WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #3

Do Not Mark in this Box

RECEIVED
1995 JUL 28 AM 9:16
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY W.Va. Code §§ 11-6A-4 and 11-10-5

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Pollution Control Facilities

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

TITLE OF RULE BEING PROPOSED: ___

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

Robert A. Hoffman
Authorized Signature
James H. Paige III
State Tax Commissioner

6-60

GASTON CAPERTON
GOVERNOR

State of West Virginia
Department of Tax and Revenue

TAX DIVISION
P. O. Box 2389
Charleston, WV 25328-2389

JAMES H. PAIGE III
SECRETARY

RECEIVED
1995 JUL 28 AM 9:16
OFFICE OF WEST VIRGINIA
SECRETARY

CONSENT TO FILE RULE

July 25, 1995

To Whom It May Concern:

Title of Rule:	Pollution Control Facilities
Title Number:	110
Series Number:	6

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 25th day of July, 1995.

James H. Paige, III
Secretary, Tax and Revenue

FISCAL NOTE FOR AGENCY APPROVED RULES

Rule Title: Pollution Control Facilities.

Type of Rule: X Legislative ____ Interpretive ____ Procedural

Agency: State Tax Division
Address: W-300
State Capitol
Charleston, WV

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$	$	$	$	$
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

This amended rule should not create any additional fiscal impact on Departmental expenses.

3. Objectives of these rules:

The purpose of the amendments is to harmonize the rule with S.B. 524, to include in the rule the two methods for valuing those parts of a pollution control facility which produces a profitable by-product, and to provide additional clarification on the appeal of a determination of the taxation of such a facility.

Rule Title: Pollution Control Facilities.

4. Explanation of Overall Economic Impact of Proposed Rule.

   A. Economic Impact on State Government.

      None anticipated.

   B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

3 None anticipated.

   C. Economic Impact on Citizens/Public at Large.

      None anticipated.

Date: July 27, 1995

Signature of Agency Head or Authorized Representative

James H. Paige III
Secretary of Tax and Revenue,
State Tax Commissioner

SUMMARY OF AGENCY APPROVED RULE

Senate Bill 524, enacted March 11, 1995, amended Article 6A, Chapter 11 of the West Virginia Code, which governs the tax treatment for pollution control facilities. The newly enacted Section 11-6A-5 provides direction to determining the value of the subject personal property. The rule is amended accordingly.

STATEMENT OF AGENCY APPROVED RULE

The primary purpose for amending this rule is to harmonize the rule with S.B. 524.

DATE: July 28, 1995

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

LEGISLATIVE RULE TITLE: Pollution Control Facilities

1. Authorizing statute(s) citation: West Virginia Code §§ 11-6A-4 and 11-10-5

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

   June 21, 1995

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

   N/A

   c. Date of public comment period: June 21, 1995 - July 24, 1995

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

   Attached X No comments received ____

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

   July 28, 1995

   f. Name and phone number(s) of agency person(s) to contact for additional information:

   John Montgomery - 558-5330

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

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: N/A

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

N/A

d. Attach findings and detminations and reasons:

Attached N/A

AGENCY APPROVED
WEST VIRGINIA LEGISLATIVE REGULATIONS
DEPARTMENT OF TAX AND REVENUE
TITLE 110
SERIES 6

RECEIVED
1995 JUL 28 AM 9 17
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

POLLUTION CONTROL FACILITIES

---

§ 110-6-1. General.

1.1 **Scope.** - These regulations established general operating procedures for the tax treatment of pollution control facilities.

1.2 **Authority.** - W. Va. Code § 11-6A-4.

1.3 **Filing Date.** -

1.4 **Effective Date.** -

§ 110-6-2. Definitions.

2.1 "Commissioner" means the State Tax Commissioner, or his delegate.

<u>2.2 "Coal waste" means coal waste extracted from a gob pile located in West Virginia.</u>

<u>2.3 "Coal waste disposal power project" means an electrical generation facility designed, constructed or installed to reclaim, burn and dispose of coal wastes in compliance with applicable air and water quality standards and which meets the criteria for financing under W. Va. Code § 13-2C-21.</u>

~~2.2~~ <u>2.4</u> "Facility" or "Pollution Control Facility" means any personal property designed, constructed, or installed primarily for the purpose of abating or reducing water or air pollution or contamination by removing, altering, disposing, treating, storing, or dispersing the concentration of pollutants, contaminants, wastes or heat in compliance with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, the design, construction, and installation of which personal property was approved as a pollution control facility by the Water Resources Division of the Department of Natural Resources or the Air Pollution Control Commission, as the case may be. The definition of facilities eligible for salvage tax treatment shall be strictly construed so as to include only such equipment and devices as are installed primarily and immediately to abate air or water pollution. These items of personal property which may coincidentally comply with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, but which are primarily installed for plant operations or are productive, ~~or add to the economic value of a business~~

~~enterprise or have a market value after installation in excess of salvage value,~~ will not be deemed eligible for salvage tax treatment.

For purposes of W. Va. Code § 11-6A-3, with the exception of intangible personal property, furniture, fixtures, inventories, materials and supplies used in the operation of the facility, all items of personal property installed at a coal waste disposal power project are deemed a pollution control facility.

~~2.3~~ 2.5 "Personal Property" means things of value, moveable and tangible, which are the subjects of ownership. This definition is found as a part of West Virginia Code § 11-15-3 and applied to all of Chapter 11. For purposes of these regulations, personal property is deemed to be only machinery and equipment.

~~2.4~~ 2.6 "Moveable", as used in Section ~~2.3~~ 2.5, relates to a device or piece of equipment capable of being moved from one location to another.

~~2.5~~ 2.7 "Salvage Value" means the price for which such facility would sell in place if voluntarily offered for sale by the owner thereof; that is to say, the scrap value of the material of an eligible facility less the cost of removal of said facility. Administratively, salvage value will be five percent of original cost.

§ 110-6-3. Statement of Pollution Control Facilities Tax Treatment.

3.1 Pollution control facilities are required for the protection and benefit of the environment and the general welfare of the public. However, pollution control facilities are considered to be nonproductive, to not add to the economic value of a business enterprise, and to have no market value after installation in excess of salvage value.

~~§ 110-6-3.~~ § 110-6-4. Approval as Pollution Control Facility.

~~3.1~~ 4.1 Any owner or taxpayer requesting salvage valuation for a pollution control facility under the authority of W. Va. Code § 11-6A-3 must receive approval from the appropriate state agency governing the control of air or water pollution. The approval must state that the pollution control facility subject to salvage value consideration is designed, constructed or installed primarily for the purpose of abating air or water pollution, and does abate or reduce water or air pollution in compliance with air or water quality standards prescribed under the laws of this State or the United States.

~~§ 110-6-4.~~ § 110-6-5. Allocation or Separation of Values.

5.1 The value of a pollution control facility first placed in operation subsequent to July 1, 1973 is, for the purpose of ad valorem taxation, deemed to be its salvage value.

5.2 When allocating value to a coal waste disposal power project, the salvage value shall be accorded to a portion of the total personal property at the project. That portion shall be equal to the ratio of tons of West Virginia coal waste burned and disposed of at the project to the total tons of coal and coal waste burned and disposed of at the project during the immediately preceding calendar year.

5.2.1 For a project placed in service prior to March 11, 1995 at which the ratio for the calendar year ending December 31, 1994 was less than 70%, the salvage value shall be accorded to 63% of the total personal property at the project for tax years beginning after March 11, 1995, regardless of the actual ratio for any calendar year. The remaining portion of the personal property at the project, but in no event less than 25% of the total personal property at the project, must be accorded full value, that is value without reference to salvage value.

5.3 A facility will not qualify as a pollution control facility under W. Va. Code § 11-6A-5(b) if it burns coal, coal waste or fuel waste obtained from outside West Virginia after March 11, 1995.

~~4.1~~ 5.4 Where the pollution control facility produces a profitable by-product or where a part of such facility is required for the operation of the business without regard to the requirements of state or federal air or water qualify standards, the tax commissioner shall allocate or separate that portion of value attributable to the pollution control activity. Two (2) methods have been developed whereby the Tax Commissioner may accomplish that activity:

5.4.1 **Component Method.**

5.4.1.1 The component method will receive primary consideration as a method of allocation or separation of values of a pollution control facility. The component method of allocation or separation of values requires the identification of the specific item or component of machinery and/or equipment which is used for the purpose of pollution abatement control but which is also an integral part of the production process and the identification of the acquisition cost of the specific item or component. The component thus identified will be appraised at five percent (5%) of acquisition cost. (For example, a conveyor belt system is used to transport fuel to a boiler to produce energy. The conveyor belt line, while not a pollution abatement control device, contains water sprays and is totally enclosed to retard dust during the transportation process. While the belt line is not a pollution abatement control device but an integral part of the production process, the dust conveyors and the water sprays are eligible pollution abatement facilities. The acquisition costs of these items eligible for salvage value treatment are readily discernible and will receive salvage value treatment.)

5.4.1.2 If an item or the cost associated with an item is not discernible, the alternative substitution method would be used.

5.4.2 **Substitution Method.**

5.4.2.1 When acquisition costs for eligible pollution abatement control items or components are not discernible or the items or components' use or purpose are such an integral part of the production process that the specific use or task is not clearly ascertainable, the substitution method will be applied.

5.4.2.2 The substitution method of allocation or separation of valuation is based on the assumption that the value attributable to pollution control is the difference between the value of a similar facility which has the same utility without the pollution abatement attributes and the value of the subject property being appraised which has pollution abatement attributes. (For example, a double-walled pipe used for the transportation of a product from the manufacturing area of the plant to the loading area. A single-walled pipe or other means of transportation is required for the operation of the business whereas the double-walled pipe is twenty-five percent higher than single wall.) The additional cost of the twenty-five percent would represent the value attributable to pollution abatement control for the purposes of ad valorem taxation.

~~§ 110-6-5.~~ § 110-6-6. Recommendation of Values to County Assessor.

~~5.1~~ 6.1 Each county assessor will be notified before December ~~first~~ fifteenth of any eligible facility in his county on the preceding July first assessment day together with the salvage value of each such facility. Said notice will recommend that the assessor use the salvage value provided as the appraised value of such facility.

~~§ 110-6-4.~~ § 110-6-7. Annual List of Eligible Facility Items.

~~6.1~~ 7.1 The tax commissioner, annually before July tenth, will prepare a list of apparatus, equipment and components which ~~are~~ as of that date have been deemed to be eligible for salvage treatment under provisions of Article 6A, Chapter 11 of the Code and these regulations. Such list shall be revised annually to include items made eligible by administrative or judicial decision subsequent to the most recent July tenth list date. This list shall be deemed to be a listing of items contemplated for pollution control facility treatment as authorized in Section 4.1 of these regulations.

~~§ 110-6-7.~~ § 110-6-8. Administrative Remedy.

~~7.1~~ 8.1 ~~Any taxpayer or government official claiming~~ The owner of property assessed under Article 3, Chapter 11 of the Code, properly the subject of a determination of the applicability of Pollution Control Facilities Tax Treatment authorized under Article 6A, Chapter 11 of the West Virginia Code, or the Assessor of the county in which such property is assessed, who claims to be aggrieved or damaged by the tax commissioner by the inclusion or exclusion of a facility or any component thereof, or an allocation of any portion thereof, ~~may~~ shall appeal such action to the commissioner under the authority of W. Va. Code § 11-3-24a. Disputes concerning whether an item of personal property qualifies as a "facility" or "pollution control facility" as defined in Section ~~2.2~~ 2.4 above shall be deemed to be matters of classification or taxability and as such are appealable under the provisions of W. Va. Code § 11-3-24a.

WEIRTON
STEEL CORPORATION

July 21, 1995

Via facsimile # 304-558-3269

Legal Division
WV Dept. Of Tax and Revenue
Charleston, WV 25324-1005

Re: Comments on Proposed Rule Relating to Pollution Control Facilities (Title 110, Series 6)

Dear Sir or Madam:

In lieu of a public hearing, the following comments are submitted within the comment period relating to the proposed rule on pollution control facilities:

Comment One:

110-6-5.3 A facility will not qualify as a pollution control facility under W. Va. Code Section 11-6A-5(b) if it burns coal, coal waste or fuel waste obtained from outside West Virginia after March 11, 1995.

The above rule is violative of the spirit and technical requirements of the Commerce Clause of the United States Constitution in that it discriminates against interstate commerce. The apparent purpose of this rule is to favor local commercial interests over those of out-of-state businesses and impedes upon taxpayer's rights to utilize interstate commerce to successfully compete in the marketplace. Such facial discrimination has been held invalid even where there is no intent to discriminate. Kraft General Foods v. Iowa Dept. Of Revenue, 112 S.Ct. 2365 (1992). See also New Energy Co. Of Indiana v. Limbach, 486 U.S. 269 (1988), and most recently, West Lynn Creamery, Inc. V. Healy, 114 S.Ct. 2205 (1994).

Comment Two:

Section 110-6-2.4: "Facility or "Pollution Control Facility" means any personal property....

The narrow construction of the rule that salvage value is only applicable to personal property overlooks the economic and legal requirements and realities that pollution control facilities sometimes includes capital improvements upon real property in areas such as remediation, land improvements, and real property structures built around personal property. The definition at present excludes such improvements made that are required for the protection and benefit of the environment and the general welfare of the public, yet do not add economic value to the business. Further, if the primary purpose of a building or capital improvement is to preserve the economic life of pollution control equipment, it's market value is only that of preserving equipment that has no economic value to the business enterprise, and accordingly, should be subject to a residual value for assessment purposes.

Comment Three:

110-6-2.4: These items of personal property which may coincidentally comply with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, but which are primarily installed for plant operations or are productive, will not be deemed eligible for salvage tax treatment.

"Coincidentally" does not fully address fact patterns in the middle range of the continuum that exist in a large industrial facility. There are situations where a taxpayer receives significant benefit from a piece of equipment from its productive capabilities as well as for its pollution control features. In such a circumstance, the substitution method proposed at 5.4.2 would result in no cost apportionment to the pollution control equipment, and hence no tax reduction. A third test would be more representative of the economic consequences, that being a proportionality method based on the pollution control features of the property over the pollution control features and production features of the property (discussed more fully in comment Four).

Comment Four:

110-6-5.4.3 (Suggested): Proportionate Method.
5.4.3.1 When the component or substitution method fail to apprehend the economic consequences of installing pollution control equipment, a proportionality method based on the pollution control features of the property over the pollution control features and production features of the property will be applied. The numerator will represent the lesser of the proportion of the value of the property that is related to pollution control as determined on a functional basis or the separate value of the pollution control element of the property installed as a standalone item; over the total cost of the property.

Such a test would not penalize taxpayer's who for economic efficiency purposes attempt to meet the general welfare of the public as well as maintain competitiveness in the marketplace in the outlays for new property.

Should you have any questions relating to the above comments, please contact me at 304-797-2718. Thank you for your consideration.

Very truly yours,

James J. Pierson

James J. Pierson
Corporate Tax Director

PUBLIC COMMENTS AND RESPONSES THERETO ON THE POLLUTION CONTROL FACILITIES REGULATIONS

Set forth below are public comments received by the Department of Tax and Revenue pertaining to the Pollution Control Facilities Regulations. For purposes of responding to the issues presented, the comments have been condensed rather than repeated verbatim. Copies of the original correspondence containing the comments are attached for your review.

COMMENT: The Department of Tax and Revenue has attempted to change the definition of "personal property" in the absence of statutory authorization.

RESPONSE: Section 2.5 has been returned to its original language.

COMMENT: Section 5.3 violates the Commerce Clause of the United States Constitution in that it prohibits pollution control facility treatment to those facilities which burn coal, coal waste or fuel waste obtained from outside West Virginia.

RESPONSE: Senate Bill 524, in effect from passage on March 11, 1995, enacted West Virginia Code § 11-6A-5, which in pertinent part provides as follows:

> ...Provided, however, That the facility shall not qualify as a pollution control facility under this subsection if it burns coal, coal waste or fuel waste from outside the state of West Virginia after the effective date of this section.

The Department does not possess the authority to make a unilateral determination of the constitutionality of statutory language; rather, it is the position of the Department that it must administer the laws as enacted by the Legislature. It is the responsibility of the Judiciary to determine whether statutory language passes constitutional muster. The language in the Rule merely reflects the prohibition in S.B. 524; this is a situation which the Department may not on its own authority change.

COMMENTS: The salvage value available under the statutory and regulatory system is applicable to only personal property, but does not apply to capital improvements upon real property in areas such as remediation, land improvements, and real property structures built around personal property.

RESPONSE: West Virginia Code § 11-6A-2 provides the following:

> As used in this article, "pollution control facility" means any personal property designed, constructed or installed primarily for the purpose of abating or reducing water or air pollution or contamination by removing, altering, disposing, treating, storing or dispersing the concentration of pollutants, contaminates, wastes or heat in compliance with air or water

quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, the design, construction and installation of which personal property was approved as a pollution control facility by either the office of water resources or the office of air quality, both of the division of environmental protection, as the case may be.

As provided above, the term "pollution control facility" relates to only personal property, not real property. There is no statutory authority to expand the definition to include real property, and the Department may not do so without any such authority.

COMMENT: The definition of "pollution control facility" should include personal property which provides significant pollution control benefits even if that result is not the reason for the property being used.

RESPONSE: Please note the foregoing Section 11-6A-2 which states that the personal property must be "designed, constructed or installed primarily" for pollution control purposes. As a result, the personal property which "coincidentally" complies with air, water or effluent standards but installed primarily for plant operations does not fall within the definition and, therefore, may not receive the preferential salvage valuation.

COMMENT: A new method for allocating or separating values, called the "Proportionate Method", is suggested. This method apparently is for those situations where a piece of equipment is installed and used for operational purposes, rather than for pollution control purposes, and should be valued at least in part for any resulting pollution control.

RESPONSE: As indicated previously, Section 11-6A-2 requires that the property be "designed, constructed or installed primarily" for pollution control purposes. This new method would allow personal property other than that which is "designed, constructed or installed primarily" for pollution control purposes to also receive the salvage value, even though there is no statutory authorization. Such a change may occur only as a result of a statutory amendment. The Department does not possess authority to use a method which provides a result other than that intended by Section 11-6A-2.

COMMENT: The annual listing of apparatus, equipment and components which have been deemed eligible for salvage treatment and which was prepared by the Tax Commissioner should be a listing of items "approved" for pollution control facility treatment, not just "contemplated" for such treatment.

RESPONSE: The purpose of the sentence in question is not that of a listing of approved items; rather, it is a listing of items for which pollution control facility treatment is available, depending upon how the property is ultimately used. As a result, a statement that the property is approved for pollution control facility treatment absent any other consideration is not appropriate.

COMMENT: Section 8.1 should reflect the difference between property assessed by the Board of Public Works under W. Va. Code § 11-6-1 et seq. and property assessed under W. Va. Code § 11-3-1 et seq. .

RESPONSE: The Department agrees and has made the suggested change.

COMMENT: Reference to the West Virginia Code should be consistent with previous references.

RESPONSE: The Department agrees and has made the suggested change.

COMMENT: For public service businesses, the administrative remedies available under Article 6 should be applicable to a determination concerning pollution control facilities treatment which is made under Article 6A.

RESPONSE: The Department disagrees. Article 6 relates to the valuation of public service business while W. Va. Code § 11-3-24a relates to property assessed under Article 3. The appeal for property valuations under Article 3 is to the assessor, then to the Tax Commissioner, and finally to the circuit court. For property assessed under Article 6, the appeal is first to the Board of Public Works and then to the circuit court. The proposal would remove the Tax Commissioner from the appeal process and, in the Commissioner's place, allow the Board of Public Works to determine the application of the pollution control facilities treatment. As such treatment is primarily dependent upon an approval of the Division of Environmental Protection, there is no valid reason for the involvement by the Board of Public Works.

John K. Kinzer
Vice President, Taxes
(304) 526-3629
(304) 526-3656 FAX

Ashland Coal, Inc.

P.O. Box 6300
Huntington, WV 25771-6300

July 20, 1995

State of West Virginia
Department of Tax and Revenue
Legal Division
P. O. Box 1005
Charleston, West Virginia 25324-1005

'95 JUL 21 AM 10 46
STATE TAX DEPT.
LEGAL DIVISION

CERTIFIED MAIL
P 921 162 570

Gentlemen:

Re: **PROPOSED WEST VIRGINIA LEGISLATIVE REGULATIONS POLLUTION CONTROL FACILITIES, SECTION 110-6-1**

Ashland Coal, Inc. would like to take this opportunity to comment on the proposed changes to the pollution control facility rules. According to Appendix B, the objective of these rules "is to harmonize the rule with S.B. 524, to include in the rule the two methods for valuing those parts of a pollution control facility which produces a profitable by-product, and to provide additional clarification on the appeal of a determination of the taxation of such a facility." The changes made to the definition of "personal property" go far beyond the stated objective and are not only without statutory authority, but are actually contradictory to the clear language of Section 11-6A-2 of the West Virginia Code (Code). The egregious changes are contained in revised subsection 2.5, as follows:

> ~~2.3~~ 2.5 "Personal Property" means things of value, moveable and tangible, which are the subjects of ownership. ~~This definition is found as a part of West Virginia Code § 11-5-3 and applied to all of Chapter 11.~~ For purposes of these regulations, personal property is deemed to be only machinery and equipment.

Section 11-6A-2 of the Code reads as follows:

> **Sec. 11-6A-2. Definition.** - As used in this article, "pollution control facility" means any personal property designed, constructed or installed primarily for the purpose of abating or reducing water or air pollution or contamination by removing, altering, disposing, treating, storing or dispersing the concentration of pollutants, contaminants, wastes or heat in compliance with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United

> States, the design, construction and installation of which personal property was approved as a pollution control facility by either the office of water resources or the office of air quality, both of the division of environmental protection, as the case may be. (Emphasis Added)

Section 11-5-3 of the Code defines personal property for the purpose of assessment of personal property. This section reads in part as follows:

> **Sec. 11-5-3. Definitions. -** The words *"personal property,"* as used in this chapter, shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value, movable and tangible, which are the subjects of ownership; . . . (Emphasis Added)

There is no authority in Article 6A for the Department of Tax and Revenue to limit the definition of personal property. Article 6A does not contain a definition of personal property, however, the definition contained in Article 5 applies to all of Chapter 11 and therefore is controlling for this rule. It is interesting that the language proposed to be struck from the definition of personal property in actually confirms this.

The additional language "for purposes of these regulations, personal property is deemed to be only machinery and equipment" clearly limits the definition of personal property. We strongly object to the definition of personal property contained in the proposed amendment to the pollution control facility rules. The Legislature clearly intended for the reduction in value to apply to any personal property and equipment, not just machinery and equipment which is movable, which otherwise meets the criteria of Section 11-6A-2. The presumption that only moveable machinery and equipment can meet the criteria of this section is erroneous.

If you have any questions on my comments you may reach me at 304-526-3629.

Very truly yours,

ASHLAND COAL, INC.

John K. Kinzer
Vice President, Taxes

JKK/fah

Appalachian Power Company
PO Box 1986
Charleston, WV 25327-1986
304 348 4700

APPALACHIAN POWER

July 24, 1995

State of West Virginia
Department of Tax and Revenue
Legal Division
P. O. Box 1005
Charleston, West Virginia 25324-1005

Subject: Proposed Rules For Pollution Control Facilities

Ladies and Gentlemen:

In response to the Notice Of A Comment Period On A Proposed Rule filed on June 21, 1995 in the Office of the West Virginia Secretary of State, the following comments are submitted regarding the proposed West Virginia Legislative Regulations, Title 110, Series 6, concerning the tax treatment of Pollution Control Facilities.

1. SECTION 2.5 OF THE PROPOSED RULES SHOULD DEFINE PERSONAL PROPERTY IN A MANNER CONSISTENT WITH THE STATUTE.

Section 2.5 of the proposed rules would delete from the existing rules the reference to the definition of personal property contained in §11-5-3 of the West Virginia Code (the Code), and limit the definition for pollution control tax treatment purposes to only machinery and equipment. There is no foundation in the statute for such restriction of the definition of personal property.

Section 11-6A-2 of the Code provides the following definition, in relevant part:

> ... "pollution control facility" means *any personal property* designed, constructed or installed primarily for the purpose of abating or reducing water or air pollution ... [Emphasis added.]

Section 11-5-3 of the Code provides the definition of the words personal property "as used in this chapter." In so stating, it defines the term personal property for all purposes under Chapter 11 of the Code, including the provisions concerning pollution control facilities. In ascribing a more restrictive meaning, Section 2.5 of the proposed regulations seeks to limit by administrative rule that to which taxpayers are entitled by statute.

In order to provide a definition of personal property that is consistent with the statute, section 2.5 of the proposed regulations should either be replaced with the definition contained in §11-5-3 of the Code *verbatim* or revised to read as follows:

> 2.5 "Personal Property " shall have the meaning provided in §11-5-3 of the Code.

2. SECTION 7.1 OF THE PROPOSED RULES SHOULD PROVIDE THAT ITEMS INCLUDED IN THE LIST OF ELIGIBLE FACILITIES SHALL BE DEEMED APPROVED UNDER SECTION 4.1 OF THE REGULATIONS.

Section 11-6A-2 of the Code provides that in order to qualify as a pollution control facility, a facility must be approved as such by the Division of Environmental Protection (DEP). Section 4.1 of the proposed regulations mirrors that requirement. However, there is currently no regulation or procedure in place for the DEP to process requests for or issue such approvals.

In order to assure that the requirements of the statute and regulations for approval of pollution control facilities will be met, the last sentence of section 7.1 of the proposed regulations should be revised by deleting the word "contemplated" and inserting in its place the word "approved" and deleting by the words "as authorized in" and inserting in their place the word "under." The revised sentence would read as follows:

> This list shall be deemed to be a listing of items approved for pollution control facility treatment under Section 4.1 of these regulations.

3. SECTION 8 OF THE PROPOSED REGULATIONS SHOULD DISTINGUISH BETWEEN THE ADMINISTRATIVE REMEDIES APPLICABLE TO ASSESSMENTS OF PUBLIC SERVICE BUSINESSES AND ASSESSMENTS GENERALLY.

Public service businesses are assessed under Article 6, Chapter 11 of the Code. Sections 11-6-9 and 11-6-11 of the Code provide an owner or operator an opportunity to review a tentative assessment and to be heard by the Board of Public Works before an assessment is certified to the auditor. Under §11-6-12 of the Code an owner or operator claiming to be aggrieved by the Board's valuation may appeal to the circuit court.

Section 8.1 of the proposed regulations does not reflect the differences in administrative remedies applicable to public service business assessments.

In order to accurately describe the available administrative remedies, the first sentence of section 8.1 of the proposed regulations should be revised by inserting after the word property in the second line the words "assessed under Article 3, Chapter 11 of the Code." In addition, references to the West Virginia Code in that sentence should, for the sake of consistency, be conformed to the format used throughout the regulation. The revised sentence would read as follows:

> The owner of property assessed under Article 3, Chapter 11 of the Code properly the subject of a determination of the applicability of Pollution Control Facilities Tax Treatment authorized under Article 6A, Chapter 11 of the Code, or the Assessor of the county in which such property is assessed, who claims to be aggrieved or damaged by the tax commissioner by the inclusion or exclusion of a facility or any component thereof, or an allocation of any portion thereof, shall appeal such action to the commissioner under the authority of W. Va. Code §11-3-24A.

In addition the following section should be added:

> 8.2 In the case of property of public service businesses assessed under Article 6, Chapter 11 of the Code, the administrative remedies in said Article 6 shall be applicable to a determination by the commissioner concerning pollution control facilities tax treatment.

Very truly yours,

P. Scott Icard

P. Scott Icard
Governmental Affairs Manager

WEIRTON
STEEL CORPORATION

July 21, 1995

Via facsimile # 304-558-3269

Legal Division
WV Dept. Of Tax and Revenue
Charleston, WV 25324-1005

Re: Comments on Proposed Rule Relating to Pollution Control Facilities (Title 110, Series 6)

Dear Sir or Madam:

In lieu of a public hearing, the following comments are submitted within the comment period relating to the proposed rule on pollution control facilities:

Comment One:

110-6-5.3 A facility will not qualify as a pollution control facility under W. Va. Code Section 11-6A-5(b) if it burns coal, coal waste or fuel waste obtained from outside West Virginia after March 11, 1995.

The above rule is violative of the spirit and technical requirements of the Commerce Clause of the United States Constitution in that it discriminates against interstate commerce. The apparent purpose of this rule is to favor local commercial interests over those of out-of-state businesses and impedes upon taxpayer's rights to utilize interstate commerce to successfully compete in the marketplace. Such facial discrimination has been held invalid even where there is no intent to discriminate. Kraft General Foods v. Iowa Dept. Of Revenue, 112 S.Ct. 2365 (1992). See also New Energy Co. Of Indiana v. Limbach, 486 U.S. 269 (1988), and most recently, West Lynn Creamery, Inc. V. Healy, 114 S.Ct. 2205 (1994).

Comment Two:

Section 110-6-2.4: "Facility or "Pollution Control Facility" means any personal property....

The narrow construction of the rule that salvage value is only applicable to personal property overlooks the economic and legal requirements and realities that pollution control facilities sometimes includes capital improvements upon real property in areas such as remediation, land improvements, and real property structures built around personal property. The definition at present excludes such improvements made that are required for the protection and benefit of the environment and the general welfare of the public, yet do not add economic value to the business. Further, if the primary purpose of a building or capital improvement is to preserve the economic life of pollution control equipment, it's market value is only that of preserving equipment that has no economic value to the business enterprise, and accordingly, should be subject to a residual value for assessment purposes.

Comment Three:

110-6-2.4: These items of personal property which may coincidentally comply with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, but which are primarily installed for plant operations or are productive, will not be deemed eligible for salvage tax treatment.

"Coincidentally" does not fully address fact patterns in the middle range of the continuum that exist in a large industrial facility. There are situations where a taxpayer receives significant benefit from a piece of equipment from its productive capabilities as well as for its pollution control features. In such a circumstance, the substitution method proposed at 5.4.2 would result in no cost apportionment to the pollution control equipment, and hence no tax reduction. A third test would be more representative of the economic consequences, that being a proportionality method based on the pollution control features of the property over the pollution control features and production features of the property (discussed more fully in comment Four).

Comment Four:

110-6-5.4.3 (Suggested): Proportionate Method.

5.4.3.1 When the component or substitution method fail to apprehend the economic consequences of installing pollution control equipment, a proportionality method based on the pollution control features of the property over the pollution control features and production features of the property will be applied. The numerator will represent the lesser of the proportion of the value of the property that is related to pollution control as determined on a functional basis or the separate value of the pollution control element of the property installed as a standalone item; over the total cost of the property.

Such a test would not penalize taxpayer's who for economic efficiency purposes attempt to meet the general welfare of the public as well as maintain competitiveness in the marketplace in the outlays for new property.

Should you have any questions relating to the above comments, please contact me at 304-797-2718. Thank you for your consideration.

Very truly yours,

James J. Pierson

James J. Pierson
Corporate Tax Director