out the duties of the position. The Environmental Advocate will not request any information which is confidential, i.e., personnel records, corporate or trade secrets protected by statute, work product, etc., except as authorized by the Director.

4.2. The Environmental Advocate will consult with and request information from other agencies of state or federal government, as necessary to carry out the duties of the position.

4.3. The Environmental Advocate will make public any available information except confidential information as described in subsection 4.1 of this section.

4.4. The Environmental Advocate will attend meetings, hearings, proceedings, etc., as necessary to carry out the duties of the position.

4.5. The Environmental Advocate will take such actions as deemed appropriate on behalf of any person, *provided*, That such action is lawful and is not in conflict with subsections 4.9 and 4.10 of this section.

4.6. The Environmental Advocate will provide advice and council to any person as necessary to carry out the duties of the position.

4.7. The Environmental Advocate will prepare and/or distribute correspondence, documents, records, reports, etc., as appropriate and necessary to carry out the duties of the position.

4.8. The Environmental Advocate will be guided in all actions by the nine purposes set forth in West Virginia Code §22-1-1 (b).

4.9. The Environmental Advocate will not represent any person in, or file on behalf of any person, legal or quasi-legal actions, either in support of or opposed to the Division of Environmental Protection without the expressed approval of the Director, and under the supervision of the Division of Environmental Protection's General Counsel.

**WEST VIRGINIA** Oil and  
**Natural Gas**  
ASSOCIATION

---

July 18, 1994

Mr. Roger T. Hall  
Special Assistant to the Director  
W.Va. Division of Environmental Protection  
10 McJunkin Road  
Nitro, W.Va. 25143

RE: Office of Environmental Advocate Rule

Dear Mr. Hall:

On behalf of the member companies of the West Virginia Oil & Natural Gas Association (WVONGA), I appreciate the opportunity to provide the following comments on the above-referenced rule as a way to assist the Division of Environmental Protection (DEP) in the development of a comprehensive rule to guide the Office of Environmental Advocate (OEA).

Although the OEA serves at the will-and-pleasure of the DEP Director, our association feels the provisions of the proposed rule are a little too open-ended and, accordingly, we suggest that some constraints be provided that will establish a benchmark of appropriate activities for the Office of Environmental Advocate.

**ROLE OF OEA**

One of the fundamental changes that needs to be made to this proposed rule involves the function and role of the OEA. As the proposed rule is presently written, it appears that the primary duty of the OEA is the internal collection of information and its external dissemination. This viewpoint comes from the language contained in subsection 4.3 of the proposed rule.

This section should be rewritten as follows: "The Environmental Advocate shall not restrict public access to any available information except confidential information as described in subsection 4.1 of this section."

Clearly it is not legislative intent nor the purpose of this rule to make the OEA an information gathering and dissemination entity. The Office of Environmental Advocate should serve an advocacy role, one that presents to the DEP environmental viewpoints and assists citizens in their interaction with the agency.



The main role of the OEA should be to receive information from affected individual(s) or public groups, analyze this information and provide it to the appropriate agency departments or officials.

This will help address one of the long-standing complaints of the environmental community, which is that they do not have the resources nor personnel to afford them the same level of access that the regulated community supposedly has enjoyed.

#### **CONFIDENTIALITY OF INFORMATION**

While the proposed rule restricts the OEA's ability to obtain confidential material, it does not go far enough. A clause should be inserted into the proposed rule in subsection 4.1 that states that in the event the OEA acquires confidential, trade secret or corporate or proprietary information by whatever means, the OEA is to be required to maintain that information as confidential in the same as the DEP Director and as otherwise provided by law.

Furthermore, the failure to retain this information in confidence and/or to allow for its release should subject the offending OEA personnel to criminal and civil penalties as provided by law. This would put the personnel in the OEA on notice that release of confidential information could subject them to criminal and/or civil penalties.

#### **MEETING ATTENDANCE**

The provision that allows the OEA to attend any meetings at will and pleasure is another area that should be reevaluated. This unlimited open-access capability could enable the OEA to attend certain meetings in state government that are not available for public attendance. Similarly, the OEA should not by its status as another agency of government be permitted in meetings in which the OEA does not have standing or clearly would be intrusive. Moreover, the proposed rule needs to clarify the ability of the OEA to attend meetings within the agency in which the OEA was not invited. Without these types of restrictions, the candid communications between the DEP and the regulated community may be stifled.

#### **LEGAL NEUTRALITY**

Another change that needs to be made is a revision to subsection 4.9. The OEA should not be involved in any lawsuits either in support or in opposition to the position of the DEP, notwithstanding expressed approval by the Director to the contrary. There should be an outright prohibition of the OEA regarding its involvement in lawsuits.

Similarly, the OEA should be not interpreting regulations, agency policy or current statutory law in the context of advising citizens in legal matters. Nor should the OEA refer citizens to legal services. Thus, subsection 5.10 should be rewritten accordingly.

Likewise, subsection 4.5 needs adjustment because "such actions" may be beyond the limitations contained in subsections 4.9 and 4.10 and may violate the spirit of the

Mr. Roger T. Hall  
July 18, 1994  
page 3

regulations. The phrase "such actions" is vague and should be revised or subsection 4.5 should be eliminated entirely.

Lastly, throughout this rule the term "will" should be changed to "may" so that the guidance provided in the rule is clearer. Rules should be written in terms of "may" and "shall" instead of "will" and "must."

To reiterate, the West Virginia Oil & Natural Gas Association thinks the state will be best served by an Office of Environmental Advocate within the DEP that is a clearinghouse for the receipt of information, complaints and policy suggestions from the public. Furthermore, the OEA should condense any information it receives, provide statistical evidence and perform other relevant activities that will assist the agency in the development of its policies and regulations.

The changes and revisions that we have been outlined will ensure that the DEP's Office of Environmental Advocate serves as an appropriate advocate of environmental viewpoints and not as a distributor of information to the public or a "spy" on the regulated community.

The West Virginia Oil & Natural Gas Association appreciates the opportunity to comment on the proposed procedural rule for the Office of Environmental Advocate of the West Virginia Division of Environmental Protection. If the DEP has any questions or if we may be of assistance, please contact my office at your convenience.

Sincerely,



Lawrence J. Malone  
Executive Director

# AFFILIATED CONSTRUCTION TRADES FOUNDATION



STEVE WHITE  
Director

523 Central Ave.  
Charleston, WV 25302

Phone: (304) 345-7570  
Fax: (304) 345-7649

**PARTICIPATING  
LOCAL UNIONS:**

July 18, 1994

**BOILERMAKERS  
LU 667, Winfield**

Mr. Roger Hall  
West Virginia Department  
of Environmental Protection  
10 McJunkin Road  
Nitro, WV 25143

**BRICKLAYERS  
LU 5, Huntington  
LU 9, Charleston  
LU 15, Fairmont**

Dear Mr. Hall:

**CARPENTERS  
LU 128, St. Albans  
LU 302, Huntington  
LU 899, Parkersburg  
LU 1207, Charleston**

Below are my comments regarding the proposed interpretive rules for the Office of Environmental Advocate, Title 38, Series 10.

**PLASTERERS &  
CEMENT MASONS  
LU 887, Charleston  
LU 181, Parkersburg**

First let me state that I support the establishment of the Environmental Advocate position. The ACT Foundation has been active in environmental issues and sees a clear need for a position that has the resources and expertise to assist residents in protecting their environment from polluters. Of equal importance is to help the public understand, interpret and confront the rules, regulations and agencies of our state.

**IRON WORKERS  
LU 301, Charleston  
LU 769, Ashland, KY**

In this regard I find the proposed rules for the office of Environmental Advocate to be lacking of an "advocate" role. As proposed, these rules mirror the existing responsibilities of current DEP employees.

**LABORERS  
LU 453, Beckley  
LU 543, Huntington  
LU 1353, Charleston**

I find sections 4.9 and 4.10 particularly troublesome. Both of these sections are contrary to any vision of an advocate. I would strongly suggest that these sections be eliminated. If these are not removed then it is clear that the office should be placed under some other agency than the DEP for it to have any credibility.

**MILLWRIGHTS  
LU 1755, Parkersburg**

Further, the idea that the Advocate be an employee at will of the DEP director leaves little question as to the independence of the position. It would better serve the public to have a term of office designated.

**PLUMBERS & FITTERS  
LU 565, Parkersburg  
LU 625, Charleston  
LU 83, Wheeling**

Finally I suggest an addition to the rules that would insure the resources of the DEP, including technical staff, testing and other expert resources be made clearly available to the Advocate. If the Advocate does not have proper technical resources they will not be able to function effectively.

**TEAMSTERS  
LU 175, Charleston  
LU 505, Huntington**

Sincerely,

Steve White

# Surface Mining Research Library

Box 5024 • Charleston, West Virginia 25361

Norman Kilpatrick  
Director

Telephone  
(304) 768-0489

## COMMENTS ON PROPOSED RULES CONCERNING THE POSITION OF ENVIRONMENTAL ADVOCATE

July 18, 1994

My name is Norman Kilpatrick and I am director of the Surface Mining Research Library, Box 5024, Charleston, West Virginia 25361. I have held this position since the Library was established by The Conservation Foundation, in 1971.

I would like to propose a significant addition to the duties of the Environmental Advocate office within the West Virginia Division of Environmental Protection, after having gone over the new rule proposed by the DEP to cover this new position.

I am confident that nothing in that portion of the State law establishing this post, would prohibit the Director from adopting this addition to the duties and required background of the Environmental Advocate, as set forth in Chapter 22, Article #20 of the West Virginia Code.

I also am encouraged because this position and its related duties are not required by any Federal law or regulation that requires approval of the U.S. Environmental Protection Agency, the Office of Surface Mining or some such.

Thus, my proposal can be adopted immediately by the DEP and help improve the environment of West Virginia as well as shape the history of the Environmental Advocate, from its start.

My proposal is based on my experience as the only West Virginian serving on the National Coal Policy Project, from 1978 - 1980. Also, from my experience since then as an independent coal consultant and writer.

All of this has convinced me that it is possible to eliminate some of the harsh statements and ill feelings between industry representatives regulated by the DEP and the environmental and citizen groups that often have concerns with projects proposed by the regulated industries.

My experience has convinced me that most environmental groups at the grass-roots, are not seeking to force those looking for new or expanded job opportunities to move to North Carolina, as some industry representatives seem to believe.

Nor are most landfill developers waiting to slip toxic waste or some such into a landfill not intended to contain such items, as some environmentalists may believe.

I am convinced that in a number of cases what citizen groups with environmental concerns want may be agreeable to the industry or business involved, if a proper discussion between the two camps can be arranged.

This is most important when environmental groups seek something that goes beyond the maximum requirements that DEP can require for a particular disposal operation, mine site, or well.

Thus, I propose that the Environmental Advocate position include a conflict resolution duty, and add a requirement for experience in this method of promoting environmental concerns.



Conflict resolution stimulators have a long and honored history, so far as I can see. The National Coal Policy Project, dealing with environmental groups and coal producing groups, was one example. More recently, the U.S. Government utilized a top negotiator to help end the last Bituminous Coal Operators - United Mine Workers of America national strike.

I can see the problems the Environmental Advocate dealing with often coming down to a situation where that worthy has to say, "Look, the DEP can not require the industry in question to do what you want done. You will have to sue or go home."

I believe this state would be well served, and the environmentalists and industry representatives involved better served, by the Environmental Advocate being charged to go beyond the "letter of the law" type of answers to try to develop negotiated settlements where possible.

The National Coal Policy Project was governed by "The Rule of Reason", and an agreement that coal mining in a responsible manner was to be encouraged. It produced several documents related to the 1977 national surface coal mining act and related issues entitled "Where We Agree." Some agreements were brought to the Congress.

It also produced a list of items where it was determined the environmental forces (I was a member of the environmental side I should note) and the coal producers and their associations could not agree.

In fact, some groups that want to block a proposed project at all costs, are not candidates for such conflict resolution, it should be stated. Nor will negotiations always reach a successful compromise or result. I certainly am not suggesting lawyers will go out of business if my proposal is adopted.

But if a local group wants to see trees on land to be disturbed by a project subject to DEP review, yet the Division can only require a vegetative cover of grass, surely it would be to the advantage of all to allow the Environmental Advocate to bring the two parties together for discussions. Creating wetlands, or providing wild animal "cover" on project sites are other examples of where a company might agree to spend more money to meet the environmental group's demands under the proper circumstances.

I enclose an article from Fortune magazine about the National Coal Policy Project, for your consideration. Although it deals with coal mining, the approach represented here can surely be applied to other industries as well.

The DEP is limited by the laws and the courts in what it can do and not do. Thus, some of the criticisms of it are unfair, it seems to me. Involvement of the Environmental Advocate in bringing the contending parties (environmental/citizen groups and industry) together for negotiations surely has to be to the Division's advantage.

And it will, as the National Coal Policy Project did, allow the parties to start seeing each other as human beings, not "devils" whose only goal is to do the other in. It also should help both sides understand the other's concerns outside of the legal framework that permit requests to DEP, etc. must be brought in, and opposition also must be presented.

West Virginia NEEDS MORE LIGHT ON SUCH ENVIRONMENTAL CONFLICTS AND LESS HEAT. Thus, I urge the DEP to amend the rules for this position to include a strong "conflict resolution" mandate in its job requirements and a requirement that the holder of the position have a background that allows him or her to be creditable with both environmental groups and industry organizations, as well as having experience in this approach to helping improve the environment.

Surely, this will be in the best interest of the State of West Virginia and its people.

*William F. Fritch*

# Detente for Coal

The effort to clean up the environment has always hinged on the question of means—or how to do it. A national commitment was made a decade ago to repair the damage industrial society had wrought on our physical surroundings. That commitment left unanswered what technical methods should be employed in the repair job, what mixture of compulsion and incentives would achieve the best results in winning compliance, and how to reconcile the cleanup effort with the need for a vigorous and growing economy. Honest men could reasonably differ about these matters, but the hope was that they would resolve these differences in a rational manner through compromises and trade-offs.

Unfortunately, as we now know, these hopes foundered. Instead, environmental issues generated a kind of guerrilla warfare. The environmental movement in many cases was taken over by zealots who espoused an end-justifies-the-means philosophy, scorned compromise, strong-armed Congress and the regulatory agencies into setting extreme standards, used litigation and public harassment to delay or halt industrial expansion that they considered harmful, with alarming consequences for the economy.

In response, business was driven to take extreme positions of its own: industry spokesmen, who knew better, began to deride the need for any environmental cleanup, and business lobbyists adopted rough tactics similar to those of their opponents.

## A yen for peace and reason

This destructive warfare has finally begun to trouble leaders in both camps. Some environmentalist leaders have concluded that quite a few of their triumphs have turned out to be hollow. Crude legislative, regulatory, and judicial measures built up public antagonism and resistance. And the expense of long court battles strained the treasuries of many organizations, forcing them to neglect other cherished causes. The businessmen on the other side became equally weary of conflicts in which victories for common sense were rare.

*Research associate: Nancy Martin*

The mutual disillusionment with warfare is now encouraging efforts to reach a detente. Environmentalists and businessmen have begun to sit down together and to settle issues outside the courts, legislatures, and bureaucracies. A group based at the University of Washington, for example, has successfully mediated a controversy over the route and size of a major freeway. Recently a foundation-supported, nonprofit corporation called RESOLVE was formed to help settle environmental disputes at the national level.

The new trend toward detente has been greatly spurred by the National Coal Policy Project, a yearlong series of meetings between leading conservationists and top and middle-rank executives from the coal-mining and coal-consuming industries. Their aim was to try to agree on how coal can be exploited in ways that society can tolerate. Even the participants are astonished by their success. Probably never before have so many industrialists and environmentalists found common ground on such an array of issues. Some of the project's hundreds of recommendations—which cover matters ranging from coal mining to the pricing of electricity—are being made public this month.

## Less influence for extremists

One immediate effect of the recommendations may be to move regulatory agencies toward more flexibility in writing and enforcing their rules. Some of the conclusions would require changes in federal and state laws, and such action would presumably come slowly. In any case, the intricately balanced prescriptions should help reduce the political influence of extremists on both sides. The example of conciliatory behavior, which may be the project's most valuable contribution, provides a model for speedier and wiser resolution of present and future environmental disputes.

There has always been inherent conflict in the nation's commitment to both a cleaner environment and to coal as the main alternative to overdependence on imported oil. Though coal is the nation's most abundant source of energy (at current rates

of consumption, the U.S. has enough to last some 320 years), coal's role in meeting our energy needs has until recently been in a prolonged decline. From 1920 to 1972, coal's share of U.S. energy consumption fell from 78 percent to a mere 17 percent.

A major reason for that decline is that coal is one of the dirtier substances with which man deals. Many people old enough to remember the grimy cellars, the blackened buildings, and the sulfurous, lung-clogging pall that once blanketed nearly every northern city have reason to be uneasy about renewed dependence on coal. Several studies predict that even if the best available pollution controls are widely deployed, doubling coal consumption by 1985, as the Carter Administration projects, would mean an unpleasant rise in emissions of sulfur dioxide and oxides of nitrogen. Many authorities believe that existing regulations on mining, safety, and air and water pollution could preclude reaching the national goal for coal use.

## Where mining should be off limits

Some sixty participants—half from coal-mining and coal-using industries, half from environmentalist ranks—are taking part in the coal project. Working as members of five separate task forces, they have sought agreement not only on how and where coal should be mined and burned, but also on how it should be transported, priced, and conserved.

The seriousness of the effort can be measured by the number of retreats that both sides have already made from previous positions. Industry, for example, has accepted the principle that portions of several coal-bearing regions in the U.S. should be placed off limits to mining or limited to experimental projects. These include not only scenic areas in Appalachia and agricultural portions of the Midwest, as well as arid sections of New Mexico, Arizona, Utah, and Colorado where natural ecosystems might be hard to restore, but also ponderosa-pine forests of Montana and Colorado, and, in the northern Great Plains and Rocky Mountains, alluvial valley farmlands and terrain with groundwater aquifers or



A good way to harmonize conflicting viewpoints, the coal project's task force on mining found, was to see a lot of coal operations in the field. Studying reclamation efforts in a West Virginia strip mine are (foreground, from the left) Michael McCloskey of the Sierra Club; Barbara Brandon, then of the University of Kentucky Law School; Chuck Kucera of AMAX; John Corcoran, former chairman of Consolidation Coal; and James Sembower of Dow Chemical.

springs that would be disrupted by mining.

For its part, the environmental contingent has softened its once rigid insistence that strip miners must in every case level the cliff-like "high walls" that remain after coal is removed. The project's mining task force concluded that in some flat parts of the Midwest more productive farmland might be destroyed by leveling some high walls than by leaving them alone. If the walls are left standing, farming could continue to the edge of the cliff; but tearing them down might replace the cliffs, the mined strip, and flat agricultural land with a slope unsuited for farming.

#### A boost for one-stop hearings

In a second significant concession, the environmentalists agreed, in effect, to abandon their standard delaying tactics at licensing and siting hearings for power plants to which they object. Instead, they concurred in a recommendation that utilities be required to submit only one state application instead of dozens, to present their plans at only one public hearing rather than three or four, and that limits be set on the time government agencies are allowed to deliberate. Utilities have argued that past procedures and delays added greatly to the cost of the plants, usually with little discernible environmental benefit. But their opponents, lacking the money and technical expertise to fight the plants on their merits, have supported complicated licensing procedures because they offer more chances to harass and stop projects.

In return for one-stop licensing hearings and more flexibility in mining regulation,

the industry participants agreed to notify the public before applying for power-plant licenses. They also assented to the principle that qualified public-interest groups participating in power-plant and mine-project hearings should receive public financial support.

The two sides also concluded that people who stand to benefit most from energy-producing facilities ordinarily should bear the brunt of the resulting pollution or else bear the cost of eliminating it. Power plants, in other words, should be sited near the area where the bulk of the power is sold, not at the mine mouth or in some remote, unspoiled spot.

Industry has been preoccupied with trying to maintain some flexibility in environmental regulations to accommodate varying local conditions, to minimize unwarranted costs, and to encourage new technology. Environmentalists have long suspected that such pleas are pretexts to evade the intent of the law. Much to the surprise of the industry participants in the project, however, the environmentalists expressed considerable willingness to rethink—and perhaps give up—some of their hard-fought legislative and judicial gains if industry could demonstrate the need for flexibility.

In one concession, the environmentalists retreated a bit from their long-standing insistence that every new plant must install the "best available technology" to reduce emissions and must meet rigorous emissions standards based on that technology. Industry contends that these standards discourage development of cheaper, potentially more effective antipollution devices.

Under present law, if a new technology fails to work, industry must retrofit plants with older devices, thereby paying more than if it had not tried to innovate.

The project's air-pollution task force recommended that variances be granted to some plants with new technology, with the proviso that if the plant fails to meet the desired emission standards, the company would have to pay a charge. In order not to discourage innovation, the task force specified that the charge should not exceed what the company would have saved if the new devices had performed as expected.

#### A compromise on pricing

The environmentalists usually turned out to be enthusiastic proponents of market incentives to achieve their purpose while the businessmen, who normally can be expected to advocate marketplace decision-making, occasionally found themselves in the uncomfortable position of defending government regulation. The environmentalists generally favored emissions charges, for example, but utility executives tended to oppose them for fear that they might wind up with both charge and regulations.

The environmentalists also argued that electricity rates should be based on the marginal costs of producing power—that is, consumers should not get volume discounts, and rates should be higher for power consumed during periods of peak demand. In principle, this should motivate consumers to conserve power, thus reducing pollution, and should also result in greater economic efficiency by leveling peaks and valleys in demand.

Marginal-cost pricing might also yield higher before-tax revenues, but the utilities were generally opposed to it. They reasoned that political bodies would probably tax away such gains, leaving the companies with a decline in sales volume and a larger role as tax collectors for the government. The two sides compromised on a recommendation that electrical rates ought at least to reflect the principle of marginal cost pricing—in other words, while utilities' return on their investment should

continue

## Important national issues have been unnecessarily distorted through overstatement, rancor, and defensiveness.

remain the same, peak and bulk rates should be higher than they are now, and other rates should be lower.

For coal mining and transportation, two industries in which competition is reasonably keen, the project agreed that prices and rates should be determined by the marketplace and not by government. The transportation task force recommended that barge carriers on the nation's waterways should pay user charges instead of receiving a hidden subsidy that the Department of Transportation places at nearly \$1 billion a year.

Conceding the validity of industry's arguments that some ways of spending the nation's limited resources on controlling pollution are more cost-effective than others, the environmentalists seemed more willing than their previous public utterances had indicated to disavow doctrinaire insistence upon cleanliness-at-any-price. A notable instance is the project's recommendation for emissions controls on old coal-burning facilities—those that already have most of their useful life behind them but which also are the most expensive to retrofit. A frequent effect of requiring such plants to conform to new standards has been to force them into early retirement, often to be replaced with oil- or gas-burning plants. The air-pollution task force recommended that no more money be spent on old plants than on new ones, so that old plants might run out their economic lives with cheaper palliatives—tail smokestacks, say, instead of stack-gas scrubbers.

### Tax incentives for clean factories

Right from the beginning of the project, the two sides in effect disagreed about whether any industrial growth should be permitted in the numerous areas of the country that don't yet meet national minimum air-quality standards. The question comes down to whether such areas must be doomed not only to dirty air but to a stagnant economy as well. After months of fruitless discussion, a special committee, appointed to work out a compromise devised an ingenious scheme to use taxes to draw cleaner industries into such regions.

The appropriate governing body would first draw up a timetable for gradually reducing the amount of pollution emitted by each industrial sector in the region. Emissions charges would be imposed on each polluter, and the charges would increase every year that emissions exceeded the scheduled level. But the sums collected from each industrial sector would be redistributed annually to the individual plants or companies in that sector in direct proportion to each member's production of, say, kilowatt-hours of electricity or tons of steel. Thus heavy polluters would be penalized but not immediately impoverished, and other companies might be encouraged to build new nonpolluting plants in the area by the prospect of collecting extra revenue at the expense of dirtier competitors.

Like some other project recommendations, the emissions-charge scheme may be too complicated to win acceptance in the real world. On a number of other issues, such as whether the federal government should lease more of its coal-bearing lands, the project failed to reach any agreement. Even so, many of the participants feel that if they can continue their discussions for another year, a lot of these differences will be ironed out.

### Serendipity at committee meetings

A more important result of the project than its conclusions could well be its impact in raising the tone of discussion about important national issues that get distorted by rancor, overstatement, and defensiveness. From its conception more than two years ago by Gerald L. Decker, corporate energy manager for Dow Chemical, the coal project experimented with several promising but little-known techniques for resolving conflicts.

Genial and open, Decker is a man whose decency and trustworthiness are fiercely attested to by several ardent environmentalists. As long ago as the mid-Sixties, he had grown alarmed about national energy trends, particularly the switch from coal to obviously limited oil and natural gas. He spent a lot of time lecturing about the problem to skeptical executives of other large

corporations, and served on several government energy committees. There he worked closely with quite a few environmentalists, including Laurence I. Moss, a government consultant who is a former president of the Sierra Club. Soft-spoken and innocent in mien, Moss among other things had started the successful fights against the domestic SST and the deterioration of air quality in pristine areas.

### A case for the rule of reason

Decker says that in his committee dealings he was impressed by the environmentalists' objectivity and reasonableness. He concluded, as he puts it, "that if they had a chance to walk in industry's shoes a little, they might come to a different point of view about legislation." Encouraged by some of his colleagues at Dow and by executives at such companies as U.S. Steel, PPG Industries, and Detroit Edison, he enlisted Moss's aid in setting up a meeting with prominent environmentalists to explore the possibility of a detente on coal. In January, 1976, Decker and two Dow associates met some twenty representatives of ten major environmental groups on neutral ground: the Federal Energy Administration offices in Washington.

"It was the roughest meeting I had ever sat through," says Decker. He outlined his concept for reconciling differences through negotiations and joint field trips to affected areas. He also enlarged upon a system of ground rules that he thought should govern the proceedings. The rules were drawn from proofs of a provocative book by Milton Wessel, professor of law at New York University, who had helped Dow argue its case in several environmental suits and hearings.

Wessel's book, *The Rule of Reason*, grew out of his belief that conventional courtroom procedures are inappropriate in "socio-scientific" cases. He argued that lawyers' standard tactics, based heavily upon deceit, *ad hominem* attack, and procedural devices and delays—all designed to win for a client by any means—serve neither the client nor the public interest in the kinds of risk/benefit questions that typify

Most participants have been amazed not only by the number of issues they agreed on, but also by the trust and mutual respect that developed.

environmental or consumer lawsuits. In most cases, Wessel wrote, "the key party in interest—the public—is missing; there are no absolute answers; and the final decision must depend upon society's balancing of all the good against all the bad in light of how it wishes to live on this planet. The public may be willing to accept the 'game' approach in strictly private litigations ... However, the public cannot accept it where its own survival is at stake, and where the scientific issues are so complex and the ultimate judgments to be made so nebulous. In those cases, the public's judgment must necessarily be based on its confidence in the decision process and the credibility of the participants."

Wessel proposed that lawyers should agree to argue such cases under the rule of reason, a long-standing principle in anti-trust litigation but one that is rarely applied in other court proceedings. Opponents should not, for example, withhold data from each other or employ misleading tricks. They should not impugn motives or characters. They should avoid dogmatism, acknowledge uncertainties, and disclose personal interests and biases.

#### From scorn to mutual respect

At that first meeting, when Decker explained his idea for adopting the rule of reason to working out differences over coal, the environmentalists responded with skepticism and scorn befitting able practitioners in a litigious and Machiavellian age. Their reaction, which many expressed in scathing language, was that the whole idea was probably a waste of time, that industry wouldn't agree to substantive compromises, and that even if it did, it couldn't be trusted. The environmentalists would agree only to discuss the proposals further among themselves.

Undeterred, Decker later telephoned all the environmental participants and managed to persuade about two-thirds of them to give the project a try. Moss then picked the environmentalists who made up half of each task force. A caucus from industry chose the industry participants. Georgetown University's Center for Strategic and

International Studies agreed to sponsor the project, to supply office facilities and an administrative staff, and to manage a campaign to raise the estimated \$675,000 needed for expenses. (So far, the project has raised about three-quarters of that total.) The money comes partly from industry, partly from foundations, partly from government agencies.

Though they occasionally have had to be reminded of their agreement to abide by the rule of reason, most of the project participants profess amazement not only at the number of issues they managed to resolve but also at the trust and mutual respect that developed. Environmentalists

and businessmen have, of course, encountered one another many times over the years, but generally as adversaries arguing their case before others, seldom as individuals sitting down to solve problems in reasonable ways. Understandably, the average businessman developed a stereotypical image of environmentalists as militant, anti-growth, anti-industry ideologues, while the environmentalists tended to see all industrialists as callous to environmental outrage in their single-minded pursuit of profits.

At first, the industrial members of the mining task force were horrified when they heard that one of the members picked for

"We're able to  
massage details until we've  
worked them out."

the environmental side was Robert Curry, professor of geology at the University of Montana. In the past, Curry's biting testimony before courts and hearings had often lacerated the technical competence and the motives of his industrial opponents. But by the time the mining task force had completed its first field trip through the lignite fields in the Gulf states, Curry's expertise and evenhanded attitude had earned the industry men's profound respect. "If I wanted to open a mine in the West," says lawyer John Corcoran, co-chairman of the mining task force and a former board chairman of Consolidation Coal, "Bob Curry is the first man I would go to about the environmental problems."

At the air-quality task force's first session, an environmentalist insisted that an industry member repeat his comment that the group was there to figure out some way to use coal without damaging the environment. Asked why, the environmentalist said it was the first time he had heard anybody from industry express any concern for the environment and he wanted to be sure he had heard correctly.

#### Avoiding those political twists

Though the project was put together at industry's initiative, some environmental participants now appear to be its most enthusiastic supporters. Acknowledging that he was dubious in the beginning, Michael McCloskey, executive director of the Sierra Club and co-chairman with Corcoran of the mining task force, is currently seeking to extend the process to other environmental disputes. "I'm now persuaded that in many cases the possibilities for resolving policy issues are better in this kind of setting than they are in public legislative bodies," he says. "There's not the same overlay of extraneous issues—the opportunities for public advancement, the competition for attention. When a topic gets that extra political twist on it, it often gets simplified and horribly mangled. Confrontation politics leads to sweeping generalizations rather than fine distinctions and both sides conceal their ultimate aims."

A large part of the value of direct nego-

tiation, McCloskey observes, is mutual education. "We're able to massage details until we've worked them out. We may still disagree on a few big points, but at least we're not doing violence to each other simply by the accident of not understanding each other's point."

According to McCloskey, many environmentalists now perceive that in numerous instances they have been winning political and legal battles but not the physical battle to protect the environment. As an instance, he cites the 1972 federal law authorizing the creation of marine sanctuaries in the oceans bordering the nation. In five years, only two sanctuaries have been established. In many environmental disputes, McCloskey asserts, government plays only a complicating role, trying to maintain its control by keeping the two sides apart and preventing negotiations on grounds that "the government does not negotiate with the governed."

For all the good fellowship that the Coal Policy Project has engendered among its participants, many people in industry, conservation groups, and government remain sharply divided over the seemliness of industrial lions and ecological lambs sharing the same bed. Some environmentalists subscribe to the old dictum: "Polite conservationists leave no marks except the scars on the landscape that could have been prevented."

#### "A victory for the coal industry"

The most vocal center of opposition is the Environmental Policy Center, a Washington-based organization that has long lobbied for stringent strip-mining legislation. Louise Dunlap, E.P.C.'s director, fears that the coal project's recommendations for variances will be used by strip miners to try to weaken implementation of last year's law outlawing high walls. "Those recommendations can only be considered a major victory for the coal industry," she says. "It was presumptuous for the Coal Policy Project to go off to one side to develop a so-called consensus at a time when Congress had already been working for six years on one. It is disheartening and damaging to

citizens groups and environmentalists."

At the Department of Interior there has already been some grumbling about some of the mining task force's recommendations, which are regarded as an intrusion by an unaccountable elite into already settled issues. On the other hand, officials at the Environmental Protection Agency and the Department of Energy, both caught in the environmental-economic cross fire, welcome the signs of an armistice.

Like the environmentalists, industry executives are divided over whether negotiation and compromise will lead to a more favorable outcome than stonewalling and lobbying. Both the aluminum and paper industries refused to contribute to the project's support.

#### A tolerable balance

It is obvious that the project's recommendations will undergo scrutiny and criticism by other interested parties. There's also some cause for skepticism on other grounds: at about the time the coal project was starting, some of its members also participated in a small-scale imitator, the Natural Gas Policy Project. They met for a few months with the narrow aim of devising a joint industry-environmental policy on gas pricing. The participants rapidly reached agreement in favor of marginal-cost pricing for gas sold both wholesale and retail. But with a lively fight on that issue going on in Congress, the participants later dropped the project.

Whatever the outcome, the National Coal Policy Project has at least struck a tolerable balance between social goals that inherently tend to be incompatible. Exposed to the pressures and oversimplified arguments of the two posturing sides, politicians have until now tended either to dither or to overreact one way or the other, depending on which side they perceive to have more public support at the moment. To the extent that the project can offer the beginnings of a legitimate consensus on coal—and to the extent that it can serve as a precedent for handling other disputes as well—it has been a refreshing example of applied good sense. **F**

# COAL in the HILLS

— THE WEST VIRGINIA HILLBILLY — MARCH 1, 1978 —

A Section Of The  
West Virginia  
HILLBILLY

Dedicated To The Proposition  
That If People Knew The  
Problems Of Coal, Coal Would  
Have Fewer Problems

## National Coal Policy Project Report

A recent *Fortune* magazine took a careful look at what was called "A Promising Truce At Environmental Detente." The National Coal Policy Project, a yearlong encounter session between businessmen and conservationists.

Some 60 participants, half from environmental groups and half from coal mining and coal-using industries, worked together in five task forces, seeking agreement not only on how and where coal should be mined and used, but also how it should be transported, priced and conserved.

The National Coal Policy Project was the brainchild of Gerald Decker, corporate energy manager for Dow Chemicals, who, with the cooperation of former Sierra Club President Laurence Moss, got together a group willing to talk things out.

Here's a boil-down of Tom Alexander's article in *Fortune*:

For the past decade and longer, a commitment was made to repair ecological damage caused by industrial society. Although some advances were made, eventually the environmental movement seemed to be taken over by zealots who by any means pressured for extreme standards, using litigation, delays, arm twisting and other means in order to get things their way. In response, industry was forced to adopt the same tactics and take on extreme positions of their own. Consequently, little of substance was being accomplished without much rancor.

But lately, people on both sides have become disillusioned with the warfare, and efforts to reach a detente are encouraging. The National Coal Policy is just one response to this new trend.

The aim of the NCPP was to try to agree on how coal can be exploited in ways society can tolerate. And even the participants are astonished by the success of the yearlong project. Probably never before have so many industrialists and environmentalists found common ground on such an array of issues. In the end, the group made hundreds of recommendations which were made public last month.

*Fortune* points out that the results of the project "should help reduce the political influence of extremists on both sides. The example of conciliatory behavior, which may be the project's most valuable contribution, provides a model for speedier and wiser resolution of present and future environmental disputes."

## Industry, Environmentalists Work On Differences

Both sides, after discussions in task forces, made significant retreats from generally held views. For example:

\*Industry has accepted the principle that portions of several coal-bearing regions in the U.S. should be placed off limits to mining, or limited to experimental projects. Included in this would be "scenic areas in Appalachia."

\*Environmentalists softened their once rigid insistence that strip miners must always level highwalls remaining after the coal is mined.

\*Environmentalists agreed, in effect, to abandon their standard delaying tactics at licensing and siting hearings for power plants to which they object. They agreed with industry that one governmental application form and one public hearing are enough to present their plans, rather than the dozens of applications and the handful of hearings.

\*Industry on the other hand agreed to notify the public before applying for power-plant licenses. They also agreed that qualified public-



A good way to harmonize conflicting viewpoints, the coal project's task force on mining found, was to see a lot of coal operations in the field. Studying reclamation efforts in a West Virginia strip mine are (foreground, from the left) Michael McCloskey of the Sierra Club; Barbara Brandon, then of the University of Kentucky Law School; Chuck Kucera of AMAX; John Corcoran, former chairman of Consolidation Coal; and James Semanowicz of Dow Chemical. (From *Fortune* Magazine.)

interest groups participating in power-plant and mine project hearings should receive public financial support.

\*The two sides concluded

that people standing to benefit most from energy-producing facilities should ordinarily bear the brunt of the resulting

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## The Way We Were...



Before automation came to the coalfields a shovel was a miner's constant companion. In the days of hand loading, miners were paid in accordance with how many coal cars they loaded. Today, except for "housecleaning" chores in the mine, the shovel has nearly been eliminated by complex mining machinery. (From *Consolidation News*.)

# Where We Agree: Report of the National Coal Policy Project

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## B. NORTHERN PLAINS FIELD TRIP--MINING TASK FORCE MEETING, May 16-18, 1977 Billings, Montana

### ENVIRONMENTAL MEMBERS

|                   |                                                                                                             |
|-------------------|-------------------------------------------------------------------------------------------------------------|
| Russell Boulding  | National Coal Policy<br>Project<br>Environmental Consultant<br>4725 E. Bethel Lane<br>Bloomington, IN 47401 |
| Barbara Brandon   | Vice Co-Chairman<br>University of Kentucky<br>800 20th Street, South<br>Arlington, VA 22202                 |
| Robert R. Curry   | Vice Co-Chairman<br>Prof. Dept of Geology<br>University of Montana<br>Missoula, MN 59801                    |
| Robert Goltan     | Counsel<br>National Wildlife Fed'n.<br>1412 16th Street, NW<br>Washington, D.C.                             |
| Norman Kilpatrick | Director<br>Surface Mining Research<br>Library<br>Box 5024<br>Charleston, WV 25311                          |
| Michael McCloskey | Co-Chairman<br>Exec. Dir., Sierra Club<br>530 Bush Street<br>San Francisco, CA 94108                        |
| Laurence I. Moss  | Chairman<br>Environmental<br>7531 OakGlen Court<br>Falls Church, VA 22042                                   |
| Arnold Silverman  | Department of Geology<br>University of Montana<br>Missoula, MT 59801                                        |

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PUBLIC COMMENTARY RECORD  
PROPOSED INTERPRETIVE RULE  
DIVISION OF ENVIRONMENTAL PROTECTION  
BUREAU OF ENVIRONMENT

CSR 38 - 10

OFFICE OF ENVIRONMENTAL ADVOCATE

The Division of Environmental Protection (DEP) filed a proposed interpretive rule (CSR 38-10) with the Secretary of State on June 16, 1994, announcing a thirty- (30) day public comment period. Pursuant to West Virginia Code § 22-1-3, a public hearing was scheduled for July 18, 1994, which marked the end of the public comment period. The hearing was scheduled at 7:00 p.m. in the training center at the Nitro, W.Va. Headquarters Office of the DEP.

The public comment period and public hearing yielded sixteen (16) documents containing written comments on the proposed rule, and ten (10) persons gave oral testimony at the public hearing. The DEP wishes to express its appreciation to all commenters for their excellent suggestions. These suggestions are being incorporated into the proposed rule which will result in a much improved final product.

RESPONSE TO COMMENTS

1. Comment

Nearly all commentors felt the rule was not descriptive of the term "Advocate" as it is defined in the conventional "Funk and Wagnell" sense. It was suggested by some that another term i.e., Environmental Ombudsman, Environmental Affairs, etc., be used.

Response

The DEP recognizes that the West Virginia Code at § 22-20-1 et. seq. is not as reflective of a proposed earlier draft as some would have liked. However, the language as passed by the Legislature is by necessity the basis for the rule. Therefore, the DEP is not at liberty to re-write in the rule language in the statute by assigning the Office of Advocate to the Attorney General, by excluding the Office from oversight by the Director, or by other radical departures from the Legislative mandate. To paraphrase one commentor, "the Legislature used the word 'Advocate' so it can't be changed in the rule". Other commentors reflected on the fact that Article 20 as passed was quite different from the original concept, but it reflected the will of the Legislature and cannot be changed by a rule.

Therefore, the DEP will not propose to amend the rule as suggested.

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2. **Comment**

Some commentors objected to the position of Advocate being a "will and pleasure position".

**Response**

This is also required by statute and is the will of the Legislature. The rule cannot amend the statute.

3. **Comment**

Many commentors indicated that the rule, in large measure, described the functions of the DEP Public Information Office (PIO), and should be amended in several places to reflect other concepts as appropriate functions that the Office should perform.

**Response**

The DEP recognizes that the functions described in sections 4 and 5 of the rule interplay with the functions of the Public Information Office. The intent was to assure that the Advocate has free access and some input to the PIO in terms of its ability to professionally format and publish public information circulars. The functions of the Advocate as set forth in the rule are more along the lines of developing the content of such publications in a manner which is informative and useful to the public. The PIO will structure such documents into official DEP publications.

The DEP will amend the rule to make it more reflective of this intent.

4. **Comment**

A few commentors raised concerns relating to paragraph 2.3.3 of the rule which requires two years of full time employment in work relating to environmental protection. It is felt that this provision, as written, limits those who may do volunteer work in the area of environmental advocacy.

**Response**

The DEP agrees and will amend the rule to address this concern.

5. **Comment**

Two commentors suggested that paragraph 4.8 be expanded to include a purpose statement similar to those contained in the DEP reorganization bill (HB - 4065).

**Response**

The DEP will amend the rule to incorporate this suggestion.

**6. Comment**

Several commentors remarked that paragraphs 4.9 and 4.10 are too limiting, and should allow the Advocate greater flexibility in choosing the appropriate actions to address citizens' needs. One commentor suggested that language be inserted to limit such restriction to functions performed "in the official capacity of the Office" to protect the Advocate's right of free speech as a citizen.

**Response**

With regard to the Advocate providing legal representation, this is an area within the exclusive jurisdiction of the State Attorney General's Office. While the Attorney General may authorize such actions, the request should appropriately come from the Director or DEP General Counsel. With regard to quasi-legal representation and organizing campaigns, the Advocate would be well advised to use discretion and to seek guidance from the Director and DEP counsel to avoid personal liability and conflict of interest. Also, if the rule mandated such activities of the Office of Advocate, it is anticipated that the Office would be inundated with requests. Finally, it is appropriately the responsibility of the Director to reserve such actions for cases which have statewide implication or are precedent setting in the interest of efficiency and effectiveness.

The DEP will consider some amendments to these paragraphs to help alleviate the concerns of the commentors.

**7. Comment**

One commentor objected to the requirement that the Advocate have a four-year degree from an accredited college or university.

**Response**

While it is true that there may be individuals without a formal education who are astute enough to perform the majority of the functions of the Office, the DEP would be hard pressed to identify qualifications that could be substituted for academic performance. Also, persons who complete a college curriculum acquire training and skills which are

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broad based and essential to the Advocate position and are not easily acquired otherwise. Therefore, this minimum requirement will remain in the rule.

**8. Comment**

Some commentators expressed concern that the Advocate would be required under subsection 5.12 of the rule to conduct negotiated settlements for DEP on issues in conflict.

**Response**

The rule requires only that the Advocate assist the Director in negotiated settlements (emphasis added). This could be by way of providing background information, arranging meetings, etc, but could involve some minimal level of negotiation on behalf of the DEP. Conflict resolution and issues management have become highly developed and high-profile professions in this modern age. It would be naive to think that an Advocate Office could function adequately without engaging in some level of conflict resolution.

The DEP will amend the language for more clarity, but will retain the provision.

**9. Comment**

Some commentators objected to the requirement of 2.3.1 that the Advocate be a permanent resident of the State.

**Response**

The DEP believes that social, economic and geographic knowledge of the State is essential for this position, and the requirement will remain. However, the word "permanent" will be stricken at the request of some commentators.

**10. Comment**

Some commentators correctly point out that the provisions of 2.3.4 are in conflict with subsections 5.2 and 5.3 in that one requires the Advocate to possess certain knowledge and skill, and the others require the Advocate to acquire the same as part of the duties of the Office.

**Response**

The DEP will amend paragraph 2.3.4 to require that the Advocate only have some familiarity with the subject agency processes.

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11. Comment

Some commentors objected to the requirement of 2.3.7 that the Advocate possess a valid West Virginia driver's license.

Response

The DEP submits that since the Advocate must be a West Virginia resident and that the position require the operation of a State vehicle, a West Virginia driver's license is a legal requirement.

12. Comment

Some commentors felt that paragraphs 3.2.4 and 3.2.5 which provide for travel and educational expenses may be subject to excess and abuse.

Response

The DEP would agree except that the potential for such abuse is controlled by the Travel Management Office, the DEP Administration Office, and budgetary constraints.

13. Comment

A few commentors pointed out that the use of the word "will" in Section 5 should be interchanged for the word "may". Others suggested the use of the word "shall".

Response

The DEP fails to see a substantive difference; however, in deference to the commentors, the word "may" will be used in the appropriate places. The word "shall" in this context is no longer considered conventional practice in drafting statutes or rules.

14. Comment

Several commentors objected to granting the Advocate in subsections 4.1 and 4.2 access to confidential information. It was felt by some that this provision placed many businesses and future development opportunities at risk.

Response

The DEP does not agree. This provision grants no authority to the Advocate which doesn't currently exist. The intent was to even further restrict the Advocate access to

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such information by requiring prior authorization by the Director. It is the DEP's position that on occasion such information will be required by the Advocate to reach informed decisions regarding issues before the office. However, access and possession of such information does not exempt the Advocate from maintaining its confidentiality. Therefore, the DEP will amend the subsection by more restrictive language which holds the Advocate accountable for improper use of the information.

15. Comment

Some commentors objected to subsection 4.4 which they believe grants the Advocate access to closed and private meetings, hearings, etc..

Response

The DEP does not agree that such access is granted; however, in deference to the commentors the word "open" will be inserted before the word "meetings" to clarify the issue.

16. Comment

Some commentors question the need for subsection 5.10 regarding legal services.

Response

The DEP believes that the Advocate Office will at least occasionally be asked for legal guidance. Although the Advocate is limited in its ability to provide such services, it makes sense to make referrals to available public legal assistance. To clarify the intent of the provision, the DEP will cite examples of appropriate referrals.

17. Comment

A few commentors inquired as to who approves the plan required in subsection 5.13.

Response

The subsection will be amended to provide for the Director's review of the plan.

18. Comment

A few commentors felt that subsection 2.1 should be amended to make it clear that the Advocate position is a full time position.

**Response**

The DEP will amend the subsection accordingly.

**19. Comment**

One commentor suggested that a new subsection be added to section 5 to provide that the Advocate identify for the Director citizens' issues which have state-wide implications and which are important to enhancement of the environment for the State.

**Response**

The DEP agrees and will add a new subsection as suggested.

**20. Comment**

One commentor suggested that subsection 3.1 be amended to provide that the Advocate be granted free and unobstructed access to the Director.

**Response**

The DEP agrees, and will amend subsection 4.1 accordingly.

**21. Comment**

Two commentors suggested that subsection 3.2 be amended with a new paragraph providing for a "1-800" telephone line for use by the public. The advocate has the authority to establish such a service.

**Response**

The DEP agrees and will so amend.

**22. Comment**

One commentor objected to the rule being filed as an interpretive rule instead of a legislative rule.

**Response**

The DEP considered the alternative rule-making process and opted for an interpretive rule in the interest of expediency. There was an obvious interest on the part of many to

have this Office established and the position filled in the shortest time possible. Since the interpretive rule procedure provides for adequate time and opportunity of public input, and development of a sound rule reflecting legislative intent, this process seemed appropriate.

**23. Comment**

One commentor suggested that subsection 5.1 be stricken on the basis that the Advocate was not qualified to take public opinion polls, and that public opinion evaluation was not an appropriate function of the Office.

**Response**

The DEP does not agree. The DEP has believed for some time that there is a need for the agency to sample the public's perception of the agencies performance. This knowledge will assist the agency in directing its limited resources to the most critical areas of public need. The sampling does not necessarily need to be professionally done or scientifically valid.

**24. Comment**

One commentor suggested that a new subsection be added to section 5 to provide for the Advocate to promote remining of abandoned mine sites.

**Response**

The DEP agrees that promoting remining is a worthy environmental endeavor. This is one of many sound environmental policies or programs that the DEP is currently promoting. Therefore, it is not important to cite specific initiatives in this rule.

**25. Comment**

One commentor raised concerns regarding the estimated salary of the Advocate.

**Response**

The DEP recognizes the sensitivity of this matter, and gave careful consideration to its impacts on current personnel. However, a survey of qualified applicants and the "will and pleasure" aspect of the position clearly required a salary in this range to secure a person with the knowledge, skills, abilities and dedication demanded of the Office.



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**26. Comment**

One commentor suggested that the Advocate be given access to and assistance from technical staff within the agency as needed to perform the functions of the Office.

**Response**

The DEP agrees and will amend subsection 4.1 accordingly.