WEST VIRGINIA
SECRETARY OF STATE
Betty Ireland
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Department of Environmental Protection - Office of Oil and Gas TITLE NUMBER: 35

RULE TYPE: Legislative CITE AUTHORITY: §22-21-4

AMENDMENT TO AN EXISTING RULE: YES [X] NO [ ]

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Coalbed Methane Wells Rule

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: July 17, 2007 TIME: 6:00

LOCATION OF PUBLIC HEARING: WV Department of Environmental Protection
Coopers Rock Training Room (1204)
601 57th Street, SE Charleston, WV

COMMENTS LIMITED TO: ORAL [ ] WRITTEN [ ] BOTH [X]

DATE WRITTEN COMMENT PERIOD ENDS: July 17, 2007 TIME: at close of hearing

WRITTEN COMMENTS MAY BE MAILED TO:
WV DEP - Public Information Office
601 57th Street, SE
Charleston, WV 25304

Att: Jessica Greathouse

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

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TITLE 35
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF OIL AND GAS

SERIES 3
COALBED METHANE WELLS RULE

§35-3-1. General.

1.1. Scope. -- This rule shall govern and apply to proceedings under W. Va. Code §22-21-1 et. seq., governing coalbed methane wells. Certain portions of this series shall apply to W. Va. Code §22-10-1 et. seq., related to abandoned wells, W. Va. Code §22-12-1 et. seq., related to groundwater protection, and W. Va. Code §22-6-1 et. seq., related to oil and gas wells and other wells.

1.2. Authority. -- W. Va. Code §§22-21-3 and 4.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Forms. -- An index of current forms and copies of any forms currently used under or required by this rule may be obtained from the chief. The Office of Oil and Gas may prospectively amend any form at any time without notice to accord more fully with the requirements of W. Va. Code §22-21 and this rule.

§35-3-2. Definitions.

Unless the context in which used clearly requires a different meaning, the definitions contained in W. Va. Code §22-21-2 shall apply to this rule in addition to those definitions set forth below.

2.1. "Authorized agent" means a representative as designated by the Review Board.

2.2. "Review Board" means the board as defined in W. Va. Code §22-21-2(a).

2.3. "Chairman" means the chairman as defined in W. Va. Code §22-21-2(a).

2.4. "Coal operator" shall mean a coal operator as defined in W.Va. Code §22-21-2(g).

2.~~1~~5. "W.Va. Code" shall mean the West Virginia Code of 1931, as amended.

2.~~2~~6. "Day" shall mean a period of twenty-four (24) consecutive hours.

2.~~3~~7. "Designated agent" shall mean a resident of the State of West Virginia designated by an operator as the agent or attorney in fact of the operator upon whom process, notices, orders, or other communications issued pursuant to W. Va. Code §22-21 may be served.

2.8. "Field" means a geographic area which is underlain or appears to be underlain by at least one (1) coal seam that may comprise a coalbed methane pool. The words "Field" and "Pool" are synonymous when only one (1) underground coal seam is involved; however, "Field" may relate to two (2) or more coal seams in the same geographic area.

2.9. "Hearing" means a proceeding in which an applicant or the Review Board on its own motion seeks to establish special field rules for a specific geographic area.

2.410. "Log" or "Well log" shall mean a systematic, detailed geological record of all formations, including coal, fresh water, and salt water encountered in the drilling of a well.

2.11. "Special field rules" are rules ordered on an application filed by the operator, or by the operator of any CBM wells directly and immediately affected by the drilling of such CBM well or wells to establish the field or pool, or by the Review Board on its own motion.

2.512. "Surface owner of record", and the term "owner of record of the surface" as used in W. Va. Code §22-21-9, shall mean any person who is an owner of record of surface land or an undivided interest therein, whether or not the surface ownership is severed from the mineral ownership.

2.613. "Operator" or "gas operator" for notice purposes shall mean any person having the right to operate or who does operate an oil or gas well and is interchangeable with the terms "operator" or "well operator" as defined in W. Va. Code §22-6-1. "Operator" or "gas operator" for the purpose of determining responsibility with the plugging of a coalbed methane well shall be any person having the right to operate the coalbed methane well, which may include all royalty interest owners, plus the owners of any business operating the well.

2.714. "Casing" shall have the meaning set forth in W. Va. Code §22-6-1.

2.815. "Cement" shall have the meaning set forth in W. Va. Code §22-6-1.

2.916. "CBM Well Operator" shall mean a coalbed methane well operator as defined in W. Va. Code §22-21-2(f).

2.1017. "CBM Well" shall mean a coalbed methane well as defined in W. Va. Code §22-21-2(e).

2.1118. "Expanding Cement" shall have the meaning set forth in W. Va. Code §22-6-1.

2.1219. "Plat" shall have the meaning set forth in W. Va. Code §22-6-1.

2.20. "Statute" means W.Va. Code §22-21-1, et seq.

2.21. "Waste" shall have the meaning set forth in W. Va. Code §22-21-2(q).

§35-3-3. Inspectors, Inspection Forms, Violations, Abatement.

3.1. Violations, Findings and Orders. - Findings and orders of oil and gas inspectors concerning violations discovered during an inspection shall be recorded on the appropriate form listed in subsection 3.2. Such finding and orders shall not be construed to limit the office's power to initiate any other lawful proceedings concerning violations of W. Va. Code §22-21 et seq., or this rule.

3.2. Inspectors' Report Forms. - The report forms to be used by inspectors pursuant to W. Va. Code §22-21 will be those forms set forth in 35 CSR, section 3.

§35-3-4. Permit Required for Coalbed Methane Well; Permit Fee; Soil Erosion Control Plan.

4.1. Application for Permit; Issuance, Conditions, and Modifications.

4.1.a. An application for any well work permit required for a CBM Well, except permits to plug a well, shall be made on Form WW-5B, "Application for Coalbed Methane Well Work Permit," and shall be accompanied by:

4.1.a.1. A "Notice of Application for a CBM Well Work Permit" in the form prescribed by W. Va. Code §22-21-9;

4.1.a.2. A plat in the form prescribed by §22-21-6 (5) and W. Va. Code §22-6, and further described in section 9 of this rule;

4.1.a.3. A Performance Bond, Corporate Security, or other security in one of the forms prescribed by W. Va. Code §22-6-26, or in lieu thereof cash or collateral security allowed by W. Va. Code §22-21-8;

4.1.a.4. Form WW-9, "Construction and Reclamation Plan," applicable to the plan required by W. Va. Code §22-21-6(d) and a plan for performing the reclamation required by section 14 of this rule;

4.1.a.5. With any initial application to drill a Coalbed Methane well the fees required by W. Va. Code §22-21-6(c)(2) (application fee of two hundred fifty dollars), W. Va. Code §22-6-29, (special reclamation fee of one hundred dollars) and any fees associated with any environmental permits required under Chapter 22;

4.1.a.6. If applicable, the consent required by W. Va. Code §22-6-21;

4.1.a.7. If stimulation of the well is proposed, the consent required by W. Va. Code §22-21-7 or in lieu thereof the request for hearing prescribed by W. Va. Code §22-21-7(b);

4.1.a.8. Copies of statements of no objection from persons entitled for notice pursuant to W. Va. Code §22-21-7;

4.1.a.9. A statement describing whether any users under subdivision 13.3.e were identified and the manner in which any such users were provided with notice as required under subdivision 13.3.f; and

4.1.a.10. If applicable, the consent required by W. Va. Code §22-21-20.

4.1.b. Where there is more than one type of well work, a single application may be used provided all such well work is noted on the Form WW-5b filed in connection therewith.

4.1.c. The applicant for any permit mentioned in this rule must file an original and
two (2) copies of the Application and an original and four (4) copies of the Notice, plat and, except for application for a permit to plug a CBM Well, a Construction and Reclamation Plan.

4.2. Notice to Surface Owners of Record; Proof of Notice; Comments.

4.2.a. For purposes of notice of surface owners of record, pursuant to W. Va. Code §22-21-6, the applicant CBM well operator shall be entitled to assume, subject to performing the public record review described in subdivision 4.2.b. below, that the specific person(s) listed on the relevant tax ticket(s) maintained by the Sheriff pursuant to W. Va. Code §11A-1-8 (as distinguished from the

listing of an estate, or of person(s) as "agent" or with "et al" or "heirs" or other designation indicating unspecified owners or record) were in fact surface owners of record when the tax ticket was prepared.

4.2.b. To establish that a surface owner identified on a tax ticket has not transferred an interest in the surface, the CBM well operator must review, from the date the surface owner acquired the surface, or for ten (10) years prior to the date of the review, whichever period is shorter, the "Grantor Index" and the "Fiduciary Index" maintained in the office of the Clerk of the County Commission. If the review identifies surface owner(s) in replacement of or in addition to the tax ticket listing, all successor names shall likewise be checked in the Grantor and Fiduciary Indexes to establish the surface owner(s) of record on the date the review is made.

4.2.c. Where the relevant tax ticket(s) list an estate, or list person(s) as "agent" or with "et al" or "heirs," or other designation indicating unspecified owners of records in the office of the clerk of the county Commission to determine whether the total number of such owners is more than three (3) and, if the total number of such owners is three (3) or less, the names(s) of the surface owner(s) of record on the date the review is made.

4.2.d. If the identification of the surface owners of record is made pursuant to the criteria of subdivisions 4.2.a., 4.2.b. or 4.2.c. within ninety (90) days of the date of filing of the application for a permit, the CBM well operator need not review the records again prior to the filing.

4.2.e. Except where notice by publication is permissible under the provisions of W. Va. Code §22-21-9(c), the notice to surface owners of record required by W. Va. Code §22-21-9 shall consist of true, complete copies of all documents required under subdivision 4.1.a. of this rule and shall contain a statement of the methods and time limits for filing comment and objection, who may file comment and objection, the name and address of the chief with whom the comment and objection must be filed, the ability to obtain additional information from the chief, the fact that such persons may request notice of the permit decision, and a list of persons qualified to test water as provided in this section.

4.2.f. All comments filed pursuant to the provisions of W. Va. Code §22-21-10 shall be in writing, and should contain the name, address and telephone number of the person filing the comment, the CBM well operator's name and CBM well number, and the approximate location of the proposed CBM well site including district and county as indicated in the permit application. Comments may be accompanied by other pertinent documents. Other than as prescribed in this rule, no particular form for the comment is prescribed.

4.2.g. Proof of personal service may be made by the return of any sheriff or other official empowered by law to serve process, or by affidavit of personal service on Form WW-70 by any person, including but not limited to any employee or agent of the CBM well operator. If service is effected by certified mail, service is effective upon mailing and the return receipt card or other postal receipt for certified mailing with postal stamp affixed or photocopy will be accepted as proof of service.

4.2.h. Notice of publication under the provision of W. Va. Code §22-21-9(c) shall be substantially as provided in Form WW-

71CBM. Proof shall be supplied by affidavit of publication from the newspaper.

4.2.i. No permit will be issued until all required proof of notice has been filed with the chief.

4.3. Notice to Coal Owners or Operators, Proof of Notice.

4.3.a. Notice to Coal Operators, Owners or Lessees - A copy of the completed notice and application of any CBM well permit as required by W. Va. Code §22-21-6, including the associated Construction and Reclamation Plan, Consent and Agreement (if applicable), Plat, and Certificate of Notice required by subdivision 4.3.c., shall be used as the form of the notice to Coal Operators, Owners or Lessees required by W. Va. Code §§22-21-6, 22-21-7 and 22-21-9, and shall be mailed by registered or certified mail to coal operators, owners or lessees.

4.3.b. Proof of personal service may be made by the return of any sheriff or other official empowered by law to serve process, or by affidavit of personal service on Form WW-70 by any person, including but not limited to any employee or agent of the CBM well operator. If service is effected by certified mail, service is effective upon mailing and the return receipt card or other postal receipt for certified mailing with postal stamp affixed or photocopy will be accepted as proof of service.

4.3.c. Notice of publication under the provisions of W. Va. Code §22-21-9 shall be substantially as provided in Form WW-71CBM. Proof shall be supplied by affidavit of publication from the newspaper.

4.3.d. No permit will be issued until all required proof of notice has been filed with the chief.

4.4. Notice to Natural Gas Owners, Lessees, and Operators.

4.4.a. A copy of the completed notice and application of any CBM well permit including the plat shall be used as the form of Notice required to be provided to each owner and lessee of record and each operator of natural gas surrounding the well bore of a proposed CBM well and existing in formations above the top of the uppermost member of the "Onondaga Group" or at a depth less than six thousand feet, whichever is shallower, pursuant to W. Va. Code §22-21-9. Notices to gas operators shall be sufficient if served upon the agent of record with the office of oil and gas.

4.4.b. Proof of personal service may be made by the return of any sheriff or other official empowered by law to serve process, or by affidavit of personal service on Form WW-70 by any person, including but not limited to any employee or agent of the CBM well operator. If service is effected by certified mail, service is effective upon mailing and the return receipt card or other postal receipt for certified mailing with postal stamp affixed or photocopy will be accepted as proof of service.

4.4.c. Notice of publication under the provisions of W. Va. Code §22-21-9 shall be substantially as provided in Form WW-71CBM. Proof shall be supplied by affidavit of publication from the newspaper.

4.4.d. No permit will be issued until all required proof of notice has been filed with the chief.

4.5. Review of Application; Issuance of Permit for CBM well in the absence of

objections.

4.5.a. The chief shall review each application for a CBM well work permit and shall determine whether or not a permit shall be issued.

4.5.b. No Permit shall be issued less than fifteen days after the filing date of the application for any CBM well work except plugging or replugging; Provided, that if the applicant certifies that all persons entitled to notice of the application under the provisions of W. Va. Code §22-21-9 have been served in person or by certified mail, return receipt requested, with a copy of the CBM well work application, including the erosion and sediment control plan, and the plat and further files written statements of no objection by all such persons, the chief may issue the CBM well work permit at any time.

4.5.c. Subject to the requirements of W. Va. Code §22-21-22, no permit for plugging or replugging shall be issued less than five days after the filing date of the application except a permit for plugging or replugging a dry hole: Provided, that if the applicant certifies that all persons entitled to notice of the application under the provisions of W. Va. Code §22-21-9 have been served in person or by certified mail, return receipt requested, with a copy of the CBM well work application, including the erosion and sediment control plan, and the plat and further files written statements of no objection by all such persons, the chief may issue the CBM well work permit at any time.

4.5.d. The chief may cause such inspections to be made of the proposed CBM well work location as to assure adequate review of the application. The permit shall not be issued, or shall be conditioned, including conditions with respect to the location of the well and access roads, prior to issuance if the chief determines that:

4.5.d.1. The proposed CBM well work will constitute a hazard to the safety of persons; or

4.5.d.2. The plan for soil erosion and sediment control is not adequate or effective; or

4.5.d.3. Damage would occur to publicly owned lands or resources; or

4.5.d.4. The proposed CBM well work fails to protect fresh water sources or supplies.

4.5.e. The chief shall promptly review all comments filed. If after review of the application and all comments received, the application for a CBM well work permit is approved, and no timely objection or comment has been filed with the chief under the provisions of W. Va. Code §§22-21-10, 22-21-11 and 22-21-22, the permit shall be issued, with conditions, if any.

4.6. Consent and Agreement of Coal Owner or Operator.

4.6.a. Evidence of the Coal Owner, lessee, or operator consent and agreement as required by W. Va. Code §22-21-6 shall be submitted to the chief on Form WW-5A and shall become a part of the permanent well record.

4.6.b. In the absence of the applicant submitting evidence of a consent and agreement on Form WW-5A, a request for hearing before the board may be submitted accompanied by an affidavit which shall include all the information required by W. Va. Code §22-21-7.

4.7. Issuance of Permits.

4.7.a. The determination to deny a permit under the provisions of W. Va. Code §22-21-6(g), or to deny or condition a permit under the provisions of W. Va. Code §22-21-12 shall be in writing and issued within thirty (30) days from the date the Notice and Application in complete form with the required documents are filed, except in those cases where comments or objections have been filed pursuant to W. Va. Code §§22-21-10 and 22-21-11 or where an applicant has submitted a request for hearing before the Board as provided by W. Va. Code §22-21-7(b).

4.7.b. The determination to deny, issue or condition a permit under the provisions of W. Va. Code §22-21-13, shall be in writing and issued within thirty (30) days from the date of receipt of the Coalbed Methane Well Review Board order by the chief in complete form with all documents as required.

4.7.c. In the absence of a pooling order or an order establishing special field rules issued by the Board, no permit to drill a CBM well within 100 feet of the outermost boundary of a coalbed methane tract, leased premises, or unit from which coalbed methane will be produced or within 1,600-feet of an existing CBM well for which a permit application is on file, shall be issued by the chief unless the CBM well operator has provided consent as required by W. Va. Code §22-21-20.

4.7.d. The permit and any conditions to or modifications of the proposed permitted well work shall be issued by endorsement on or attachment to the "Permit" copy of the Application Form WW-5B.

4.7.e. Any permit issued shall expire automatically unless the permit well work is commenced within twenty-four (24) months of the date the permit was issued. No permit shall be extended to authorize the commencement of well work after the expiration date of twenty-four (24) months.

4.7.f. Upon the issuance of any permit pursuant to the provisions of this article, the chief shall transmit a copy of such permit to the Office of the Assessor for the county in which the well is located.

4.7.g. Upon the issuance or denial of any permit pursuant to the provisions of this article, the chief shall transmit a copy of such permit or denial to all persons noticed in the permit application pursuant to W. Va. Code §22-21-9.

4.8. Prior to the construction of roads, locations and pits for any permitted well work, the CBM well operator or his contractor shall notify the appropriate oil and gas inspector and allow the opportunity of inspecting and approving the construction and method of reclamation for all proposed areas to be disturbed in siting, drilling, completing or producing the well. In addition, the CBM well operator or his contractor shall notify the appropriate district oil and gas inspector twenty-four (24) hours before actual permitted well work is commenced.

4.9. Drilling prohibition 200 feet - No coalbed methane well shall be drilled nearer than two hundred feet from an existing water well or dwelling without first obtaining the written consent of the owner of such water well or dwelling.

§35-3-5. Casing Requirements - Coalbed

Methane Wells.

5.1. Fresh Water Casing - For each coalbed methane well, the operator shall run and permanently cement a string of casing through the fresh water bearing strata. The fresh water protective casing shall extend at least thirty (30) feet below the deepest fresh water horizon (that being the deepest horizon which will replenish itself and from which fresh water or usable water for household, domestic, industrial, agricultural, or public use may be economically and feasibly recovered) and shall have cement circulated in the annular space outside the casing. The volume of cement needed shall be calculated using approved engineering methods to assure the return of the cement to the surface. In the event cement does not return to the surface, the district Inspector shall be notified. If the top of cement cannot be located using sound engineering practices approved by the chief or his authorized representative, then an electric log or similar technology approved by the chief shall be used. Sound engineering practice approved by the chief or his authorized representative shall be used to fill the annular space back to the surface. Requests to approve methods, other than pre-approved practices, shall be acted upon by the chief or his authorized representative within twelve (12) hours of actual notice to the chief or his authorized representative, otherwise the request will be deemed approved. In no case shall the fresh water casing penetrate salt water or extend below sea level. There shall be no oil and gas production through the fresh water casing for new wells or the redrilling of existing wells permitted on or after August 1, 1993. Variances from the requirements of this section shall be granted on a site specific or area basis in accordance with section 16 of this rule.

5.2. Casing When Drilling Encounters Coal Seams.

5.2.a. Coal Protection String - Except for those coalbeds which the coalbed methane operator proposes to complete for production or produce from, or where a ventilation hole is being converted to a well, when a well penetrates one or more workable coalbeds, the well operator shall run and cement a string of casing in the hole through the workable coalbed or beds in such a manner as will exclude all oil, gas or gas pressure from such coalbed or beds, except such oil, gas or gas pressure as may be naturally present in each coal seam. Such string of casing shall have cement circulated in the annular space outside the casing. The casing shall either be cemented to the surface or at least into the fresh water casing to at least 100 feet above the uppermost workable coal seam. If the casing is not cemented to the surface, the operator will demonstrate that the casing has been cemented to 100 feet above the uppermost workable coal seam. The volume of cement needed shall be calculated using approved methods to assure cementing to the required level. In the event cement does not return to the required level, every reasonable attempt will be made to fill the annular space by introducing cement from the surface.

The fresh water casing may be extended through the workable coal seams and also serve as the coal protection string provided the casing is cemented as required in subsection 5.1 through the fresh water horizons, and subsection 5.2 through the workable coal seams, and subdivision 5.2.b regarding when a worked-out coal seam is encountered.

5.2.b. When Drilling Encounters a Mined Zone - Except where the horizon of a previously mined coalbed and its associated gob are expected to be the producing zone, when a coalbed methane well is drilled

through the horizon of a coalbed from which the coal has been removed, the hole shall be drilled at least thirty feet below the coalbed, of a size sufficient to permit the placing of a liner which shall start not less than 20 feet below the coal seam and extend not less than 20 feet above the void created by the mined area. This liner, which may be welded to the casing being used, shall be centered in the borehole, and the space between the liner and casing shall be filled with cement as they are lowered into the hole. Cement shall be placed in the bottom of the hole to a depth of at least 20 feet to form a sealed seat for both liner and casing.

Following the setting of the liner, drilling shall proceed in the manner provided in subdivision 5.2.a. Should it be necessary to drill through the horizon of two or more workable coalbeds from which the coal has been removed, such liner shall be started not less than 20 feet below the lowest such horizon penetrated and shall extend to a point not less than 20 feet above the highest such horizon, provided that, where two or more horizons from which the coal has been removed are sufficiently far apart, separate liners for each horizon or combination of horizons from which coal has been removed may be used. In any event, each segment of liner shall start not less than 20 feet below the lowest such horizon penetrated and extend to a point not less than 20 feet above the highest such horizon.

5.3. For gob wells, drilled after the effective date of this rule and vent holes converted to gob wells, a single string of casing may be used as the fresh water, coal protection and the production casings. In any event, a string of casing shall extend 30 feet below the deepest fresh water horizon (that being the deepest horizon which will replenish itself and from which fresh water or usable water for household, domestic, industrial, agricultural, or public use may be economically and feasibly recovered). Such casing shall have cement circulated in the annular space outside the casing. The volume of cement needed shall be calculated using approved methods to assure the return of cement to the surface. In the event cement does not return to the surface, every reasonable attempt will be made to fill the annular space by introducing cement from the surface.

5.4. Production Casing - For all coalbed methane wells, production casing shall, through cementing or other mechanical means such as a packer, be set in such a manner as to prevent the migration of stimulation pressure or fluid, or any produced gas or water into the space between the well bore or any other casing set and the production casing.

The coal protection string may also serve as the production casing. However, if the fresh water casing and the coal protection string are the same as provided for in subdivision 5.2.a, then a separate string of casing shall be used as the production string, except for those wells as provided for in subsection 5.3.

5.5. Cement Type and Strength - When cement is used to fill the annular space around the casing required in this section, it shall be American Petroleum Institute Class A Ordinary Portland Cement with no greater than three percent (3%) calcium chloride; provided that, if the coalbed methane operator furnishes satisfactory proof that different cement types are adequate, the chief may approve use of such different cement types.

The cement placed in the annular space around the casing shall be allowed to set to a minimum compressive strength of five hundred (500) pounds per square inch using approved engineering data for the type of cement used, or the waiting time for all

cement used shall not be less than eight (8) hours.

5.6. Variances from Cementing Requirements - The chief may also allow, upon sufficient proof by the coalbed methane operator that it will not affect mine safety or fresh water aquifers and upon consent of all coal owners or operators effected, variances from the requirement of subdivision 5.2.1, and subsections 5.4 and 5.5 regarding the cementing of the coal protection and/or the production casing along its full length.

5.7. Drilling Practices Prior to Freshwater Casing - Prior to the cementing of the freshwater casing as required by subsection 5.1, drilling practices and procedures, such as air or water pressure and soaping, shall be conducted using operating practices so as to minimize damage or disturbance or the possibility of unnecessary damages or disturbance to the uncased strata/formations and groundwater contained in any of those formations. The requirements of this section shall not prevent the use of drilling practices and procedures reasonably necessary to the successful drilling of the well in a safe manner. The requirements of this section shall not be construed to prohibit practices specifically allowed by statute or other regulation.

5.8. Blowout Prevention Training - The well operator shall assure that at all times during the operation of the drilling rig a person shall be present that has successfully completed a training course on blowout prevention approved by the chief.

5.9. Well Identification - Every well shall have attached or stamped, in a permanent manner, the API identification number which consists of the state (047), county (001 through 109), and permit number. Such number shall be no less than one half (1/2) inch in height and detectable by any interested person approaching the well. Any additional information the well operator desires to display may be incorporated in such a manner that it will not confuse or distort the permanent API identification number.

§35-3-6. Notice of Plugging and Reclamation of a CBM Well; Right to Take Well; Objection; Plugging Order; Plugging for Mine Through.

6.1. Notice of Intention to Plug and Abandon a CBM Well.

6.1.a. Prior to filing an application for a permit to plug a coalbed methane well under W. Va. Code §22-21-22, the applicant shall deliver by personal service or by certified mail, return receipt requested, copies of the application, well plat and erosion and sediment control plan to the following:

6.1.a.1. The "chief" as defined in W. Va. Code §22-21-2(i);

6.1.a.2. The owners of record of the surface of the tract on which the CBM well is located; and

6.1.a.3. The name and address of each coal operator and each coal owner and coal lessee of record, or providing a record declaration of notice pursuant to section thirty-six, article six of this chapter, of any coal seam which is (i) penetrated by the well; (ii) within seven hundred fifty horizontal feet of any portion of the well bore; or (iii) within one hundred vertical feet of the completed coal seams of the well, except that in the case of an application to plug a well which was converted from a ventilation hole, the name and address only of such owner or operator of the seams penetrated by the well shall be

necessary.

6.2. An application for a permit to plug a CBM well shall be made on form, "Application to Plug and Abandon a CBM Well" and shall be accompanied by:

6.2.a. A plat in the form prescribed by W. Va. Code §22-21-6(C)(5);

6.2.b. The CBM well name, well number, and permit number or such other identification as the chief may require;

6.2.c. The anticipated date plugging operations will commence;

6.2.d. The total depth to which the well was drilled, deepened or converted, the coal seams (stating the depth and thickness of each seam) in which the well was completed for production, and any other coal seams (including the depth and thickness of each seam) which penetrated by the well; and

6.2.e. A certification to the chief the notice requirements of this article have been completed by the applicant. Such certification shall be by affidavit(s) of personal service or return receipt card(s), or other postal receipt(s) for certified mailing.

§35-3-7. Work Order: Manner and Method of Plugging a CBM Well.

7.1. An applicant for a permit to plug a well shall set forth a detailed statement of the manner in which the work of plugging and filling such well is to be performed, including:

7.1.a Location (by depth);

7.1.b. Kind and length of plugs to be used and the method chosen to insure that no gap exists between the bottom of the coal protection string of casing and the expanding cement plug thereunder;

7.1.c. Plans for mudding, cementing, and filling;

7.1.d. Plans for altering or removing casing if required; and

7.1.e. All other pertinent information regarding said plugging and filling, all of which shall be in compliance with W. Va. Code §22-21-23. The information shall be submitted on Form WW-6B "Application to Plug and Abandon a CBM Well".

7.2. Rights of Coal Owner or Operator Pursuant to W. Va. Code §22-21-22(b).

7.2.a. Any coal owner or operator noticed within the "Application to Plug and Abandon" and whose coal seam is affected by such well shall have the following rights pursuant to W. Va. Code §22-21-22:

7.2.a.1. To convert the well to a vent hole or otherwise take the well. In such event the chief, upon determination that the coal owner or operator has placed the well under a mining permit, shall release the well operator's bond and the well operator shall be relieved of further responsibility for the well.

7.2.a.2. To file comment or objection with the chief, within fifteen (15) days after receipt of intent to plug, with respect to the proposed manner or method of plugging. The chief shall consider any such comment or objection and issue an order specifying the manner and method of plugging and reclamation.

7.3. Issuance of a Permit to Plug and Abandon a CBM Well.

7.3.a. The chief shall issue an order within fifteen (15) days after the expiration of the comment and objection period, either permitting or rejecting such application and endorsed on Form WW-6B. The issuance or rejection shall be mailed to all parties noticed on the application to plug and abandon a CBM well. In entering any such order, the chief shall give special consideration to the ability to mine any affected coal seam safely and the protection of any affected coal seam for future mining.

7.3.b. Verbal permission may be given pursuant to WV Code §22-6-23 (c) in the event the well to be plugged and abandoned is one on which drilling or working operations have been continuously progressing pursuant to authorization granted by the office. Any verbal permission shall be given by the chief, or the supervising inspector, or any inspector who is available to supervise the plugging work. Unless such verbal approval is given by the chief, the well operator shall notify the chief's office by telephone of such verbal approval no later than the next regular working day.

7.4. When any coalbed methane well is located in that portion of a coal seam which will be mined within six (6) months, the well operator shall, within sixty (60) days after notice from the coal owner or coal operator that the well is to be mined through, plug the well. The well shall be plugged in accordance with the requirements of section 8 of this rule.

§35-3-8. Plugging of Coalbed Methane Wells When a Workable Coal Seam is Encountered.

8.1. All coalbed methane and gob wells shall be plugged upon abandonment and shall be plugged in accordance with a plan filed and approved by the chief. The approved method of plugging shall require the plugging of the well will be sufficient to allow the well to be mined through safely.

8.2. Method of Plugging.

8.2.a. Materials Used in Plugging. Any non-porous materials including gels and cements to be used in plugging must be specified in the work order portion of Form WW-6B. All cement, except where expanding cement is used in conjunction with plugging, shall be American Petroleum Institute Class A Ordinary Portland Cement with no greater than 3% calcium chloride and no other additives. All non-porous materials used in conjunction with plugging shall be at least six percent (6%) bentonite gel.

If the operator furnishes satisfactory proof that different cement or non-porous material types are adequate, the chief may approve use of such different cement or non-porous materials. Materials and cements must be of a kind and quality accepted by the oil and gas industry and approved by the chief as suitable for the intended purpose and which otherwise comply with all provisions of law and accepted standards. The chief may approve the use of non-standard material or cement.

8.3. Length of Plug - All cement plugs, other than those across coal seams, shall be at least one hundred (100) feet in length unless a variance from such a requirement is granted pursuant to section 16 of this rule.

8.4. Retrieving Casing and Completing a Seal - The operator shall make reasonable efforts to cut and pull all recoverable casing (as determined by methods approved by the chief or his authorized representative). Equipment used to pull recoverable casing shall be rated and rigged at or above one

hundred and fifty percent (150%) of the estimated weight of the heaviest string of recoverable casing, unless otherwise approved by the chief or his authorized representative. Sufficient instrumentation shall be used to accurately indicate the pulling force applied. When the fresh water casing has not been cemented to surface and the casing cannot be pulled, the operator shall make reasonable attempts to perforate the casing and squeeze cement behind the casing in the vicinity of the fresh water zones to prevent the contamination of the fresh water zone.

8.5. Cleaning Out and Preparing Wells.

8.5.a. The well shall be cleaned out along its entire length or, in the case of gob wells, if it is not feasible to clean out along the entire length, the well shall be cleaned to the lowest practical depth or at least below the lowest workable coal seam.

8.5.b. Either at the time of drilling the well or at least prior to the application to plug, a suite of logs shall be made consisting of a caliper survey if an open hole section is to be plugged, directional deviation surveys (at a minimum), logs or drillers' records suitable for determining the top and bottom of all coalbeds, logs or other mechanical means to determine the lengths along the casing where cement is present, and the location of the bridge plugs. If the required logs are done at the time of drilling, then they shall be filed with the chief and be available to the coal owner and operator.

8.5.c. When cleaning out a well, and based on the information determined in subdivision 8.5.a of this rule, a diligent effort will be made to remove all uncemented casing from at least 200 feet below to 100 feet above each workable coal seam in the well bore. Any remaining uncemented casing, as determined by cement bond log, shall be perforated or ripped at a minimum of 200 feet below and 100 feet above each workable coalbed at intervals spaced close enough to permit expanding cement slurry to infiltrate the annulus between the casing and the well bore.

8.5.d. The wellbore shall be completely filled and circulated with a gel that inhibits any flow of gas, supports the walls of the borehole, and densifies the expanding cement. This gel shall be pumped through open-end tubing run into the well.

8.6. Plugging Coalbed Methane Wells to the Surface. The following procedures shall be used when plugging coalbed methane wells to the surface:

8.6.a. A cement plug shall be set in the wellbore by pumping an expanding cement slurry down the tubing to displace the gel and fill the borehole to the surface. As an alternative, after the expanding cement slurry is pumped down the tubing so that the wellbore is filled to a point approximately 100 feet above the top of the topmost workable coalbed, materials permitted under subsection 8.2 of this rule may be used to fill the wellbore from that point to the surface.

8.6.b. A small quantity of steel turnings, or other detectable material, shall be embedded in the top of the cement near the surface to serve as a permanent magnetic monument of the borehole.

8.7. Plugging Coalbed Methane Wells Using the Vent Pipe Method. The following procedures shall be used when using the vent pipe method for plugging coalbed methane wells:

8.7.a. A vent pipe sized appropriately

based on the existing casing in the well shall be run into the wellbore to a depth of the lesser of the bottom of the well or 100 feet below the workable coalbed and cemented to 100 feet above the uppermost workable coalbed.

8.7.b. A cement plug shall be set in the wellbore by pumping an expanding cement slurry, Portland cement, or a Portland cement-fly ash mixture down the tubing to displace the gel so that the borehole is filled with cement. The borehole shall be filled with expanding cement from the bottom of the well to 100 feet above the target seam or producing horizon.

8.7.c. All fluid shall be evacuated from the vent pipe to facilitate testing for gases.

8.7.d. The top of the vent pipe shall be protected to prevent liquids or solids from entering the wellbore, but permit ready access to the full internal diameter of the vent pipe when necessary.

8.7.e. The vent shall extend at least 30 inches above the ground and have a tag affixed with the well identification or in some manner identify the well.

8.8. The chief may allow alternate plugging methods or waive certain of the requirements of subsections 8.5 and 8.6 provided the coal owner and operator consents in writing to such alternate methods. The chief may also require additional steps to be taken during plugging to insure conformance with any requirements a state or federal agency which has jurisdiction over mine safety may impose or require for a safe mine through of the well.

8.9. An affidavit of plugging shall be filed with the chief, stating the plugging method used and any deviations from the proposed plugging plan.

8.10. Plugging when a coalbed methane well does not encounter a workable coalbed, including the target horizon, or a gob well does not encounter a workable coal seam.

8.10.a. When a coalbed methane well or gob well does not encounter a workable coalbed, upon abandonment shall be plugged in accordance with the provision of this section.

8.10.b. All materials used in plugging shall be in accordance with subsection 8.2 of this rule.

8.10.c. The wellbore shall be filled from the bottom of the well with non-porous material and cement to the surface. At a minimum, a cement plug extending from the surface to a depth of 100 feet shall be placed in the well.

8.10.d. An affidavit of plugging shall be filed with the chief by the operator stating the method of plugging used and any deviation from the plugging plan.

8.11. Permanent Marker. - Except as provided below, upon the completion of the plugging and filling of any abandoned CBM well which was not subsequently converted to a vent hole by the coal operator, a permanent monument or marker consisting of a length of pipe (minimum diameter size six (6) inches) filled with concrete (or the equivalent thereof approved by the chief) shall be erected over the well. The marker shall extend no less than thirty (30) inches above the surface and no less than ten (10) feet below the surface and into the well, and shall be sealed with concrete for the purpose of making the marker

permanent. The API well identification number which consists of the state (047), county (001 through 109), and permit number shall be attached or stamped in a permanent manner to said monument. Such number shall be no less than one half (1/2) inch in height and detectable by any interested person approaching the monument. The erection of a monument shall in no way interfere with the bleeder pipe from the well where such pipe is required, or the vent or other device installed pursuant to W. Va. Code §22-6-24. Such monument shall be accurately described on Form WR-38, "Affidavit of Plugging and Filling Well" as well as the time and manner of plugging and filling and shall be approved by the chief as a satisfactory landmark which may be used as such in the location of adjacent wells. Two (2) permanent reference points with courses and distances from the abandoned well shall be designated and prescribed on the plat required by 35 CSR 4, subdivision 5.2.d, in the form prescribed by 35 CSR 4, section 9, accompanying the Form WW-6A, "Notice of Intention to Plug and Abandon a Well", or if any change in the plat is necessary, accompanying Form WR-38, "Affidavit of Plugging and Filling Well".

§35-3-9. Form and Contents of Plats.

9.1. Statutory Requirements for Plats - Any plats required to be furnished under W. Va. Code §§22-21-6 or 22-21-15 shall contain all information specified in those statutory sections.

9.2. Additional Requirements for Plats - Any plat required to be furnished under W. Va. Code §§22-21-6 or 22-21-15 for coalbed methane wells shall conform to the standards of accuracy and depiction for plats for wells:

9.2.a. The plat shall conform to the standards and depictions set forth in 35 CSR 4, subdivisions 9.2.a. through 9.2.h.

9.2.b. Topographic Map Location of Coalbed Methane Well - The topographic map location of the coalbed methane well for which any permit application is made pursuant to W. Va. Code § 22-21-6 shall be shown on the plat by a "cross" with the measured distance in feet from the nearest two point five (2.5) minute latitude and longitude intersection using the North East (upper right) border of the plat on a seven point five (7.5) minute (1:24,000) topographic map. Each plat shall indicate the quadrangle name of the topographic map used.

9.2.c. Wells - All wells, including coalbed methane wells, within the scope of the plat, whether active, drilling or abandoned, shall be shown. The scope of every plat shall be sufficient to show all wells within two thousand five hundred (2,500) feet of the well which is the subject of the application. Each well so shown, including the subject well, shall bear a designation that permits the type (oil, gas, coalbed methane, liquid injection, under W. Va. Code §22-6-14 underground storage, or storage observation) and status (active, abandoned, or drilling) of each such well to be determined by use of the API permit number (excluding state and county) for each well having such a permit number, and in parenthesis, and following the API number if such is listed, the kind and status numbers and symbols provided for in 35 CSR 4, paragraphs 9.2.k.1 through 9.2.k.6, and 35 CSR 4, subdivision 9.2.1.

9.2.d. Other Surface Features - In addition to the surface features and owner identification data required by statute or by the foregoing specification of subsection 9.2, the plat shall also show the following surface features lying within the scope of the plat:

9.2.d.1. Dwellings within two hundred (200) feet of the well for which any such permit is being sought;

9.2.d.2. Water wells within two hundred (200) feet of the well, for which any such permit is being sought;

9.2.d.3. Stream; and

9.2.d.4. Roads and highways,

9.2.d.5. Applicable boundaries as described in W. Va. Code §22-21-20.

9.2.e. Names - The plat shall show:

9.2.e.1. The information specified in W. Va. Code §22-21-6(c)(5);

9.2.e.2. If the application is for a drilling unit, the information specified in §22-21-15(c)(1); Provided, however, that upon establishment of any drilling unit by the Board that differs from the applicant's original unit as shown in said plat, the applicant shall revise the plat so that the information is consistent with the unit established by the Board; and

9.2.e.3. Any other information the chief may require.

9.3. Plat Certification - The plat shall be certified pursuant to the requirements of 35 CSR 4, subsection 9.3.

9.4. Re-use of Plats - Following issuance of an initial permit for a CBM well, any subsequent application for a new permit involving the same CBM Well may be accompanied by an accurate copy of the plat accepted by the Office for use with the permit issued for the most recent previous application, updated as necessary to reflect new data or additional data not required by statute or this rule; provided, that a new certification as required by subsection 9.3 of this rule shall be necessary.

9.5. Permanent Character of Plats - The plat submitted under section 9 of this rule shall be of permanent character as specified in 35 CSR 4, subsection 9.5.

§35-3-10. Rules Applicable to Separate Bonds; Blanket Bonds; Financial Responsibility; Financial Security for Stimulation in the Absence of Consent of Affected Coal Operators or Owners; Regulation; Designation of Agent; Transfer of Title and Operator Status; Transfer Procedures; Periodical Circular; Ineffective Bonds; and Financial Responsibility.

10.1. Separate Bonds - Each permit application filed after the effective date of this rule for a coalbed methane well shall be accompanied by a separate bond with corporate surety or cash or other collateral security in compliance with W. Va. Code §22-21-8 and shall be submitted with Form OP-7, "Bond for Single Well", except where (a) a blanket bond is being furnished pursuant to W. Va. Code §22-21-8(c); or (b) the permit application is for a permit to convert an existing oil or gas well to a coalbed methane well or to plug a coalbed methane well which is already subject to corporate surety, cash or collateral security which satisfied applicable requirements at the time such corporate surety, cash or collateral security was furnished. Any corporate surety bond, cash or collateral security furnished prior to the effective date of this rule shall remain in effect for the office until such time as the well operator is issued any new determination of financial responsibility as may be required by this rule.

10.2. Blanket Bonds - Any blanket bond for coalbed methane wells furnished after the effective date of this rule, shall have corporate surety or cash or other collateral security and shall be submitted with Form OP-8 "Blanket Bond for Wells." Any blanket bond with corporate surety, cash or collateral security furnished in connection with any coalbed methane permit or permits issued prior to the effective date of this rule, shall remain in effect for the benefit of the office until such time as the well operator is issued any additional permit and such well operator has furnished new or additional corporate surety cash or collateral security complying with W. Va. Code §22-21-8; provided, that if a blanket bond furnished prior to the effective date of this rule complies with the requirements of W. Va. Code §22-21-8, a new blanket bond shall not be required to be submitted with a permit application; provided, further, that if a permit application is for a permit to plug a well which is already subject to a corporate surety, cash or collateral security which satisfied applicable requirements at the time such corporate security, cash or collateral security was furnished, no additional corporate security, cash or collateral security shall be required. Any corporate surety bond, cash or collateral security furnished prior to the effective date of this rule shall remain in effect for the office until such time as the well operator is issued any new determination of financial responsibility as may be required by this rule.

10.3. Financial Security for Individual Coalbed Methane Wells that will be Stimulated in the Absence of consent of Affected Coal Owners or Operators.

10.3.a. In addition to the bond required by W. Va. Code §22-21-8, where a board order directs the chief to issue a permit authorizing stimulation in the absence of consent of the affected coal operators or owners of workable coal seams, prior to the chief issuing the permit the applicant must file Form OP-10, "Bond to Stimulate Coalbed Methane Well in the Absence of Coal Owner/Operator's Consent" which form shall be accompanied by a separate bond with corporate surety or cash or other collateral security in the amount set by order of the board pursuant to W. Va. Code §22-21-13(d)(5).

10.4. Registration; Designated Agent; Transfer of Title for Coalbed Methane Well.

10.4.a. All persons owning or operating or proposing to own or operate any coalbed methane well in West Virginia shall register with the chief. In all cases an agent or attorney in fact shall be designated on Form OP-1, A Operator Registration and Designation of Agent@ by and for each CBM well or operator, upon whom process, notices, orders and other communications issued pursuant to W. Va. Code §22 may also be served; but the designation shall not be effective until it has been accepted in writing by the designee and approved by the office. Every well owner or operator who has designated such agent or attorney in fact shall within five (5) days after termination of such designation, notify the office of such termination and designate a new agent on Form OP-1. This rule applies to all well operators, not merely those whom W. Va. Code §22-21-6, subsection (e), specifically requires to designate an agent; provided, that a well operator who is a natural person and a resident of the State of West Virginia may list himself instead of an agent for service of all papers.

10.4.b. When title to a CBM well or the right to operate a CBM well is transferred from one (1) well owner to another, the chief

shall be notified in writing within five (5) days by the transferor well owner of the name and address of the transferee well owner. A copy of such notification shall be delivered to the transferee well owner. Failure to notify the chief of such transfer shall be a violation of this rule by said transferor and shall be punishable under W. Va. Code §22-21-28; and in addition all bonds of such transferor under W. Va. Code §22-21-8 shall be forfeited.

10.4.c. The transferee well owner shall forthwith register with the office if he has not previously registered such ownership. In any event, said transferee shall forthwith notify the office of his designated agent or attorney in fact pursuant to subdivision 10.4.a of this rule, unless a designation has already been made and approved. The transferee well owner shall file with the office the well name and the permit number of the subject well. The county and district in which the subject well is located, the names and addresses of the transferor well owners and the transferee well owners, a copy of the instrument of assignment or transfer, or a certification of such assignment or transfer acceptable to the chief, and the applicable bond, cash, or collateral security, described in W. Va. Code §22-21-8.

10.4.d. No assignment or transferor owner shall relieve the transferor well owner of any obligation and liabilities pursuant to this rule, or W. Va. Code §22-6 or §22-21, unless and until the transferee well owner files with the office the well name and the permit number of the subject well, the county and addresses of the transferor well owners and the transferee well owners, a copy of the instrument of assignment or transfer acceptable to the chief, the bond, cash or collateral security, which satisfies the requirements of W. Va. Code §22-21-8, and the name and address of the transferee well owner's designated agent, if the transferee well owner would be required to designate such an agent under W. Va. Code §22-21-6.

10.4.e. Upon compliance with the requirements of subdivisions 10.4.b and 10.4.c. of this rule by the transferor well owner and transferee well owner, the chief shall release the transferor well owner from all duties and requirements of this rule, and the chief shall give written notice of release to the transferor well owner of any bond and return to the transferor well owner any cash or collateral securities deposited pursuant to W. Va. Code §§22-21-6, 22-21-9 or 22-21-8.

10.5. Filing requirements and procedure for the transfer of operator and declaration of operator status.

10.5.a. General requirements - The procedures of 35 CSR 4, subsections 10.4. and 10.5, shall apply to coalbed methane wells.

10.6. Transfer Procedures.

10.6.a. If for any reason the bond or other proof of financial responsibility on a well is rendered invalid or ineffective, the operator shall have sixty (60) days in which to replace such bond or other proof of financial responsibility. In the event such bond or other proof of financial responsibility is not replaced, then the chief shall order the well to be shut in and may order the well to be plugged.

10.7. Nothing in this section shall prohibit the chief from accepting and holding bonds or other form of financial responsibility from more than one competing interests.

§35-3-11. Waste.

11.1. All CBM well Operators, owners,

drillers or contractors shall use reasonable efforts to prevent waste of coalbed methane as defined in W. Va. Code §22-21-2(q).

§35-3-12. Records and Reports.

12.1. Well Records. - Each CBM Well Operator or his contractor shall comply with all the applicable requirements of 35CSR4, subsections 12.1 and 12.2, related to records required to be kept or submitted to the chief.

12.2. Annual Reports of Production. - Each CBM Well Operator shall submit to the chief the annual report of production as required by 35CSR4, section 15.

12.3. Within 30 days after the completion of stimulation of a CBM Well, the CBM Well Operator shall certify on Form WW-30, "Affidavit of Stimulation of CBM Well," the details of the actual stimulation performed, copies of which shall be submitted to the chief and to the coal owners or operators entitled to notice pursuant to W. Va. Code §22-21-14(c).

12.4. Accident Reports. - If any explosion or other accident causing loss of life or serious personal injury occurs in or about a well or during the drilling, completing or plugging of a well, the CBM Well Operator or his contractor shall give notice, by the most expedient means practical, of the particulars of the explosion or accident to the district oil and gas inspector or the chief.

12.5. Annual Inspection. - The operator shall conduct an inspection at the surface of each unplugged well at which drilling has been completed more than five (5) years. Such an inspection shall be conducted no less frequently than once each calendar year in a method approved by the chief. Certification of the performance of such inspection, in a form approved by the chief, shall be filed with the Office of Oil and Gas in conjunction with the operator's annual report as required under subsection 12.2 of this rule. Should the operator detect evidence of any significant leakage or other indications of casing integrity failure, the operator shall give notice to the Office of Oil and Gas and take such measures as may be appropriate to eliminate or mitigate the leakage.

§35-3-13. Water Protection, Testing and Redemption.

13.1. Before commencing to drill any CBM well, the CBM Well owner or operator shall make proper and adequate provision to prevent surface and underground water pollution as required by W. Va. Code §22-6-7 and 35CSR1.

13.2. When drilling of a CBM well penetrates a formation known to contain substantial amounts of salt water, drilling will continue to the next casing point by drilling with mud, foaming, or other satisfactory methods for the purpose of isolating the salt water in the formation or preventing the discharge of salt water per se into a fresh water horizon, or above the surface of the ground. In the case of foaming, it is recognized that a certain amount of salt water, mixed with the cuttings, will be discharged above the surface of the ground which will be contained in sump pits no larger than necessary for this purpose.

13.3. Water Testing Rights and Obligations.

13.3.a. Prior to drilling a CBM well at the request of the owners of record of the surface tract as defined in W. Va. Code §22-6-9, or an occupant of land within one thousand (1,000) feet of the proposed well, the CBM well operator shall sample and analyze, in

accordance with this section, water from any wells or springs located within one thousand (1,000) feet of the proposed CBM well that is actually used by such owner or occupant for human consumption, domestic animals, or other general use.

13.3.b. If, prior to drilling, no request is made of the CBM well operator pursuant to the previous subsection, the CBM well operator shall sample and analyze, in accordance with this section, water from any one known and existing well or spring within one thousand (1,000) feet of the proposed well. If more than one such well or spring exists, the CBM well operator shall select for sampling and analysis the one well or spring that, in the CBM well operator's judgment, has the highest potential for being influenced by the CBM well operator's well work.

13.3.c. If for any reason the CBM well operator is unable to sample and to analyze water from any such water wells or springs within one thousand (1,000) feet of the CBM well operator's proposed well, the chief may require the operator to sample and to analyze in accordance with this section water from one existing well or spring located between one thousand (1,000) feet and two thousand (2,000) feet from the CBM well operator's proposed well.

13.3.d. At a CBM well operator's discretion, any or all water wells or springs within one thousand (1,000) feet of CBM well operator's proposed well may be sampled and analyzed in accordance with this section.

13.3.e. Surface Owner Notice - The CBM well operator shall give notice to the owner of record of the surface tract as defined in W. Va. Code §22-6-9 of the right of the user who is either an owner or occupant to request the CBM well operator to sample and analyze a well or spring in accordance with subdivision 13.3.a of this section. The CBM well operator shall be deemed to have satisfied this requirement if notice is provided by the same methods used in conjunction with the permit application.

13.3.f. Additional Notice - The CBM well operator shall make a reasonable attempt to give additional notice of the right to request the operator to sample and analyze a well or spring in accordance with subdivision 13.3.a. of this section. The CBM well operator will be deemed to have satisfied this requirement if notice is provided by any of the following methods:

13.3.f.1. By personal service or by posting of notice at the entrance to any dwellings located within one thousand (1,000) feet and at any other locations within one thousand (1,000) feet of the CBM well operator's proposed well where the use of such water wells and springs is conspicuous;

13.3.f.2. Mailing of notice to dwellings located within one thousand (1,000) feet of the CBM well operator's proposed well and posting at any other locations within one thousand (1,000) feet of the operator's proposed well where the use of such water wells and springs is apparent; or

13.3.f.3. By any other means reasonably calculated by the chief to provide adequate notice to the occupant/user.

13.3.g. Form of Notice - The notice provided by the CBM well operator in accordance with this section shall be in a form approved by the chief, which, at a minimum, shall contain a statement of such user's right to request such sampling and analysis, advise such users of the independent right to sample and analyze any water supply at the expense

of the user, advise such users as to whether the operator will use an independent laboratory, or not, to analyze any sample, and to advise such users of the availability through the chief of a list of laboratories.

13.3.h. Timing - The CBM well operator shall provide such notice prior to the time of the filing of any permit application with the chief.

13.3.i. Methods of Sampling - The CBM well operator shall collect and analyze samples in accordance with methods approved by the chief or set forth at 40 CFR Part 136.

13.3.j. Parameters - The CBM well operator shall analyze samples for the following parameters:

13.3.j.1. pH;

13.3.j.2. iron;

13.3.j.3. total dissolved solids;

13.3.j.4. chloride;

13.3.j.5. detergents (MBAS); and

13.3.j.6. any other parameters as determined by the CBM Well Operator.

13.3.k. Laboratories - The laboratory used by the operator shall be approved by the chief as being capable of performing sample analyses in accordance with this section.

13.3.l. Distribution of Results - The CBM well operator shall, no later than thirty (30) days after receipt of such sample analysis provide the results of such sample analysis in writing to the chief, and any of the users who may have requested such analysis in accordance with this section.

13.3.m. After notice as required by this section, the CBM well operator (or any other contractor or laboratory directed by the CBM well operator to collect samples of water for analysis by this section) may enter onto land upon which a water well or spring is located to conduct sampling as authorized.

13.3.n. If any owner of the land or use of the water well or spring protests or acts to block the right of entry, then the right of entry may be enforced by a court with jurisdiction to enter an injunction regarding the land upon which the source or supply is located. However, if any person acts to block the right of entry provided herein, the CBM well operator is not required to enforce this right of entry and shall not be liable for any penalty or loss of rights, privileges or permits based on the failure to exercise the right of entry and obtain the water sample otherwise required by this section. To the extent that a landowners refusal to allow a CBM operator to enter land restricts the CBM operator from compliance with other sections of this rule, the CBM operator is relieved of liability for such non-compliance.

13.4. The CBM well operator is liable for any reasonable actual damages done while gathering the sample required by this section. This provision does not limit other provisions of the law.

13.5. Groundwater Remediation - Where the facilities or activities of an CBM well operator cause or contribute to the concentration of a certain constituent in groundwater which exceeds standards of purity and quality for ground water promulgated by the state Water Resources Board pursuant to W. Va. Code §20-5M-5, every reasonable effort shall be made by the CBM well operator to identify, remove or

mitigate the source of such contamination. Within thirty (30) days following written request by the chief, the CBM well operator shall submit to the chief a groundwater remediation plan to strive where practical to reduce the level of contamination over time to support drinking water use. Such a plan shall include such groundwater monitoring as may be necessary to demonstrate the effectiveness of the plan.

§35-3-14. Operation and Reclamation.

14.1. All proposed reclamation methods for construction of roads, drilling locations, and pits, if any, or alternative overflow prevention facilities, shall be submitted on Form WW-9 with the application for any permit under this series, except a permit to plug a well. Such proposed reclamation methods shall be approved by the chief or his designate, prior to the issuance of the permit, all reclamation shall be done under the supervision of the chief. The reclamation may be altered from that set out in said Form WW-9, if found necessary, with the consent of the chief of his designate, due to topography or other conditions not apparent upon initial submission and approval of the proposed reclamation methods.

14.2. Access Roads - All access road shall be constructed and maintained so as to prevent excess sedimentation, maintain natural drainage areas and, if practicable, to direct or carry away from disturbed areas surface water run-off from undisturbed areas.

14.3. Drilling Sites - Drilling sites shall be constructed and maintained to prevent surface run-off carrying excessive sedimentation from the site, to confine all materials leaked or spilled as a result of drilling operations to the drilling site and to prevent excess sedimentation by not placing in any stream any material moved or cut. Upon the plugging of a non-productive well, whether as a continuous operation with other permitted well work or otherwise, all cementing and other waste materials resulting therefrom shall be stored and disposed of accordance with the permits issued for the site.

14.4. Pits - All field constructed pits which are used to contain waste water shall meet the following minimum requirements:

14.4.a. Any pit shall be constructed and maintained so as to prevent seepage, leakage or overflows and to maintain its integrity.

14.4.b. Provisions shall be made for diverting surface water from the pits.

14.4.c. When an operator is unable to maintain adequate freeboard to prevent overflow from any pit, the district inspector shall be notified by the well operator and an additional pit (or alternative overflow facility) shall be constructed under the supervision of the chief which shall also meet the requirements specified in subsection 14.4 of this section.

14.4.d. If existing soil is not suitable to prevent seepage or leakage, other materials which are impervious shall be used as a liner for a pit. Any such liner shall be installed in such a manner as to protect the structural integrity of both pit and liner.

14.4.e. Dikes associated with pits shall be constructed of compacted material and maintained with a slope that will preserve the structural integrity of such dike.

14.4.f. Any unlined dike constructed of existing soil shall be free of trees and other

organic matter, large rocks, or any other material which could be reasonably expected to adversely affect the structural integrity of such dike.

14.4.g. Reclamation of the pits shall not cause an overflow or unpermitted discharge of materials to waters of the state.

14.4.h. All drilling pits and alternative overflow prevention facilities shall be constructed, maintained and reclaimed as required by those conditions of any permit issued by the chief pursuant W. Va. Code §22-6-7 and subsection 14.5 of this rule, and so as not to be left in such condition as to constitute a hazard or to prevent use of the surface for agricultural purposes after the expiration of the six (6) month or extended period for reclamation prescribed by W. Va. Code §22-6-30.

14.5. Water Pollution Control Permit. - Collection, storage and discharge of water, fluids, or other wastes in connection with the drilling or operation of CBM wells shall be pursuant to a permit issued by the chief in accordance with W. Va. Code §22-6-7.

§35-3-15. Requirements for Production and Gathering Pipelines.

15.1. This rule prescribes the minimum requirements for the safe and efficient installation of all production and gathering pipelines installed, relocated or replaced after June 9, 1983, which are not regulated by the United States Department of Transportation minimum safety standards applicable to pipelines.

15.2. The chief reserves the right to direct the burial of any line installed under this regulation to protect the public safety, by order issued after notice and hearing under the office's rules.

15.3. Subject to the reservation in subsection 15.2 of this section, of production and gathering lines subject to this rule shall conform with the following:

15.3.a. Lines shall be buried where practical and reasonable; and practical and reasonable shall be construed to mean lines should be buried in the following situations:

15.3.a.1. Where the line crosses agricultural land as defined in W. Va. Code §19-19-2;

15.3.a.2. Where an unburied line would prohibit use of a pre-existing private roadway or other means of access to a part of or all of surface land;

15.3.a.3. Where the line cannot more practically and reasonably be securely suspended to cross stream beds;

15.3.a.4. Where the line crosses a public road, in which event it shall be buried and otherwise installed in accordance with the rules of the public agency having jurisdiction over the road; and

15.3.a.5. Where the chief decides prior to installation that burial would be practical and reasonable.

15.3.b. All buried lines shall be installed with a minimum of eighteen (18) inches of cover, except where solid rock is encountered in which case the minimum cover shall be six (6) inches;

15.3.c. Whenever a buried line crosses a pre-existing public or private roadway, the location of the line shall be clearly marked at the point of crossing by an appropriate

marker; and

15.3.d. A suitable conductive wire shall be installed with plastic pipe to facilitate locating it with an electronic pipe locator; provided, that any other suitable material or means for accomplishing this purpose may be employed.

15.4. Notwithstanding subsection 15.3 of this rule, the surface owner(s) of record of any tract subject to the provisions of W. Va. Code §22-6-30(d) shall have the right to prescribe that a pipeline or specified parts thereof need not be buried. The prescription shall be on form WR-75, "Permission Not to Bury Production or Gathering Line", unless it is included in the recorded right-of-way or lease under which pipeline is to be installed, which right-of-way or lease was granted by the then surface owner of record. Once executed and delivered to the person who proposed to install and operate the line, the prescription may not be revoked by any subsequent surface owner(s) of record.

15.5. This rule shall not be construed to prohibit a surface owner from preparing a safe crossing of a pipeline for a new means to access of another part of his tract.

§ 35-3-16. General Rules for Special Field Rules; Operational Rules for Special Field Rules.

16.1. General Criteria for Special Field Rules.

16.1.a.1. Scope. -- The rules contained in this section govern the application for, the process by which applications are considered and the orders entered by which the Review Board establishes special field rules. Subsequent orders may amend, modify, alter or enlarge generally a prior special field rule.

16.1.a.2. Purpose. -- A special field rule may be issued by the Review Board to allow the efficient and economic development of coalbed methane, to prevent waste and to otherwise achieve the purposes of the Statute expressed at WV Code §22-21-1(b). No special field rule issued by the Review Board shall be deemed, however, to preclude any person from asserting any right or legal interest protected by the Statute, or to modify, amend or diminish any procedure or obligation, including the obligation to secure a permit, imposed by the Statute and this rule.

16.1.b.1. Providing Necessary Records. -- The establishment of a special field rule requires sharing with the secretary and other participants in the special field some information an applicant may perceive as a trade secret. Because this information is necessary for the establishment and management of a special field, the voluntary submission of an application to participate in or establish a special field rules is a limited waiver of the protections of the state freedom of information act [W.Va. Code §29-1-1 et seq.]. This waiver is limited by and for the purposes contained in subsection 16.1.b.2 of this rule.

16.1.b.2. Access to Records. -- The Review Board and/or its authorized agent shall have access to such CBM well and lease records, wherever located, as may be necessary in the performance of its statutory duties with respect to special field rules. All persons or operators, drilling or servicing CBM wells, shall permit the Review Board, and/or its authorized agent, to come upon any coalbed methane lease, coalbed methane property or CBM well operated or controlled by such persons or operators, and to inspect

the records and operation of such CBM wells and to have access at reasonable times to such records of CBM wells; provided, that information so obtained may be kept confidential consistent with the provisions of West Virginia Code §29B, Article 1.

16.1.c. Reports. -- All operators of CBM wells within a geographic area for which special field rules have been established shall, from time to time, file reports containing such information and covering such periods as the Review Board, in order to perform its statutory duties, may require by order or rule.

16.1.d. Access to Confidential Records. -- Any coal operator or any oil and gas operator within the proposed or established area for special field rules desiring access to the records or other information obtained by the Review Board pursuant to sections 16.1.b or 16.1.c shall file an application with the Board. Such application shall demonstrate that the requested records or information are necessary to:

(a) facilitate the expeditious, safe evacuation of coalbed methane from the coalbeds of this state;

(b) foster, encourage and promote the commercial development of this state's coalbed methane without adversely affecting the safety of mining for coal;

(c) facilitate safe mining in the vicinity of and/or through coalbed methane wells; or

(d) carry out such other clearly specified purpose that is consistent with the public policy outlined in W. Va. Code §22-21-1.

The application shall further confirm that the requested records or information shall be used solely to facilitate and further the purposes stated in the application.

Upon receipt of an application by the Chief of the Office of Oil and Gas, the Chief shall provide a convenient date and time for a hearing by the Review Board on the application, which hearing shall be no sooner than forty-five (45) days nor more than sixty (60) days from the date the application is filed. The Review Board shall take evidence, making a record thereof, by the procedures detailed in sections 16.2.k.1, 16.2.k.2 and 16.2.k.3. If the affected CBM well operation for which the information or records are obtained is within the proposed or established area for special field rules and is not within the coal operator's or oil and gas operator's area of operation, both the affected CBM well operator and the coal operator or oil and gas operator shall present evidence regarding the proximity of the operations.

The Review Board shall take into account the evidence introduced, comments received and any objections at the hearing, including any evidence presented regarding the proximity of the coal operation or oil and gas operation to the affected CBM well operation. If satisfied that the coal operator or oil and gas operator has failed to establish the requirements for receipt of the records or information, the Review Board shall enter an order within forty-five (45) days of the conclusion of the hearing denying the application. If the Review Board is satisfied that the coal operator or oil and gas operator has established the requirements for receipt of the records or information, it shall enter an order within forty-five (45) days of the conclusion of the hearing providing for the dissemination of the records or information. Such order shall provide that the records or information so

obtained shall be kept confidential unless the statute provides otherwise. Such order shall further provide that the records or information so obtained shall be used solely to further the purposes addressed in the application.

The operator of any active mining operation or the operator of any permitted, existing oil and gas well or any permitted oil and gas well which will be drilled within thirty (30) days of the date of filing the application described in this section may petition the Review Board to issue an order on an expedited basis. In addition to complying with the requirements of this section, the coal operator or oil and gas operator shall attach to such application a statement that it is involved in active mining operations, permitted and existing oil and gas operations, or permitted oil and gas operations that will commence within thirty (30) days of the date the application is filed. Such attached statement shall further specify that the information requested in the application is needed on an expedited basis to ensure the safety of the mining or drilling operation and shall request an expedited hearing on the application.

When deemed necessary, the Review Board shall schedule a date and time for an expedited hearing on the application no sooner than ten (10) days nor more than twenty-five (25) days from the date the application is filed. At the hearing, the Review Board shall take evidence, making a record thereof, by the procedures detailed in sections 16.2.k.1, 16.2.k.2, and 16.2.k.3. After taking into account the evidence introduced, comments received and any objections made at the hearing, the Review Board shall issue an order either denying or granting the application. Such order shall be issued no later than thirty (30) days from the date the application was filed and shall, in all other respects, comply with the requirements of this section.

16.1.e. Tests and Surveys. -- When deemed necessary or advisable in the performance of its statutory duties with respect to special field rules, the Review Board, by order or rule, may require tests and surveys to determine the occurrence of waste.

16.1.f. Corrective Action. -- The Review Board shall require correction of any condition which is causing or is likely to cause waste of coalbed methane.

16.1.g. Naming of Fields. -- All coalbed methane fields subject to the statute discovered subsequent to the adoption of these rules may be named by the Review Board.

16.2. Operational Rules for Special Field Rules.

16.2.a. Location of Wells for Special Field Rules. -- In establishing special field rules, the Review Board may establish drilling units, authorize well spacing or modify or authorize well distances from the outermost boundary of the coalbed methane lease, tract or unit from which the coalbed methane will be produced, notwithstanding the distances specified in W. Va. Code §22-21-20. The Review Board's authority to authorize or modify these distances is set forth in the final sentence in W. Va. Code §22-21-20. In establishing special field rules the Review Board shall review the location and pattern, if any, of CBM wells adjacent to an area governed by special field rules where there is sufficient evidence to indicate that the pool or reservoir spaced by the special field rules may extend beyond the boundary of the spacing order and may incorporate such adjacent area into the special field rules where the uniformity of the spacing pattern is necessary to ensure orderly development of the pool or field.

16.2.b. Application for Well Permit in Geographic Area with Established Special Field Rules. -- All applications for a permit to drill or redrill a CBM well in a geographic area with established special field rules, are to be submitted to the Chief of the Office of Oil and Gas on such forms as prescribed by the Chief and shall be reviewed by the Chief of the Office of Oil and Gas for compliance with the special field rules, if any, for the geographic area where such CBM well will be drilled or redrilled. If the applicant is in compliance with all other applicable sections of the statute and rules pertaining to the CBM well, the permit will be issued by the Chief of the Office of Oil and Gas. The application shall, in addition to the requirements of this rule and other requirements set forth in the statute:

16.2.b.1. Tabulate all existing CBM wells or proposed CBM wells for which a permit application is on file that are within the minimum spacing distance between wells set forth in the applicable special field rules and identify the API number of the CBM well, well name and the name and address of the operator shall be provided, if available.

16.2.b.2. Show on a plat for a proposed CBM well location in a geographic area covered by special field rules, the boundaries of the drilling unit, the distances from the proposed CBM surface well location to the nearest outside boundary and the acreage of each tract within the drilling unit. Such plat shall accompany the application and conform to the requirements of Section 9.2.a of this rule. The plat shall be prepared by a licensed land surveyor or registered engineer showing the district and county in which the tract of land upon which the well to be drilled is located, the acreage of the tract, the name of the coal and oil and gas owners and coal and oil and gas lessees of adjacent tracts within the unit, the proposed or actual surface location of the well determined by survey and the owner of such surface location, the courses and distances of such locations from two (2) permanent points or landmarks on said tracts and the number to be given the CBM well.

16.2.b.3. Provide any other information the Review Board by order, rule or policy may require to perform its statutory duties.

16.2.c. Directional, Deviated or Horizontal Coalbed Methane Drilling and Completion. -- At any hearing for the establishment of special field rules for a geographic area, the applicant and any other CBM well operator, oil and gas operator, coal operator of tracts for said specific geographic area or other person who asserts interests protected by the statute may provide the Review Board with information concerning the drilling and development of the geographic area through either vertical or directional, deviated or horizontal techniques and the Review Board may, at its discretion to carry out its duties as set forth in the statute, enter special field rules that cover the development of such area by either the vertical or directional, deviated or horizontal methods or by the utilization of any such methods. When an applicant has applied for special field rules for a specific area and the applicant's intent is to develop the area through the drilling of directional, deviated or horizontal wells, notice of intention to do so shall be specifically stated on such application for special field rules and upon completion, the operator shall file a directional survey for all directional wells with the Board.

16.2.d. Application for Special Field Rules. -- An application for special field rules for a specific geographic area shall clearly

state the name and address of the CBM well operator applicant, the name of the proposed field or pool to be developed and the seams to be developed in such field or pool, the county or counties, the area of the county or counties encompassed within the proposed special field rules, the general method of development through directional, deviated or horizontal holes or vertical holes or any combination of holes, the proposed unit pattern and the proposed minimum distances between both the surface locations and the in seam directional, deviated or horizontal locations from offsetting wells, the proposed direction of deviation and proposed horizontal distance between the bottom of the hole and surface location, reason for intentional deviation and a list of oil and gas operators, CBM well operators and coal operators for the proposed geographic area. Such application shall also specifically outline the applicant's recommended method for determining the bottomhole locations of all horizontal wells and all horizontal segments or legs of such wells. The applicant shall attach to such application a statement that a reasonable effort has been made to determine the oil and gas operators, CBM well operators and coal operators to whom notices must be sent pursuant to Section 16.2.e of these rules. Such application shall be submitted to the Chief of the Office of Oil and Gas.

16.2.e. Notice to Oil and Gas Operators, Coal Operators, CBM Well Operators and Public Within Proposed Geographic Area. -- On or no later than five (5) days of filing an application for special field rules for a specific geographic area, the applicant shall deliver a copy of the application by personal service or by certified mail, return receipt requested, to (i) any coal operator who is located in either the county encompassing the specific geographic area for which the special field rules are proposed or in a West Virginia county immediately adjacent to such specific geographic area, and who also has a permit for a mine issued by, or has an application for a mining permit on record with the West Virginia Department of Environmental Protection; (ii) any surface owner or coal owner identified as such in a mining permit issued by the West Virginia Department of Environmental Protection for a mine in the county encompassing the specific geographic area for which the special field rules are proposed or to any surface owner or coal owner listed as such by any coal operator on an application for a mining permit on record with the West Virginia Department of Environmental Protection in the county encompassing the specific geographic area for which the special field rules are proposed; and (iii) any CBM well operator and oil and gas operator within the specific geographic area. Such notice shall set forth the date set for hearing by the Review Board and the date by which such operators shall file a statement of opposition, if any, as set forth in section 16.2.f. The applicant shall also publish a Class II legal advertisement as described in W.Va. Code §59-3-2 in a newspaper of general circulation in the county or counties where the land which is the subject of the application is located. Such advertisement notice shall be published no later than fifteen (15) days from the date the application is filed and shall include, at a minimum, the time, date and location of the hearing by the Review Board, the name of the applicant, a general description or map of the location of the land which is the subject of the special field rules, the purpose of the hearing and the date by which a statement of opposition must be filed as set forth in section 16.2.f. In addition, no later than five (5) days from the date the application is filed, the applicant shall also provide notice to the following trade associations:

(a) West Virginia Coal Association;

(b) Independent Oil and Gas Association;

(c) West Virginia Oil and Natural Gas Association; and

(d) West Virginia Mineral and Land Owners Council.

Such notice shall include, at a minimum, the time, date and location of the hearing by the Review Board, the name of the applicant, a general description or map of the location of the land which is the subject of the special field rules, the purpose of the hearing and the date by which a statement of opposition must be filed as set forth in section 16.2.f.

Provided, however, that nothing in this section operates to relieve the CBM well operator from providing notice prior to filing an application for a permit to drill a CBM well, as required by W. Va. Code §22-21-9.

16.2.f. Interventions -- Any oil and gas operator, coal operator, CBM well operator, surface owner, or other person who asserts an interest protected by the statute desiring to intervene in the hearing shall, at least (15) fifteen days prior to the date of the hearing, file a motion for intervention and statement of position with the Review Board and all oil and gas coalbed methane and coal operators within the geographic area.

16.2.g. Hearing Date to be Set by Chief and Conducted by Review Board. -- Upon receipt of an application by the Chief of the Office of Oil and Gas, the Chief shall provide a convenient date and time for a hearing by the Review Board on the application for special field rules which hearing shall be no sooner than forty-five (45) days nor more than sixty (60) days from the date the application is filed. The Review Board shall review the application and on the date specified for a hearing conduct a public hearing.

16.2.h. Evidence to be Submitted by Applicant at Hearing. -- At hearing the applicant shall submit the following:

16.2.h.1. A topographic map at a scale of 1 inch equal to 2,000 feet with an outline of the geographic area for which special field rules are requested;

16.2.h.2. Oil and gas operators, coal operators, and CBM well operators for the geographic area for which special field rules are requested by plat at a scale of 1 inch equal to 2,000 feet and/or a tabulation of such ownership;

16.2.h.3. Geological mapping, records, testimony and any other information relevant to the area for which special field rules are sought, which other information shall include geological information on any workable coal seams that will be penetrated;

16.2.h.4. If the applicant is seeking special field rules that include a minimum spacing of less than 1,600 feet, the identity of any coal operator within the specific geographic area who has a permit for a mine issued by or has an application for a permit on record with the West Virginia Department of Environmental Protection and if there is such a coal operator, the applicant shall provide relevant available information concerning both the preservation of coal seams in that geographic area for future safe mining and the facilitation of the expeditious, safe evacuation of coalbed methane from the coalbeds in that geographic area;

16.2.h.5. Reservoir data anticipated for the average proposed drilling units for

either vertical or directional drilling or both, within the geographic area;

16.2.h.6. An economic evaluation of various spacing patterns and unit sizes, based on estimated production and rate of production of for the CBM wells within the proposed drilling units;

16.2.i. The Review Board shall take evidence making a record thereof and consider:

16.2.i.1. The area which may be drained efficiently and economically by the proposed CBM well or wells;

16.2.i.2. The plan of development of the coal and the need for proper ventilation of any mines or degasification of any affected coal seams;

16.2.i.3. The nature and character of any coal seam or seams which will be affected by the CBM well or wells and, if directional, deviated or horizontal drilling will be employed, the proposed method of determining the location of the vertical and non-vertical portions of the well bores;

16.2.i.4. The surface topography and property lines of the lands underlaid by the coal seams to be included in the unit;

16.2.i.5. Evidence relevant to the proper boundary of the drilling units;

16.2.i.6. Any other available geological or scientific data pertaining to the pool which is proposed to be developed;

16.2.i.7. Whether the proposed special field rules for a specific geographic area will:

16.2.i.7.a. preserve coal seams in that area for future safe mining; facilitate the expeditious, safe evacuation of coalbed methane from the coalbeds in that geographic area, and maintain the ability and absolute right of coal operators at all times to vent coalbed methane from mine areas within that geographic area;

16.2.i.7.b. foster, encourage and promote the commercial development of coalbed methane by establishing special field rules for CBM wells in that specific geographic area without adversely affecting the safety of mining or the mineability of coal seams within said geographic area;

16.2.i.7.c. safeguard, protect and enforce the correlative rights of CBM well operators and coalbed methane owners in the specific geographic area to the end that each such operator and owner may obtain his or her just and equitable share of production from coalbed methane recovered and marketed from that geographic area; and

16.2.i.7.d. safeguard and protect the mineability of coal during the removal of coalbed methane from that geographic area.

16.2.i.8. Whether the comments or objections made at the hearing were from oil and gas operators, coal operators, CBM well operators or others who assert interests protected by statute and who are located in the proposed area for special field rules.

16.2.j. The Review Board shall take into account the evidence introduced, comments received and any objections at the hearing, and if satisfied that special field rules should not be established, shall enter an order within forty-five (45) days of the conclusion of the hearing denying the application. If the Review Board is satisfied that a special field rules should be established, it shall enter an order within forty-five (45) days of the

conclusion of the hearing establishing such special field rules. Such special field rule order shall:

16.2.j.1. Establish the boundary of the geographical area to be covered by special field rules, establish the unit sizes to be utilized in vertical or directional drilling or through both methods, establish minimum distances, if any, between surface locations of wells and the horizontal portions of wells, and establish minimum distances, if any from the unit boundaries of the surface locations of wells and the horizontal portions of wells;

16.2.j.2. Address the various drilling methods to be utilized for the drilling of all wells, including any non-production holes that are associated with the drilling of or production from CBM wells.

16.2.j.3. Such other findings and provisions as are appropriate for each order.

16.2.k. Procedures to be Utilized During Special Field Rules Hearing.

16.2.k.1. The applicant will open the hearing and present the testimony and exhibits offered in support of the application. The applicant's witnesses will be subject to cross-examination by the Review Board or any interested parties. The Review Board shall determine the order of the appearances of the other participants in the hearing. Each interested party affected by the application who has complied with the requirements of these rules may present testimony and exhibits in support of or in opposition to the applicant's proposals. The applicant or interested parties may request to enter as evidence information of a proprietary nature. Proprietary information is defined as information that is not readily available in the public domain. If objections arise concerning the proprietary nature of evidence, the Review Board may hear arguments with regard to the validity of the request and rule prior to the submission of evidence. If the evidence is found to be of a proprietary nature the Review Board will issue a protective order restricting the use of that evidence to the hearing and in deliberations of the Review Board. A copy of all proprietary evidence shall be sealed and held by the Review Board. All other copies utilized in the hearing shall be returned to the submitting parties. All witnesses shall be subject to cross-examination as previously set forth.

16.2.k.2. The applicant may offer rebuttal testimony and exhibits, but the witnesses will again be subject to cross-examination. Surrebuttal testimony and exhibits and subsequent testimony and exhibits may be permitted at the discretion of the Review Board.

16.2.k.3. Closing statements and statements of position may be made by the participants and all other interested persons before the hearing is closed or at such time as designated by the Review Board.

16.2.k.4. The Review Board may continue a hearing to its next meeting to allow for further investigation and the gathering of additional data and evidence. If at the time of a hearing there is not sufficient evidence for the Board to determine field boundaries or drilling unit size and shape, the Board may enter a temporary order establishing provisional drilling units and field boundaries for the orderly development of the pool pending receipt of the information necessary to determine the ultimate pool boundaries and spacing of wells. Upon additional findings of fact, the boundaries of a pool and drilling units for the pool may be modified by the

Review Board.

16.2.l. Exception to Location of Wells Established by Special Field Rules. -- When an exception to a specific special field rule order applicable to the location of CBM wells is desired, the operator shall file a supplemental application with the Chief of the Office of Oil and Gas requesting an exception to the special field rule order. The provisions of 16.2.f, 16.2.g, 16.2.h, 16.2.j and 16.2.k shall apply except that they shall be limited in application, including with respect to the notice provisions, to the unit at issue and the units surrounding such unit at issue as opposed to the geographic area encompassed by the proposed special field rules. The supplemental application shall be accompanied by a plat, in conformance with the requirements of Section 9.2.a of this rule with appropriate coordinates, drawn to the scale of 1 inch equaling to 2,000 feet accurately showing to scale all other completed, drilling or permitted CBM wells including their actual or proposed horizontal bores if any, and all other oil and gas and CBM wells within the unit at issue and all units immediately surrounding such unit at issue. The plat shall show:

16.2.l.1. The location at which a CBM well could be drilled in order to be in compliance with the applicable special field rule;

16.2.l.2. The location at which the applicant requests permission to drill; and

16.2.l.3. The location at which CBM wells have been drilled or could be drilled in accordance with the applicable special field order or rule, directly or otherwise offsetting the proposed exception.

The Review Board, after notice and hearing, may grant or deny the supplemental application. No exception shall prevent any operator from drilling a CBM well on adjacent lands, directly or otherwise offsetting the exception, at locations permitted by any applicable special field rules ordered by the Review Board.

§35-3-17.Variances.

17.1. Upon request, or upon his own initiative, the chief may grant a variance from any other requirements of this series upon a showing by an operator that alternate practices will satisfy the requirements of the W. Va. Code, would not significantly increase the risk to coal mines, mine workers, fresh water aquifers, surface owners and exhibit sound engineering practice. Prior to taking final action to grant or deny such a variance, the chief shall provide notice of his proposed action to the public and to the surface owners of record and any coal owner, operator or lessee and provide all such persons with an opportunity to comment on such a proposal.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Coalbed Methane Wells Rule

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: WV Department of Environmental Protection - Office of Oil and Gas

Address: 601 57th Street Charleston, WV 25304

Phone Number: 304-926-0450 Email: jmartin@wvdep.org

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The proposed rule amendment addressing "special field rules", may result in a few additional hearings before the Coalbed Methane Review Board. Hearings before that Board cost the DEP approximately $1,030.00 per hearing.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

	FISCAL YEAR		
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	2,060.00	6,180.00
Personal Services	0.00	1,660.00	4,980.00
Current Expenses	0.00	400.00	1,200.00
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues			

Rule Title: _____

Rule Title: Coalbed Methane Wells Rule

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

We are estimating six additional Coalbed Methane Review Board hearings annually. There are no fees associated with this proceeding.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: _____

Signature of Agency Head or Authorized Representative

_____

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: Coalbed Methane Wells Rule, 35CSR3

A. AUTHORITY: WV Code 22-21-4

B. SUMMARY OF RULE:

The WVDEP, Office of Oil and Gas is proposing to revise existing rule 35CSR3. Series 3 is a legislative rule in place to enforce the provisions in WV Code §22-21-1 et seq., Coalbed Methane Wells and Units, commonly referred to at the Coalbed Methane Act. The revisions will:

1). Address the establishment of special field rules to promote the orderly development of coalbed methane fields;

2.) Protect the correlative rights of all owners located within the geographic area for which special field rules are established;

3.) Provide a process by which the Review Board may hold a hearing on an application for special field rules and issue such rules;

4.) Insert language (Section 17) which was inadvertently deleted from the rule during the 2006 legislative session. This language existed in the rule prior to the revisions in 2006.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

Continued interest in coalbed methane development has resulted in the need for provisions to establish special field rules as identified in WV Code §22-21-20. These field rules will allow for various exploration techniques and provide for an orderly development of the State's coalbed methane resources.

D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

There is no federal counterpart regulation, thus no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its meetings on May 21, 2007, and May 30, 2007, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Wednesday – May 30, 2007
10:00 a.m. – 12:00 p.m.
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Rick Roberts
Karen Price
Bill Raney
Larry Harris - Teleconference
Jackie Hallinan

DEP:

Randy Huffman, Deputy Cabinet Secretary/Director –Division of Mining & Reclamation
Karen G. Watson, Assistant General Counsel
Lisa McClung, Director – Division of Water and Waste Management
John Benedict, Director – Division of Air Quality
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
Pam Nixon, Advocate
Jim Mason, DAQ
Mike Zeto, DWWM – EE
John Morgan, DWWM
Scott Mandirola, DWWM
Greg Adolfson, PIO

VISITORS:

Dave Yaussy
Brittany Carns
Joe Gollehon
Gregory Hoyer
Jeff Mauzy
Amy Christy

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection called the meeting to order at 10:00 a.m. Advisory Council Member Larry Harris joined the meeting via teleconference. Deputy Cabinet Secretary Huffman then turned the meeting over to Karen Watson, Assistant General Counsel for the West Virginia Department of Environmental Protection. Karen informed the Council that the agency had received comments from several Council members and those comments would be appended to the minutes. (see attached) She explained the agency

had representatives from each of the programs to answer questions for the rules identified in those comments. She also explained the agency had made several changes in the rules as a result of those comments.

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

Proposed Rule 6 is now a basic open burning/ incinerator rule. Revised scope includes 'statutory air pollution,' addition of new language for posted operating instructions and open burning or incineration of animal or poultry carcasses during a declared state of emergency. Except for temporary Air Curtain Incinerators for land clearing debris (DOH jobs) and incineration of animal or poultry remains, most Air Curtain Incinerators will now be exempted under Rule 6 and placed under Rule 18.

COMMENT

Larry Harris: Had raised the issue of "low-level radioactive waste" in the last meeting.

DEP Response: DEP has removed the chemotherapeutic waste and low-level radioactive waste provisions from the proposed rule. The proposed rule does not in any way affect current medical waste incineration rules now on the books.

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO_2 & PM NAAQS include correction of SO_2 annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour $PM_{2.5}$ standards, and addition of measurement methods for $PM_{2.5}$. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO_2 and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Karen Price: Section 4.2.c – $PM_{2.5}$ Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m^3. This should be 65 ug/m^3, pursuant to 40 CFR 50.7.

DEP Response: On October 17, 2006, the federal NAAQS regulation changed from 65 to 35.

Larry Harris: Restated his concern that the standards may not be stringent enough to protect public health. He also restated his question about the antidegradation language struck from the rule.

DEP Response: DEP cannot lower the NAAQS standards below that of federal levels unless the provisions for the stringency test in §22-1-3a are fully met. 45CSR14, in its entirety, has wholly replaced the intent of the relic anti-degradation language struck in proposed Rule 8.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

Ozone Season CAIR NOx Rule - Incorporates revisions 40 CFR to Part 96.

Annual CAIR NOx Rule - Incorporates revisions to 40 CFR Part 96.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

Annual CAIR SO_2 Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

Karen Price: Asked why the opt-in language was deleted from each of these rules.

DEP Response: has removed the opt-in provisions in the three CAIR rules so that West Virginia can say that CAIR equals NOx RACT for EGUs under the PM2.5 implementation rule.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

The Greenhouse Gas Inventory Program Rule is authorized by SB337 passed in the 2007 legislative session. The rule establishes a program which requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount; inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions, capture and sequestration; provides for: a periodic compilation of a greenhouse gas inventory; a determination whether WV is a net sink or emitter; development of a registry for voluntary reductions; and a determination whether greenhouse gas can be developed as an asset for economic development.

COMMENT

Karen Price and Larry Harris: Both asked about the definitions of "anthropogenic" and "biogenic" in the rule and asked for examples of each.

DEP Response: An example of an anthropogenic source is the coal extraction process and an example of a biogenic source is the erosion of soil exposing a coal seam. The agency does not plan

to ask sources to report biogenic activities. In order to receive credit a source must report all of its emissions.

Karen Price: Can the reporting requirement in section 4.1 be made consistent with the emissions inventory requirements.

DEP Response: The date in the rule is March 31st and is the same as the emissions inventory date.

Karen Price: Does not believe fees should be required for greenhouse gas reporting.

DEP Response: The agency will consider the issue.

Karen Price: The last sentence in section 5.3 allowing the Secretary to request information is not authorized by statute.

DEP Response: It is authorized by the statute.

Karen Price: There should be a reasonable protocol for reporting emissions.

DEP Response: D AQ purposely wrote the rule in a manner flexible to the Secretary, as greenhouse gas reduction quantification protocols are still being developed at this time.

Karen Price: Is WV going to sign on to the climate registry or are we going to have our own?

DEP Response: In order to trade, we have to be consistent with other programs, but we do not want to be more specific in the rule.

Bill Raney: The exemption in section 3.2 includes language referring to sources covered by chapter 22-3 as well as sources required to report emissions. We are concerned this may take the exemption in the statute away.

DEP Response: While the agency did not want to require mining extraction to report emissions, thermal dryers associated with coal prep plants often have huge emissions of greenhouse gases. That is the reason the statute and rule only exempt sources permitted under chapter 22-3.

Division of Water and Waste Management

33CSR9 – Standards for Beneficial use of Filtrate from Water Treatment Plants

SUMMARY

This legislative rule establishes a mechanism and requirements for the permitting, siting, bonding, and use of water treatment plant sludge from water treatment plants that has beneficial properties. This rule applies to the beneficial use of water treatment plant sludge and to any person who seeks approval from the Secretary to beneficially use such sludge within the state. This rule is intended to enhance the resource recovery and recycling goals of article fifteen of chapter twenty-two of the West Virginia Code and to encourage the beneficial use of water treatment plant filtrate. Section 22-15-23

of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

Larry Harris: DEP made changes to this rule during the Interims process last year, and the rule now requires a permit for both short-term and long-term applications. This is a good change. However, we feel that most of the information required in Section 7.3. Permit Application Requirements for long-term permits should also be required for short-term permits.

DEP Response: The requirements of section 7.3 were intended to be directed toward facilities that proposed to land apply filtrate as the beneficial use. It was intended to be applicable to both, if land application was the proposed method of reuse. Section 7.3 will be revised to more clearly reflect the applicability of the requirement for both long-term and short-term, if land application is the proposed beneficial reuse.

Rick Roberts and Larry Harris: Regarding the environmental effects of disposal of sludge are the values in Table 1 of the rule sufficient?

DEP Response: The Table 1 values are the same as the sewage sludge levels in DEP's other rules, and the agency believes they are supported by sound science.

Rick Roberts and Larry Harris: Mr. Harris expressed concern with the distinction between "beneficial reuse" and "disposal." Mr. Roberts believes that his concern is satisfied by the language in section 3.1.b.1.

Rick Roberts: The rule should include general permits as proposed.

Larry Harris: Only individual permits should be allowed under the rule.

DEP Response: There will be public notice in the general permit process.

33CSR30 – Underground Storage Tanks

SUMMARY

There are several new provisions to reflect the 2005 Federal Energy Act, including: secondary containment requirements for new or replaced thanks or piping; secondary containment requirements for new or replaced fuel dispenser systems; tank eligibility for delivery, deposit or acceptance – enables agency to prevent deposit or delivery to a tank that is not in compliance; and training requirements for individuals who operate, maintain or are responsible to address emergencies from spills or releases from underground storage tank systems.

COMMENT

Karen Price: Section 6.1. states "....including any person who accepts a delivery order, accepts payment, delivers or deposits product into an underground storage tank.....". The portion that states "...accepts payment..." should be removed from this section because those individuals within a company who accept payment or make payments most often do not know anything about the underground storage tank (UST), the operation of the UST, or the current regulatory status of the UST.

DEP Response: This language will give the agency a better handle on transporters and middle-men involved in the process.

Karen Price: Section 7.3.a.1. states "....the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods.....".

1. The portion that states "..the date, time and location of the course,...." should be deleted. For large companies with many UST installations and locations there can be numerous individuals that need to be trained. Training will most likely occur on multiple dates, times, and locations that may not always be known until just prior to the training event. When new employees are hired training might occur on short notice and for one individual. The burden of having to report the dates, time and locations would hinder and slow down the training process and restrict a company's ability to comply.

2. The portion that states "...the credentials of the instructors..." should be removed. Credentials will vary from instructor to instructor new instructors might be utilized, and a company might not know which instructors will be used at the various training sessions until just prior to the training session. In addition, the course content is the main issue of concern and should be the main focus in obtaining State approval of a training program.

DEP Response: Regarding dates, times and location of the training the agency will not require the information prior to the training. As far as the credentials of the instructor the agency needs this information as part of its curriculum review, in this case before the training.

Karen Price: Section 7.3.a.2 - This section states that a nonrefundable application fee of $280 must be submitted with the application. Larger companies may have one training program, but administer the training on multiple dates, times and locations. Having to submit an application for approval of the training program each time the program is administered would be cost prohibitive, burdensome, and would hinder the training process.

DEP Response: The agency agrees and believes the rule only requires a one-time fee.

Rick Roberts: Regarding the $5.00 per ton fee, how does a source measure the tonnage? Perhaps the agency should consider using a cubic-yard approach.

DEP Response: The agency will consider.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

The proposed revisions reflect updates identified during the federally-mandated triennial review of the Water Quality Standards rule. These include proposed additions to the trout water list, new criteria for nutrients, revisions to criteria in Appendix E and a use redesignation in the Guyandotte River Basin.

COMMENT

Larry Harris: Does the use removal in section 7.2.d follow the federal Clean Water Act requirements?

DEP Response: Yes, the agency followed all the requirements, federal and state, and required extensive information from the company. The agency also conducted two public meetings.
Bill Raney: Mr. Raney repeated his concern with the listing of trout waters in the rule and the fact that the list has to be approved by the Legislature. Karen Price agreed with this comment. Jackie Hallinan and Larry Harris did not agree with this comment.

Karen Price: Questioned the need for Appendix D, because the Category C use applies to all state waters.

DEP Response: Agency will consider.

Karen Price: Will the agency consider not making use removals go through the legislative process.

DEP Response: The agency decided not to include any language pertaining to this issue at this point in time, but will be subjecting this issue to the public participation process in the coming months.

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

Antidegradation is a requirement of the federal Clean Water Act intended to preserve the existing quality of the State's waters and to prevent and/or minimize future degradation. The rule was first adopted in 2001 and establishes four levels, or tiers, of protection for state waters, Tiers 1, 2, 2.5 and 3. Each tier provides a graduated level of protection used during the NPDES permit issuance process. The proposed revisions to the rule carry forward the agency's antidegradation implementation efforts, and move the Tier 2.5 streams that had been on the "presumptive" list in Appendix C to a final proposed list in Appendix A. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

COMMENT

Larry Harris: Scientific criteria should be used to add or delete streams from the Tier 2.5 list.

Rick Roberts: Can the SRF program give priority to facilities impacted by the Tier 2.5 list?

DEP Response: Agency will take this under advisement.

Larry Harris: Is the nomination process adequate?

DEP Response: The agency believes the process is generally adequate and workable. If, however a large number of streams are nominated at one time, the individual notification requirements may be difficult and costly.

At this point in the meeting, Bill Raney submitted written comments regarding several mining rules. (see attached)

60CSR8 - Environmental Excellence Program

Greg Adolfson summarized the rule revisions. He said the changes would provide more flexibility for the agency to approve or disapprove of incentives in the program, as well as other flexibilities.

SUMMARY

Changes are being proposed to the Environmental Excellence Program Rule (60CSR8) to better align with and follow the momentum of the United States Environmental Protection Agency's National Environmental Performance Track Program. Additionally, the primary purpose for the changes is to give more flexibility to the Department of Environmental Protection Cabinet Secretary in areas such as: Eligibility Criteria for Participation (section 4); Environmental Performance Record (section 5); Environmental Management System (section 6); Public Participation (section 8); Incentives (section 9); Procedures for Application (section 10); and Annual Performance Report (section 14). Language, such as "may include, but will not be limited to, the following," has been added to allow for this flexibility.

COMMENT

Rick Roberts: Why is section 6.2 completely deleted?

DEP Response: The section is not completed deleted, just the 1996 standards. This will allow the agency to use the most current standards.

Bill Raney: How many companies are participating in the program?

DEP Response: There are two in the National Program, Toyota and Dow.

Jackie Hallinan: The program is a good idea.

Meeting was adjourned by Deputy Cabinet Secretary Randy Huffman.

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Monday – May 21, 2007
1:00 p.m. – 3:00 p.m.
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Rick Roberts
Karen Price
Bill Raney
Lisa Dooley
Larry Harris
Jackie Hallinan

DEP:

Randy Huffman, Deputy Cabinet Secretary/Director –Division of Mining & Reclamation
Karen G. Watson, Assistant General Counsel
Ken Ellison, Director - Division of Land Restoration
Lisa McClung, Director – Division of Water and Waste Management
John Benedict, Director – Division of Air Quality
Lewis Halstead, DMR
Ken Politan, DMR
Charlie Sturey, DMR
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
James Martin, Chief, Office of Oil & Gas
Carroll Cather, DWWM
Pam Nixon, Advocate
David L. Vande Linde, Blasting
Jim Mason, DAQ
Mike Zeto, DWWM – EE
Matt Sweeney, DWWM

VISITORS:

Ann Bradley, Spilman Thomas & Battle
Charlie Burd, IOGA
Don Garvin, WVEC
Dave Yaussy, Robinson & McElwee

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection

called the meeting to order at 1:00 p.m.
Karen Price stated that the Council did not have enough time to review the rules, therefore was requesting to have another meeting to discuss further and the remaining of the Council agreed. The Council will meet May 30, 2007 at 10:00 a.m. – WVDEP – 601 57th Street, SE – Charleston, WV 25304 – West Virginia Room (3001).

Deputy Cabinet Secretary Huffman apologized for the short time period regarding the rules getting out to Council. Randy Huffman then introduced Karen Watson, Assistant General Counsel to discuss with the Council the DEP bills that had passed in the 2007 Regular Legislative Session:

- SB 337 – Establishing New Greenhouse Gas Inventory Program
  Approved by Governor – April 4, 2007

- SB 425 – Relating to Water Pollution Control Revolving Fund
  Approved by Governor – April 4, 2007

- SB 465 – Establishing Dam Safety Rehabilitation Revolving Fund
  Approved by Governor – March 27, 2007

- SB 490 – Relating to Underground Storage Tank Insurance Fund
  Approved by Governor – April 3, 2007

- SB 524 – Requiring Proof of Lawful Disposal of Solid Waste
  Approved by Governor – March 28, 2007

- SB 588 – Removing Tax Expiration Date on Manufacturing or Production of Synthetic Fuel From Coal
  Approved by Governor – April 4, 2007

Karen Watson then gave a brief summary of each proposed rule for the 2008 legislative session:

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

Proposed Rule 6 is now a basic open burning/ incinerator rule. Revised scope includes 'statutory air pollution,' addition of new language for posted operating instructions and open burning or incineration of animal or poultry carcasses during a declared state of emergency. Except for temporary Air Curtain Incinerators for land clearing debris (DOH jobs) and incineration of animal or poultry remains, most Air Curtain Incinerators will now be exempted under Rule 6 and placed under Rule 18.

COMMENT

Mr. Harris: Why does it allow low-level radioactive waste?

DEP Response: To allow crematories to dispose of bodies with chemo drugs. Does not allow high-level radioactive compounds related to research.

Council wanted to know if the agency would accept comments in writing after the meeting (e-mail in comments)

DEP Response: Yes

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO_2 & PM NAAQS include correction of SO_2 annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour $PM_{2.5}$ standards, and addition of measurement methods for $PM_{2.5}$. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO_2 and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Mr. Harris: Are we sure we are protecting the public's health? We should not be lowering standards so that our energy being transmitted to other states doesn't pollute our air. Are we aware of EPA's Science Advisory Panel?

DEP Response: CAIR aims to lower emissions at power plants. Utility controls are helping us meet targets earlier. EPA's regional approach has generally been successful and we are seeing tremendous benefits. The agency is aware of the EPA's panel, and EPA is considering more stringent regulations but has not done so yet.

45CSR16 – Standards of Performance for New Stationary Sources

SUMMARY

Revisions to rule incorporate annual incorporation by reference updates and exclusions.

COMMENT

No questions.

45CSR18 – Control of Air Pollution from Combustion of Solid Waste

SUMMARY

CISWI Rule 18 combines and incorporates by reference all current federal Section 111/129 combustion regulation into one rule. Old Rule 24 will be repealed and replaced. New exemption section is consistent with revised Rules 6, 25 and 34. Revisions also include revised scope, extensive federal counterpart language updates, improved citing and consistency.

COMMENT

No questions.

45CSR25 – Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities

SUMMARY

Revisions to the proposed rule include general annual incorporation by reference and revisions required to maintain consistency with the DWWM's rule 33CSR20 and federal counterpart regulation. Addition of direct incorporation by reference of new provisions published in the Federal Register. Language for pathological waste incinerators is revised for clarity.

COMMENT

No questions.

45CSR34 – Emission Standards for Hazardous Air Pollutants

SUMMARY

Rule 34 now combines all NESHAP regulations previously adopted under both Rules 15 & 34. Old Rule 15 will be repealed and replaced. Revisions to Rule 34 incorporate annual NESHAP updates under Parts 61 & 63. Some Part 63 standards affecting non-major sources of hazardous air pollutants are being excluded from incorporation by reference: Oil and Natural Gas; Polyvinyl Chloride and Copolymers; Primary Copper Smelting; Secondary Copper Smelting; and Primary Nonferrous Metals.

COMMENT

No questions.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

SUMMARY

Annual CAIR NOx Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

SUMMARY

Ozone Season CAIR NOx Rule - Incorporates revisions 40 CFR to Part 96.

COMMENT

No questions.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

SUMMARY

Annual CAIR SO_2 Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

The Greenhouse Gas Inventory Program Rule is authorized by SB337 passed in the 2007 legislative session. The rule establishes a program which requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount; inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions, capture and sequestration; provides for: a periodic compilation of a greenhouse gas inventory; a determination whether WV is a net sink or emitter; development of a registry for voluntary reductions; and a determination whether greenhouse gas can be developed as an asset for economic development.

COMMENT

Mr. Raney: Is the exclusion still there for coal preparation activities?

DEP Response: Yes, section 3.2. (45CSR42)

Mr. Rancy: How do we quantify sequestration?

DEP Response: Don't think we will get down to stationary source level. Agency will look at area sources and biogenic activities. Once we get information, we will compile in an inventory.

Division of Water and Waste Management

33CSR9 – Standards for Beneficial use of Filtrate from Water Treatment Plants

SUMMARY

This legislative rule establishes a mechanism and requirements for the permitting, siting, bonding, and use of water treatment plant sludge from water treatment plants that has beneficial properties. This rule applies to the beneficial use of water treatment plant sludge and to any person who seeks approval from the Secretary to beneficially use such sludge within the state. This rule is intended to enhance the resource recovery and recycling goals of article fifteen of chapter twenty-two of the West Virginia Code and to encourage the beneficial use of water treatment plant filtrate. Section 22-15-23 of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

Lisa Dooley: Public notice of permits – who bears the cost – there has to be a more efficient way of getting notices out than Class I legal ads. This is a suggestion for the future.

DEP Response: Applicant bears cost – DEP is trying other methods of getting the information out – but not everyone has access to e-mail.

400 people on DEP's mailing list to receive permits by e-mail and we have between 30-40 who receive permits by US mail.

33CSR20 – Hazardous Waste Management System

SUMMARY

This amendment will adopt by reference approximately two years of changes to federal regulations by adopting the federal regulations in effect as of June 1, 2007 consisting of changes that correct errors in previously enacted Dye and Pigment rule and Manifest rule, allow more hazardous waste, allow greater flexibility in SW-846 testing and monitoring, allow more mercury containing devices to be managed as universal waste, streamline permitting process through a standardized permit, allow additional headworks and de minimus waste exemptions, reference Clean Air Act standards for hazardous waste combustors, allow a series of paperwork burden reductions for hazardous waste management facilities, corrects errors in 40 CFR (federal regulations) and excludes cathode ray tubes from the definition of solid waste under certain conditions. Language corrections, updated references and a change as the result of an EPA comment regarding annual groundwater monitoring at corrective action sites are also included in the amended rule. The rule amendment is not projected to require additional operating expenses above current levels as the amendments are generally de-

regulatory in nature.

COMMENT

No questions.

33CSR30 – Underground Storage Tanks

SUMMARY

There are several new provisions to reflect the 2005 Federal Energy Act, including: secondary containment requirements for new or replaced thanks or piping; secondary containment requirements for new or replaced fuel dispenser systems; tank eligibility for delivery, deposit or acceptance – enables agency to prevent deposit or delivery to a tank that is not in compliance; and training requirements for individuals who operate, maintain or are responsible to address emergencies from spills or releases from underground storage tank systems.

COMMENT

No questions.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

The proposed revisions reflect updates identified during the federally-mandated triennial review of the Water Quality Standards rule. These include proposed additions to the trout water list, new criteria for nutrients, revisions to criteria in Appendix E and a use redesignation in the Guyandotte River Basin.

COMMENT

Mr. Raney: Would like to have the trout water list stay within the agency and be able to discuss the science on a case-by-base basis before the EQB, not the Legislature.

DEP Response: The DEP believes the scientific basis for the proposed trout streams is clear and does not need to be litigated before the EQB.

Mr. Harris: Commented on the changes in Appendix E and asked whether the formula change for copper and cadmium resulted in a more or less stringent standard.

DEP Response: The changes in Appendix E are recommended by EPA, updating MCL's, etc. The revised hardness formulas represent EPA's latest science.

47CSR10 – National Pollutant Discharge Elimination System (NPDES)

SUMMARY

The proposed revisions to the National Pollutant Discharge Elimination System Rule reflect updates/additions made to the various federal regulations that govern the NPDES program. The proposed changes also include specific language in section 14 of the rule relating to the Pretreatment Program to ensure that the rule is consistent with the most recent federal pretreatment regulations in 40 CFR Part 403.

COMMENT

No questions.

47CSR34 – Dam Safety

SUMMARY

The proposed revisions establish requirements governing the disbursement and use of moneys in the Dam Safety Rehabilitation Revolving Fund, authorized by SB 465 in the 2007 legislative session.

COMMENT

Ms. Hallinan: Any progress being made in reducing the number of deficient dams?

DEP Response: Not very much. The fund initiative is badly needed.

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

Antidegradation is a requirement of the federal Clean Water Act intended to preserve the existing quality of the State's waters and to prevent and/or minimize future degradation. The rule was first adopted in 2001 and establishes four levels, or tiers, of protection for state waters, Tiers 1, 2, 2.5 and 3. Each tier provides a graduated level of protection used during the NPDES permit issuance process. The proposed revisions to the rule carry forward the agency's antidegradation implementation efforts, and move the Tier 2.5 streams that had been on the "presumptive" list in Appendix C to a final proposed list in Appendix A. The agency is proposing a total of 156 streams be included on the list. The list of 156 waters is comprised of the 37 waters that did not receive objections in the formal objection period, those waters that contain reproducing trout and are 100% on public land, those waters listed as high quality on public land based on their high biological scores, and Loop Creek.

COMMENT

Mr. Harris: Suggested we file with 309 streams instead of 156 streams because Legislature will

further reduce.
Mr. Raney: Suggested we start with 39.

Mr. Harris: Asked about section 2.11 in the definitions regarding "trading" and if it includes cross-pollutant trading.

DEP Response: The definitions were unchanged from the ones the EQB first adopted in 2001. The agency does not think it allows cross-pollutant trading.

Division of Mining and Reclamation

38CSR2 – Surface Mining Reclamation Rule

SUMMARY

§38-2-3.2.g. Notice of Technical Completeness is new language and is to provide the public an opportunity to review the application once technical review is completed. §38-2-5.4.e.1 is removing language that is contrary to returning the natural drainway to its original pattern, profile, and dimensions once drainage control structure is removed. The changes in §38-2-5.6 clarify what operations may be exempt from conducting a "Surface Water Runoff Analysis", monitoring requirements and removes phase-in compliance schedule that expired on June 19, 2006. Changes to §38-2-6 removes duplication of rules for Blasting and after this change, all the requirements for blasting will be contained in Surface Mining Blasting Rule, Title 199 Series 1. New §38-2-11.8 titled "Bond Credit for Reclamation of Bond Forfeiture Site under a No Cost Reclamation Contract" encourages qualified operators to undertake reclamation of bond forfeiture sites for the purpose of eliminating hazards to human health and safety, abating pollution of surface and ground waters and the contribution of sediment to adjacent areas, and restoring land to beneficial uses. Changes in §38-2-14.15.c.2 and 14.15.d.3 are clarifying contemporaneous reclamation rules on excess spoil disposal. The changes in 14.15.e remove a phase-in compliance schedule that expired in 2004. The changes in §38-2-23 are being made to make the mining rule consistent with the proposed changes in the State's NPDES Mining Rules.

COMMENT

No questions.

47CSR5A – Individual State Certification of Activities Requiring a Federal Permit

SUMMARY

The proposed amendments to this rule are being made to adopt into rule requirements that have been applied through past practices for coal related activities requiring mitigation and issuance of a 401 State Certification of a 404 Permit. Ratios for monetary compensation for temporary impacts are detailed. Monetary compensation for permanent impacts to wetlands from coal related activities are made the same as non-coal related. Additional economic and stream measurement information is being requested to be added to the 401 application.

COMMENT

Mr. Harris: How do we determine the "ordinary high water mark" under section 4.2.f.4 and how is it determined on a small stream?

DEP Response: The US Army Corps of Engineers is responsible for determining "waters of the U.S." under the rule.

Mr. Harris: What are the differences between coal and non-coal impacts and how are they determined?

DEP Response: Rule has to be consistent with statute.

47CSR30 – WV/NPDES Rules for Coal Mining Facilities

SUMMARY

The proposed amendments to this rule are being made to allow general clean-up of sections referencing outdated names of agencies and references to the EQB governing rule making. This rule addresses the Secretary as being the person as head of all actions. References to the "Director" are changed to "Secretary" to eliminate the need to distinguish between the Director of Mining and Reclamation and the Director of Water and Waste Management when issuing a coal related WV/NPDES permit. This rule adds provision for storm-water coverage for certain minimal activities without the requirement for modification through application to the permit. This rule also provides for an advanced approval of transfer of a WV/NPDES Permit to coincide with the advanced approval of the corresponding Article 3 Permit. This rule clarifies provisions related to coal remining operations and provides a remining water quality standard variance for any parameter of concern.

COMMENT

No questions.

199CSR1 - Surface Mining Blasting Rule

SUMMARY

The proposed amendments change the following sections: 2.27. Adds the definition of "other structure" (structures built by the permittee); 2.38 Clarifies definition of "surface mine operation"; 3.2.C. Plan for blasting should include seismic monitoring when within 1000 ft of a structure, and performance specifications for blasting seismographs; 3.4. Areas of blasting that will be regulated for shaft and slope development; 3.6.c.3. Requiring field practice guidelines for blasting seismographs; 3.7a Request for alternate limits must have written consent of the owner; 3.9. Minimum qualifications and continuing education requirements for surveyor; 4.1.b. Allows the agency to consider blasting experience of applicants that was gained prior to the last three years; 4.5.d. Requires applicants who have been suspended or revoked in other states to show cause as to why should be issued a certification; 4.9.a.2 process for issuing a temporary suspension to a blaster and

appeal rights; 4.13 Clarifies blasters responsibility of training the blasting crew; 5.2.a.3&4 Clarifies

the investigations process on a claim of blasting damage; 6.1 Requiring that any arbitrators that are removed from the list must be done with cause; and 7.3 Detonators and initiation systems are not considered for calculation of fees.

COMMENT

No questions.

Office of Oil and Gas

35CSR3 – Coalbed Methane Wells Rule

SUMMARY

The WVDEP, Office of Oil and Gas is proposing to revise existing rule 35CSR3. Series 3 is a legislative rule in place to enforce the provisions in WV Code §22-21-1 et seq., Coalbed Methane Wells and Units, commonly referred to at the Coalbed Methane Act. The revisions will: Address the establishment of special field rules to promote the orderly development of coalbed methane fields; Protect the correlative rights of all owners located within the geographic area for which special field rules are established; Provide a process by which the Review Board may hold a hearing on an application for special field rules and issue such rules; Insert language (Section 17) which was inadvertently deleted from the rule during the 2006 legislative session. This language existed in the rule prior to the revisions in 2006.

COMMENT

Is this the same rule that went through last year?

DEP Response: Yes, except for two sections that had changes:

16.2.e – advertisement "15 days"

16.1.6.1 – "FOIA" issue that came out of the LRMRC.

Mr. Raney: Is this the product of the stakeholders group?

DEP Response: Yes.

Ms. Hallinan: What is a field rule?

DEP Response: Special spacing procedure for coalbed methane wells. It deals with pooling and royalty issues.

Division of Land Restoration

33CSR10 – Recycling Assistance Grant Program

SUMMARY

This rule sets out guidelines and procedures for providing assistance grants to local governments and other interested parties for the purpose of planning, initiating, expanding, or upgrading recycling programs, provide related public education programs, and assist in recycling market procurement efforts.

COMMENT

No questions.

60CSR3 – Voluntary Remediation and Redevelopment Rule

SUMMARY

This legislative rule establishes the eligibility, procedures, standards and legal documents required for voluntary and brownfield cleanups and updates risk protocol standards, including updates to the deminimis table. It also includes changes to the land use covenant section to incorporate the components of the Uniform Covenant Act.

COMMENT

Ms. Dooley: Are there grant dollars for brownfields?

DEP Response: Yes

The next scheduled Advisory Council Meeting will be on May 30, 2007 at 10:00 a.m. Mr. Huffman asked the Council members to notify the DEP of which rules they want to discuss so the right agency person can be at the meeting. He also asked them to submit comments prior to the meeting if possible.

Council meeting - 5/30/07
Comments
Submitted
by Bill Raney

Bill...

Here are some preliminary comments provided by the Environmental-Technical Committee on the rules that will be reviewed by the Advisory Council:

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

Inclusion of a stream in the codified list contained in the rule forever locks in unrealistic WQS on that stream regardless of existing and/or future water quality. The lower standards are very problematic for the coal industry by targeting iron and aluminum.

WVCA believes the list is immaterial to protection of the existing use if it is indeed a trout stream.

WV DEP, in the NPDES permitting process, will apply appropriate trout stream effluent limitations if the agency believes a stream to have a trout population regardless of whether or not it in on the codified list contained in the water quality standards rule or not. The only difference is that in the permitting process, the applicant has the opportunity to present data and sampling to refute the agency's assertion that a stream is a trout stream, and has a right of appeal if they continue to disagree with agency's assignment of trout stream limits. The ability to dispute the trout stream designation is very important, especially since some of the data supporting the current initiative to expand the codified list is decades old.

If a trout stream is included on the codified list approved by the legislature, the only option for removing that designation is to once again pursue a legislative fix. Under those circumstances, it is easier to just challenge the entire expansion of the trout stream list.

The massive expansion of the trout stream list as currently proposed is much more restrictive than the standards found in surrounding states, where the regulatory agencies have developed different levels and categories of trout streams. West Virginia continues to treat all trout streams the same as though they were native, naturally-reproducing, cold water streams that deserve the highest levels of protection. This is simply not true, as many streams in West Virginia are stocked trout streams where the existing, in-stream water quality is lower than the established effluent guidelines for native trout streams.

Mining & Reclamation Rule (38 CSR 2)

Main concern relates to 14.15 c 2, regarding contemporaneous reclamation and valley fills:

This revision will penalize operators that are constructing "bottom-up" valley fills, the agency's preferred method of fill construction by unnecessarily restricting when such fill can be counted as "reclaimed" under the state's contemporaneous reclamation rules. These rules already vastly exceed the federal requirements and those of any other surrounding state, and this change will only make them worse.

Additionally, this proposed revision was deleted during the Legislative session in 2007.

401 Water Quality Certification Rule (47 CSR 5A)

The changes to this rule are totally un-necessary, and add further detail and complication to a state mitigation rule when the Legislature has specifically instructed the agency to better align its mitigation program with that of the Corps of Engineers. Several years ago, the Legislature passed a bill directing WV DEP to provide state mitigation credit for Corps mitigation. While this has occurred, we feel the revisions to this rule will drive the two programs further apart Additionally, we know of no state statutory revision that necessitates these changes... the state mitigation program has functioned for years without this level of detail, and we question why it's needed now.

Further, we are concerned that the rule seeks to change definitions that should only be revised in the statute with Legislative approval. For example, the revisions jettison the long-used references to stream types and insert reference to ordinary high water mark. This appears to be an effort to expand the definition of "waters of the state" to all cover every erosional feature, regardless of whether or not it actually functions as a stream.

West Virginia Coal Association

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July 18, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 47 CSR 5A, "Rules for Individual State Certification of Activities Requiring a Federal Permit".

WVCA is a non-profit state trade association representing the interests of the West Virginia coal industry on policy and regulatory issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's primary goal is to enhance the viability of West Virginia's coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments regarding the West Virginia Department of Environmental Protection's (WVDEP") proposed revisions to the state's Clean Water Act ("CWA") Section 401 certification rule.

General Comments

WVCA is very concerned about the WVDEP's proposal to add detail to its § 401 mitigation program, particularly at this time. The WVDEP has not articulated any problems with implementation of its existing mitigation program pursuant to this rule, and the WVCA sees no benefit to adding further detail and complexity now. Even more importantly, the WVCA understands the history of the WVDEP's § 401 mitigation program, and believes that the very basis for its development years ago no longer exists. The WVDEP's program has been fully replaced by the federal mitigation program which has developed into a comprehensive program and is the subject of new joint United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") rules to update and conform their collective mitigation goals and requirements. The state's mitigation requirements, at least as they relate to mitigation for activities permitted by a CWA § 404 permit, have become obsolete and duplicative.

History of State § 401 Mitigation Requirements.

The state's mitigation program as maintained by the WVDEP and implemented through the § 401 rules is not a required component of the federal § 404 permitting program. The § 401 certification program is intended to insure that

issuance of a federal permit does not result in a violation of state water quality standards:

> CWA section 401 provides that states certify that federal activities or activities requiring federal approvals relative to CWA section 404 would not violate applicable effluent limitations, or other limitations, or other water quality requirements.[1]

Instead, the state has independently required mitigation as a condition of § 401 certification. Implementation of the state's mitigation program and requirements dates from a time when the Corps imposed no federal mitigation requirement on mining operations authorized by the § 404 General Permit for coal mining operations, Nationwide Permit 21("NWP 21"):

> [NWP] 21. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. **The notification must include an OSM or state-approved mitigation plan** (emphasis added).[2]

Based on the requirements of the NWP 21, a state mitigation plan was required for a mining-related § 404 permit (usually a NWP 21) to be issued by the Corps:

> Prior to reissuance of NWP 21 in January 2002, the COE [Corps] considered mitigation adequate with the inclusion of an OSM or state-approved SMCRA onsite mitigation plan in the permit application.[3]

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[1] Programmatic Environmental Impact Statement. Corps, EPA et al. 2005. page II.C-42.
[2] Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec. 13, 1996. 61 Fed. Reg. 241.
[3] Programmatic Environmental Impact Statement. Corps, EPA et al. 2005. Page II.C-52

West Virginia implemented this program through the § 401 certification program which imposed monetary or in-lieu fee requirements on coal mining related § 404 permits.

In 2002, the Corps revised and reissued NWP 21 adding a condition that the Corps' District Engineer require federal mitigation, reviewed and approved by the Corps in accordance with its joint mitigation rules and regulations maintained with the EPA.[4] The revised and reissued NWP 21 allowed the Corps to consider state mitigation when determining federal mitigation, but removed the automatic acceptance of state-required mitigation as sufficient for § 404 authorization. From this point on, the state mitigation requirements as maintained in the § 401 certification process became duplicative because the Corps was requiring federal mitigation plans as part of the § 404 permitting process

Federal Mitigation Requirements are Comprehensive.

Coal mining-related § 404 permitting and mitigation has evolved since the Corps's reissuance of NWP 21 in 2002. Most mining projects are now permitted using the Corps' Individual Permit process and mitigation plans are now developed based on the Corps's and EPA's combined preference for on-site, in-kind mitigation to restore the impacted aquatic resource.

As you know, coal mining operations are typically subject to the federal CWA § 404 program and the state § 401 certification program because of

[4] Final Notice of Issuance, Reissuance and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Jan. 15, 2002. 67 Fed. Reg. 10

activities undertaken in jurisdictional waters. The steeply-sloped terrain of West Virginia is permeated by small ephemeral and intermittent streams that serve to drain natural runoff into larger perennial stream systems. Any development in these areas--coal mining or otherwise--will result in some form of impact to small streams. Unlike many other activities subject to § 404 permitting and § 401 certification, mining activities are mostly temporary in nature, with the reclamation process providing a unique opportunity for reconstruction of impacted stream segments.[5] The Corps has recognized this opportunity for on-site, in-kind replacement/restoration of impacted aquatic resources and issued guidance encouraging this type of mitigation:

> This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.
>
> Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.
>
> ...Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating...features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.[6]

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[5] See pages ____ of attachment "A", comments filed by WVCA concerning the draft federal mitigation rule.

[6] "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining" U S Army Corps of Engineers. May 7, 2004

In addition to the Corps's above-cited guidance for mining, on-site, in-kind mitigation remains the preferred means of performing mitigation for other authorized impacts to aquatic resources:

> In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.[7]
>
> Mitigation should be required, when practicable, in areas adjacent or contiguous to the discharge site. On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat.[8]
>
> Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.[9]

To satisfy the Corps's preference (enunciated in previously-cited Regulatory Guidance Letters issued by the Corps) for in-kind mitigation, or a functional replacement of the impacted resources, a Functional Assessment Protocol, referred to as the "Central Appalachian Protocol", has been used for several years now by the Huntington District to assist in assessing and assigning mitigation requirements for mining-related projects.[10]

Unfortunately, the WVDEP has to date largely ignored the mitigation guidance and requirements developed and imposed by the Corps, as well as the functional assessment protocol. The WVDEP has continued to implement its duplicative § 401 mitigation requirements, and typically requires mitigation above

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[7] Regulatory Guidance Letter No 01-1. U.S. Army Corps of Engineers, October 31, 2001.
[8] Regulatory Guidance Letter No 02-2. U.S. Army Corps of Engineers, December 24, 2002
[9] Compensatory Mitigation Guidelines- Huntington District. U.S. Army Corps of Engineers, Huntington, WV District. January 30, 2004
[10] See attached power point presentation - Central Appalachian Protocol.

and beyond that which is required by the Corps despite the mandate of W. Va. Code § 22-11-7a(a)(2)(C):

> The Director shall provide credit for any mitigation that is a required component of the permit issued by the United States Army Corps of Engineers pursuant to 33 U.S.C. § 1344 to the extent that it satisfies required mitigation pursuant to this section.

Because a comprehensive federal mitigation program is being implemented, the WVDEP's failure to provide credit for such mitigation ***as mandated*** is a serious concern to the WVCA. To the extent a state program is relevant at all, perhaps to address the limited circumstances where the state's definition of "waters of the state" is broader than the CWA definition of "waters of the United States," it should be narrowly tailored to address that need. The WVCA cannot support proposed revisions that are not so narrowly tailored.

WVCA urges WVDEP to postpone pursuit of these proposed revisions at this time and to more fully consider the need for its separate mitigation program in light of (1) the federal mitigation now required as part of a § 404 permit, (2) the possibility of creating inconsistencies with the draft federal Corps and EPA rule for mitigation, (3) the deletion of NWP 21 conditions relating to state mitigation, and (4) the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Specific Comments

Page 4 4.2.f.2.A. Economic Info[redacted]tion about the coal mi[redacted]g operations, including, without limitation, the estimated nu[redacted]r of jobs created, the e[redacted]ated proportion of employees who will be residents of Wes[redacted]rginia, the estimated a[redacted]al payroll, the

estimated annual coal production (if applicable), the estimated life of the operation, the estimated severance tax for the operation, the estimated annual property tax, and such other economic information as may be requested by the agency.

WVCA questions why this level of information is needed for the § 401 certification process. Similar information is provided to the Corps under the § 404 permitting program and to the state through the Community Impact Statement. The justification for requiring duplicative information as part of the § 401 certification process is lacking. Further, we are puzzled as to why this information is required only for mining operations. Sections 404 and 401 of the CWA apply to all manner of filling activities, not just coal mining operations. If this information is needed by the WVDEP to properly implement the § 401 certification process, then it should be required for all dredge and fill activities. If it is not, then it should be removed from the proposed revisions. Without further explanation and justification, the WVCA does not support this proposed revision.

4.2.f.4. A Delineation of the Stream to be Impacted. The length, width and depth of the stream segment impacted shall be measured. Width and depth measurements shall be made at one hundred (100)foot intervals. The stream delineation shall indicate the ephemeral and intermittent/perennial segments to be impacted. The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of ~~an intermittent stream, as defined in 46 CSR 1-2.9 and/or 38 CSR 2-2.71.~~ the ordinary high water mark. The applicant shall provide a table listing the station number with the corresponding acreage, including the drainage area from the toe of the pond and the toe of the fill.

As proposed, this revision appears to extend the reach of the state's jurisdiction and expand the WVDEP's mitigation requirements under the § 401 certification program. While this change may be motivated by a desire to more closely align the state's mitigation requirements with those of the Corps, the

WVDEP's first and most needed step in that direction is compliance with W. Va. Code § 22-11-7a(a)(2)(C) Until the WVDEP revises its mitigation rules and policies to accept Corps-required mitigation, this proposed change will serve only to increase the amount of in-lieu fee mitigation provided to the state, with no resulting environmental benefit. Further, the proposed change appears to be counter to the authorizing statute which bears no mention of the "ordinary high water mark." The WVCA does not support this proposed revision

6.2.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

WVCA believes that this proposed revision extends the authority of the state beyond the authorizing, underlying statute:

> 1) If the applicant's surface coal mining operation will not impact waters of the state designated as national resource waters and streams where trout naturally reproduce and will not impact wetlands of the state in a manner inconsistent with all applicable state or federal standards as the case may be, as required by the federal Clean Water Act, and if the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is less than two hundred fifty acres, then the director may issue a water quality certification pursuant to the requirements of this section. If the watershed above the toe of the farthest downstream permanent structure impacted is equal to or greater than two hundred fifty acres, the director shall require that mitigation be undertaken. Additionally, the director may require mitigation for temporary impacts to waters of the state as specified in subdivision (2) of this subsection.

> (2) If the watershed above the toe of the farthest downstream permanent structure authorized pursuant to the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 is greater than or equal to two hundred fifty acres and all other necessary requirements are met consistent with this section, the director shall further condition a water quality certification on a requirement that the applicant mitigate the expected water quality impacts under the following conditions…

The above-cited statute contains no reference to "1/2 acre" of stream. Apparently, the agency is attempting to further extend its jurisdiction or merely implementing past policies that existed with respect to coal and non-coal mitigation. Since the statute contains no reference to ½ acre of stream, **WVCA suggests the agency delete this proposed revision. If the agency truly believes that this change is necessary, it should seek a legislative revision to 22-11-7(a) and only then seek to modify the rule.**

~~6.2.d.1. Permanent impacts for coal related monetary mitigation will be assessed at $200,000 per acre of impacts in watersheds greater than or equal to two hundred and fifty (250) acres from the toe of the farthest downstream permanent structure, and/or exceeds a ½ acre of loss or impact of stream.~~ Monetary compensation for stream impacts resulting from coal related activities shall be assessed as follows:

6.2.d.1.APermanent impacts for coal related monetary mitigation will be assessed at $200,000 per acre of impacts

6.2.d.1.B Temporary coal related stream impacts resulting from structures (excluding stream crossings) that will be removed prior to final bond release will be assessed at $20,000 per acre of stream impact per each five-year period of impact and/or prorated for each year the impact occurs.

6.2.d.1.CTemporary coal related stream impacts resulting from stream crossings (i.e. culverting) and stream relocations where the stream impact is greater than or equal to two hundred one (201) lineal feet, but less than or equal to four hundred (400) lineal feet and is in place for five years or more, shall be assessed at $20,000 per acre for the first five (5) year period and prorated for each additional year the impact shall occur. A temporary stream impact resulting in more than four hundred (400) linear feet shall be monetary compensated at a rate of $20,000 per acre per each five (5) year term and/or prorated for

each year the impact occurs.

As noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, because § 404 permit mitigation plans cover both permanent and temporary impacts, there is no need for the duplicative state provision for monetary mitigation. As explained in our general comments, the Corps and EPA have continuously stressed a desire for on-site, in-kind mitigation. Using the "Central Appalachian Protocol", coal mining operations have been providing on-site, in-kind mitigation through the reclamation and stream reconstruction process. These projects have been embraced by the Corps and EPA through mining-specific regulatory guidance.

WVCA questions the need for these revisions, and urges WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

6.2.d.1.D Permanent wetland impacts for coal related monetary mitigation will be assessed at the rate $30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation plans cover

both permanent and temporary impacts to all impacted aquatic resources, including wetlands, and there is no need for the duplicative state provision for monetary mitigation for wetland impacts.

To the extent WVDEP nevertheless chooses to pursue this proposed revision, it has no justification for the $30,000 replacement value proposed. In addition, by proposing this specific amount, the WVDEP has excluded any opportunity to determine a monetary mitigation amount for wetlands on a case-by-case basis, which could be either higher or lower than $30,000 per acre.

In-lieu fee payment for wetlands impacts is a desirable option to have, but we question whether the agency will ultimately determine that wetland replacement as already specified in the rule is sufficient. The WVCA cannot support this proposed revision without additional justification and explanation, and again urges the WVDEP to re-evaluate the need for this provisions in light of the federal mitigation now required as part of a § 404 permit and the mandate of W. Va. Code § 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

Sincerely,

Jason Bostic, Vice President
Regulatory & Technical Affairs

West Virginia Coal Association

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Ms. Gloria Shaffer
West Virginia Department of Environmental Protection
Division of Water and Waste Management
Water Quality Standards Program
601 57th Street SE
Charleston, WV 25304

Via Electronic Mail: Gjshaffer@wvdep.org

Re: Comments on 2007 Triennial Review of Water Quality Standards

Dear Ms. Shaffer:

Pursuant to the September 22, 2005 announcement by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's first triennial review of water quality standards.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's producing members account for 80 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally

criteria EPA is currently in the process of revising the nationally-recommended selenium criteria.[6] Because of the flawed nature of the current selenium criteria and its inappropriate application to flowing waters in West Virginia, WVCA is supportive of this federal initiative. However, we caution WV DEP to fully analyze the appropriateness of applying any federally-revised standard in West Virginia. Available information seems to indicate that a state-specific selenium standard for West Virginia may be warranted, as fish populations appear to be healthy and diverse in streams with identified selenium concentrations.[7] The pressing nature of selenium also warrants that WV DEP investigate a state-specific criteria for West Virginia since the federal revisions remains pending. The agency has recently completed draft TMDL documents that impose selenium allocations based on the existing water quality criteria, and will continue to develop and implement selenium TMDLs, adding urgency to this important issue.

Trout Streams

In the EQB's last triennial review, it proposed adding some 400 streams to the list of Trout Waters contained in the water quality standards rule. The EQB allowed only a 30-day comment period on this major expansion of the Trout Waters list. The EQB proposal was based only on the recommendations of the

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[6] See Attachment "F", October 29, 1999 Federal Register Notice published by EPA regarding revision of the selenium criteria and Attachment "G", December 17, 2004 Federal Register Notice announcing draft criteria and requesting public comments.

[7] See Attachment "H", relevant pages from comments filed by the National Mining Association and WVCA regarding the programmatic Mountaintop Mining/ Valley Fill Environmental Impact Statement and *Fish Communities and Their Responses to Environmental Factors in the Kanawha River Basin, West Virginia, Virginia, and North Carolina* U.S. Geological Survey, 2001

West Virginia Division of Natural Resources, with no accompanying data or information on whether or not the streams actually meet the requirements to be classified as trout waters. Based on the lack of information regarding the current status of the proposed trout waters and the limited opportunity for comment provided, the West Virginia Legislature rejected the revision.

The permitting ramifications of classifying streams as trout waters can be significant, as different water quality standards (uniformly more stringent) apply to trout streams. Incorrectly classifying a water as a trout stream can have serious economic impacts for property owners and NPDES dischargers along that streams and should not be taken lightly be WV DEP. Before the agency undertakes any effort as part of its 2007 triennial review to list any additional streams as trout waters, WV DEP should conduct scientific investigations of water quality and fish populations in order to ascertain if a water body meets the criteria required of a trout stream. The agency should also hold hearings in the communities where such streams are located to take comment from the persons most familiar with the conditions of these streams.

We appreciate the agency's consideration of these comments.

Respectfully Submitted,

Jason D. Bostic
West Virginia Coal Association

West Virginia Coal Association

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July 17, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304

Re: Comments on Proposed Revisions to 38 CSR 2

Dear Mr. Sturey:

Pursuant to the notice filed with the Secretary of State on June 15, 2006, the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to 38 CSR 2, the state's Mining and Reclamation rules.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's membership accounts for over 80 percent of the Mountain State's underground and surface coal production. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal extraction and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA appreciates the opportunity to provide comments to the West Virginia

Department of Environmental Protection (WV DEP) regarding the proposed revisions to the state's mining and reclamation rule.

Specific Comments

3.2.g. Notice of Technical Completeness. After the Secretary deems a Surface Mine Application technically complete, the Secretary shall cause the applicant to advertise stating such. The notice shall state that the application has been deemed technically complete by the Secretary and include a fifteen (15) day public review period. Provided, however, Notice of Technical Completeness may not be necessary if the application was technically complete prior to the end of the comment period of the original advertisement and a decision is made within ninety (90) day of the end of the comment period or informal conference.

WVCA believes this revision is unnecessary. Existing state rules provide the agency with authority to require re-advertisement:

> 3.2.e. Re-advertisement. After a Surface Mine Application (SMA) has been advertised once a week for four successive weeks, and is determined by the Secretary to have had a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement, he may require one (1) additional advertisement to be published with a ten (10) day public comment period.

As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement…" for changes that are substantive WV DEP has always required re-advertisement. Additionally,

the proposed revisions exceed the corresponding federal requirements maintained by the Office of Surface Mining (OSM) at 30 CFR 773.6. Because the agency has already has the authority to require re-advertisement, WVCA suggests that WV DEP delete the proposed revision.

14.15.c.2. Areas within the confines of excess spoil disposal fills which are under construction provided the fill is being constructed in the "conventional" method, i.e., completed from the toe up, or those fills which are being constructed progressively in lifts from the toe up or are being progressively completed from the toe up by constructing benches and appropriate drainage control structures (ditches, flumes, channels, etc.) from the toe up as soon as the ~~area is available to do so;~~ first two lifts are in and are seeded and certified;

WVCA is extremely concerned about this proposed revision and believes that it will unnecessarily restrict operating flexibility and thereby discourage the construction of "bottom-up" valley fills. WVCA strongly suggests the agency delete this proposed revision. This entire section of rules already exceeds the corresponding federal requirements of OSM, but members of WVCA negotiated the rules in good faith to remedy an agency-perceived problem with valley fill construction. These rules have been scrutinized and approved by the West Virginia Legislature and OSM. WVCA is concerned as to why the agency believes this change is necessary, and would be willing to discuss other possible remedies to the situation.

Respectfully Submitted,

Jason D. Bostic, Vice-President
Regulatory & Technical Affairs

Surface Mining 38 CSR2 (agreement)
401 Certification 47 CSR5A
TROUT LISTING

2.5 "Biogenic Sources" include COAL

TITLE 45

LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

3.2 turned an exemption into an inclusion

5.3 "Shall provide information"

§45-42-1.General.

1.1 Scope -- This rule establishes a greenhouse gas emissions inventory program in West Virginia which:

1.1.a Requires the reporting and inventory of greenhouse gas emissions by stationary sources which emit more than a *de minimis* amount of greenhouse gases on an annual basis;

1.1.b Inventories greenhouse gas emissions from stationary, area, mobile and biogenic sources, and accounts for reductions and sequestration of greenhouse gas emissions;

1.1.c. Provides for a periodic compilation of a greenhouse gas emissions inventory and a determination whether West Virginia is a net sink or emitter of greenhouse gases;

1.1.d Provides for development of a registry to record voluntary reductions of greenhouse gas emissions; and

1.1.e Provides for a determination whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development.

1.2 Authority -- W Va. Code §22-5-19

1.3. Filing Date --

1.4 Effective Date -- June 1, 2008

§45-42-2. Definitions.

2.1 "Air pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution

2.2. "Air pollution" or "statutory air pollution" means and is limited to the discharge into the air by the act of man substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

2.3 "Anthropogenic" means a direct result of human activities or the result of natural processes that have been influenced by human activities.

2.4 "Area source" means, for purposes of this rule, a collection of similar sources of air pollutants within a geographic area. Area sources collectively represent individual sources that are small and numerous, and that typically have not been inventoried as a stationary or mobile source

2.5 "Biogenic" means a naturally occurring biological source or process that is not significantly affected by human actions or activity

Biogenic Sources include COAL

2.6. "Capture" means the collection of greenhouse gas emissions from a stationary source.

2.7. "*De minimis*" means emissions from a stationary source that are equal to or less than ten thousand tons per year for carbon dioxide, four hundred seventy-six tons per year for methane, thirty-two and six tenths tons per year for nitrous oxide, eight hundred fifty-five thousandths tons per year for hydrofluorocarbons, one and nine hundredths tons per year for perfluorocarbons and forty-two hundredths tons per year for sulfur hexafluoride.

2.8. "Emission" means the release, escape or discharge of regulated air pollutants or greenhouse gases into the air.

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF_6).

2.10. "Mobile source" means a variety of onroad and nonroad vehicles, engines, locomotives, marine vessels, airplanes and other equipment that generate air pollutants and greenhouse gas emissions, and that move or can be moved from place to place.

2.11. "Regulated air pollutant" means, for purposes of this rule, any air pollutant regulated under rules promulgated by the Secretary pursuant to W. Va. Code §22-5-4.

2.12. "Reservoir" means a geological site where a greenhouse gas is securely stored.

2.13. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W. Va. Code §§22-1-6 or 22-1-8.

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink.

2.15. "Sink" means any process, activity or mechanism which removes a greenhouse gas from the atmosphere. Forests are considered sinks because they remove carbon dioxide through photosynthesis.

2.16. "Source" means, for purposes of this rule, any process or activity which releases a greenhouse gas into the air.

2.17. "Stationary source" means any building, structure, facility, installation, stationary process or process equipment which emits or may emit any regulated air pollutant or greenhouse gas.

2.18. "Ton" means a short ton, or 2000 pounds.

2.19. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W. Va. Code §22-5-1 et seq.

§45-42-3. Applicability.

3.1. Any stationary source that emits one or more greenhouse gases on an annual basis greater than the *de minimis* amounts listed in the table below, and reports emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W. Va. Code §22-5-4(a)(14), shall be an affected source required to report emissions of all greenhouse gases to the Secretary under section 4:

Greenhouse Gas Compound	tons/year
carbon dioxide	10,000
methane	476
nitrous oxide	32.6

Any facility, etc.

hydrofluorocarbons	0.855
perfluorocarbons	1.09

sulfur hexafluoride	0.42

Rock plants under Title IV

3.2. Stationary sources which are regulated by the Secretary under W. Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W. Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

n/a Stationary sources

§45-42-4.Reporting Requirements.

4.1. By March 31, 2009, and March 31 of each year thereafter, affected sources shall report to the Secretary the quantity of all greenhouse gases emitted in the previous calendar year.

4.2. Affected sources shall only be required to report annual quantities of anthropogenic non-mobile source greenhouse gas emissions at the source, and shall not be required to report biogenic emissions of greenhouse gases.

4.3. The Secretary shall determine the form and format of the information reported by affected sources under subsection 4.1 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF_6 Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis.

4.5. Reports of greenhouse gas emissions submitted to the Secretary under this section shall be signed by a responsible official and shall include the following certification statement: "I, the undersigned, hereby certify that the data transmitted to the West Virginia Department of Environmental Protection is true, accurate, and complete, based upon information and belief formed after reasonable inquiry."

§45-42-5.Greenhouse Gas Emissions Inventory.

5.1. The Secretary shall periodically compile an inventory of greenhouse gas emissions to:

5.1.a. Characterize the relative contributions of greenhouse gas emissions from stationary, area, mobile and biogenic sources in West Virginia; and

5.1.b. Determine the extent to which greenhouse gas emissions are offset by the rate of sequestration, and whether West Virginia is a net sink or emitter of greenhouse gases.

5.2. The greenhouse gas emissions inventory shall include the emissions from stationary sources reported under section 4, and other relevant information regarding significant emissions, reductions, and sequestration of greenhouse gases from stationary, area, mobile

entire Surface Area / underground Mines is an AREA SOURCE

and biogenic sources requested by the Secretary under subsections 5.3 and 5.4.

5.3. To inventory greenhouse gas emissions reductions, the Secretary shall consult with the citizenry and other entities such as industry trade groups that have information relating to greenhouse gas emissions reductions, and sequestration. Upon request of the Secretary, such entities shall provide relevant information relating to greenhouse gas emissions reductions; capture and sequestration.

5.4. The Department of Agriculture, the Division of Forestry, Marshall University, West Virginia University, West Virginia Geological and Economic Survey, and the Department of Transportation shall enter into interagency agreements with the Secretary and at the Secretary's request provide:

5.4.a. Relevant information relating to greenhouse gas emissions from area, mobile and biogenic sources;

5.4.b. Relevant information relating to greenhouse gas emissions reductions and sequestration; and

5.4.c. Any assistance the Secretary may request during the development of the greenhouse gas emissions inventory.

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

§45-42-6. Greenhouse Gas Emissions Registry Program.

6.1. The Secretary shall develop a registry for the recordation of voluntary reductions of greenhouse gas emissions.

6.2. The greenhouse gas emissions registry program shall be as consistent as possible with developing regional, national, or international programs designed to monitor, quantify and register reductions in greenhouse gas emissions with respect to:

6.2.a. Development of criteria, based on a set of standardized emissions accounting, reporting and verification protocols, to determine baseline emissions and quantification of voluntary reductions in emissions of greenhouse gases;

6.2.b. Public recognition of such voluntary emissions reductions;

6.2.c. Consideration of voluntary greenhouse gas emission reductions when determining baselines and reduction requirements under future federal greenhouse gas emission reduction programs; and

6.2.d. The ability of sources to participate in future greenhouse gas emission trading programs.

§45-42-7. Economic Development Potential.

7.1. Using information obtained, gathered or developed under this rule, the Secretary will determine whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development in West Virginia.

§45-42-8. Inconsistency Between Rules.

8.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method or rule.

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Biogenic substance

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A **biogenic substance** is a substance produced by life processes. It may be either constituents, or secretions, of plants or animals.
Examples

Coal and oil are examples of constituents which have undergone changes over geologic time periods.

Chalk, and limestone are examples of secretions (marine animal shells) which are of geologic age.

Cotton and wood is are biogenic constituents of contemporary origin.

Pearls, silk and ambergris are examples of secretions of contemporary origin.

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From: "Charles Harris" <clharris@hsc.wvu edu>
To: <jhallinan@hallinanlaw.com>, <rick@lcpsd.com>, <braney@wvcoal.com>, <PWHITE@wvdep.org>, <karen@wvma com>, <wvml@wvml org>
Date: 5/24/2007 7:54:40 PM
Subject: Re: May 30, 2007 Meeting

Trish: I received some last minute comments on 33CSR8 that I would like to submit:

§33-9-2. Definitions – Section 2 5 defines "Beneficial Use" as "the use of a non-hazardous material for a specific beneficial purpose where it is done in a manner that protects groundwater and surface water quality, soil quality, air quality, human health, and the environment." We are concerned that it has not been adequately demonstrated that this filtrate is non-hazardous, and point to the current "inter-sex" fish issue in the Potomac River drainage which illustrates that there are unanswered questions concerning unmonitored pollutants in sludge from both water and waste treatment facilities

§33-9-2. Definitions - Section 2.5 defines beneficial uses as including "use as a fertilizer substitute, soil amendment, cover material, fill material, mulch or horticultural product, or other purpose approved by the Secretary" However, Section 33-9-3, in sub-Section 3.1 b 1 requires that "The use proposed is a reuse, and not a disposal" We suggest that the use of this filtrate as fill material is actually simply a disposal and not a "reuse." We believe this material should not be used as fill material. This would also require a change to Section 33-9-5, sub-Section 5.2.

§33-9-5. Standards for Beneficial Use of Filtrate - sub-Section 5.3 states, "The Secretary may approve the use of filtrate as fill material within fifty (50) feet of surface water upon submission of information sufficient to show that the fill material will have no significant impact on the quality of runoff reaching the surface water" Even the U.S. Forest Service has adopted stronger stream buffers for sediment runoff DEP should develop stronger stream buffers for this rule, and there should be no discretion.

§33-9-7. -- DEP made changes to this rule during the Interims process last year, and the rule now requires a permit for both short-term and long-term applications. This is a good change. However, we feel that most of the information required in Section 7.3. Permit Application Requirements for long-term permits should also be required for short-term permits

§33-9-8. Draft Permits and Public Comment. Section 8.2 a. provides for a 30-day public comment period for long-term permits, but only a 15-day public comment period for short-term permits. We oppose the shortened public notice provisions for short-term permits. The 30-day comment period should apply in both instances.

§ 33-9-11. General permits. We oppose the development of a General Permit to cover the provisions of this rule. Specific individual permits are necessary to inform potentially affected parties of the application of this material.

Appendix A -- Frequency of Monitoring. The Legislative Rule-Making Review Committee last session accepted an amendment proposed by industry that reduced monitoring tests to once a year. While we would prefer even more frequent monitoring than proposed in this rule, we hope DEP will strongly oppose any attempts to reduce the monitoring provisions provided in this rule.

Charles L. Harris
Professor of Biochemistry
West Virginia University
School of Medicine
304-293-7749
>>> "Patricia White" <PWHITE@wvdep.org> 05/21/07 4:21 PM >>>
Please be advised of the following meeting:

Comments on DEP Rules for 2007

Communicated by Larry Harris, Public Advisory Council Member

I would like to commend the staff of the DEP for the hard work and expertise used in preparing and reviewing the rules with Council. As promised, I include below some of the technical and other issues raised during the May 21 meeting of the Council, omitting some questions that were answered at the meeting. Members of the environmental community who reviewed the rules raised some of the questions.

Some of the issues mentioned below are related to the act of valley fills and determining compensation for this process. I have pointed out my view to Council previously that the permitting of valley fills is essentially allowing the destruction of upper tributaries of watersheds. As such the process should be outlawed, in my view.

47CSR2 Water Quality

We learned that the B2 list is essentially the same as submitted previously and includes the definition of trout waters cited on page 2 of the rule.

Page 11: Why is the temperature regulation on Stony River being removed?

47CSR2 (7.2.d.9) — The removal of variances, etc. on the Blackwater seems to be a strength, but why do these rivers remain "reserved" on the list? Why not just remove them?

47CSR2 (7.2.d.34.1): Adds language for site-specific applicability of water use categories and water quality criteria: "Pats Branch from its confluence with the Guyandotte River to a point 1000 feet upstream shall not have Water Use Category A and Category D1 designation."

* Is this a use removal? Yes was the answer.
* If so, did this go through the appropriate public process and use attainability analysis to justify a use removal . Did the use and attainability

analysis follow the federal Clean Water Act provision. (i.e. how was this decision justified)? Not sure this was fully answered.

47CSR2 (Appendix E):

Are the changes in concentrations for cadmium, copper, and others in Appendix E consistent with EPA changes/ recommendations? Some of the changes in hardness calculations are in response to comments from our groups last year asking DEP to be consistent—so this is good.

47CSR5A

47 CSR 5A (State Certification)

***47CSR5A (4.2.f.4): seems to be weakening the system for determining stream miles (delineation). DEP inserts the language: "The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of the ordinary high water mark."

This will result in fewer stream miles being "delineated" as actual stream miles, it seems. Why would you move upstream (where there are fewer inputs) to find a high water mark? Thus, it also seems fewer miles of headwaters will be mitigated for impacts.

47CSR5A (6.2.b): Typo—"loses" should be "losses"

47CSR5A (6.2.d.1): Is there a discrepancy between how monetary compensation for coal versus non-coal impacts is assessed? It may be worth determining that coal is not getting a break, in comparison to non-coal.

For example—why is it lineal miles for coal and acreage for non-coal? If they are going to assess from the high water mark—as discussed above—will this not result in fewer stream miles and thus fewer miles to mitigate/compensate? Also, there is no assessment for non-coal related temporary impacts—why?

60 CSR5 Antidegradation

I made the suggestion that the list of Tier 2.5 streams (156 in the current rule) should be returned to the same number as began the legislative session, which is 309 streams. A scientific process that included expertise

from the WVDNR, which manages trout waters, arrived at the list of 309 streams. The list now submitted with the bill was reduced by the political process. Politics should not determine which streams merit protection from pollution; science should.

Other issues:

2.11 Explanation of the addition of this trading section is needed. Is this similar to EPA rules and consistent with the Clean Water Act?

3.9 Which advisory committee is this phrase referring to:

5.5b is removed. Why?

Is the procedure for nomination and addition of streams to the tier 2.5 list adequate?

Comments from Adam Webster (WVRC)

60CSR5 (2.11): It's good that DEP provides "upstream controls" and mentions "for the same parameter" in the first sentence of the "trading" definition. Overall, the definition is good, but it is important to remember that the intent of the definition is not to allow cross-pollutant trading. With this in mind, the second sentence—"More than one parameter of concern may be traded on a given stream"—needs to be worded more restrictively (i.e. despite what the first sentence says, the second sentence could be interpreted as if cross-pollutant trading is allowed).

*** 60CSR5 (5.2): Removes (strikes) the language: "Water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection".

Does this suggest the default is Tier 1 (if data does not suggest otherwise)? If so,why?

60CSR5 (5.6.c): The deletion is a response to lawsuit. However, the new 5.6.c suggests they cannot assess assimilative capacity when dealing with pH,

DO, temperature, and fecal coliform. We feel that they can assess these parameters and should not treat them separately.

45CSR42 Greenhouse Gases

The fact that the DEP is beginning to deal with the process of greenhouse gases that lead to global warming is commendable. Some questions on the rule were raised by Dr. Kotcon:

The greenhouse gases emissions inventory rule (45-42-1) needs to be
>strengthened considerably. The sections on emissions inventory
>(section 5, pages 3-4) is so vague as to be meaningless, especially
>as it deals with sequestration for area sources and sinks. I do not
>see how any meaningful data can be generated with this language.
How would the carbon sequestration be estimated? Has there been studies estimating the biogenic incorporation of CO2 per acre of woodland, for example? The rule appears to be a vague in how it would be implemented.

Air Quality and Emission Rules (see below)

45CSR8 Ambient Air Quality Standards

Don Garvin pointed out that the the antidegradation language was removed from this rule, and it was explained that the agency feels these provisions are now covered in 45-CSR-14("Prevention of Significant Deterioration.") However, the language that was stricken does not appear in 45-CSR-14, and the stricken language is the ONLY statement in the rules of West Virginia's antidegradation policy for air quality. The environmental community still believes the stricken language should be restored.

Here is what should be reinstated:

§45-8-2. Anti-Degradation Policy.

2.1. Pursuant to the best interests of the State of West Virginia, it is the objective of the Secretary to obtain and maintain the cleanest air possible, consistent with the best available technology.

2.2. Where the present ambient air is of better quality than the established standards, the Secretary will develop long-range plans to protect the difference between the present quality and the established standards. The plans will be based upon the best available forecasts of probable land and air uses in these areas of high air quality.

2.3. The air quality of these areas will not be lowered unless it has been clearly demonstrated to the Secretary that such a change is justifiable as a result of necessary economic or social development and will not result in statutory air pollution. This will require that any industrial, public, or private project or development which could constitute a new source of air pollutants, within an area of such high air quality, provide the best practicable control available under existing technology as part of the initial project or development.

45CSR41 Control of Annual SO2 emissions

45CSR6 Control of Air Pollution from Refuse Combustion

45CSR39 Nitrogen Oxides

I raised the general concern whether the standards for air quality were consistent with the EPA guidelines or not. Further, were any recognized health authorities consulted when these levels were determined? I also raised the issue that West Virginia is increasing supplying electricity to the population east of our mountains. New transmission lines are proposed that are to be connected with coal burning power plants. Billy Jack Gregg, Consumer Advocate for the WV PSC has pointed out that the states receiving our generated power will not permit generation plants in their region. They are concerned about air pollution and its various effects. But they need power, so they turn to West Virginia. This helps the coal industry and generation plants, but puts the health of West Virginians in jeopardy. I feel that our air quality and emission limits should be even more stringent than the EPA calls for in order to protect our citizens. This should be particularly true for power plants that export electricity.

Dr. Kotcon has raised the following issues:

45-CSR-8 Ambient Air Quality Standards

The standards for PM2.5 and Ozone are not adequately protective. I recommend that the standards be lowered from 15 ug/m^3 to 13 ug/m^3 in section 4.2.b., and from 0.08 ppm to 0.07 ppm in section 4.4.b.

The air standards (45-8-1) retains the standards for PM2.5 and ozone
>that the EPA Clean Air Scientific Advisory Council has already
>determined to be inadequate. Keeping these old standards will kill
>dozens or hundreds of West Virginians each year.

>The rule on refuse combustion (45-6-1) attempts to revise the
>definition of low-level radioactive waste and revives the
>Below-Regulatory_Concern (BRC) issue from some years ago. It also
>creates a large number of exemptions for "temporary" pollution
>sources. I am not yet sure if this re-opens old battles over
>medical waste incineration, but this was a really hot issue a few
>years back.

Comment submitted by Karen Price at Council meeting 5/30/07

Questions/Comments on DEP's 2007 Proposed Rules

- **45 CSR 8 Ambient Air Quality Standards**

Section 4.2.c – $PM_{2.5}$ Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m^3. This should be 65 ug/m^3, pursuant to 40 CFR 50.7.

- **45 CSR 39, 45 CSR 40, 45 CSR 41**

The opt-in unit language is deleted from each of these rules. What is the purpose for the deletion of these provisions?

- **33 CSR 30, Underground Storage Tank Rules**

Section 6.1. states "....including any person who accepts a delivery order, accepts payment, delivers or deposits product into an underground storage tank....". The portion that states "....accepts payment...." should be removed from this section because those individuals within a company who accept payment or make payments most often do not know anything about the underground storage tank (UST), the operation of the UST, or the current regulatory status of the UST.

Section 7.3.a.1. states "....the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods....."

1. The portion that states "..the date, time and location of the course,...." should be deleted. For large companies with many UST installations and locations there can be numerous individuals that need to be trained. Training will most likely occur on multiple dates, times, and locations that may not always be known until just prior to the training event. When new employees are hired training might

occur on short notice and for one individual. The burden of having to repor the dates, time and locations would hinder and slow down the training process and restrict a company's ability to comply.

2. The portion that states "...the credentials of the instructors..." should be removed. Credentials will vary from instructor to instructor new instructors might be utilized, and a company might not know which instructors will be used at the various training sessions until just prior to the training session. In addition, the course content is the main issue of concern and should be the main focus in obtaining State approval of a training program.

Section 7.3.a.2 - This section states that a nonrefundable application fee of $280 must be submitted with the application. Larger companies may have one training program, but administer the training on multiple dates, times and locations. Having to submit an application for approval of the training program each time the program is administered would be cost prohibitive, burdensome, and would hinder the training process. The State should clarify or make provision for a company to submit one application for the training program that will be administered to all company UST facilities. This will make the $280 application fee reasonable and the application process less burdensome.

INDUSTRY'S REVISIONS

45CSR42

TITLE 45
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

§45-42-1.General.

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1.1.c. Provides for a periodic compilation of a greenhouse gas emissions inventory and a determination whether West Virginia is a net sink or emitter of greenhouse gases;

1.1.d. Provides for development of a registry to record voluntary reductions of greenhouse gas emissions; and

1.1.e Provides for a determination whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for economic development.

1.2 Authority -- W Va Code §22-5-19.

1.3. Filing Date --

1.4. Effective Date -- June 1, 2008.

§45-42-2. Definitions.

2.1. "Air pollutants" means solids, liquids, or gases which, if discharged into the air, may result in statutory air pollution

2.2. "Air pollution" or "statutory air pollution" means and is limited to the discharge into the air by the act of man substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.

2.3. "Anthropogenic" means a direct result of human activities or the result of natural processes that have been influenced significantly by human activities.

2.4. "Area source" means, for purposes of this rule, a collection of similar sources of air pollutants within a geographic area. Area sources collectively represent individual sources that are small and numerous, and that typically have not been inventoried as a stationary or mobile source.

2.5. "Biogenic" means a naturally occurring biological source or process that is not significantly affected by human actions or activity.

2.6. "Capture" means the collection of greenhouse gas emissions from a stationary source

2.7. "*De minimis*" means emissions from a stationary source that are equal to or less than ten thousand tons per year for carbon dioxide, four hundred seventy-six tons per year for methane, thirty-two and six tenths tons per year for nitrous oxide, eight hundred fifty-five thousandths tons per year for hydrofluorocarbons, one and nine hundredths tons per year for perfluorocarbons and forty-two hundredths tons per year for sulfur hexafluoride.

2.8. "Emission" means the release, escape or discharge of regulated air pollutants or greenhouse gases into the air.

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF_6)

2.10. "Mobile source" means a variety of onroad and nonroad vehicles, engines, locomotives, marine vessels, airplanes and other equipment that generate air pollutants and greenhouse gas emissions, and that move or can be moved from place to place.

2.11. "Regulated air pollutant" means, for purposes of this rule, any air pollutant regulated under rules promulgated by the Secretary pursuant to W.Va. Code §22-5-4

2.12. "Reservoir" means a geological site where a greenhouse gas is securely stored.

2.13. "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties pursuant to W.Va Code §§22-1-6 or 22-1-8

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink

2.15. "Sink" means any process, activity or mechanism which removes a greenhouse gas from the atmosphere Forests are considered sinks because they remove carbon dioxide through photosynthesis.

2.16 "Source" means, for purposes of this rule, any process or activity which releases a greenhouse gas into the air.

2.17 "Stationary source" means any building, structure, facility, installation, stationary process or process equipment which emits or may emit any regulated air pollutant or greenhouse gas.

2.18 "Ton" means a short ton, or 2000 pounds.

2.19. Other words and phrases used in this rule, unless otherwise indicated, shall have the meaning ascribed to them in W.Va. Code §22-5-1 et seq

§45-42-3.Applicability.

3.1. Any stationary source that emits one or more greenhouse gases on an annual basis greater than the *de minimis* amounts listed in the table below, excluding biogenic emissions, and reports emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14), shall be an affected source required to report emissions of all greenhouse gases emitted above *de minimis* amounts to the Secretary under section 4:

Greenhouse Gas Compound	tons/year
carbon dioxide	10,000
methane	476

nitrous oxide	32.6
perfluorocarbons	1.09
sulfur hexafluoride	0.42
hydrofluorocarbons	0.855

3.2. Stationary sources which are regulated by the Secretary under W.Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W.Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

§45-42-4. Reporting Requirements.

4.1. ~~By March 31, 2009, and March 31 of each year thereafter, affected~~ Affected sources shall report to the Secretary the quantity of all greenhouse gases emitted above *de minimis* amounts in the previous calendar year at the same time such sources are to report emissions of regulated air pollutants pursuant to the emissions inventory requirements of the Secretary under rule or W.Va. Code §22-5-4(a)(14).

4.2. Affected sources shall only be required to report annual quantities of anthropogenic non-mobile source greenhouse gas emissions directly at the source, and shall not be required to report biogenic or mobile emissions of greenhouse gases, or indirect emissions of greenhouse gases, such as emissions occurring offsite from energy consumption.

4.3. The Secretary shall determine the form and format of the information reported by affected sources under subsection 4.1 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF_6 Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis

4.5. Reports of greenhouse gas emissions submitted to the Secretary under this section shall be signed by a responsible official and shall include the following certification statement: "I, the undersigned, hereby certify that the data transmitted to the West Virginia Department of Environmental Protection is true, accurate, and complete, based upon information and belief formed after reasonable inquiry."

4.6. Greenhouse gases reported under this section are not subject to fees under 45 CSR 30, unless the greenhouse gases are otherwise regulated by the Secretary.

§45-42-5. Greenhouse Gas Emissions Inventory.

5.1. The Secretary shall periodically compile an inventory of greenhouse gas emissions to:

5.1.a. Characterize the relative contributions of greenhouse gas emissions from stationary, area, mobile and biogenic sources in West Virginia; and

5.1 b. Determine the extent to which greenhouse gas emissions are offset by the rate of sequestration, and whether West Virginia is a net sink or emitter of greenhouse gases.

5.2. The greenhouse gas emissions inventory shall include the emissions from stationary sources reported under section 4, and other relevant information regarding significant emissions, reductions, and sequestration of greenhouse gases from stationary, area, mobile and biogenic sources requested by the Secretary under subsections 5.3 and 5.4.

5.3. To inventory greenhouse gas emissions reductions, the Secretary shall consult with the citizenry and other entities such as industry trade groups that have information relating to greenhouse gas emissions reductions, and sequestration ~~. Upon request of the Secretary, such entities shall provide relevant information relating to greenhouse gas emissions reductions, capture and sequestration~~.

5.4. The Department of Agriculture, the Division of Forestry, Marshall University, West Virginia University, West Virginia Geological and Economic Survey, and the Department of Transportation shall enter into interagency agreements with the Secretary and at the Secretary's request provide:

5.4.a. Relevant information relating to greenhouse gas emissions from area, mobile and biogenic sources;

5.4 b. Relevant information relating to greenhouse gas emissions reductions and sequestration; and

5.4.c. Any assistance the Secretary may request during the development of the greenhouse gas emissions inventory.

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

§45-42-6.Greenhouse Gas Emissions Registry Program.

6.1. The Secretary shall develop a registry for the recordation of voluntary reductions of greenhouse gas emissions.

6.2. The greenhouse gas emissions registry program shall be as consistent as possible with developing regional, national, or international programs designed to monitor, quantify and register reductions in greenhouse gas emissions with respect to:

6.2.a. Development of criteria, based on a set of standardized emissions accounting, reporting and verification protocols, to determine baseline emissions and quantification of voluntary reductions in emissions of greenhouse gases;

6.2 b. Public recognition of such voluntary emissions reductions;

6.2.c Consideration of voluntary greenhouse gas emission reductions when determining baselines and reduction requirements under future federal greenhouse gas emission reduction programs; and

6.2.d The ability of sources to participate in future greenhouse gas emission trading programs.

§45-42-7.Economic Development Potential.

7.1 Using information obtained, gathered or developed under this rule, the Secretary will determine whether the reduction and sequestration of greenhouse gas emissions can be developed as an asset for net economic development or will result in a deterrent to net economic development in West Virginia.

§45-42-8.Inconsistency Between Rules.

8.1. In the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and the determination shall be based upon the application of the more stringent provision, term, condition, method or rule

Summary of Industry's Suggested Changes and Comments on 45 CSR 42, Greenhouse Gas Emissions Inventory Program

- Section 2.3. The definition of "anthropogenic" should be revised to state that it is the "result of natural processes that have been influenced significantly by human activities". Adding the term "significantly" makes the definition consistent with the definition of "biogenic" which means a "naturally occurring biological source or process that is not significantly affected by human actions or activity."

- Section 3.1. Applicability. This section should be revised to clarify that only individual greenhouse gases emitted above the *de minimis* amounts are required to be reported. Otherwise, affected sources that trigger any of the *de minimis* amounts could be required to report emissions of all of the greenhouse gases even if they are below the *de minimis* amounts. We do not believe that this is DEP's intent. Also, this section should be revised to clarify that the *de minimis* amounts do not include biogenic emissions.

- Section 4.1. Reporting Requirements. This section should be revised to require reporting of greenhouse gases at the same time the air emissions inventory reporting is required. Sources should not be required to report their emissions at two different times. This section should also be clarified so that only greenhouse gases emitted above the *de minimis* amounts are required to be reported.

- Section 4.2 should be revised so that "mobile" emissions of greenhouse gases are not required to be reported. This section should also be revised to clarify that only direct emissions and not indirect greenhouse gas emissions (e.g., emissions occurring offsite from electricity consumption) are required to be reported. The references in section 4.3 to programs like Climate Leaders could lead sources to include indirect and direct emissions in their reporting. This would lead to double counting of electric generation greenhouse gas emissions and to higher source emissions compared to the *de minimis* amounts.

- Section 4.6 should be added so that sources will not be subject to fees for reporting greenhouse gas emissions, as the purpose of such reporting is to create an inventory, not to generate fees.

- Section 5.3. This section should be revised to delete the requirement that certain entities, including trade associations, must provide relevant information on greenhouse gas emissions, reductions, capture and sequestration to the Secretary upon request. This requirement is not found in the statute and could be interpreted to require such entities to report reductions, which is also not required under the statute.

- Section 7.1. Economic Development Potential. This section should be revised to require the DEP to also determine whether reduction and sequestration will result in a deterrent to net economic development – not just whether it will be an asset.

- Additional questions/issues:

    - A reasonable protocol for reporting greenhouse gas emissions from stationary sources should be developed. Affected sources should not be required to report emissions from individual units within a stationary source if such emissions are insignificant. Affected stationary sources should have the option to report all of its greenhouse gas emissions in the aggregate.

    - Over 30 states have signed on to "The Climate Registry". Does West Virginia intend on signing on? The rule indicates that West Virginia will have its own registry independent of "The Climate Registry". Does DEP intend to rely upon any greenhouse gas registry programs, such as the Chicago Climate Exchange Registry, in developing the registry program?

MEMORANDUM

TO: Karen Price

FROM: David L Yaussy

DATE: May 29, 2007

SUBJECT: DEP Advisory Council Rules

A. Rules for Individual State Certification of Activities Requiring a Federal Permit.
Title 47, Series 5A.

No comment.

B. National Pollutant Discharge Elimination System (NPDES) Program.
Title 47, Series 10.

We would urge the DEP to update the rule. It still contains references to the Chief, rather than the Director (See, for example, Sections 5.13.d.1, 6.2 and 9.1.a.)

Has the DEP updated this rule to reflect changes in the Code of Federal Regulations that were made since it was last comprehensively updated?

C. Antidegradation Implementation Procedures.
Title 60, Series 5.

We agree that the State should do away with Section 6.2. There is no need for an initial presumptive listing procedure at this point. As for the 156 (I counted 157, but I may have miscounted) streams in Appendix A, we will disagree with all those listed except the 39 to which no objections were ever lodged.

D. Requirements Governing Water Quality Standards.

Title 57, Series 2.

There are a couple of minor errors – Section 2.2 has a "then" that should be "than" and Section 6.1 is missing text

We remain disappointed that the State continues to interpret its water quality standards to apply all uses in all streams at all times. Section 6.1 clearly provides that B and C are the only default, or universal, uses

Appendix D should be eliminated. Category C, Water Contact Recreation, is a default use, and listing all streams with that use assigned to them suggests that there are streams that do not have that designation.

Appendix A. The DEP is listing a huge number of trout streams with no justification for their listing. If streams meet the requirements of trout waters, they qualify as such; if they do not, there is no reason to list them. Unless the DEP can document that each stream has year round, multi-age populations, they should not be listed.

DLY:shb