

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #3

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SECRETARY OF STATE  
STATE OF WEST VIRGINIA

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

AGENCY: Department of Environmental Protection *Waste Management* TITLE NUMBER: 33

CITE AUTHORITY: West Virginia Code §22-15A-19(h)(1)

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: RECYCLING ASSISTANCE GRANT PROGRAM

IF NO, SERIES NUMBER OF 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.

  
Authorized Signature

**QUESTIONNAIRE**

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

DATE: 7/26/2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection  
601 57th Street, S.E.  
Charleston, WV 25304  
(304) 926-0499

LEGISLATIVE RULE TITLE: RECYCLING ASSISTANCE GRANT PROGRAM

1. Authorizing statute(s) citation West Virginia Code §22-15A-19(h)(1)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
June 5, 2007

b. What other notice, including advertising, did you give of the hearing?  
Class I Legal Ad in Charleston Gazette and Daily Mail  
Agency Mailing List  
Agency Website  
Agency Newsletter

c. Date of Public Hearing(s) *or* Public Comment Period ended:  
July 12, 2007

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 27, 2007

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

Danny Haught, Chief of REAP

601 57th Street, S.E.

Charleston, WV 25304

(304) 926-0499, ext 1137

Fax: (304) 926-0457

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

Same

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

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

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**BRIEFING DOCUMENT**

**Rule Title: Recycling Assistance Grant Program**

**A. AUTHORITY: West Virginia Code §22-15A-19(h)(1)**

**B. SUMMARY OF RULE:**

**This rule updates and streamlines the recycling grant requirements, clarifies the use of grant funding, increases the maximum grant funding levels per grantee, revises the Recycling Assistance Fund Grant Review Committee and establishes agency review criteria.**

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

**The proposed rule amendment is a result of Senate Bill 428, enacted Article 15A, The A. James Manchin Rehabilitation Environmental Action Plan, which transferred the Recycling Assistance Grant Program from the Division of Natural Resources to the Department of Environmental Protection.**

**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.)**

**ADVISORY COUNCIL MEETING MINUTES**

Monday – May 21, 2007

1:00 p.m. – 3:00 p.m.

601 57<sup>th</sup> Street, SE, Charleston, WV

West Virginia Room – 3<sup>rd</sup> 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 57<sup>th</sup> 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<sub>2</sub> & PM NAAQS include correction of SO<sub>2</sub> annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour PM<sub>2.5</sub> standards, and addition of measurement methods for PM<sub>2.5</sub>. 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<sub>2</sub> 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<sub>2</sub> 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. Raney: 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 tanks 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

## 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.

**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 as 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 de minimis 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.

**ADVISORY COUNCIL MEETING MINUTES**

Wednesday – May 30, 2007

10:00 a.m. – 12:00 p.m.

601 57<sup>th</sup> Street, SE, Charleston, WV

West Virginia Room – 3<sup>rd</sup> 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<sub>2</sub> & PM NAAQS include correction of SO<sub>2</sub> annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour PM<sub>2.5</sub> standards, and addition of measurement methods for PM<sub>2.5</sub>. 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<sub>2</sub> 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<sub>2.5</sub> Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m<sup>3</sup>. This should be 65 ug/m<sup>3</sup>, 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 anti-degradation 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<sub>2</sub> 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 PM<sub>2.5</sub> 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 31<sup>st</sup> 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 tanks 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 completely 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.

Council Meeting - 5/30/07  
Comments  
Submitted  
by Bill Ramey

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 is 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 57<sup>th</sup> 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.<sup>1</sup>

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).<sup>2</sup>

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.<sup>3</sup>

<sup>1</sup> Programmatic Environmental Impact Statement. Corps, EPA et al. 2005 page II.C-42.

<sup>2</sup> Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec 13, 1996. 61 Fed. Reg. 241.

<sup>3</sup> 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.<sup>4</sup> 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

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<sup>4</sup> 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.<sup>5</sup> 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/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.<sup>6</sup>

<sup>5</sup> See pages \_\_\_\_ of attachment "A", comments filed by WVCA concerning the draft federal mitigation rule.

<sup>6</sup> "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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

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

<sup>7</sup> Regulatory Guidance Letter No 01-1. U.S. Army Corps of Engineers, October 31, 2001.

<sup>8</sup> Regulatory Guidance Letter No 02-2. U.S. Army Corps of Engineers, December 24, 2002.

<sup>9</sup> Compensatory Mitigation Guidelines- Huntington District U.S. Army Corps of Engineers, Huntington, WV District. January 30, 2004.

<sup>10</sup> 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 Information about the coal mining operations, including, without limitation, the estimated number of jobs created, the estimated proportion of employees who will be residents of West Virginia, the estimated annual 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 1/2 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 1/2 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 1/2 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.A Permanent 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.C Temporary 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) lineal 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.

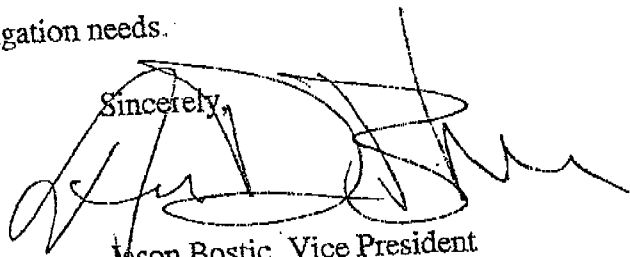
Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation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

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ [www.wvcoal.com](http://www.wvcoal.com)

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

Via Electronic Mail: [Gjshaffer@wvdep.org](mailto: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.<sup>6</sup> 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.<sup>7</sup> 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

<sup>6</sup> 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.

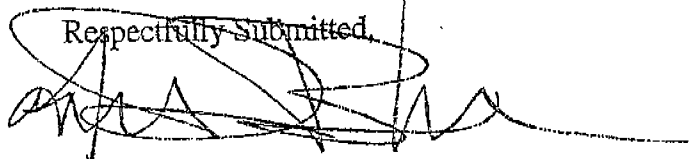
<sup>7</sup> See Attachment "H", relevant pages from comments filed by the National Mining Association and WVCA regarding the programmatic Mountaintop Mining/ Valley Fill Environmental Impact Statement and *Fish Communities and Their Responses to Environmental Factors in the Kanawha River Basin, West 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 by 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,

A handwritten signature in black ink, appearing to read "Jason D. Bostic", is written over the typed name and extends to the right across the page.

Jason D. Bostic  
West Virginia Coal Association



# West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 ■ (304) 342-4153 ■ Fax 342-7651 ■ [www.wvcoal.com](http://www.wvcoal.com)

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July 17, 2006

Mr. Charles Sturey  
West Virginia Department of Environmental Protection  
Division of Mining & Reclamation  
601 57<sup>th</sup> 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.

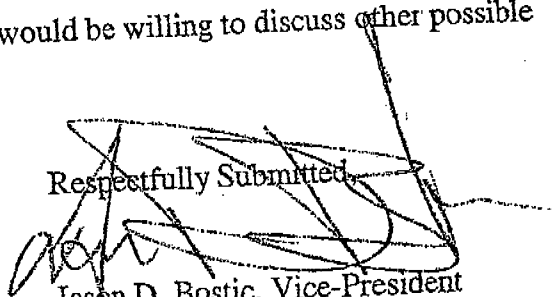
As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect 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 CSRSA 45CSR42  
TRADU LISTON

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 on  
exemption info  
on inclusion  
5.3 "shall provide  
information?"

§45-42-1. General.

11 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<sub>6</sub>).

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
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Prep Plants under title 11

only stationary sources

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 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<sub>6</sub>

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 Area 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 CO<sub>2</sub> 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 SO<sub>2</sub> 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 PM<sub>2.5</sub> and Ozone are not adequately protective. I recommend that the standards be lowered from 15  $\mu\text{g}/\text{m}^3$  to 13  $\mu\text{g}/\text{m}^3$  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 PM<sub>2.5</sub> 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 Pree 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<sub>2.5</sub> Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m<sup>3</sup>. This should be 65 ug/m<sup>3</sup>, 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 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.

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 USI 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.

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 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<sub>6</sub>)

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
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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<sub>6</sub> 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

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**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

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: 33CSR10 Recycling Assistance Grant Program

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Department of Environmental Protection

Address: 601 57th Street, S.E.  
Charleston, WV 25304

Phone Number: (304) 926-0455 Email: kellison@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.

This proposed rule amendment makes programmatic guidance and procedural changes and will have no impact on costs and revenues of state government.

**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	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: \_\_\_\_\_

Rule Title:

33CSR10 Recycling Assistance Grant Program

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

The proposed amendments to the Recycling Assistance Grant Program Rule will cause no increase or decrease in fees.

**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.

The proposed amendments will not have any immediate or overall fiscal impact on state government.

Date: \_\_\_\_\_

Signature of Agency Head or Authorized Representative

\_\_\_\_\_

TITLE **58 33**  
LEGISLATIVE RULE  
BUREAU OF COMMERCE  
DIVISION OF NATURAL RESOURCES  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
SERIES **5 10**  
RECYCLING ASSISTANCE GRANT PROGRAM

SECRETARY OF STATE  
STATE OF WEST VIRGINIA

2001 JUL 27 AM 10: 22

RECEIVED

**§58-5 33-10-1. General.**

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

1.2. Authority. -- West Virginia Code ~~§20-11-5a(h)(1).~~ §22-15A-19(h)(1).

1.3. Filing date. -- ~~April 14, 2000~~

1.4. Effective Date. -- ~~May 1, 2000~~

**§58-5 33-10-2. Definitions.**

2.1. ~~“Director” means the director of the Division of Natural Resources, or his or her, authorized representative.~~

2.2. ~~“Instrumentality” means an agency authorized by state law.~~

2.3. ~~“Municipality” means an incorporated community.~~

~~2.4. "Other Interested Party" means private enterprise and nonprofit organizations.~~

~~2.5. "Recycling Market Procurement" means developing markets for the materials generated by recycling programs.~~

~~2.6. "Recyclable Materials" includes, but is not limited to steel and bimetal cans, aluminum, glass, paper, plastic, tires, white goods and yard waste~~

~~2.7. "Source Separated" means materials separated from general solid waste at the point of origin for the purpose of reuse and recycling but does not include sewage sludge.~~

~~2.8. "White Goods" means bulky appliances such as stoves, hot water heaters, sinks, washers, dryers, refrigerators, and dishwashers.~~

~~2.9. "Division" means the West Virginia Division of Natural Resources.~~

~~2.10. The terms as defined in the Solid Waste Management Rule, 47 C.S.R. 38, are adopted for use, where applicable, in this rule.~~

2.1. "Applicant" means the local government or other interested party applying for a grant pursuant to this rule.

2.2. "Bulky goods" means bulky appliances such as stoves, hot water heaters, sinks, washers, dryers, refrigerators, and dishwashers.

2.3. "Cure period" means the period between the submission deadline and 5:00 p.m. on the last business day in July.

2.4. "Department" means the West Virginia Department of Environmental Protection.

2.5. "Financially benefited" means to have received a benefit from a grant, whether by cash, purchases, use of assets, or payment of obligations, that if not received

would have caused the beneficiary to avoid the purchase/service of that benefit or to incur and pay the costs or obligation from other financial resources.

2.6. “Grant period” means the period from January 1 to the last day in February of the following year. The total grant period consists of these fourteen months.

2.7. “Grant Recipient” or “Grantee” means an entity to whom a grant has been awarded.

2.8. “Incomplete proposal” means a proposal that does not meet Department submission requirements.

2.9. “Instrumentality” means an agency authorized by state law.

2.10. “Local government” means any unit of local government within the state, including a county, county board of education, municipality, and any other authority, board, commission, district, office, public authority, public corporation, or other instrumentality of a county, county board of education, or municipality or any combination of two or more local governments.

2.11. “Municipality” means an incorporated community.

2.12. “Other interested party” means private business and enterprise and nonprofit organizations, public and private schools, colleges and universities, and state agencies and municipalities.

2.13. “Proposal” means an application, on the proper forms, requesting a grant through the West Virginia Recycling Assistance Grant Program.

2.14. “Recyclable materials” means, for the purpose of this rule, any source separated material collected from the solid waste stream for the intended purpose of reprocessing or having that material reprocessed into a useable, marketable end product.

This includes, but is not limited to, steel and bimetal cans, aluminum, glass, paper, plastic, tires, bulky goods and yard waste. Provided, That sewage sludge processing facilities are not considered recycling facilities and sewage sludge compost is not considered a recyclable material within the meaning of W.Va. Code Chapter 22, Article 15.

2.15. "Recycle" means the process by which recovered products are transformed into new products and includes the collection, separation, recovery, processing and marketing, or reuse, of that new product.

2.16. "Recycling market procurement" means developing markets for the materials generated by recycling programs.

2.17. "Recycling program" means any program, project, endeavor, or facility created for the purpose of recycling or promoting recycling.

2.18. "Secretary" means the Cabinet Secretary of the West Virginia Department of Environmental Protection.

2.19. "Sewage" means water-carried human or animal wastes from residences, buildings, industrial establishments, or other places together with such groundwater infiltration and surface waters as may be present.

2.20. "Sewage sludge" means any solid, semi-solid or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes, but is not limited to, domestic septic, scum or solids removed in primary, secondary or advanced wastewater treatment processes and a material derived from sewage sludge.

2.21. "Source separated" means materials separated from general solid waste at the point of origin for the purpose of reuse and recycling but does not include sewage sludge.

2.22. "Submission deadline" means the latest date and time that proposals must be received by the department to be considered for funding, which is 5:00 p.m. on the first business day in July.

2.23. "Yard waste" means grass clippings, weeds, leaves, brush, garden waste, shrub or tree prunings and other living or dead plant tissue, except that, such materials which, due to inadvertent contamination or mixture with other substances which render the waste unsuitable for composting, shall not be considered to be yard waste. Provided, that the same or similar waste generated by commercial agricultural enterprises is excluded.

2.24. "Yard waste composting" means the controlled decomposition of yard waste to produce a stable and beneficial humus-like material.

**§58-5 33-10-3. Grants Available From Recycling Assistance Grant Program.**

3.1. The recycling assistance grant program provides grants to assist ~~municipalities, counties and others~~ local governments and other interested parties in:

3.1.1. ~~implementation~~ initiating, expanding, or upgrading ~~of~~ recycling programs;

3.1.2. public education programs which promote recycling; and

3.1.3. recycling market procurement efforts.

3.2. The Recycling Assistance Fund Grant Review Committee shall evaluate the Recycling Assistance grant proposals that have met all department submission requirements and eligibility requirements established by this rule and are in compliance with one or more the criteria of section 3.1 of this rule on a competitive basis considering each proposal's objectives towards maximizing the following factors:

- 3.2.1. conservation of limited natural resources;
- 3.2.2. public education regarding litter control;
- 3.2.3. recycling of valuable materials;
- 3.2.4. extending the useful life of solid waste landfills; and
- 3.2.5. reducing the need for new landfills.

3.3. The following types of grants are available:

3.3.1. Local Government Recycling Feasibility Study and Planning Grant - This grant is for researching the feasibility of community, county, and regional recycling programs including market development and requires submittal of a detailed comprehensive plan. A local government may use a professional service to assist in planning and/or implementing a comprehensive recycling program.

~~3.3.2. Recycling Promotion, Collection Drive, and Office Paper Recovery Grant - This grant is available to instrumentalities and state and private colleges in the absence of a county, municipal, or state recycling program, as provided for in West Virginia Code §20-11-6. The grant is for the purpose of implementing recycling programs consisting of source separation, collection and transportation activities; and may include school projects, drop-off collection bins, paper collection equipment and special events which increase public awareness of recycling and its benefits.~~

~~3.3.3. 3.3.2. Local Government Recycling Program Assistance Grant -~~

~~This grant is for the implementation initiating, or expansion of county, municipal and regional expanding, or upgrading recycling programs, and emphasizes the integration of source reduction and recycling. ~~The local or regional solid waste authority shall have a comprehensive solid waste management and siting plan developed and approved by the West Virginia Solid Waste Management Board to qualify for the grant.~~~~

~~3.3.4. Recycling Market Development Grant This grant is available to state, regional, county or local governments to assist in developing markets for materials collected and/or processed.~~

**§58-5 33-10-4. Grant Program Eligibility and Priority and Other Criteria.**

4.1. All West Virginia ~~municipalities, county commissions, county and regional solid waste authorities, instrumentalities, proprietorships, partnerships, corporations and private schools,~~ entities, as defined under 2.10 and 2.12 of this rule, are eligible to apply for recycling program assistance grants as provided for in subdivisions ~~3.3.1. through 3.3.4. 3.3.2.~~ of this rule, through notification of the county or regional solid waste authority in which the applicant is located. Only local governments are eligible to apply for grants as provided for in subdivision 3.3.1 of this rule, through notification of the county or regional solid waste authority in which the applicant is located. The recycling assistance fund grant review committee shall give priority to those municipalities, counties, state instrumentalities, private schools, proprietorships, partnerships, corporations, and cooperatives, required to ~~implement recycling programs~~ recycle as a result of a county referendum or pursuant to the provisions of West Virginia Code §20-

~~11-5 and 20-11-6 §22-15A-18 and §22-15A-20.~~ If a county has adopted a recycling ordinance by referendum vote, the ordinance shall be consistent with the provisions of West Virginia Code ~~§20-11-5(e)~~ §22-15A-18(c) for the applicant to receive priority for a grant. ~~If the county has one or more municipalities each with a population greater than 10,000, the municipality's program shall, at a minimum, be consistent and coordinated with the county's recycling program.~~ Grant proposals shall meet the following criteria:

~~4.1.1. Municipalities with populations over 10,000; county governments; cooperatives; and other interested parties:~~

~~4.1.1.a. Proposals for grants under subdivision 3.3.1. of this rule shall have work elements that are at a minimum consistent with the provisions of subsections (a) and (b) of West Virginia Code §20-11-5; and~~

~~4.1.1.b. Proposals for grants under subdivision 3.3.3. of this rule shall document that the plan to be implemented has been approved by the solid waste management board. Grant proposals shall include, but not be limited to the following:~~

~~4.1.1.b.A. source separation of at least three recyclable materials;~~

~~4.1.1.b.B. collection and transportation of materials to a processing center; and~~

~~4.1.1.b.C. public education programs which promote recycling.~~

~~4.1.2. A county government required pursuant to West Virginia Code §20-11-5(e) to implement a comprehensive recycling solid waste program shall at a~~

~~minimum develop a program that is in compliance with the provisions of West Virginia Code §20-11-5(c).~~

~~4.1.3. Special funding proposals for five or more communities or two or more counties combining their efforts to provide a cooperative countywide or multi-county recycling program shall have a comprehensive recycling plan which has been approved by the solid waste management board.—~~

~~4.2.— Municipalities with a population under 10,000; absence of a municipal program; other interested parties:~~

~~4.2.1. Municipalities with a population under 10,000 may implement a curbside or drop-off recycling program that includes public education, providing transportation of recyclable materials to a processing center, and integration of other recyclable materials into the program;~~

~~4.2.2. In the absence of either a municipal or a countywide recycling program, all instrumentalities, primary and secondary schools, private colleges and universities are eligible to receive grants under subdivisions 3.3.2. and 3.3.4. of this rule. Grant proposals shall include, but not be limited to the following:~~

~~4.2.2.a. source separation of at least two recyclable materials;~~

~~4.2.2.b. collection and transportation of materials to a processing center; and~~

~~4.2.2.c. public education programs which promote recycling.~~

~~4.2.3. Other interested parties may apply for grants provided that grant proposals are consistent with one or more of the objectives listed under subsection 3.1 of~~

~~this rule, and include, but are not limited to the recycling activities listed under subdivision 4.2.2. of this rule; and~~

4.2.4. 4.2. Persons responsible for collecting, hauling or disposing of solid waste who do not participate in the collection and payment of the solid waste assessment fee imposed by West Virginia Code ~~§20-11-5a~~ §22-15A-19 in addition to all other fees and taxes levied by law for solid waste generated in this state which is destined for disposal, are not eligible to receive grants.

4.3 An applicant that has a current grant from the Recycling Assistance Grant Program is not eligible for the next cycle of grants.

4.4. A request for a waiver to receive consecutive funding may be submitted to the Secretary for the following reasons:

4.4.1. Significant damages, through no fault of the applicant, caused by fire, flood, or other act of nature;

4.4.2. New legislative requirements or restrictions that materially affect program operations.

4.5. A grant recipient who files a delinquent final report shall be ineligible to receive grants for a period of two years following the year in which the delinquent final report was received. A grant recipient who has a final report outstanding and due to the department shall not be eligible to receive a grant.

4.6. Applicants shall be in compliance with all federal, state and local laws, codes, ordinances, rules and regulations to be eligible for a grant.

**§58-5 33-10-5. Use of a Grant.**

5.1. A recycling assistance grant shall be used for:

5.1.1. Personnel - The salary costs ~~associated with~~ of a recycling manager or coordinator, or recycling program laborers. No more than a total of \$25,000 may be used from grant funds for the combined wages and/or benefits of a recycling manager, coordinator, and/or laborers;

5.1.2. ~~Travel~~ Conference Attendance - Educational recycling conference expenses limited to: airfare or mileage, meals, lodging, parking and registration fees. No more than a total of \$1,500 may be used from grant funds for travel;

5.1.3. Office Supplies - ~~allowed for~~ General office supplies, ~~and other~~ supplies, such as collection bags or household bins used for the collection/storage of ~~recyclables~~; used in the ordinary course of business. No more than \$1,000 may be used from grant funds for office supplies, such as paper, stamps, notebooks, and filing supplies.

5.1.4. Operational Supplies – Operational supplies used in the collection, transportation and processing of recyclable material, such as collection bags, household bins, gaylord boxes, baling wire and gloves.

~~5.1.4:~~ 5.1.5. Equipment - Collection equipment, processing equipment, material handling or storage equipment, scales, and safety equipment used in recycling activities. ~~The equipment is to remain in the grantee's name and may be leased, but not transferred to a third party. The Division of Natural Resources shall by grant agreement acquire a lien interest in property and equipment purchased with grant monies. This lien shall state the terms of release and the period of years in which the lien attaches, in accordance with subdivision 6.1.11. of this rule. All equipment becomes property of the~~

~~Division of Natural Resources if the recycling program dissolves. At the discretion of the Director, equipment which has not been productively used for 180 days shall become property of the Division of Natural Resources;~~

~~5.1.5.~~ 5.1.6. Recycling Vehicle Expense - The ~~lease/purchase,~~ maintenance, fuel, ~~mileage~~ and insurance for a truck or van used in approved recycling activities. Collecting and Transporting transporting materials to market using the program's vehicle and labor is an approved recycling activity;

~~5.1.6.~~ 5.1.7. Printing - Costs associated with printing educational materials on recycling such as pamphlets, posters, flyers, etc;

~~5.1.7~~ 5.1.8. Advertising - Costs associated with the production and/or placement of recycling advertising in newspaper, radio, business cards, and other advertising related to development and implementation of a recycling program;

~~5.1.8.~~ 5.1.9. Promotional Items - Costs associated with promotional items such as awards, decals, patches, buttons, magnets, and costs associated with the rental of a fair booth and/or exhibit space for creating public awareness;

5.1.10. Utilities – Costs associated with the utilities required to operate a recycling processing center, such as electric, gas, telephone and water. No more than a total of \$1,200 may be used for telephone costs. Rent/lease charges related to a recycling program for a building, land, or office space are not allowable expenditures; and

5.1.11 Recycling Facility Improvements and Repairs – A grant is limited to repairs or minor improvements to an existing recycling facility, such as loading docks, fences, roof repair, gravel, or paving; Provided, that the facility is owned by the grantee. No more than a total of \$10,000 may be used for facility repairs and improvements.

~~5.1.9.~~ 5.1.12. Professional Services - To assist in planning and implementation of recycling projects including feasibility studies;

5.1A. A grant may be utilized by local and state governments or state instrumentalities for recycling projects in which a private "for profit" business or a not-for-profit organization is contracted to provide a service, or services, only as long as the bid for the services is in accordance with the appropriate local or state competitive bidding process.

~~5.1.10. Development Work - A grant is directed towards recycling market procurement.~~

5.2. A recycling assistance grant may not be used for:

5.2.1. The purchase or long term lease of dumpsters or other containers, or their servicing, when they are not part of an approved recycling activity;

5.2.2. Land acquisition and buildings;

5.2.3. The cost for office equipment including such items as desks, chairs, telephones, typewriters, ~~files~~ filing cabinets, and photocopying equipment;

5.2.4. Street sweepers or their equivalents;

5.2.5. Entertainment costs (banquets, parties, etc.);

5.2.6. Alcoholic beverages, in-state lunches, and all gratuities;

5.2.7. Beautification projects (plantings, mowing, weeding, etc.);

5.2.8. Computer hardware/software, provided that, the ~~director~~ Secretary may waive or modify this constraint where appropriately justified by the applicant; or

5.2.9. Any type of lobbying expense.

5.3. A grant shall not be used to replace funding which is currently budgeted or being provided by the applicant.

5.4. A grant shall not be used to fund an entity, program, or facility that financially benefited from a Recycling Assistance grant the previous year. A waiver to apply for a consecutive grant may be approved as provided in section 4.4. of this rule. A request for a waiver shall be submitted to the Secretary in writing.

**§58-5 33-10-6. General Conditions Applicable to Grants Proposals.**

6.1. The following general conditions apply to ~~counties, municipalities, and instrumentalities~~ all proposals applying for funding under the recycling assistance grant program:

~~6.1.1. The applicant shall be an eligible municipal or county government, and/or instrumentality with an expressed commitment to recycling as a long-term solid waste management strategy. This commitment shall be in the form of a formal resolution or ordinance from the local governing body, or a formal policy or rule from a state agency or state instrumentality;~~

~~6.1.2. The proposed recycling project shall be a logical extension of the applicant's current solid waste management services and/or authority to manage solid waste through recycling;~~

~~6.1.3. 6.1.1. The proposed project shall be designed to affect a significant and measurable reduction in the municipal solid waste stream. All grant proposals shall include analysis and projection of materials that will be diverted from the solid waste~~

~~currently being landfilled and the costs and/or savings that will directly result from the proposed project;~~

~~6.1.4. 6.1.2. All county or municipal proposals shall plan to involve all or a substantial percentage of the community's residents located in the project area and should include a plan to provide public education regarding the recycling program;~~

~~6.1.3. The grant proposal should demonstrate the relationship to, and support of, the hierarchy established under West Virginia Code §22C-4, i.e., source reduction, recycling, reuse and resource recovery, and landfilling.~~

~~6.1.5. Projects proposed for funding shall be designed to collect and recycle at least three items with respect to municipal and county programs and two items with respect to state agency and state instrumentality programs. These items shall be those that are typically discarded with household solid waste (i.e., newspaper, aluminum, steel and bi-metal cans, glass bottles and jars, and number 1 and 2 plastic containers);~~

~~6.1.6. Project proposals shall include a plan to identify markets able to handle the projected volumes of materials to be collected;~~

~~6.1.7. The proposal shall clearly demonstrate that the county, municipality, or state instrumentality will be directly involved in the planning, administration, implementation, monitoring and evaluation of the project. The overall operation and coordination of the project shall be conducted directly by an agency of local or state government, or one of its instrumentalities;~~

~~6.1.8. A grant may be utilized by local and state governments or state instrumentalities for recycling projects in which a private "for profit" business or a not-for profit organization is contracted to provide a service, or services, only so long as the~~

~~bid for the services is in accordance with the appropriate local or state government competitive bidding process;~~

~~6.1.8.a. The applicant shall solicit sealed bids for all construction-related contracts or purchases which have an estimated value of over five thousand dollars (\$5,000). Any attempts by the applicant to segregate the project into sections having an estimated value of less than \$5,000 may be cause for termination of grant;~~

~~6.1.8.b. The bids shall be obtained by public notice as a Class II legal advertisement in compliance with the provision of W. Va. Code, §59-3-2. This notice shall be published by the applicant in the newspaper with the largest circulation serving the general area twice within fourteen days preceding the final date of submitting bids. The applicant shall have available upon request for review by the Division of Natural Resources or its designated representative, bid documentation and other evidence of compliance with these procedures; and~~

~~6.1.8.c. The applicant shall comply with the requirements of W. Va. Code, §5G-1-1 et seq., in regard to obtaining architectural or engineering services, if those services are needed;~~

~~6.1.9. A grant may not be used to replace existing personnel, equipment or funding which is currently being provided by the local government;~~

~~6.1.10. All grant recipients shall hold the title to equipment listing the West Virginia Division of Natural Resources as first lienholder for the lien term. The lien shall apply to equipment purchased with West Virginia Division of Natural Resources grant in whole or part. A copy of the title shall be submitted to the division at~~

~~the address shown in subsection 14.2 of this rule. The grant recipient shall assume the risk of loss;~~

~~6.1.11. The division shall determine the lien period for each individual piece of equipment purchased with grant funds using the class life depreciation schedules published by the Internal Revenue Service. If a piece of equipment is in question as to which class the equipment is to be placed in, the division may make that determination; and~~

~~6.1.12. Public and private sector grants involving equipment shall have subsequent on-site inspections for the term specified.~~

~~6.2. The following general conditions apply to non-profit organizations and private enterprises applying for funding under the recycling assistance grant program:~~

~~6.2.1. The proposed project shall be designed to affect a significant and measurable reduction in the municipal solid waste stream;~~

~~6.2.2. The project may provide recycling market procurement efforts; and~~

~~6.2.3. The project shall be consistent with one or more of the objectives listed under subsection 3.1. of this rule, and include, but is not limited to the recycling activities listed under subdivision 4.2.2. of this rule.~~

~~6.3. Private Sector Grant Guidelines:~~

~~6.3.1. An applicant shall demonstrate through a narrative its past performance in recycling;~~

~~6.3.2. All equipment specifications shall be a part of the grant application and include the equipment seller's name and the price of the equipment;~~

~~6.3.3. All equipment purchases shall be done by public bid;~~

~~6.3.4. The maximum amount of a grant is \$50,000;~~

~~6.3.5. The grantee shall submit quarterly reports showing totals of all recyclables whether or not they relate directly to the grant; and~~

~~6.3.6. All private sector grants are subject to the general grant guidelines in this rule. Where there is a contradiction, subsection 6.3. applies.~~

**§58-5 33-10-7. Schedule of Grants Available Funding Levels.**

~~7.1. Schedule for one applicant: An applicant may receive one grant every other year from the Recycling Assistance Grant Program. The schedule of funding levels per applicant by type of grant is as follows:~~

<u>Type of Grant</u>		<u>Maximum Grant</u>
<u>Recycling Feasibility Study and Planning Grant</u>		
<u>Local Government</u>		<u>\$ 20,000</u>
<u>Recycling Program Assistance Grant</u>		
Municipality over 10,000 population.	<del>\$100,000</del>	<u>\$150,000</u>
<del>Community/Municipality</del> under 10,000.	<del>\$ 50,000</del>	<u>\$ 75,000</u>
County or Regional Solid Waste Authority.	<del>\$100,000</del>	<u>\$150,000</u>
<u>County Commission</u>		<u>\$150,000</u>
State agency/state instrumentality or school.	<del>\$ 50,000</del>	<u>\$ 75,000</u>
<del>Recycling Promotion, Collection Drive and Office Paper Recovery.</del>		<u>\$ 50,000</u>
<del>Recycling Feasibility Study/Planning.</del>		<u>\$ 20,000</u>

Recycling Market Development. \_\_\_\_\_ \$ 20,000

Non-Profit/Other Interested Party.            \$ 50,000     \$ 75,000

7.2 ~~Schedule for cooperatives — For a cooperative recycling between counties, municipalities, or private sector entities, the maximum amount of funding for a cooperative grant shall not exceed \$200,000, or the cumulative of the maximum amount allowable for each individual applicant as stated in subsection 7.1 of this section, whichever is smaller. An entity, program, organization or facility shall not receive more than \$250,000 during a grant year, regardless of the number of proposals submitted for that entity, program, organization or facility.~~

**§58-5 33-10-8. Criteria for Developing a Grant Proposal, Proposal Content.**

8.1. ~~The grant proposal should demonstrate the relationship to, and support of, the hierarchy established under West Virginia Code §22C-4, i.e., source reduction; recycling, reuse and resource recovery; and landfilling.~~

8.2. ~~All applicants shall submit to the county or regional solid waste authority in which the proposed project is located, a copy of their application to be reviewed by the members of the solid waste authority to avoid duplication, ensure coordination of solid waste programs, and maximize the market for recyclables.~~

8.3: 8.1.        The proposal for a recycling program assistance grant shall contain the following:

8.3.a. ~~A policy statement and/or resolution or ordinance as required by the provisions of this rule;~~

~~8.3.b.~~ 8.1.1. An outline of the materials to be source separated and recycled. The list of recyclable material may be adjusted according to whether the generator is residential, commercial or another type of establishment;

~~8.3.e.~~ 8.1.2. A public information program to ensure receipt of good clean quality materials;

~~8.3.d.~~ 8.1.3. A description of a collection system;

~~8.3.e.~~ Provisions where required to ensure compliance with West Virginia Code §20-11-1, including incentives and penalties;

~~8.3.f.~~ 8.1.4. A projection of the cost effectiveness and self-sufficiency of the proposed project;

~~8.3.g.~~ 8.1.5. Documentation of the type of in-kind services to be provided by the grantee;

~~8.3.h.~~ 8.1.6. Documentation of any other type of county, state and federal grant assistance, loans, or other financial support received within the 36 month period prior to the grant submission deadline date, including the dollar amount, type of project, purpose of funding, etc., for recycling and/or solid waste management; and

~~8.3.i.~~ 8.1.7. Economic development aspects of the project, i.e.: job creation.

8.1.8. An analysis and projection of materials that are expected to be diverted from the solid waste stream currently being landfilled and the cost and/or savings that are expected to directly result from the proposed project;

8.1.9. A description of the proposed project;

8.1.10. An estimated budget with justification;

8.1.11. Attested financial documents or complete federal tax returns for two years prior to the year in which the proposal is submitted. Local governments that have not had an audit or review in the year or fiscal year prior to the year in which the proposal is submitted shall be allowed to submit the most current two years of attested financial documents, provided that the most recent of those documents are no older than 24 months prior to the submission deadline date. Businesses or other entities that have been in existence less than two years shall submit a detailed business plan to be approved by the department;

8.1.12. A letter of receipt of proposal from the county or regional solid waste authority in which the proposed project shall be located, as required by section 9.2. of this rule;

8.1.13. A time line graph representing the objectives to be completed and the approximate dates of completion;

8.1.14. A checklist in which the applicant indicates eligibility and completion of the proposal;

8.1.15. A narrative profile demonstrating the applicant's past and current performance in recycling and operational methods;

8.1.16. All equipment specifications, provided by the seller and includes the seller's name and the price of the equipment; and

8.1.17. Identify markets able to handle the projected volumes of material to be collected.

8.1.18. The Drug Free Workplace Act of 1988, Title V-D Public Law 100-690, Federal Register, Volume 54, No. 19, and West Virginia Code §60A-2-201 requires

that all state governments, federal contractors, and federal and state grant recipients maintain a drug-free workplace. The Act is implemented through additions to the Debarment and Suspension regulations published in the Federal Register on January 31, 1989. The certification form shall be completed and accompany the grant proposal.

8.1.19. Applicants requesting funding for a recycling coordinator/manager must include, as part of the grant proposal, a list of objectives to be achieved during the grant period and the methods of achieving those objectives.

### **§33-10-9 Submission Requirements.**

9.1. All applicants shall make a proposal to the department on prescribed forms as published by the department. All proposals shall meet submission requirements established by the department to be eligible for funding.

9.2. All applicants shall submit a copy of their proposal to the county or regional solid waste authority in which the proposed project is located.

9.3. The original and one copy of the proposal shall be received and logged in by the department on or before 5:00 p.m. of the first business day in July. Proposals shall be delivered or mailed to: West Virginia Department of Environmental Protection, REAP, 601 57<sup>th</sup> Street, SE, Charleston, WV 25304.

9.4. Proposals received by the department after the submission deadline shall not be considered for funding.

### **§33-10-10 Departmental Reviews of Proposals.**

10.1. The department reserves the right to reject any and all proposals that do not meet eligibility and submission requirements established by the department and this rule at the department's discretion.

10.2. The department shall review all proposals received on or before the submission deadline to ensure that all required forms, documents, and attachments have been completed and included in the proposal. The department may take action to verify that the information in the proposals is correct at the department's discretion. If a proposal is found to be incomplete or incorrect, the department may, at its discretion, contact the applicant who shall be allowed to remedy the error within the cure period, which is 5:00 p.m. on the last business day in July. Incomplete or inaccurate proposals that have not been corrected by the applicant and received by the department on or before the end of the cure period shall not be considered for funding.

10.3 The department shall present all proposals meeting eligibility and submission requirements to the recycling assistance grant review committee for consideration.

**§58-5-9 33-10-11. Recycling Assistance Fund Grant Review Committee.**

~~9.1. 11.1.~~ All grant proposals will be reviewed by a The recycling assistance grant review committee, shall be composed of the following: a member of a county or regional solid waste authority a representative of the municipal league, a representative of business or industry, and a representative from the solid waste industry, to be appointed by the Director; the Executive Director a member or representative of the Solid Waste Management Board, each to be appointed by the Secretary; the Director of the West

Virginia Development Office; ~~the Director of the Division of Environmental Protection;~~  
~~and the Director of the Division of Natural Resources;~~ and the Secretary of the  
Department of Environmental Protection or any other person to whom the agency  
~~Director~~ Secretary has delegated his or her authority or duties. For the purpose of  
conducting business, four (4) members of the recycling assistance grant review  
committee are required for a quorum. The ~~Director~~ Secretary or his or her designee may  
only vote to break tie votes of the committee. The committee shall consider each  
proposal and make a determination as to funding. The committee shall submit approved  
grants meeting the program's criteria to the Director of the Division of Natural Resources  
proposals recommended for funding to the Secretary of the Department of Environmental  
Protection for final approval and awarding.

9.2. ~~The division through the recycling assistance grant review committee~~  
~~reserves the right to reject any and all proposals. Applicants not selected for grants will~~  
~~be notified by the division within a reasonable time after award decisions have been~~  
~~made. Unsuccessful applicants may discuss their proposals with the appropriate staff.~~

11.2. Applicants shall be notified in writing, by the department, of approval or  
denial of a grant within a reasonable time after proposal award recommendations of the  
committee have been approved by the Secretary.

~~§58-5-10 33-10-12. Submittal of Grant Applications; Awarding of Grants; Financial~~  
~~Management; and Unexpended Grant and Termination of Grant. Requirements of~~  
~~Grant Recipients.~~

~~10.1.~~ 12.1. All recycling assistance grants are for a ~~one year~~ fourteen month period beginning the first of January and ending the last day in February of the following year. ~~with a final report due for approval on or before March 31 of the following year.~~

~~10.2.~~ A grant applicant shall submit its complete recycling assistance fund grant application to the division prior to the first day of August each year. The division shall notify all grant applicants in relation to funding of their proposal.

~~10.3.~~ 12.2. Unless a grant ~~applicant~~ recipient specifically requests and can demonstrate a need for a larger portion of the awarded grant to initiate the project, the ~~division~~ department shall disburse all grants on the following schedule: 30% at the time of grant award with subsequent payments of 30% to be made upon receipt of a quarterly report. The final payment shall be 10% and shall be withheld until receipt of the third quarterly report.

~~10.4.~~ 12.3. The ~~grantee~~ grant recipient shall retain and make available upon request by the ~~Division of Natural Resources~~ Department of Environmental Protection for a period of ~~three~~ five years after the grant period, all financial records, supporting documents, statistical records, and all other records as they relate to the ~~application proposal~~, acceptance and use of the grant. The provisions of West Virginia Code §12-4-14 apply to all recycling assistance grants. The ~~grantee~~ grant recipient shall provide the ~~division~~ department with a copy of the ~~grantee's~~ grant recipient's ~~independently audited financial records~~ independent audit report or sworn statement of expenditures, whichever may apply, that cover the entire grant period.

~~10.5.~~ 12.4. The ~~grantee~~ grant recipient shall return any unexpended grant funds remaining as of March 1 of the following year to the ~~Recycling Assistance Fund~~

West Virginia Department of Environmental Protection. If the grantee grant recipient expends any grant funds on or after March 1 this shall be considered an unauthorized expenditure.

~~10.6.~~ 12.5. If, through any cause, the grantee grant recipient fails to fulfill in a timely and proper manner its obligation as proposed in the grant application proposal, and as accepted and approved by the ~~division~~ department, the ~~division~~ department shall terminate payment of the remaining grant funds. The grantee grant recipient shall return any amount of the grant used for unauthorized expenditures. Authorized expenditures are those outlined in the original budget that was approved by the grant review committee.

~~10.7.~~ 12.6. The grantee grant recipient shall comply with all applicable federal, state and local laws, codes, ordinances, rules and regulations. The ~~division~~ department may withdraw all funds from grantees grant recipients who fail to comply with grant guidelines, and may not give future consideration of grants.

~~10.8.~~ 12.7. The grantee grant recipient shall deposit the grant immediately upon receipt in a separate checking account. The department may waive this requirement for grant recipients who anticipate having a minimal number of expenditures from the grant during the entire grant period and can demonstrate a high level of accountability through proper internal controls.

~~10.9.~~ Grantees with a current grant are not eligible for the next cycle of grants. The Grant Review Committee may recommend exceptions for final approval by the Director of the division. A grantee who files a delinquent final report is ineligible for future grants.

~~10-10.~~ 12.8. The ~~division~~ department shall ~~grant~~ consider requests for a change in budget only if the change does not materially alter the original grant proposal approved by the grant review committee and the adjustment is a result of conservative spending allowing any excess to be rebudgeted. ~~(Example: Budgeted \$20,000 for the purchase of a baler. The baler costs \$18,000. The extra \$2,000 may be rebudgeted upon approval.)~~ All requests shall be made in writing on or before December 31 of the grant period.

12.9. The grant recipient shall solicit sealed bids for all purchases which have an estimated value of five thousand dollars (\$5,000) or more. Any attempts to segregate the project into sections having an estimated value of less than \$5,000 may be cause for termination of the grant;

12.9.a. The bids shall be obtained by public notice as a Class II legal advertisement in compliance with the provision of W. Va. Code, §59-3-2. This notice shall be published by the grant recipient in the newspaper with the largest circulation serving the general area twice within fourteen days preceding the final date of submitting bids. The grant recipient shall submit all bid documentation and other evidence of compliance with these procedures for review and approval to the Department of Environmental Protection prior to accepting a bid.

12.10. All grant recipients shall submit the title to equipment purchased with a grant to the West Virginia Department of Environmental Protection listing the West Virginia Department of Environmental Protection as first lienholder for the lien term. The lien shall apply to equipment purchased with the grant, in whole or part. The title shall be submitted to the department at the address shown in subsection 9.3 of this rule.

The grant recipient shall assume the risk of loss and maintain adequate insurance on the equipment:

12.10.a. The department shall determine the lien period for each individual piece of equipment purchased with grant funds using the class-life depreciation schedules published by the Internal Revenue Service. If a piece of equipment is in question as to which class the equipment is to be placed in, the department shall make that determination; and

12.10.b. Public and private sector grants involving equipment shall have subsequent on-site inspections for the term specified.

**~~§58-5-11. Site Visits and Reports Required.~~**

~~11.1.~~ 12.11. ~~Grantees~~ Grant recipients shall submit a final report for approval on or before March 31 ~~of the year~~ following the end of the grant award period. The report shall include the following:

~~11.1.1.~~ 12.11.1. An evaluation of successes and failures encountered in implementing the original proposal's work tasks;

~~11.1.2.~~ 12.11.2. An evaluation of the operating costs and community support for the project;

~~11.1.3.~~ 12.11.3. An analysis of the economic development achievements, such as job creation;

~~11.1.4.~~ 12.11.4. An analysis of the project including: total volume (tons) of waste diverted from the solid waste stream, the estimated cost per ton to recycle that

volume, the estimated revenue per ton of recycled material, and the estimated savings from recycling in lieu of land filling; and

~~11.1.5.~~ 12.11.5. A complete accounting of the grant expended for the entire year.

~~11.2.~~ 12.12. A progress status report and expenditure statement shall be submitted by all ~~grantees~~ grant recipients to the ~~division~~ department every quarter containing a brief narrative of accomplishments (including individual volumes of material recycled), projections for the next report period and detailed grant expenditures for the past three months.

~~11.2.1.~~ 12.12.1. The ~~grantee~~ grant recipient shall attach evidence of all grant expenditures to the quarterly reports, including but not limited to; copies of invoices, checks, titles, bids, and bank statements.

~~11.2.2.~~ 12.12.2. The ~~division~~ department shall return an incomplete quarterly report to the ~~grantee~~ grant recipient for completion. The ~~division~~ department shall withhold any remaining grant payments until it receives a complete report as required in section ~~ten (10)~~ 12.2. of this rule.

~~11.3.~~ 12.13. The ~~division~~ department shall periodically conduct site visits with grant recipients. These visits ~~will~~ shall be conducted to provide assistance, to review progress, ~~and~~ to discuss any problems encountered in project implementation-, or to review financial compliancy and clarify discrepancies found in reports the grant recipient has submitted to the department. ~~Site visits present important opportunities for direct, on-site communications between the division and grant recipients, and may include~~

~~inspections from the Division of Environmental Protection and site visits from the West Virginia Solid Waste Management Board.~~

~~§58-5-12~~ **33-10-13. Equal Employment Opportunity.**

~~12.1.~~ 13.1. To implement the recycling assistance grant, grantee shall agree:

~~12.1.1.~~ 13.1.1. That it will not discriminate against any employee or applicant for employment because of race, color, age, religion, sex, or national origin; and

~~12.1.2.~~ 13.1.2. That all solicitations or advertisements for employees placed by or on behalf of grantee shall state that all qualified applicants ~~will~~ shall receive consideration for employment without regard to race, color, age, religion, sex, or national origin.

~~§58-5-13. Certification Regarding Drug-Free Workplace Requirements.~~

~~13.1. The Drug-Free Workplace Act of 1988, Title V-D Public Law 100-690, Federal Register, Volume 54, No. 19, and West Virginia Code §60A-2-201 requires that all state governments, federal contractors, and federal and state grant recipients maintain a drug-free workplace. The Act is implemented through additions to the Debarment and Suspension regulations, published in the Federal Register on January 31, 1989. The certification form shall be completed and accompany the grant application.~~

~~§58-5-14. Submission of an Application.~~

~~14.1. The application for a recycling assistance grant shall contain in addition to a description of the proposed project, an applicant profile, an estimated budget with justification, certification regarding a drug free workplace, an application checklist, a time line graph, attested financial documents, a letter of receipt of application from county solid waste authority, and equipment specifications. The division shall not consider incomplete applications and shall mark them "incomplete" and return them to the applicant. The applicant may complete the returned application and resubmit it before the grant submission deadline date.~~

~~14.2. The original and one copy of the application must be received by the division on or before 5:00 p.m. of the last business day in July. Applications shall be hand delivered or mailed to: West Virginia Division of Natural Resources, 1900 Kanawha Boulevard, East, Building 3, Room 732, Charleston, West Virginia 25305-0665.~~

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF LAND RESTORATION

IN THE MATTER OF:

PROPOSED RULE 33CSR10

Recycling Assistance Grant Program

**TRANSCRIPT OF PROCEEDINGS** had or testimony of adduced pursuant to the West Virginia Rules of Civil Procedure in the above-entitled action, on the 12<sup>th</sup> day of July, 2007, commencing at 6:00 p.m. and concluding at 6:13 p.m., at the office of the West Virginia Department of Environmental Protection, 601 57<sup>th</sup> Street, S.E., Cooper's Rock Training Room, Charleston, Kanawha County, West Virginia, pursuant to notice to all interested parties.

BEFORE: AUTUMN SPEARS, Public Information Office

**ORIGINAL**

**NANCY MCNEALY**  
CERTIFIED COURT REPORTER  
Post Office Box 13415  
Charleston, West Virginia 25360-0415  
(304) 988-2873 FAX (304) 988-1419

APPEARANCES: JIM HILL, Division of Land Restoration

I N D E X

Reporter's Certificate.....Page 10

1 MS. SPEARS: Good evening. My name is  
2 Autumn Spears, and I work with the Public Information  
3 Office. Welcome to the DEP and the public hearing to  
4 discuss the 2008 Proposed Legislative Rule No. 33CSR10,  
5 Recycling Assistance Grant Program.

6 Please make sure that you have signed in  
7 and indicated if you're going to make a comment. Comments  
8 shall be limited to the proposed revisions to the rule.  
9 Copies of the rules are available from the Secretary of  
10 State's Office or from the DEP webpage at  
11 [www.WVDEP.org/2008 Rules](http://www.WVDEP.org/2008_Rules).

12 We are here this evening to listen to your  
13 comments and questions and include them in the official  
14 record. Written comments must be submitted to the West  
15 Virginia Department of Environmental Protection Public  
16 Information Office, 601 57th Street, S.E., Charleston, West  
17 Virginia, 25304. Comments may also be e-mailed to  
18 [Comments@WVDEP.org](mailto:Comments@WVDEP.org). The meeting is being recorded. The  
19 comment period will end at the conclusion of the hearing.

20 Please welcome Mr. Jim Hill to discuss 2008  
21 Legislative Rule 33CSR10, Recycling Assistance Grant  
22 Program.

23 MR. HILL: All right, Mr. Sayre, you  
24 probably now want to have some comments about these rules.

1 I guess you have the floor.

2 MR. SAYRE: Okay. My name is Greg Sayre.  
3 I'm the Executive Director of the Association of  
4 Independent Professional Recyclers. I would like to make  
5 just a few brief comments on the proposed rules for the  
6 Recycling System Grant Program Series 33-10.

7 First, the Association would like to insert  
8 a new subsection, 5.1.12, and this would read as, "Minor  
9 physical improvements or construction activities related to  
10 recycling, buildings, loading docks, staging areas and  
11 drop-off locations no more than \$20,000 may be used for  
12 these minor improvements," and we would like to modify in  
13 conjunction with that rule, the proposed rule, 5.22, which  
14 states, "State acquisition, buildings, fences, any  
15 permanent item to be constructed or affixed to real  
16 property," and we would like to modify that to just land  
17 acquisition, and the intent of our change is under the  
18 proposed rule, none of the grant funds can be used for  
19 improvements to real property.

20 We agree that a grant fund should not be  
21 used for land acquisition. What our proposed rule would do  
22 would basically up to \$20,000 would be able to be used for  
23 actual improvements or modifications to real property. So  
24 if a person wanted to build a loading dock, which would be

1 an improvement to real property, as long as it was less  
2 than \$20,000, they could do it. If they wanted to pour  
3 concrete for a drop-off location, they could do it as long  
4 as it was under \$20,000, and the intent -- I believe the  
5 intent of the DEP proposed rule is they believe they have a  
6 problem with attaching a lien to real property. I  
7 understand that.

8                   However, the logistics of recycling  
9 basically if we had not over the past decade allowed people  
10 to pour concrete, build drop-off centers, build basically  
11 real things, you wouldn't have any recycling going on at  
12 all, and so we understand the legal concern and that's why  
13 we've asked for this, what we believe, is a minor  
14 adjustment; that basically at a \$20,000 limit, some things  
15 can be done. The DEP, I think, shouldn't have to worry  
16 about attaching a lien to someone's property on that amount  
17 of improvement.

18                   The second comment, and this is a much  
19 different, much broader. Basically, is the addition of a  
20 new section to the rule, Section 33-10-14, and this is a  
21 brand new section that our Association would like to  
22 include into the rules and this is primarily stemmed from  
23 legislative concern over the quality, or I guess I should  
24 say the quantity of recycling of plastic and glass

1 containers in the State of West Virginia, and the concern  
2 is, is that we are not doing a very good job of recovering  
3 plastic bottles and glass bottles from waste stream, and  
4 that's probably true, but the reason for that is that the  
5 costs of collecting and processing those bottles, the lack  
6 of local markets, doesn't make it very attractive for  
7 either people in the private sector or the public sector to  
8 really do it, but there seems to be a demand for someone to  
9 provide that service.

10           What we have proposed as sort of a pilot  
11 project within the grant program is what we call 33-10-14,  
12 Plastic and Glass Bottle Container Recycling Grant, and the  
13 way the program is set up, we have a series of eight rules.

14           The Secretary of DEP shall allocate a  
15 \$100,000 annually to this program from the existing  
16 recycling grant program.

17           The Secretary shall award up to \$40 per ton  
18 to qualifying projects.

19           Qualifying projects would include any  
20 public or private recycler that processes for resale any  
21 plastic or glass containers derived from any recycling  
22 curbside or drop-off program originating in West Virginia.

23           Applicants seeking to qualify for this \$40-  
24 a-ton grant award would register on forms prescribed by the

1 Secretary.

2 No qualifying project would receive more  
3 than \$10,000 annually.

4 Grant payments would be made twice a year  
5 on a pro-rated basis.

6 This is an on-going program. Therefore the  
7 applicant could receive funding each and every year and any  
8 monies awarded to this applicant would not apply toward the  
9 grant awards made under Section 33-10-7 and in closing just  
10 what this would do, to give you an example, the major  
11 beneficiaries of this project would actually be your public  
12 recyclers.

13 The Kanawha County Solid Waste Authority,  
14 which probably receives the most glass of any recycler in  
15 the state, but basically the shipping costs from Charleston  
16 to the nearest glass plant has really made it unproductive  
17 and unprofitable for them to receive and really recycle  
18 glass. Under this program I think they would probably make  
19 another \$10,000 a year, which basically would give them an  
20 incentive to keep recycling glass and plastic. It would  
21 help defray some of those transportation costs.

22 My estimate right now is that probably  
23 statewide you're only doing about a 1,000 tons of glass  
24 bottles and plastic bottles around the state, and I can't

1 blame people for not doing anymore simply because there's  
2 no money to be made in it.

3                   We took this idea from the State of  
4 Pennsylvania which grants program basically rewards people  
5 for recycling. They actually get paid by the state on a  
6 tonnage basis. We thought this would be a good pilot  
7 project. It's a way, basically, of subsidizing items that  
8 I think the public want to recycle and they ask about why  
9 they're not being recycled and the standard answer is,  
10 well, it just costs too much to do it, but we think that at  
11 \$40 a ton, that people could be reimbursed for that, you  
12 could increase perhaps by 100 percent the volume of  
13 material being recycled in those items, and again, you're  
14 rewarding people for doing something that's hard to do,  
15 which is recycling glass and plastic and other than that, I  
16 think everyone did a good job and I'll close.

17                   MR. HILL:            Okay.

18                   MS. SPEARS:           This completes our official  
19 comment period. We will file our responses to your  
20 comments with the Secretary of State's Office. Thanks  
21 again for your interest and participation.

(WHEREUPON, the hearing was closed.)

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF LAND RESTORATION

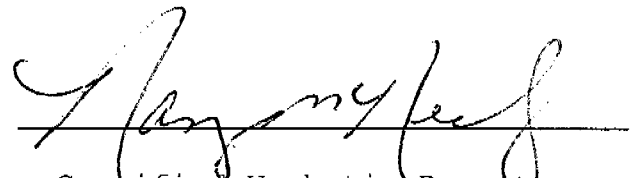
STATE OF WEST VIRGINIA,  
COUNTY OF KANAWHA, to wit:

I, **NANCY MCNEALY**, Certified Verbatim Reporter and Commissioner of West Virginia, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof.

Given under my hand this 13th day of July, 2007.

My commission expires November 26, 2010.



  
Certified Verbatim Reporter





Division of Land Restoration  
Department of Environmental Protection  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304-2345

July 9, 2007

The Putnam County Solid Waste Authority would like to make the following comments on the proposed rule changes to the Recycling Assistance Grant Program. In respect to proposed rule 5.1.1 Personnel-A grant is limited to the salary costs of a recycling manager, coordinator, or recycling program laborers. No more than a total of \$20,000 may be used from grant funds for the combined wages and/or benefits of a recycling manager, coordinator, and/or laborers.

The Authority feels that recycling grant funds could be better utilized by expanding the range of activities personnel funded by grant dollars can be involved in. By adding litter control, and community clean-ups as a permissible grant fund use, new resources can be directed toward these local problems. Municipalities and county governments can begin to put in place active roadside litter pick-up programs in conjunction with their recycling programs. Recycling and community clean-ups often go hand in hand. In Putnam County, our clean-up activities always involve a recycling component. Clean-up projects like ours are currently not eligible for funding from your recycling grant program. The proposed rule change will add new vitality to the existing recycling grant program. The change will address an important community and statewide problem. The change will also utilize the existing financial resources of DEP to improve the state of the environment.

The Authority feels that such a change would be within the statutory framework of the recycling grant program. Grant applicants will have to demonstrate they operate a recycling program that source separates at least three recycled items to be eligible for these funds. Many communities in West Virginia do this. The availability of grant funds for litter control would be an additional reward for communities that are providing recycling services. This would enhance the Litter Control Grant Program, and (PPOD). Projects such as electronics recycling could be promoted, even though a majority of the computer by weight is generally discarded.

In Putnam County our recycling program would have been severely hampered without buildings and concrete funded by the Recycling Grant Program. Under Rule 5.1.1 we would like to see building contractors or contractual services added. This would give grant applicants the ability to make small capital improvements to their facilities(\$20,000.00) without requiring the DEP to place liens on fixed structures or concrete pads. The construction of attractive drop-off locations increases public participation in recycling, reduces litter around the drop-off sites, and adds to a community's sense of pride. We cannot recall a building lien issue being a major problem for the grant program in the past.

The Putnam County Solid Waste Authority respectfully asks the Department of Environmental Protection to consider these comments. These changes will improve the "State of the Environment in West Virginia", and make the REAP recycling grant program more successful.

Sincerely yours,

  
Roger Randolph, Chairman





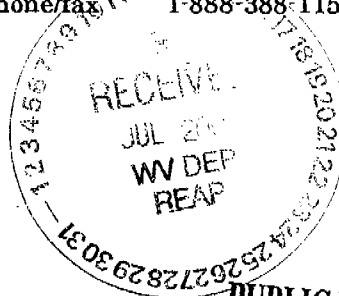
# Calhoun County Solid Waste Authority

1903 W. Little Kanawha Hwy Grantsville, WV 26147

1-304-354-7786 phone/fax 1-888-388-1158 toll free

July 10, 2007

WV Department of Environmental Protection  
Public Information Office  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304



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PUBLIC INFORMATION OFFICE

Calhoun County Solid Waste Authority (CCSWA) offers these comments on the proposed rule 33 CSR 10 Recycling Assistance Grant Program.

Before we get to specifics we would like to offer our perspective as a solid waste authority in a small rural county. There are a great variety of conditions in West Virginia. Some areas of the state have booming economies, such as the eastern panhandle and Putnam County. Others have stagnant or declining economies. Some county solid waste authorities have landfills in their counties and benefit from host fees. Some county solid waste authorities receive funding from their county commissions. Others struggle and have more need of grant funding. Sparsely populated areas where economies of scale are difficult to achieve need special attention. Certainly nobody would contemplate removing garbage, telephone, or electric service from small counties, yet there are some who think that recycling is not necessary in small counties.

When I watched "An Inconvenient Truth" I was happy to see that solutions to the problem of global warming were presented. It was stated that no one solution by itself was enough to solve global warming, but that all of them together would give us a chance. Conserving energy was one of the solutions, and there was specific mention of recycling. Following that reasoning, developing a *statewide* recycling infrastructure is vitally important.

Specific comments follow:

## Section 2.10 "Local Government"

The list of entities "...and any other authority, board, commission, district, office, public authority, public corporation ..." is followed by the qualifying language: "...or other instrumentality of a county, county board of education, or municipality or any combination of two or more local governments."

Since solid waste authorities are not part of the county government structure per se, or county boards of education, or municipalities, it is not clear that solid waste authorities are included in this wording of the definition. We suggest the following:

2.20. "Local Government" means any unit of local government within the state, including a county, county board of education municipality, county or regional solid waste authority, and any other authority, board, commission, district, office, public authority, public corporation, or

other instrumentality of a county, county board of education, or municipality or any combination of two or more local governments.”

3.1.1. We recommend adding the word “continuing” to the list “initiating, expanding, or upgrading.” The rationale for this suggestion is that many of the smaller, rural counties do not have the population density to achieve economies of scale in recycling operations. This is true whether the service is supplied by public, private, or non-profit organizations. These counties need a recycling infrastructure as much as any other county, and without the assistance of the REAP grant program they may not have any recycling program.

3.3.2. As in the comment on 3.1.1., we recommend adding the word “continuing” to the list “initiating, expanding, or upgrading.”

5.1.1. Personnel. The amount allotted for salaries has not increased since the grant program was initiated. CCSWA suggests increasing the amount to \$30,000.

5.1.6. Recycling Vehicle Expense. CCSWA recommends restoring the provision to fund the lease/purchase of recycling vehicles. It is hardly possible to initiate, expand, upgrade, or even continue a recycling program without recycling vehicles, and they are quite expensive. If “...Collecting and transporting materials to market using the program’s vehicle and labor is an approved recycling activity;”, then surely it would follow that the lease/purchase of such vehicles would be an approved item. Such vehicles can be repossessed and sold if the applicant defaults. The REAP program could recover its money from recycling vehicles more easily than from other items that are approved for grant funding, such as contracting with a private business or not-for-profit organization to haul recyclables.

5.2.2. CCSWA feels that improvements to buildings used for recycling programs should be funded, whether they are owned or leased. Especially if it is a long term lease. As mentioned previously, small rural counties with low population densities face unique problems in achieving the economies of scale needed to be self sufficient. Help with maintaining and/or improving buildings is just the sort of thing they need. We have heard often over the years that recovering money from building improvements is difficult. However, we note that contracting with private and/or not-for-profit organizations is approved, even though it would be extremely difficult to recover money if such a venture failed.

Of course, if funding of improvements to buildings was restored, CCSWA believes that the language requiring sealed bids for all construction related contracts or purchases over \$5,000 should be restored.

5.3. CCSWA believes that this provision, which states that: “A grant shall not be used to replace funding which is currently budgeted or being provided by the applicant.” is unduly punitive. As mentioned previously, many of the smaller, rural counties do not have the population density needed to achieve economies of scale in recycling operations. Contracting out to private business will not solve their problem, because a for-profit business will not operate in an environment where economies of scale cannot be reached. Such counties depend on the REAP and SWMB grant programs. Since grants are not awarded in consecutive years, these counties have to

provide funding to things in the "off" years that they count on being funded during the "on" years. Section 5.3. will doom these programs. Rural counties need a recycling infrastructure as much as any other county. It should be noted that buyers of recyclables will be hurt when their volumes decrease due to the closure of numerous small programs. CCSWA recommends deleting 5.3., or at least building flexibility into it.

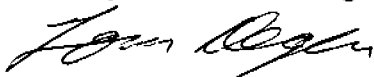
CCSWA recommends restoring the language in the former 6.1.7.: "The proposal shall clearly demonstrate that the county, municipality, or state instrumentality will be directly involved in the planning, administration, implementation, monitoring and evaluation of the project. The overall operation and coordination of the project shall be conducted directly by an agency of the local or state government, or one of its instrumentalities;"

8.1.12. CCSWA believes that it is not enough to simply notify the solid waste authority and show a letter of receipt. Solid waste authorities are charged with developing recycling plans for their areas. The stricken language from the former section 8.2 should be added to this section. That language is: "All applicants shall submit to the county or regional solid waste authority in which the proposed project is located, a copy of their application to be reviewed the members of the solid waste authority to avoid duplication, ensure coordination of solid waste programs, and maximize the market for recyclables."

8.1.16. CCSWA has no problem with the requirement, except to note that enough flexibility should be allowed for a cheaper alternative to be purchased if one can be located. There is often as much as a year between the time of the proposal and the time of the actual purchase of the item. Many things can change in that time. To provide a price and seller's name to give the grant review committee an idea of what such equipment costs is prudent, but to lock the applicant in to one source may actually end up costing more money.

10.11. Recycling Assistance Fund Grant Review Committee. CCSWA recommends restoring the member of a county or regional solid waste authority. Solid waste authorities are charged with formulating county wide recycling plans, and they have been at the forefront of recycling efforts. The committee will be lacking a much needed perspective if this member is not restored. CCSWA also recommends that the "representative from the solid waste industry" be replaced with a "representative from the recycling industry." Although it can be argued that there is overlap, they are two distinctly different industries, and since these are recycling grants, the grant committee would benefit from the perspective of one who is in the business of recycling only.

Thank you for considering these comments.



Tom Degen, Executive Director for CCSWA

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**PUBLIC INFORMATION OFFICE**



# BERKELEY COUNTY SOLID WASTE AUTHORITY

Post Office Box 1227  
Inwood, West Virginia 25428  
Office Telephone: (304) 267-9370  
Recycling Hotline: (304) 671-2925  
Email: berkeleycountyswa@msn.com



July 10, 2007

West Virginia Department of Environmental Protection  
Public Information Office  
601 57<sup>th</sup> Street SE  
Charleston WV 25304

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PUBLIC INFORMATION OFFICE

Re: Proposed 33CSR10 Recycling Assistance Grant Program Rules

The Berkeley County Solid Waste Authority (BCSWA) respectfully submits the following comments for consideration in the aforementioned rules.

The recycling assistance grant program is vital to the success of recycling in West Virginia. The funds disseminated from this program are necessary to the development of the recycling infrastructure across the State. Our entity has operated a recycling program for 12 years. Our program is often considered one of the best recycling programs in WV and we view these proposed rules as a serious setback to recycling. Therefore, based upon the knowledge gained by the operation of our program, we seek to propose the following changes to the rules.

**1) Page 3. Rule 2.10:** Since solid waste authorities are not part of county government or county boards of education, or municipalities, it is not clear that solid waste authorities are included in this wording of the definition. We suggest the following:

“Local Government” means any unit of local government within the state, including a county, county board of education municipality, county or regional solid waste authority, and any other authority, board, commission, district, office, public authority, public corporation, or other instrumentality of a county, county board of education, or municipality or any combination of two or more local governments.”

- 2) **Page 4. Rule 2.14:** The definition of recyclable should be changed to include “brush” and “clean wood”.
- 3) **Page 10 Rule 4.4:** These proposed waivers should be edited to allow waivers to counties which are “growth” counties. “Growth” counties are counties experiencing rapid population growth and are therefore in need of additional quick recycling infrastructure development via the grant funds.
- 4) **Page 11 Rule 5.1.6.** The ability to purchase equipment is extremely valuable to the BCSWA. We find it vital to fund the lease/purchase of recycling vehicles. It is impossible to initiate, expand, upgrade, or even continue a recycling program without recycling vehicles. If “...collecting and transporting materials to market using the program’s vehicle and labor is an approved recycling activity;”, then surely it would follow that the purchase of such vehicles would be an approved item. The proposed rule should be stricken.
- 5) **Page 13 Rule 5.2.2:** This proposed rule seriously harms the potential development of the recycling infrastructure. The language that the grant rules may not be used for “buildings, fences or permanent items to be constructed or affixed to real property” is completely counter to the needs of recycling development. How else can recyclables be managed without paper sheds, compartmentalized buildings, retaining walls? Certainly nobody would contemplate operating a garbage business, sewer department or public water department without a permanent building. This language should be completely stricken.
- 6) **Page 18 Rule 7.1:** “Growth” counties which are counties experiencing rapid population growth and are therefore in need of additional grand funds should be allowed to receive additional funds.
- 7) **Page 21 Rule 8.1.12:** The BCSWA believes that it is not enough to simply notify the solid waste authority and show a letter of receipt. Solid waste authorities are charged with developing recycling plans for their county. Yet, we have little say in the approval of recycling grants for our county. We propose this language: “All applicants shall submit to the county or regional solid waste authority in which the proposed project is located, a copy of their application to be reviewed the members of the solid waste authority to avoid duplication, ensure

coordination of solid waste programs, and maximize the market for recyclables”.

- 8) **Page 23 Rule 11.1:** The makeup of the grant review committee should include a member of a county or regional solid waste authority. It is through county solid waste authorities that most of the public recycling is performed in WV. We also believe that a member of the recycling industry should be part of the Recycling Assistance Fund Grant Review Committee. Therefore, we recommend that the “representative from the solid waste industry” be replaced with a “representative from the recycling industry.” Recycling is distinctly different industry than operating a landfill or transfer station. Since these are recycling grants, the grant committee would benefit from the perspective of one who is in the business of recycling.

Sincerely,

  
Clint Hogbin  
Chairman

cc:

Senator John Yoder  
Senator John Unger  
Senator Walt Helmick  
Senator Clark Barnes  
Delegate John Overington  
Delegate Robert Tabb  
Delegate Craig Blair  
Delegate Jonathon Miller  
Delegate Walter Duke

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JUL 19 2007

**PUBLIC INFORMATION OFFICE**

DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES  
POLICY UNIT 10

**ASSOCIATION OF INDEPENDENT PROFESSIONAL RECYCLERS  
PO BOX 3706  
CHARLESTON, WV 25337**

The Association would like to make the following comments to the Recycling Assistance Grant Program rules, Series 33-10.

The Association would like to insert a new sub-section 5.1.12

5.1.11 Minor physical improvements or construction activities related to recycling buildings, loading docks, staging areas, and drop-off locations. No more than \$20,000 may be used for improvements.

Modify

5.2.2. Land acquisition, buildings, fences, or any permanent item to be constructed or affixed to real property.

5.2.2 Land acquisition

Addition of a new Section 33-10-14

**33-10-14 Plastic and Glass Bottle Container Recycling Grant**

14.1 The Secretary shall allocate up to \$100,000.00 annually to this program.

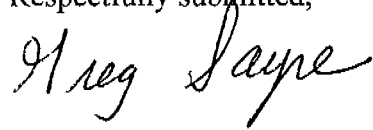
14.2 The Secretary shall award up to \$40 per ton to qualifying projects.

14.3 Qualifying projects include any public or private recycler that processes for resale any plastic or glass containers or bottles derived from any recycling curbside or drop-off program originating in West Virginia.

14.4 Applicants seeking to qualify for grant awards will register on forms prescribed by the Secretary.

- 14.5 No qualifying project may receive more than \$10,000.00 annually.
- 14.6 Grant payments shall be made twice a year on a pro-rated bases.
- 14.7 This is an ongoing program and applicants can be awarded funding from year to year.
- 14.8 The awarding of a grant under this section does not apply toward any award granted under 33-10-7 of these rules.

Respectfully submitted,

A handwritten signature in cursive script that reads "Greg Sayre". The signature is written in black ink and is positioned above the printed name.

Greg Sayre

## **RESPONSE TO COMMENTS ---33CSR10**

The following is a response to the comments provided during the public comment period on the Department of Environmental Protection's rule, 33CSR10 – "Recycling Assistance Grant Program." Written comments were accepted until July 12, 2007. A public hearing was held on July 12, 2007. Both verbal and written comments were received and each will be addressed below.

### **I. COMMENTER: Roger Randolph (Putnam County Solid Waste Authority)**

#### **COMMENT A. Expanding allowable activities for personnel funded by grants.**

*The commenter recommends that the range of allowable activities for personnel funded by recycling grants be expanded to include personnel cost for litter clean up projects. The commenter also recommends that personnel costs be expanded to include the costs of building contractors.*

**RESPONSE A.** According to the WV Code §22-15A-19(h)(1), rules are to be promulgated for the purpose of establishing a recycling grant program to assist counties, municipalities, and other interested parties in planning and implementing recycling programs. Litter control clean up projects are not generally considered a recycling activity and by allowing these activities to be included as an allowable grant expenditure would contradict the purpose of the Code. Proper accounting methods require the costs of building contractors to be capitalized and added to the value of the building or equipment being constructed, not accounted for as an operating expense.

### **II COMMENTER: Tom Degen (Calhoun County Solid Waste Authority)**

#### **COMMENT A: The definition of "Local government".**

*The commenter states that solid waste authorities are not part of a county government and the definition of "local government" should be changed to include them in the definition.*

**RESPONSE A:** The definition of "Local government" in the proposed rule includes "any unit of local government within the state, including county,....any other authority,....public authority....". According to WV Code §22C-4-3, solid waste authorities were "created and established as a public agency in every county of the state..." making each authority a local government. Therefore solid waste authorities are included in the definition as it is written.

#### **COMMENT B: Include "continuing operations" as an allowable purpose of a grant.**

*The commenter recommends that the word "continuing" be added as an allowable use for a grant. The proposed rule currently states that "initiating, expanding, or upgrading" recycling facilities as allowable uses for a grant.*

**RESPONSE B:** According to the WV Code §22-15A-19(h)(1), rules are to be promulgated for the purpose of establishing a recycling grant program to assist counties, municipalities, and other interested parties in planning and implementing recycling programs. The Code does not indicate that grants are to be used to maintain day-to-day operations of facilities already in operation.

**COMMENT C:** Increase the maximum amount allowable for personnel costs from \$20,000 to \$30,000.

*The rule currently allows a grant recipient to use up to \$20,000 to pay for salaries, wages, and other personnel costs. This limit has not been raised since the inception of the grant program. The commenter recommends that this limit be raised.*

**RESPONSE C:** The primary purpose of the grant program is to initiate, expand, or upgrade recycling facilities. Personnel cost is mainly considered a general operating cost. However we agree that some increase is necessary and will increase the maximum amount to \$25,000.

**COMMENT D:** Restore the "lease/purchase of recycling vehicles" under Recycling Vehicle Expense.

*Under the section of the rule that lists expenditures that are allowable from the grant, "lease/purchase" was removed from the section that allows various recycling vehicle expenses. The commenter recommends that "lease/purchase" not be removed because it will make the purchase of recycling vehicles unallowable.*

**RESPONSE D:** The commenter has misunderstood this change to the rule. The removal of "lease/purchase" from the Recycling Vehicle Expense section of the rule disallows the grantee from entering into a lease/purchase agreement for a vehicle. It does not restrict them from making a direct purchase of a vehicle. Another section in the rule, titled Equipment, allows the grantee to purchase any recycling equipment for the purpose of collecting, processing or marketing recyclables, which includes recycling vehicles.

**COMMENT E:** Include building and real property improvements as an allowable expense.

*The commenter recommends making building and real property improvements an allowable expense under the grant program, whether the property is owned or leased.*

**RESPONSE E:** The grant program holds liens on all equipment purchased with grant funds to ensure the continuation of the program. Liens cannot be perfected through the Secretary of State's Office for real property. Therefore the State has no security on any

real property purchases made with grant funds. However we are going to allow up to \$10,000 to be used for real property for minor improvements and maintenance, provided that the property is owned by the grantee. If the property is leased, the actual owner of that property, not the lessee, should make improvements to the property. Also, real property leases generally contain a cancellation clause, allowing termination of the agreement at any time by either party.

**COMMENT F:** *The statement "A grant shall not be used to replace funding which is currently budgeted or being provided by the applicant" is unduly punitive.*

**RESPONSE F:** The commenter may have misunderstood this statement, which means that the grant funds are to be used "in addition to" any budget the grantee may have for recycling. It basically prevents an entity from using grant funds to "free up" previously budgeted funds to be used for purposes other than recycling.

**COMMENT G:** *Reinstating section 6.1.7, involving local government in all proposed recycling projects.*

*The commenter recommends restoring section 6.1.7, which states, "The proposal shall clearly demonstrate that the county, municipality, or state instrumentality will be directly involved in the planning, administration, implementation, monitoring and evaluation of the project. The overall operation and coordination of the project shall be conducted directly by the agency of local or state government, or one of its instrumentalities."*

**RESPONSE G:** Many grantees are private businesses and have no need to involve local or state government in their operational methods. The recycling program proposed by each applicant is evaluated by a review committee to determine its merit. We monitor the grantees through regular on site visits to ensure compliance with the legislative rule. No additional oversight is necessary.

**COMMENT H:** *Submission of grant applications to solid waste authorities.*

*Commenter believes that it is not enough to simply notify the solid waste authorities that an applicant is applying for a grant. Commenter wants solid waste authorities to review applications to ensure that duplication of programs are avoided and ensure coordination of solid waste programs.*

**RESPONSE H:** Based on the commenter's statement that "it is not enough to simply notify" the solid waste authorities, we can only assume that he wants some level of authority to approve or disapprove any applicant the authority feels is duplicating other programs or is not in coordination with the county's solid waste program. The notification to solid waste authorities is made to ensure that the authority is aware of all recycling activity in its county and to make adjustments, if necessary to its countywide plan to accommodate any changes. Solid waste authorities are eligible to receive grants under this program and to operate recycling facilities. To give them any authority to reject or approve applications would be a conflict of interest.

**COMMENT I:** Regarding the Recycling Assistance Fund Grant Review Committee, restore the member of a county or regional solid waste authority and replace the representative from a solid waste industry with a representative from the recycling industry.

*Commenter states that solid waste authorities are charged with formulating countywide recycling plans, and have been at the forefront of recycling efforts. Commenter believes that the review committee will be lacking a much-needed perspective if this member is not restored. Also, Commenter believes that the committee would better benefit from the perspective of a person in the recycling industry instead of a person in the solid waste industry.*

**RESPONSE I:** The review committee previously had a representative from a county/regional solid waste authority and the Director of the Solid Waste Management Board. Both representatives are directly tied with the interest of county solid waste authorities. However previously there was no representative for municipalities, who are mandated to recycle if they have a population greater than ten thousand. The solid waste authority representative was replaced with a municipal representative. Regarding the representative from the solid waste industry, there are many more solid waste operators who are also recycling facility operators, but there are no recycling facility operators who are also solid waste operators. We believe we are getting a broader knowledge from a representative from the solid waste industry than we would from a representative from the recycling industry.

### **III COMMENTER: Clint Hogbin (Berkeley County Solid Waste Authority)**

**COMMENT A:** The definition of "Local government".

*The commenter states that solid waste authorities are not part of a county government and the definition of "local government" should be changed to include them in the definition.*

**RESPONSE A:** See response to Comment II. A above.

**COMMENT B:** The definition of "Recyclable".

*The Commenter recommends that the definition of "Recyclable" should be changed to include the terms "brush" and "clean wood".*

**RESPONSE B:** The definition of "Recyclable" includes yard waste, which as defined under 33CSR3 includes the term brush. The definition of yard waste will be added to the proposed rule to clarify its meaning.

**COMMENT C:** Waivers under section 4.4 of the rule should include "growth" counties.

*Commenter recommends expanding the reasons for allow waivers for consecutive funding to include "growth" counties experiencing rapid population growth.*

**RESPONSE C:** Interested parties can apply for grant funding every other year, except in the event there they experience a flood, fire, or other act of nature that damages the operation. Another reason a waiver may be granted is due to any new legislative requirement or restriction that materially affects program operations. Population growth does not warrant a need for consecutive funding. There is no definite benchmark for growth to justify a waiver for consecutive funding. Other factors that should be considered would be participation rate, new demand for the service, new materials that may have been introduced in the waste stream, etc. Other factors relating to population growth that may greatly assist a recycling program would be new recyclers and new markets moving into the area.

**COMMENT D:** Restore the "lease/purchase of recycling vehicles" under Recycling Vehicle Expense.

*Under the section of the rule that lists expenditures that are allowable from the grant, "lease/purchase" was removed from the section that allows various recycling vehicle expenses. The commenter recommends that "lease/purchase" not be removed because it will make the purchase of recycling vehicles unallowable.*

**RESPONSE D:** See response to Comment II. D above.

**COMMENT E:** Include building and real property improvements as an allowable expense.

*The commenter recommends making building and real property improvements an allowable expense under the grant program.*

**RESPONSE E:** See response to Comment II. E above.

**COMMENT F:** "Growth" counties should be eligible for additional funding.

*Commenter states that, under 7.1 of the proposed rule, growth counties should be eligible to receive additional funding. It is our understanding that the commenter means a larger sum of money than the maximum \$150,000 they would be eligible to apply for.*

**RESPONSE F:** In the event that a recycling program is in need of a grant larger than the maximum allowable amount, other entities can apply for additional grants for that facility/program contemporaneously for an amount not to exceed \$250,000 for that facility/program. This is stated under section 7.2 of the proposed grant rule.

**COMMENT G:** Submission of grant applications to solid waste authorities.

*Commenter believes that it is not enough to simply notify the solid waste authorities that an applicant is applying for a grant. Commenter wants solid waste authorities to review*

*applications to ensure that duplication of programs are avoided and ensure coordination of solid waste programs.*

**RESPONSE G:** See response to Comment II. H above.

**COMMENT H:** Regarding the Recycling Assistance Fund Grant Review Committee, restore the member of a county or regional solid waste authority and replace the representative from a solid waste industry with a representative from the recycling industry.

*Commenter states that solid waste authorities are charged with formulating countywide recycling plans, and have been at the forefront of recycling efforts. Commenter believes that the review committee will be lacking a much-needed perspective if this member is not restored. Also, Commenter believes that the committee would better benefit from the perspective of a person in the recycling industry instead of a person in the solid waste industry.*

**RESPONSE H:** See response to Comment II. I above.

**IV COMMENTER: Greg Sayre (Assoc. of Independent Professional Recyclers)**

**COMMENT A:** Inserting a new subsection to allow minor real property improvements.

*Commenter suggests allowing real property improvements such as minor building improvements, loading docks, and drop-off locations. He also suggests limiting these improvements to no more than \$20,000.*

**RESPONSE A:** See response to Comment II. E above.

**COMMENT B:** Plastic and glass bottle container recycling grant.

*Commenter suggests allocating \$100,000 of the Recycling Assistance Grant Fund to pay recyclers a \$40 fee for every ton of plastic or glass recycled. Public and private recyclers can apply for this type of grant.*

**RESPONSE B:** This type of grant is an incentive grant and would require an entirely different system of application and monitoring to ensure compliance and accuracy. An entirely new set of legislative rules should be promulgated if this type of grant program is to be considered.