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NOTICE OF AGENCY APPROVAL

LEGISLATIVE RULE: Rules of the Department of Energy,
(title)

Division of Oil and Gas - Series 1 through 8

The attached legislative rule constitutes the official rule
approved by the Department of Energy - Division of Oil & Gas
(agency)

on 15th day of August, 1986 and filed pursuant
to law with the West Virginia Secretary of State and the
Legislative Rule-Making Review Committee.



Signature of Commissioner

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF ENERGY
DIVISION OF OIL AND GAS
CHAPTER 22-1, 22B-1 and 20-5A
SERIES 5

Title: Miscellaneous Water Pollution Control

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WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF ENERGY
DIVISION OF OIL AND GAS
CHAPTER 22-1, 22B-1 and 20-5A
SERIES 5

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DEPARTMENT OF ENERGY
STATE

Title: Miscellaneous Water Pollution Control

Section 1. General

1.1 Scope - This legislative rule establishes requirements relating to discharge notification and response, waste load allocations, small wastewater treatment plants, permit application filing fee, and outlet markers, for facilities operated in connection with the exploration, development, production, storage and recovery of oil and gas, and related mineral resources in this state.

1.2 Authority and Related Code Citation(s) - W.Va. Code §§22-1-13, 22-1-15, 22-1-16, 22B-1-2, 22B-1-7 and 20-5A-1 through 24.

1.3. Filing Date -

1.4 Effective Date -

1.5 Former Rule Superseded - This legislative rule supersedes West Virginia Legislative Rule, Water Resources Board, Chapter 20-5 and 20-5A, Series 3, "Special Regulations" in effect on July 11, 1985, to the extent that any provision of said Series 3 pertains to the exploration, development, production, storage and recovery of oil and gas, and related mineral resources in this state. The provisions of said Series 3 had continued in effect pursuant to W.Va. Code §22-1-15 for the benefit of the Department of Energy to the extent that they pertained to the provisions of The West Virginia Energy Act.

Section 2. Definitions

Unless the context in which used clearly requires a different meaning, the definitions set forth in W.Va. Code §§20-5A-2, 22B-1-1 and 22-1-3 shall apply to this rule in addition to the definitions set forth in Series 4 of the Division's rules.

Section 3. Discharge Notification and Response

3.1 The owner or operator or person in charge of a facility subject to these regulations from which a reportable discharge as described in Section 3.3 occurs shall notify the Division of Oil and Gas by calling 1-800-642-3074 immediately, but in no case later than 24 hours after becoming aware of the discharge.

3.2 The person who notifies the Division pursuant to 3.1 shall report the type of substance and the estimated quantity discharged, if known; the location of the discharge; actions the person reporting the discharge proposes to take to contain, clean-up and remove the substance, if any, and any other information concerning the discharge which the Division may request at the time of notification. A written verification of such notification shall be submitted upon request of the Division.

3.3 The following discharges from a facility subject to these regulations are "reportable discharges" within the meaning of this section:

3.3.1 Any discharge which would be reportable pursuant to Section 311(b) of the Federal Water Pollution Control Act Amendment of 1972, as amended by the Clean Water Act of 1977, 33 U.S.C. 1321, and the regulations promulgated thereunder;

3.3.2 Any upset or bypass causing effluent limitations established under the general permit to be exceeded; or

3.3.3 Any pit failure which results in a discharge to any surface water of the State.

3.4 The owner or operator of a facility from which a reportable discharge has occurred, or any person responsible for causing such discharge, shall attempt to stop the discharge and shall take reasonable measures to contain, clean-up and remove the discharge, to the extent he is capable of doing so.

Section 4. Waste Load Allocations

4.1 Sewage Discharges - Waste load allocations for sewage dischargers are to be issued by the Director to potential applicants for a Water Pollution Control Permit [W.Va. Code §22B-1-7] to assist with planning of wastewater treatment works which will meet effluent limitations guidelines and not violate State Water Quality Standards for the receiving waters. Applica-

tions for the waste load allocation shall be made for any facilities which will produce or result in a discharge of sewage to the State's surface waters. Waste load allocations are not intended to be, and shall not be interpreted to be, an advance approval of wastewater treatment facilities which may be proposed nor is it an assurance that a Water Pollution Control Permit will be issued. It is emphasized that waste load allocations are issued on major effluent criteria only for planning purposes.

4.1.1 Application forms may be prescribed by the Director requiring submission of necessary information and data by the applicant to enable the Division of Oil and Gas to make a waste load allocation determination. Such determination shall be valid for a period of time specified by the Director. Reapplication for a new waste load allocation will be required upon expiration of the preceding waste load allocation unless application for a Water Pollution Control Permit has been filed.

4.1.2 Waste load allocations shall prescribe the concentration and quality of significant wastewater substances and physical, chemical, or biological conditions for the proposed discharge. The waste load limitations shall represent 30-day and 7-day average values for biochemical oxygen demand, solids, nitrogen, and other criteria defining the load, except for pH and dissolved oxygen which are instantaneous limits, if it is deemed necessary to assure protection of water uses immediately downstream from the point of discharge to the receiving waters.

4.1.3 Waste load allocations are not required prior to an application to dispose of treated domestic sewage effluents by land treatment and disposal methods. Applications for a Water Pollution Control Permit for such purpose will be reviewed on a case-by-case basis. Such systems may require a Water Pollution Control Permit from the Director, Division of Oil and Gas, Department of Energy.

4.2 Other discharges - [Reserved]

4.3 Waste load allocations for the achievement of water quality standards shall normally be based on a specified low flow. The design flow for this purpose shall be the minimum, mean 7-consecutive day flow with a 10-year return frequency.

4.3.1 United States Geological Survey data may be used in determining the mean 7-consecutive day drought flows with a 10-year recurrence interval but this does not preclude the use of other reliable data systems as they become available.

4.4 In cases where a waste discharge is proposed to a wet weather stream, the allocation shall define the treatment plant effluent quality which will not affect designated uses of downstream waters in the nearest downstream segment of the stream but in no case less than the established water quality standard for that segment.

4.5 More stringent requirements may be specified by the Director where necessary to protect downstream uses or where special conditions such as recreation or water supply impoundments or danger to aquatic or animal life exists.

4.6 A waste load allocation may be denied when the assimilative capacity of the receiving waters is being fully utilized or if the additional waste load would result in a violation of water quality standards.

Section 5. Small Wastewater Treatment Plants

5.1 The requirements of this section apply to sewage treatment plants of 40,000 gallons per day capacity or less at facilities subject to these regulations.

5.2 Operational reliability for such plants shall be provided in order that pollutants are not discharged during periods of power failure.

5.3 The wastewater treatment structure shall be protected against physical damage for the 25-year flood level and operability be maintained during the 10-year flood level.

5.4 No construction, installation, modification or operation of a wastewater disposal system (treatment plant, sewers, lift stations and appurtenances) shall be performed until a Water Pollution Control Permit has been issued for such facilities.

Section 6. Outlet Markers.

6.1 In accordance with W.Va. Code §§22B-1-7 and 20-5A-5 each holder of a Water Pollution Control Permit for a facility subject to these regulations shall post a permanent marker at the establishment under permit in accordance with the following unless an alternative marker requirement is established by permit:

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6.1.1 A marker shall be posted on the stream bank at each surface water outlet covered by the permit.

6.1.2 The marker shall consist of the name of the establishment to which the permit was issued, the permit number, and the outlet number.

6.1.3 The marker shall be a minimum of two feet by two feet and shall be a minimum of three (3) feet above ground level.

PREAMBLE TO THE PROPOSED RULES
OF THE DEPARTMENT OF ENERGY, DIVISION OF OIL AND GAS

I. Legal authority

II. Background

III. Proposed rules

- A. Series 1 - Oil and Gas Wells and Other Wells
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- C. Series 3 - Underground Injection Control
- D. Series 4 - State National Pollutant Discharge Elimination System (NPDES)
- E. Series 5 - Miscellaneous Water Pollution Control
- F. Series 6 - Dam Control
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IV. Solicitation of Comments

I. LEGAL AUTHORITY

The regulations described in this notice are proposed under the authority of Chapters 22 and 22B of The West Virginia Energy Act.

II. BACKGROUND

On April 12, 1985, the West Virginia Legislature passed The West Virginia Energy Act making it effective 90 days from passage (July 11, 1985). The Act is codified at W.Va. Code §§22-1-1 through 22-13-3; 22A-1-1 through 22A-6-6; and 22B-1-1 through 22B-4-13 (1985 Repl. Vol.). In passing The West Virginia Energy Act, the Legislature found that there was need for the consolidation of regulatory power under a single department of state government to, among other things, achieve "more efficient administration, avoid unnecessary delays in permitting and other matters, provide better and more expeditious enforcement and

application of environmental and safety laws" with a view towards making the state's mineral development industry "more competitive with that in other energy producing states." W.Va. Code §22-1-2 (1985 Repl. Vol.).

In that Act, the Legislature found the public policy of the State to be:

(a) To foster, encourage and promote the exploration for and the development, production, utilization and conservation of coal, oil and gas and other mineral resources of the state through the fullest practical means, and at the same time promote economic development in the state, protect the environment and enhance safety and health in these vital industries;

(b) To provide a comprehensive program for the exploration, conservation, development protection, enjoyment, recovery and use of coal, oil and gas, and other mineral resources in this state;

(c) To aid in such a comprehensive program by creating a single department, designated the department of energy, to have the regulatory powers with respect to this industry and to have the general duties and responsibilities heretofore existing in the department of natural resources and department of mines, and that the department will perform such duties and functions in conjunction with the respective boards and commissions which are herein continued in effect;

(d) To expedite and facilitate the issuance of permits for mines, surface mining operations, oil and gas wells and other well work; to avoid conflicting permitting requirements and regulations in this state or with federal agencies; and to provide uniform policies with respect to this industry;

(e) To provide for a single agency of this state to implement requirements and programs of federal law affecting the exploration, development, production, recovery and

utilization of coal, oil and gas, and other mineral resources in this state;

(f) To provide for an agency of this state which can be consulted with by other agencies of this state prior to the adoption or implementation of rules, regulations, standards, programs or requirements affecting the exploration, development, production, recovery and utilization of coal, oil and gas, and other mineral resources in this state.

W.Va. Code §22-1-2 (1985 Repl. Vol.).

The West Virginia Energy Act vested exclusive jurisdiction in the Department of Energy over the issuance of regulations or any and all permits and other governmental authorizations required, or to be required, in all matters pertaining to the exploration, development, production, storage and recovery of coal, oil and gas and other mineral resources including all safety, conservation, land, water, waste disposal, reclamation and environmental regulations, permits and authorizations related to such activities as are called for pursuant to the following statutes:

W.Va. Code 20-5 (Water Resources)

W.Va. Code 20-5A (Water Pollution Control Act)

W.Va. Code 20-5D (Dam Control Act)

W.Va. Code 20-5F (Solid Waste Management Act)

The Department of Energy was specially designated to be the lead regulatory agency for West Virginia for purposes of federal legislation relating to such activities. In addition, the Department of Energy was empowered with the responsibility for

implementing certain provisions of the State Hazardous Waste Management Act, W.Va. Code 20-5E-1 through 23 (1985 Repl. Vol.).

Beyond these general requirements, Chapter 22B of The West Virginia Energy Act establishes a broad range of regulatory requirements impacting on the oil and gas industry and related matters. Many of the provisions in Chapter 22B were previously within the jurisdiction of the former Department of Mines. Other provisions were previously within the jurisdiction of the Department of Natural Resources. The regulations of other agencies are superseded, in part, as of July 11, 1985 (the effective date of the Energy Act) to the extent that those regulations conflict with the regulatory authority of the Department of Energy.

Under The West Virginia Energy Act, the Director of the Division of Oil and Gas is given the general power to propose or promulgate rules and regulations; however, the Director is obligated to submit his final action to the Commissioner of the Department of Energy for approval prior to the filing of any such regulations with the Legislative Rule-Making Review Committee.

There are several bases for the jurisdiction vested in the Department of Energy by The West Virginia Energy Act to implement the five designated environmental statutes identified above and found in Chapter 20 of the West Virginia Code. The Department's jurisdiction in this area is primarily established by W.Va. Code §22-1-16 (1985 Repl. Vol.).

Except as otherwise expressly provided in this chapter or in chapters twenty-two-a or twenty-two-b of this code, jurisdiction over the issuance of regulations, or any and all permits and other governmental authorizations required or to be required in all matters

pertaining to the exploration, development, production, storage and recovery of coal, oil and gas, and other mineral resources in this state, including all safety, conservation, land, water, waste disposal, reclamation and environmental regulations, permits and authorizations called for pursuant to articles five, five-a, five-d, and five-f, chapter twenty of this code, and the enforcement and implementation thereof is vested exclusively in the department of energy. The department of energy is hereby designated as the lead regulatory agency for this state for all purposes of federal legislation relating to such activities.

W.Va. Code §22-1-16. (1985 Repl. Vol.)

Additionally, the Department of Energy was empowered with the responsibility for implementing certain provisions of W.Va. Code §20-5E relating to the State Hazardous Waste Management Act.

W.Va. Code §20-5E-7(h) provides, in relevant part, that:

(h) To the extent that this article relates to activities with respect to oil and gas wells, liquid injection wells and waste disposal wells now regulated by articles four, four-b and seven, chapter twenty-two of this code, the administrator of the office of oil and gas and the shallow gas well review board has the jurisdiction with respect to the regulation of such activities and shall promulgate such rules and regulations as may be necessary to comply with the requirements of this article.

W.Va. Code §20-5E-7(h) (1985 Repl. Vol.).

Finally, other provisions of the West Virginia Energy Act clearly provide that specific activities are within the scope of jurisdiction of the Department of Energy.

The Department believes that each of the three previously mentioned bases of jurisdiction has a definite scope which authorizes regulation (through rules, permits, or other governmental authorizations), certain activities carried on in this

State. In order to better facilitate the understanding of the regulated community and the public, a more complete discussion of the scope of the Department's jurisdiction is set forth below.

"Exploration, Development, Production, Storage and Recovery" - In defining the scope of the jurisdiction of the Department of Energy, an interpretation of the phrase "exploration, development, production, storage and recovery of . . . oil and gas, and other mineral resources in this State" is essential. There appear to be two distinct sources for the phrase "exploration, development, production storage and recovery."

The terms "exploration, development, production" appear to have been taken from the State Hazardous Waste Management Act, W.Va. Code §20-5E-1 through 23 (1985 Repl. Vol.). That Act exempts from the coverage of its provisions, pending satisfactory completion of certain conditions precedent, "drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy." W.Va. Code §20-5E-6(a)(2)(A) (iv) (1985 Repl. Vol.) (emphasis added). An analysis of the comparable federal provisions found in sections 3001(b)(2)(A) and 8002(m) of the Resource Conservation and Recovery Act, 42 U.S.C.S. §6901 et seq. (1982 & 1985 Cumm. Supp.) ["RCRA"] (after which the State provisions were obviously modeled) indicates, in addition to excluding drilling fluids and produced waters from regulation, that a specific universe of wastes was contemplated within the terms "other wastes associated with the exploration,

development or production of "crude oil or natural gas or geothermal energy."

The term 'other wastes associated' is specifically included to designate waste materials intrinsically derived from the primary field operations associated with the exploration, development or production of crude oil, natural gas, or geothermal energy. It should cover such substances as: Hydrocarbon bearing soil in and around the related facilities; drill cuttings; materials (such as hydrocarbons, water, sand and emulsion) produced from a well in conjunction with crude oil, natural gas, or geothermal energy; and the accumulated material (such as hydrocarbon, water, sand and emulsion) from production separators, fluid testing vessels, storage vessels and production impoundments.

The phrase 'intrinsically derived from the primary field operations . . . ' is intended to differentiate exploration, development and production operations from transportation (from the point of custody transfer or of production separation and dehydration) and manufacturing operations.

H. Conf. Rep. No. 96-1444, 96th Cong., reprinted in 1980 U.S. Code Cong. & Ad. News 5019, 5031.

EPA has recently offered one possible interpretation of the scope of the terms "exploration, development or production of crude oil or natural gas or geothermal energy" in its draft sampling strategy for completion for the study required by section 8002(m) of RCRA. Office of Water Regulations and Standards-Industrial Technology Division, U.S.E.P.A., Oil and Gas Exploration, Development and Production - Sampling Strategy - Draft (May 5, 1986) [hereinafter "Draft Sampling Strategy"].

According to legislative history for the 1980 RCRA amendments, Congress intended to exempt only those waste streams associated with exploration, development, and production activities for oil and gas, and for

geothermal resources. Wastes generated from the transportation of oil, gas, or geothermal fluids, from natural gas processing, or from oil refining would not be considered to be within the scope of the exemption. Based on the legislative history, EPA interprets the exemption to include only those waste streams generated from exploration, development, and production of oil and geothermal resources.

Some of the waste streams include:

- drilling fluids
- well treatment fluids
- completion fluids
- workover fluids
- produced water
- produced sand
- tank bottom sludges

However for the oil and gas extraction industry, the exemption is not interpreted to include those wastes produced from pipelines (for example, from hydrostatic testing or from pipeline operations). Nor does the exemption include waste streams from gas processing facilities (for example, spent iron sponge).

Draft Sampling Strategy at 12.

EPA then went on to further elaborate on the scope of the terms "exploration and development" and "production."

Exploration and development activities for the extraction of oil and gas include work necessary to locate, drill, stimulate, and complete wells.

* * *

Production activities include all post-completion work necessary to bring hydrocarbon reserves or geothermal fluids from the producing formation(s) to the point of transmission. These activities include basic oil/water/sediment separation, separation of gas liquids from natural gas, gas dehydration, pumping, collection, storage, and other production practices.

Draft Sampling Strategy at 13, 15.

The Division will interpret the terms "exploration, development, production" as conferring on it the jurisdiction to regulate the following sources related to activities carried forth pursuant to W.Va. Code §§20-5; 20-5A; 20-5D; and 20-5F:

1. The exploration, development and production of oil up to the point of custody transfer at the metering unit;

2. The exploration, development and production of gas up to the point of entry into the transmission line.

Additionally, the Energy Act also includes the terms "storage and recovery" in defining the agency's jurisdiction over these programs. This language clearly recognizes the Department of Energy's expressed authority to regulate the storage of gas in underground storage reservoirs and the subsequent operation of recovering the stored gas from the reservoir.

West Virginia Hazardous Waste Management Act - As previously noted, W.Va. Code §20-5E-7(h) vests regulatory jurisdiction over hazardous waste activities relating to oil and gas wells, liquid injection wells and waste disposal wells regulated, at that time, by the Administrator of the Office of Oil and Gas and the Shallow Gas-Well Review Board. Because The West Virginia Energy Act replaced the Administrator of the Office of Oil and Gas with the Director of the Division of Oil and Gas, the Director now has the regulatory authority formerly given to the Administrator by that provision. The Division interprets this language as conferring jurisdiction on it in the following areas:

1. Should it be necessary at some point in the future for "drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy" to be regulated as a hazardous waste following action by U.S.EPA, and both houses of Congress, and declaration by the Governor [pursuant to W.Va. Code §20-5E-6(a)(2)(A)], it will be the responsibility of the Division to determine how such wastes will be identified or listed as hazardous waste and how such wastes will be managed;

2. To the extent that it is appropriate to regulate under the state Hazardous Waste Management Act any waste associated with the storage and recovery of gas, that regulation will be undertaken by the Division; and

3. Class I and Class IV wells under the State Underground Injection Control Program (Series 3 of these proposed rules) would be appropriately regulated by the Department of Energy, if such wells are related to the disposal of hazardous waste associated with the wastes described in paragraphs 1. and 2. above.

Other Specific Statutory Provisions Vesting Jurisdiction in the Department of Energy - Remaining terms of The West Virginia Energy Act also make it clear that the following activities, among others, are within the scope of jurisdiction of the Division:

1. Transportation of Oils, W.Va. Code §22B-3;
2. Underground Gas Storage Reservoirs, W.Va. Code §22B-4.

III. PROPOSED RULES

A. Series 1 - Oil and Gas Wells and Other Wells

This series is based upon regulations of the former Department of Mines relating to this topic. The previous regulations have been edited to the extent necessary to reflect the enactment of The West Virginia Energy Act which, among other things, repealed W.Va. Code §22-4 and enacted new articles. Thus, cross-reference have been updated, as well as authority sections. Textual revisions have been made, where appropriate, to create consistency and clarity in the use of language, particularly where technical criteria are defined. Regulations governing hearing and appeal procedures, formerly found in Series 1 of the Department of Mines regulation, have been deleted from this proposed Series 1 and are now contained in the proposed Series 9 rules, Hearing and Appeal Procedures.

In addition to these technical and editing changes, the proposed Series 1 differs from the previous rule in two principal areas.

Section 5, among other things, details requirements related to the designation of operator agents for service of process and notice to the Director of ownership and transfer of title by well owners. The proposed rule provides for designation of agents of operators for purposes of service of process, and requires notice of each change of well ownership and designation of an agent by the transferee operator. The rule encourages designation of a successor agent as an integral part of any well

transfer transaction by providing that the bond furnished by the transferor will not be released until designation of a successor agent for service has been made by the new owner.

Section 10 pertains to the furnishing of bonds with a corporate surety, cash or alternative collateral security required pursuant to The West Virginia Energy Act. The section now addresses the sufficiency of bonds furnished prior to July 11, 1985, in certain cases, and making provisions for additional surety or security with applications where single well or blanket bonds in effect do not meet current requirements and new work is proposed.

In Section 15.1.1 the Division proposes to allow the annual report of oil and gas production to be filed on a report form or in any other form authorized by the Director. This change should facilitate the use of electronic data transfer where the operator has that capability.

Section 16.5.2 is proposed to be changed by deleting the absolute prohibition against the discharge of salt water into fresh water. This change is necessitated by the development of discharge permits which regulate this discharge in a way that assures compliance with technology based and water quality based criteria.

Finally, the Division proposes to add a new section that would allow the Director to address site specific circumstances by deviating from generally applicable requirements in certain cases.

B. Series 2 - Certification of Gas Wells

The Natural Gas Policy Act of 1978, 15 U.S.C.S. §3301 et seq. (1982), was signed into law on November 9, 1978. Pursuant to the provisions of that statute and the regulations promulgated by the Federal Energy Regulatory Commission, various states are permitted to make findings as to certain classes of natural gas wells located within the state. As successor to the former Office of Oil and Gas of the Department of Mines, the Division of Oil and Gas has been authorized to act as the jurisdictional agency for the State to implement the requirements of the Natural Gas Policy Act of 1978.

Series 2 governs and applies to proceedings under W.Va. Code §22B-1-2(c) (11) (1985 Repl. Vol.) concerning gas wells and implementation of the Natural Gas Policy Act of 1978 and pertinent federal regulations.

The proposed Series 2 is based upon a regulation of the former Department of Mines. Series 2 has been edited to the extent necessary to reflect the enactment of The West Virginia Energy Act. This editing of former Part II (now proposed Series 2) required renumbering of sections. In this connection, the former Regulation 36 has been combined with the former Regulations 14 and 24 of Part I and included in Series 4 of these proposed rules.

C. Series 3 - Underground Injection Control

Title XIV of the Public Health Service Act, known commonly as the Safe Drinking Water Act, 42 U.S.C.S. §300f et seq. (1982), requires, among other things, that the EPA

Administrator issue regulations establishing minimum requirements for the regulation of the injection of fluids in order to protect underground sources of drinking water. The Safe Drinking Water Act provides further that states may develop programs known as State Underground Injection Control ["UIC"] Programs based on federally established regulations. If a state program is judged to be "as stringent as" the federal program, a state may obtain primacy for that program and become responsible for its subsequent implementation and enforcement.

In West Virginia, prior to 1985, the State Water Resources Board served as the sole authority for the promulgation of rules and Regulations for the control of the State UIC program. West Virginia received delegation of the federal UIC program, effective January 9, 1984. 48 Fed. Reg. 55127 (Dec. 9, 1983). The current version of the Water Resources Board's UIC regulations were filed as emergency regulations on January 6, 1986. Those regulations list as authority for their promulgation, W.Va. Code §20-5A-3(b)(2), which refers generally to the power and authority of that Board to adopt regulations for the prevention, control, and abatement of pollution and to facilitate the State's participation in the National Pollutant Discharge Elimination System under the federal Clean Water Act. Authority for the Department of Natural Resources to issue permits for underground injection wells can be found in W.Va. Code §20-5A-5(b)(7), which provides, in pertinent part, that:

(b) It shall be unlawful for any person, unless he holds a permit therefor from the department, which is in full force and effect, to:

* * *

(7) Operate any disposal well for the injection or reinjection underground of any industrial wastes, including, but not limited to, liquids or gases, or convert any well into such a disposal well or plug or abandon any such disposal well.

W.Va. Code §20-5A-5(b) (7) (1985 Repl. Vol.).

The sole authority of the State Water Resources Board to promulgate regulations and of the Department of Natural Resources to issue permits concerning the underground injection into wells of wastes associated with the exploration, development, production, storage and recovery of oil and gas and related minerals was superceded by the passage of The West Virginia Energy Act. The Energy Act has, as one of its declared purposes:

(e) To provide for a single agency of this state to implement requirements of programs of federal law affecting the exploration, development, production, recovery and utilization of coal, oil and gas, and other mineral resources in this state. . . .

W.Va. Code §22-1-2(e) (1985 Repl. Vol.).

The Department of Energy is to play a lead role in the new regulatory scheme. This is clearly contemplated by W.Va. Code §22-1-6, which provides, in pertinent part, as follows:

Except as otherwise expressly provided in this chapter or in chapters twenty-two-a or twenty-two-b of this code, jurisdiction over the issuance of regulations, or any and all permits and other governmental authorizations required or to be required in all matters pertaining to the exploration, development, production, storage and recovery of coal, oil and gas, and other mineral resources in this state including all safety, conservation, land, water, waste disposal, reclamation and environmental regulations, permits and authorizations of such activities called for pursuant to articles five, five-a, five-d,

and five-f, chapter 20 of this code, and the enforcement and implementation thereof is vested exclusively in the Department of Energy. The Department of Energy is hereby designated as the lead regulatory agency for this state for all purposes of federal legislation relating to such activities.

W.Va. Code §22-1-16 (1985 Repl. Vol.) (emphasis added).

The assumption of the State UIC program by the Department of Energy's Division of Oil and Gas is specifically supported by several statutory provisions found in Chapter 22B of the Energy Act. The Director of the Division of Oil and Gas is required to adopt rules and regulations to assure that the regulations, permits and authorizations issued by the Director are adequate to satisfy the purposes of the Energy Act, particularly with respect to the consolidation of the various state and federal programs which place permitting requirements on the exploration, development, production, storage and recovery of the state's oil and gas. W.Va. Code §22B-1-2(c)(16) (1985 Repl. Vol.).

Additionally, the Director is required to perform such acts as may be necessary or appropriate to secure to the state the benefits of federal legislation establishing programs relating to the exploration, development, production, storage, and recovery of the state's oil and gas, which programs are assumable by the state. W.Va. Code §22B-1-2(c)(17) (1985 Repl. Vol.).

Finally, as it relates to any person conducting activities which are subject to the jurisdiction of the Division of Oil and Gas, the Director is empowered to issue water pollution control permits for the operation of any disposal well for the

injection or reinjection underground of any pollutant, including, but not limited to, liquids or gases, or convert any well into such a disposal well or plug or abandon any such disposal well. W.Va. Code §22B-1-7(b)(6) (1985 Repl. Vol.).

Specific provisions on the drilling of wells for the introduction of liquids to recover oil or for the introduction of liquids for the disposal of pollutants or effluent therefrom and for converting any existing well for such purposes are found in W.Va. Code §22B-1-14 (1985 Repl. Vol.). This section requires the issuance of a permit to drill or convert such wells contingent upon compliance with all of the bonding provisions found in W.Va. Code §22B-1-12 (1985 Repl. Vol.). The well operator additionally must provide a plat prepared by a registered engineer or licensed land surveyor indicating certain statutorily required information. When a well is proposed to be drilled or converted for the purpose, as provided for in W.Va. Code §22B-1-14, and the wells are located above a seam of coal, certain other limitations apply. These limitations are set forth in W.Va. Code §22B-1-16 (1985 Repl. Vol.).

Additional authority for the regulation by the Department of Energy of underground injection wells which inject hazardous waste from oil and gas activities may be found in the State Hazardous Waste Management Act, W.Va. Code §20-5E-1 et seq. (1985 Repl. Vol.). W.Va. Code §20-5E-7(h) provides, in pertinent part, as follows:

(h) To the extent that this article relates to activities with respect to oil and gas wells, liquid injection wells and waste disposal wells now regulated by articles

four, four-b and seven [§§22-4-1 et seq.; repealed; 22-4B-1 et seq.; repealed; 22-7-1 et. seq.; repealed], chapter twenty-two of this code, the administrator of the office of oil and gas and the shallow gas-well review board has the jurisdiction with respect to the regulation of such activities and shall promulgate such rules and regulations as may be necessary to comply with the requirements of this article.

The Department of Energy interprets this language as vesting jurisdiction in itself to regulate those wells which inject hazardous waste from facilities relating to the "exploration, development, production, storage and recovery of coal, oil and gas and other mineral resources." A more detailed explanation of this phrase, which defines the scope of the Department of Energy's regulatory jurisdiction in W.Va. Code §22-1-16 (1985 Repl. Vol.), is found in Part II of this Preamble.

It is clear from a review of the previously cited statutory authority that the Division has authority to regulate the great majority of underground injection wells that are presently classified under the existing Series IX regulations of the State Water Resources Board to the extent that those wells, are related to the "exploration, development, production, storage and recovery" of oil and gas and other mineral resources in this State. Under the system of classification used by the Water Resources Board, injection wells are categorized into five classes of wells. These detailed classifications are presently found in Section 4, Series IX of the Board's regulations. An examination of the descriptions of the underground injection wells covered by the State program at the present time indicates

that the great majority of wells in those categories effect the exploration, development, production, storage and recovery of oil and gas and other mineral resources in West Virginia. Under this classification system, it is clear that all Class II and Class III wells fall into this category. Additionally, certain injection wells described in Class I also fall within this description, most specifically those injection wells described in subsections 4.5.b, 4.5.d, 4.5.f, 4.5.g, 4.5.h, and 4.5.j. Finally, those wells in Classes I and IV which inject hazardous waste from mineral resource facilities and those wells in Class V related to mineral resource facilities would also fall under the jurisdiction of the Department of Energy. In short, those wells remaining within the clear jurisdiction of the Department of Natural Resources (DNR) and the Water Resources Board (WRB) would only be a very narrow portion of Class I, IV and V wells unrelated to the exploration, development, production, storage and recovery of oil and gas and other mineral resources in the State. Even those wells that would remain within the jurisdiction of DNR and WRB would be required to obtain permits from DOE under other authority.

The United States Environmental Protection Agency has promulgated regulations on state underground injection control program requirements in 40 C.F.R. Part 145, which relate to the assumption of primacy by states of the underground injection control program. Under the provisions of these regulations, the Agency does not require that authority for state programs reside in a single agency. However, 40 C.F.R. §145.23(b) provides that

if more than one agency is responsible for the administration of the UIC program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the various state agencies having program responsibilities. Any state seeking to administer the UIC program must submit a Memorandum of Agreement to EPA for approval. 40 C.F.R. §145.25. The West Virginia Energy Act designates the Department of Energy to be the "lead agency" in the formation and implementation of the State Underground Injection Control Program. Accordingly, these proposed regulations constitute the first step in the assumption of that role. The proposed regulations reflect the adoption of a regulatory scheme for the control of underground injection wells designed to maintain primacy. The concept of incorporation by reference has been used throughout the regulations as a mechanism to assure a more efficient and simple program, from the viewpoint of the regulated community, the Division of Oil and Gas and the public at large. Where provisions are different from, or in addition to, the federal program have been deemed desirable, those provisions have been included in the proposed rule.

The proposed UIC regulations generally incorporate by reference federal language or set forth separately language of the existing UIC regulations of the Water Resources Board where no comparable federal language exists. In two instances, however, language is being proposed by the Director which has no

counterpart in either the federal or Water Resources Board UIC regulations.

First, proposed section 17.4.6 provides that only one permit shall be issued for the construction and operation of any underground injection well covered by the Department of Energy's regulations. Operation of the well shall be conditioned only upon a subsequent mechanical integrity test. This provision was included in the proposed regulations to make it clear that issuance of the UIC permit constitutes approval to commence operation of the well, subject only to acceptable results as a mechanical integrity test.

Second, proposed section 17.4.7 provides that injection pressures at levels up to 90% of the fracture pressure of the injection zone will be allowed in the operation of the well. Injection at pressures in excess of 90% may be approved at the Director's discretion on a case-by-case demonstration by the applicant.

D. Series 4 - State National Pollutant Discharge
 Elimination System (NPDES)

This series governs the State National Pollutant Discharge Elimination System (NPDES) Program for all facilities and activities affecting the exploration, development, production, storage and recovery of oil and gas, and related mineral resources for point source discharges to surface waters of the State. It is recognized that the Director of the Division of Oil and Gas also has authority to issue other types of water pollution control permits pursuant to W.Va. Code §22B-1-7. These

Series 4 regulations, however, deal with NPDES requirements necessary for the delegation of that program from EPA to the Division of Oil and Gas as outlined in 40 C.F.R. Part 123.

Similar NPDES regulations of the State Water Resources Board were continued in effect by The West Virginia Energy Act until the Division promulgated superseding regulations. These proposed regulations are part of the transition from the Division of Water Resources of the Department of Natural Resources to the Division of Oil and Gas of the Department of Energy for purposes of permit issuance.

The NPDES program implements provisions of the federal Clean Water Act. In order to administer and enforce that program in lieu of EPA, it is necessary that the Division of Oil and Gas promulgate regulations which must be approved by EPA to delegate the program to West Virginia for these point sources.

The proposed regulations essentially incorporate by reference all of the EPA regulations which are necessary to achieve delegation of the NPDES program for the oil and gas industry. Some provisions, which are fully set out in the text of the proposed regulations, differ from the federal regulations or are in addition to those federal regulations, where state law requires deviations. Also, some additional provisions have been included which increase the flexibility of the Director in administering the permit program to take account of fact-specific cases or to deal with areas of regulatory control or permit conditions which have no counterpart EPA regulations, but which

serve to improve the State program. Set forth below are significant features of the proposed regulations.

1. Continuation of expiring permits - The provisions of Section 3.2.4 are modeled on the Water Resources Board rules and W.Va. Code §20-5A-7 which statutorily limits the amount of time a permit can be extended.
2. Confidentiality - EPA has extensive confidentiality regulations in 40 C.F.R. Part 2; however, the Division's proposed rules in Section 3.3 are simple, brief and tied to our State Freedom of Information Act which protects trade secrets. EPA does not at present require adoption of its 40 C.F.R. Part 2 rules for program delegation. The Division's proposed confidentiality rule is similar to that of the Water Resources Board.
3. Separate storm sewers - The existing storm water provisions of the Water Resources Board have been used in these proposed rules in Section 4.3. U.S. EPA's rules are currently in litigation and may well change. The Division will review this requirement in the future when U.S. EPA's rule becomes more certain.
4. Inspection and entry - These provisions in Section 5.3 are more limited than EPA's to conform the rules to state law, W.Va. Code §20-5A-3(d). See 40 C.F.R. §122.41(i).
5. Analytical variability - Sections 5.5 and 6.6.1 recognize the obligation of the permittee to certify as accurate test results which inherently contain analytical variability.

The proposed rule sets forth a mechanism to take this into account in the Division's regulatory program.

6. Real time water quality control - Section 6.2.1 recognizes the control technique of flow management to meet water quality criteria and sets out rules by which toxicity testing and limits may be imposed. The Division's provision includes additional requirements establishing when toxicity testing may be imposed and when water-quality based limits should be imposed. These new provisions are consistent with U.S. EPA's policy on water-quality based permit limits for toxicity pollutants (47 Fed. Reg. 9016-19, Mar. 9, 1984) which recognizes the need for a threshold test on toxicity monitoring and points out that the primary focus of toxicity monitoring should be the protection of the receiving stream.
7. Schedules of compliance - The proposed rules in Section 6.5.1 specifically refer to W.Va. Code §20-5A-7 which deals with when phased abatement may be allowed under state law. This authority is in addition to the provisions incorporated by reference in 40 C.F.R. 122.47.
8. Issuance and effective date of permit - Section 8.11 is in conformity with EPA rules establishing the effective date of a permit but would also allow an earlier effective date if the permittee so requests (less than 30 days).
9. Emergency permit modifications and temporary permits - Section 8.21 provides for an emergency or temporary permit (up to 6 months) and would allow them to be issued for experimental practices. These new provisions would enhance

the Director's regulatory flexibility and allow limited duration permits for special needs.

E. Series 5 - Special Water Pollution Control

This series consists of a number of miscellaneous regulations which relate to the control of water pollution. Initially, the subject matter for each section was derived from counterpart regulations of the State Water Resources Board.

Section 3 of the proposed regulations contains requirements for reporting certain spills and accidental discharges to waters of the State from facilities operated in connection with the exploration, development, production, storage and recovery of oil and gas and related mineral resources in this State. This section requires reporting in three different instances:

(1) Where reporting is required under Section 311 of the federal Clean Water Act;

(2) Where effluent limitations established in any oil and gas general permits are exceeded as a result of an upset or bypass;

(3) Where a pit fails and the result is a discharge to a surface water of the state.

The report is initially made by telephone. A written verification of the report is to be submitted if requested by the Director of the Division of Oil and Gas.

Section 4 sets forth the procedure for determining wasteload allocations for discharges of sewage and other wastes from facilities operated in connection with the exploration,

development, production, storage and recovery of oil and gas and related mineral resources.

Section 5 applies to sewage treatment plants with capacities of 40,000 gallons per day or less which are operated in connection with the exploration, development, production, storage and recovery of oil and gas and related mineral resources.

Section 6 establishes filing fees for permits issued pursuant to W.Va. Code §22B-1-7, including the registration of wells pursuant to the oil and gas general permit for drilling fluids issued by the Division. The \$50.00 fee applies to initial submittals of site specific permit applications only.

F. Series 6 - Dam Control

The Energy Act empowers the Division of Oil and Gas to establish regulatory requirements with respect to the Dam Control Act, W.Va. Code §§20-5D-1 through 14 (1985 Repl. Vol.), to the extent that those requirements pertain to the exploration, development, production, storage and recovery of oil and gas and related mineral resources in this State. Accordingly, Series 6 is made expressly applicable to these activities and the regulations of the Department of Natural Resources related to dam control are superceded to the extent that they apply to these sources.

The substantive regulatory requirements which are being proposed are identical to the substantive regulations of the Department of Natural Resources relating to dam control. Certain

changes have been made to streamline the regulations and to conform the regulatory authority to that of the Division of Oil and Gas.

E. Series 7 - Solid Waste Management

The Energy Act also vests exclusive jurisdiction in the Department of Energy with respect to the regulation of the exploration, development, production, storage and recovery of oil and gas and related mineral resources in the State pursuant to the Solid Waste Management Act, W.Va. Code §§20-5F-1 through 8 (1985 Repl. Vol.).

In proposed Series 7, the applicability of the regulation is limited to those activities involving exploration, development, production, storage and recovery of oil and gas and related mineral resources in the State. To the extent that the regulations of the Department of Natural Resources relate to these activities, their rules are superceded.

The Division of Oil and Gas has proposed the establishment of a permit by rule, to the extent that a solid waste facility complies with the regulatory and permitting requirements of Series 1 of these proposed regulations wherein the Division already takes into account the disposal of solid waste. In those cases in which a facility would not be subject to the permitting requirements of Series 1, the proposed regulations call for a specific permit to be issued by the Division upon application and in accordance with such reasonable terms and conditions as may be prescribed by the Director of the Division. In issuing the

permit, the Division would also be bound to assure compliance with the requirements of the State Solid Waste Management Act.

F. Series 8 - Hazardous Waste Management

Under the terms of the Energy Act, the Department of Energy is authorized to exercise all power and duties vested in the Administrator of the Office of Oil and Gas and the Shallow Gas Well Review Board pursuant to W.Va. Code §20-5E-7(h). That section reads, in pertinent part, as follows:

(h) To the extent that this article relates to activities with respect to oil and gas wells, liquid injection wells and waste disposal wells now regulated by [W.Va. Code §§22B-1-1 et seq.; 22-7-1 et seq. and 22B-4-1 et seq.] the [Department of Energy] has the jurisdiction with respect to the regulation of such activities and shall promulgate such rules and regulations as may be necessary to comply with the requirements of this article
.....

The Division of Oil and Gas interprets this provision as placing on it the obligation to regulate all hazardous waste activities involving the injection of such wastes into wells to the extent that such wastes are associated with the exploration, development, production, storage and recovery of oil and gas and related mineral resources of this State. A more detailed explanation of the scope of the Department of Energy's regulatory jurisdiction can be found in Part II of this Preamble. Accordingly, Series 8 includes a permit by rule which authorizes a hazardous waste permit for facilities which receive hazardous waste exclusively from oil and gas operations where those

facilities have underground injection control permits issued by the Division and otherwise comply with the regulatory permitting requirements of Series 1 of these proposed rules. Facilities receiving hazardous waste from activities other than oil and gas operations must obtain such additional authorizations from DNR and other agencies as may be required by law.

In addition, the Division of Oil and Gas interprets the State Hazardous Waste Management Act to place on it the responsibility to regulate those waste materials that are associated with the exploration, development or production of crude oil or natural gas or geothermal energy which are currently exempt from regulation as hazardous waste pursuant to W.Va. Code 20-5E-6(a)(2)(A) (1985 Repl. Vol.). Accordingly, the Division proposes to adopt a regulation exempting such wastes from regulation as hazardous waste. These wastes will be subject only to other applicable provisions of federal or state law in lieu of their regulation as hazardous waste until such time as the United States Environmental Protection Agency completes its study of these wastes mandated pursuant to Section 8002 of RCRA and promulgates regulations with respect to such wastes and that the regulation of such waste has been authorized by an act of Congress in accordance with §3001(b)(2) of RCRA. At the time the Governor issues a proclamation finding that at least 6 months have elapsed since the satisfaction of these requirements as required by State law, the Division will undertake whatever regulatory action would be necessary to discharge its responsibilities under the State Hazardous Waste Management Act.

G. Series 9 - Hearing and Appeal Procedures

The provisions of Series 9 govern and apply to all hearings before the Division of Oil and Gas under the provisions of W.Va. Code §22B-1 and the Natural Gas Policy Act of 1978. Series 9 is a procedural rule which consolidates the hearing and appeal procedures contained in various provisions of the rules of the former Department of Mines.

H. Series 10 - Requests for Information

Series 10 of the proposed regulations is a procedural regulation setting forth the Division's policy on disclosure of information pursuant to the State Freedom of Information Act (W.Va. Code §29B-1-1 et seq. (1980 & 1985 Cum. Supp.)).

IV. Solicitation of Comments

The Division of Oil and Gas invites public participation in this rulemaking and requests comments on the proposed rules discussed in this notice. The Agency asks that comments be as specific as possible and that suggested revisions or corrections be supported by data. Comments should identify the section number of the proposed rules to which they are directed.