DEP drops plan to finalize stream list

By Ken Ward Jr.
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State regulators have dropped their plan to finalize a list of protected West Virginia streams, saying they don't want to pick a fight with lawmakers over the issue.

Earlier this year, the Legislature declined to act on the list of more than 300 streams the state Department of Environmental Protection said deserved tougher pollution protections.

DEP Secretary Stephanie Timmermeyer said she planned to finalize the list anyway. Timmermeyer said the DEP had the legal authority to do so.

On Friday, Deputy DEP Secretary Randy Huffman said the agency now plans to start all over.

A new list will be published in draft form. The DEP will accept public comments and then finalize the list. The resulting version will be submitted for legislative review during the 2008 session.

"It was maybe a subversion of the legislative process for us to just go out and file the rule," Huffman said. "It's a legislative process whether you agree or not."

The list in question covers streams that are deemed to qualify for "Tier 2.5" protection under West Virginia's water quality anti-degradation policy.

Under that policy, clean streams are generally supposed to be kept that way. Streams on the Tier 2.5 list could not be degraded by more than 10 percent.

DEP officials had already whittled down the Tier 2.5 list and allowed three separate rounds of public comments. But lawmakers, at the urging of coal companies, timber operators and the Farm Bureau, were slashing dozens of streams from the list.

Originally, the DEP proposed Tier 2.5 protection for about 300 streams, about 4 percent of the waterways in the state, agency officials said.

Don Garvin, lobbyist for the West Virginia Environmental Council, said the DEP's action would help regulated industries gut the stream list.

"It's going to be almost impossible to protect streams in this state," Garvin said.

Huffman said he doesn't believe the DEP ever made a definite decision to move forward without legislative action on the stream list.

"My understanding was that was an option that was on the table at the time," said Huffman, who is running the DEP while Timmermeyer is on maternity leave. "There were a number of options there."

In a March 15 interview, Timmermeyer and DEP spokeswoman Jessica Greathouse said the agency planned to file the final rules, despite legislative inaction.

Timmermeyer cited several state Supreme Court decisions she said supported the DEP's plan.

Under those rulings, she said, lawmakers can approve, reject or amend state agency rules, but she said the Legislature can't veto an agency rule by simply not acting on it at all.

To contact staff writer Ken Ward Jr., use e-mail or call 348-1702.

WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE WEST VIRGINIA SECRETARY OF STATE

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

AGENCY: WVDEP Office of Water Resources TITLE NUMBER: 47

CITE AUTHORITY: 22-1-3(a), 22-3-4

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5A

TITLE OF RULE BEING AMENDED: Rules for Individual State Certification of Activities Requiring a Federal Permit

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.

Stephanie R. Timmermeyer
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: July 27, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) West Virginia Department of Environmental Protection
Office of Water Resources
610-57th Street
Charleston, WV 25304
(304) 926-0499 ext 1526

LEGISLATIVE RULE TITLE: Rules for Individual State Certification of Activities Requiring a Federal Permit

1. Authorizing statute(s) citation 22-1-3(a), 22-3-4

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

   June 15, 2006

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

   Local Newspaper and Posting on the agency Web Page

   c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

   July 18, 2006

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

   Attached X No comments received _____

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

July 28, 2006

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

Charles Sturey, Environmental Program Manager II
601 - 57th Street
Charleston, WV 25304

Phone: (304) 926-0499 ext. 1526

Fax: (304) 926-0456

g. **<u>IF DIFFERENT</u> 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)

n/a

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: RULES FOR INDIVIDUAL STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT Title 47 Series 5A

A. AUTHORITY: §§ 22-11-7(a) and 22-1-6(d)(6).

B. SUMMARY OF RULE:

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. Stream measurement information is being requested to be added to the 401 application.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

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.

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:

During a meeting on May 31, 2006, the Environmental Protection Advisory Council reviewed and discussed this rule. Their comments are contained in the attached minutes.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules for Individual State Certification title 47 Series 5A

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

Agency: Department of Environmental Protection

Address: 601 - 57th Street

Charleston, WV 25304

Phone Number: (304) 926-0490 ext. 1526 Email: csturey@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.

These changes are mainly for clairification and should have no fiscal impact to the 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: Rules for Individual State Certification title 47 Series 5A

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

There are no proposed increase or decrease in fees proposed by these changes. Nothing proposed in these changes should have a fiscal impact on the state or public beyond that they are currently experiencing.

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.

These changes are proposed for clairifications of information needed for the state certification of activities requiring a federal 404 permit.

Date: July 28, 2006

Signature of Agency Head or Authorized Representative

Charles L Storey

TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATER RESOURCES

SERIES 5A
RULES FOR INDIVIDUAL STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT

§47-5A-1. General.

1.1. Scope. -- The purpose of these legislative rules is to carry out the responsibilities placed upon the State by Section 401 of the Federal Clean Water Act, 33 US Code § 1341 and W. Va. Code §§ 22-11-7(a) and 22-1-6(d)(6). Section 401 of the Clean Water Act requires that any applicant for a federal license or permit to conduct an activity that will or may discharge into waters of the United States (as defined in the Clean Water Act) must present the federal authority with a certification from the appropriate state agency. These rules establish the procedures and criteria for the application, processing and review of state water quality certifications which require a federal permit including those from the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 US Code §1344 and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 US Code §1791 et. seq.

1.2. Authority. -- W. Va. Code §§22-11-7(a) and 22-1-6(d)(6).

1.3. Filing Date. -- May 8, 2002.

1.4. Effective Date. -- July 1, 2002.

§47-5A-2. Definitions.

When used in this rule, for any activity involving a discharge into waters of the United States or the State that requires a 401 state water quality certification, the following terms are defined as follows:

2.1. Applicants are persons or entities that are requesting a federal license or permit to conduct activity that discharges into waters of the United States and require an individual Section 401 state water quality certification.

2.2. Aquatic resources include but are not limited to wildlife, fish, recreational uses, critical habitats, wetlands, and other natural resources under the Secretary's jurisdiction.

2.3. Complete means that the application package submitted by the applicant for a State 401 Water Quality Certification contains all information necessary to initiate processing and public review.

2.4. Certification means certification as required under Section 401 of the Federal Clean Water Act, 33 U.S.Code §1341.

2.5. Compensatory mitigation is the compensation to the State for unavoidable impacts to aquatic resources in Waters of the U.S. by replacing those aquatic resources through creation, restoration, enhancement, or monetary compensation as set forth below in this rule.

2.6. Condition means limitations and monitoring requirements which assure that any applicant for a federal license or permit will comply with all applicable federal and state laws including water quality standards.

2.7. Department means the Department of Environmental Protection.

2.8. Emergent Wetlands, commonly known as wet meadows, are characterized by the presence of more than 50% grasses, sedges and other non-woody vegetation.

2.9. Forested Wetlands are characterized by

woody vegetation that is six (6) meters tall or taller.

2.10. Open Water Wetlands are ponds, lakes, and reservoirs. Vegetation may or may not be present, and covers less than 10% of the surface area.

2.11. Ordinary high water mark is that line on the stream bank established by the fluctuation of water levels and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changed in soil characteristics, destruction or limits of terrestrial vegetation, and the presence of litter and debris. The acreage of stream disturbed or impacted must be calculated. Acreage equals the length of the disturbed impacted stream times the width. Length = the length (in feet) of the stream from the uppermost point of disturbance or the impact to the furthest downstream pint of disturbance or impact. Width = average stream width (in feet) at the ordinary high water mark.

2.12. Permanent Impacts are considered unavoidable loss of aquatic resources that result from a permanent structure or activities that cause physical stream loss.

2.13. Permanent Structure(s) shall mean any structure placed in or a disturbance in waters of the U.S. that will remain in place for twelve (12) months or longer, except for structures defined as temporary structures in this section.

2.14. Scrub-shrub Wetlands are areas dominated by woody vegetation less than six (6) meters tall. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.

2.15. Secretary means the Secretary of the Department of Environmental Protection or such other person to whom the Secretary has delegated authority or duties.

2.16. Temporary Structure means, for structures permitted under W. Va. Code §22-3-1 et seq., any structure which will be removed before or upon final bond release; for structures not permitted under W. Va. Code §22-3-1 et seq., temporary structure means any structure which will be removed upon completion of the project.

2.17. Wetlands are those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. (Environmental Protection Agency, 40 CFR 230.3 and Corps of Engineers, 33 CFR 328.3)

§47-5A-3. Scope and Effect of Certification.

3.1. Certifications may impose State standard conditions and any special conditions necessary so as to comply with applicable state and federal laws. When issuing certification, the Department may consider the proposed activity's impact on water resources, fish and wildlife, recreation, critical habitats, wetlands, and other natural resources under the Secretary's jurisdiction. The State may grant, grant with condition, deny, or waive certification. If the State denies certification, then the federal license or permit shall not be granted. 33 U.S.Code §1341(a)(1).

3.2. Certifications may require compensatory mitigation.

3.3. The Clean Water Act provides that any certification condition becomes a term or condition of any federal license or permit, 33 U.S.Code §1341(d).

§47-5A-4. Applications, Procedures for Certification Issuance.

4.1. Information contained within environmental processes and reviews such as environmental assessments, environmental impact statements and mining and reclamation plans, may be used to meet part or all of the requirements of this rule.

4.1.a. Any applicant for an individual state 401 water quality certification shall submit

five copies of a complete application to the Secretary on the forms prescribed by the Secretary. The applicant shall submit an application fee to the Department of Environmental Protection in the amount of two hundred and fifty dollars ($250).

4.1.a.1. The Secretary shall have sixty (60) days upon receipt to determine if an application package is complete.

4.1.a.2. Upon notification by the Secretary further information may be requested to facilitate an evaluation of the certification request.

4.1.b. The Secretary shall, within one year after an application is deemed complete, issue, waive or deny the request for a water quality certification.

4.1.b.1. Basis for Decision. -- Any certification decision will be based on compliance with Sections 301, 302, 303, 306 and 307 of the Clean Water Act and on any other appropriate requirement of state law. Such appropriate requirements of state law include the factors enumerated in subsection 3.1 - Scope of Certification.

4.1.b.2. Distribution of Certification Decision. -- Copies of the proposed certification decision will be sent to the applicant and all persons who commented or attended the public hearing.

4.1.b.3. Dismissal or Denial of Federal Application Meets Need for Certification. -- If an application for a federal license or permit is dismissed, denied, or otherwise rendered void, then the certification is no longer needed and any state certification proceeding or action is rendered moot and unnecessary. Any applicant for an activity needing a state certification, which was rendered moot and unnecessary, must renew its application for certification and the full time period of subsection 4.1.b. of this rule is available for review upon resubmission of a complete application.

4.2. Contents of application. Application for state 401 water quality certification shall include the form prescribed by the Secretary including an alternative analyses and the following:

4.2.a. A Wetlands Delineation. Wetlands shall be identified using the 1987 Corps Manual for Identifying and Delineating Wetlands, or by accepted methods approved by the WV Division of Natural Resources, and their function and value assessed and documented.

4.2.b. A Stream Restoration Plan. Any activity in waters of the U. S. shall include a Stream Restoration Plan, which outlines riparian revegetation plan, fluvial geo-morphological, or other acceptable methods to address impacts. The plan shall incorporate monitoring requirements found in section 6.3.

4.2.c. A Mitigation/Compensation Agreement to be executed in accordance with section 6.2.

4.2.d. The Public Notice Form for State 401 Certification.

4.2.e. A statement affirming that all information above submitted for review is accurate and true to the best of applicant's knowledge.

4.2.f. This subsection is only applicable to activities that meet the definition of a surface mining operation as defined in W. Va. Code §22-3-3. This information shall accompany the state 401 water quality certification application.

4.2.f.1. A No Practical Alternative Demonstration. A demonstration containing, but not limited to, the following:

4.2.f.1.A. Demonstrate that there is not a practical alternative in Waters of the U.S., including other alternatives that were considered but eliminated.

4.2.f.1.B. That treatment facilities will be located as close as practical to the source(s) with which it is associated.

4.2.f.1.C. Such activity will impact Waters of the U.S. no more than is

necessary to accommodate its proper construction and operation.

4.2.f.1.D. Maps, plans, specifications and design analyses for the preferred alternative to the project.

4.2.f.2. An Impact Analysis. A detailed analysis of the potential impacts, to the extent applicable, of the proposed project on water quality and quantity, fish and wildlife, aquatic habitat, parks, recreation, in-stream and downstream water uses.

4.2.f.3. A Biological Survey of the Stream. Each applicant will follow established and accepted protocols for collection, analysis, documentation, and presentation of biological data from Waters of the U.S., i.e., U.S. Environmental Protection Agency's `Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers.□ Station locations shall be located: one (1) above the proposed activity, one (1) at the proposed activity and one (1) downstream of the proposed activity or other station locations necessary to assess the activity's impact. The Secretary, may at his or her discretion, request from the applicant certain state preferred biologic indices to facilitate review. The survey requirement may be waived with the Department□s concurrence.

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.

4.2.f.4.A. Submit all findings in an appendix to the report including, but not limited to the following:

4.2.f.4.B. Name of person(s) conducting the stream delineation and his or her qualifications (i.e. DEP representative, company representative, consultant, biologist, etc).

4.2.f.4.C. Date delineation was conducted.

4.2.f.4.D. Recent weather conditions and those on the day of the delineation.

4.2.f.4.E. A statement verifying the October, 1999 DEP Stream Delineation Memorandum was followed in the determination process.

4.2.f.4.F. Method used for determination (i.e. Post-hole or benthic).

4.2.f.4.G. A copy of field notes, photographs and stream delineation map that indicates the results in relation to the proposed activity, if possible.

4.3. Federal Energy Regulatory Commission Licenses.

4.3.a. The application to the Department for certification of an activity requiring a license from the Federal Energy Regulatory Commission (FERC) shall be a letter to the Secretary requesting certification, completed application under 4.2., the license application, document submitted to and accepted by FERC under 18 CFR □4.1-4.202, the Order from FERC accepting the application and a certificate of publication from the newspaper publishing the Class II legal advertisement required by subsection 5.1.d. of this rule.

4.3.b. If the project application is altered or modified during the FERC licensing process prior to FERC's final decision, the applicant shall inform the Department of such changes. The Department may review such alterations or modifications and, if the changes are deemed significant by the Secretary, the Department may

require a new application for certification. The Department will have ninety (90) days to review such changes or until the end of the year review period, (see subsection 4.1.b. of this rule) whichever is longer, to determine whether to require a new application or to alter its original certification decision. If the Department requires a new application because of a significant application modification, then the Department will have six (6) months to issue its certification decision from the date of submission of the application.

§47-5A-5. Public Notice, Public Hearings.

5.1. Public Notice.

5.1.a. Upon the Certification application being deemed complete, the applicant shall place a one time Class I legal advertisement in a qualified newspaper of general circulation in the county of the proposed activity. There will be a thirty (30) day comment period from the date of publication. Nothing herein prohibits a joint public notice process with the U. S. Corps of Engineers. Each advertisement will contain at a minimum the following:

5.1.a.1. The surface mining and NPDES permit numbers, if applicable and available.

5.1.a.2. A clear and accurate location map of a scale and detail found in the West Virginia General Highway Map. The map size will be at a minimum four inches (4") x four inches (4"). Longitude and latitude line and north arrow will be indicated on the map and such lines will cross at or near the center of the certification request activity.

5.1.a.3. The name and business address of the applicant to include a street address or route number.

5.1.a.4. A narrative description clearly describing the location of the certification request activity.

5.1.a.5. The name(s) of the receiving stream(s) into which the discharge of fill material will be placed.

5.1.a.6. The location where a copy of the certification request is available for public review.

5.1.a.7. The name and address of the Department of Environmental Protection Office where written comments or requests for a public hearing on the certification request may be submitted.

5.1.a.8. The type of operation.

5.1.a.9. The type of federal permit being sought.

5.1.b. The advertisement and publication dates for the certification request shall be certified and notarized by the publishing newspaper. The certificate of publication shall be made part of the approved application no later than four (4) weeks after the last date of publication.

5.1.c. Any person having an interest that is or may be adversely affected, has the right to file written comments or objections to the certification request with the Secretary within thirty (30) days after the publication date of the advertisement required in subsection 5.1.a. of this section. Where a public hearing is granted the public comment period will be extended to the close of the hearing.

5.1.d. Federal Energy Regulatory Commission Licenses. -- The Department's procedure for issuing a public notice for certification of a FERC license shall be a Class II legal advertisement, (See W. Va. Code §59-3-2(a)) published by the applicant in a newspaper of general circulation in the county in which the activity will take place and in a principle newspaper of regional circulation in the area where the project is located. Such notice will describe the activity, advise the public of the scope of certification, their rights to comment on the proposed activity and to request a public hearing, and will also inform the public to whom they should send their requests and comments.

5.1.e. Submission of Comments to Applicant; Response. -- Any comments and information received by the Department may be forwarded to the applicant so that they may resolve disputes raised, rebut adverse comments and information, or supplement such comments and information. The Department will prepare a response to significant comments.

5.2. Public Hearings.

5.2.a. The decision to hold a public hearing lies within the discretion of the Secretary. The Secretary will evaluate all requests for a public hearing and make a decision based on such requests.

5.2.b. Requests made to the Secretary should explain the need for the public hearing and set forth the kind of information, material or comments expected to be given at the hearing.

5.2.c. The Secretary, if determined necessary, may also hold a public hearing without a request.

5.2.d. The Secretary shall send a written notice to all parties requesting the public hearing. The applicant shall publish a Class I legal advertisement in a qualified newspaper of general circulation in the county where the proposed activity shall occur. Such hearing notice shall be sent and published at least thirty (30) days prior to the hearing date and shall include all pertinent information including, location, date and time.

5.2.e. The applicant shall bear the cost of publishing any notice.

47-5A-6. Compensatory Mitigation.

6.1. The Department may require the applicant, as a condition of certification, to compensate for aquatic resources lost through compensatory mitigation and/or monetary compensation. If mitigation/compensation is required, necessary agreements will be executed prior to certification.

6.2. Compensatory Mitigation Requirements.

6.2.a. The Department has established a hierarchy for compensation of lost aquatic resources. The first option should be fully investigated before consideration of the next option.

6.2.a.1. On-site/In-kind: replacing habitat value losses on the site where the project has taken place with similar habitat values, allowing populations of species associated with that habitat may remain stable over time by (a) physical modification of replacement habitat to convert it to the same type lost; (b) restoration or rehabilitation or previously altered habitat; (c) increased management of similar replacement habitat so that the in-kind value of the lost habitat is replaced, or (d) a combination of these measures.

6.2.a.2. Off-site/In-kind: replacing habitat value losses off site from the project area, but preferably within the same watershed with similar habitat values using (a)-(d) above.

6.2.a.3. On-site/Out-of-kind: replacing habitat value losses on site where the project has taken place with different kinds of habitats. This may result in significant differences in fish and wildlife populations.

6.2.a.4. Off-site/Out-of-kind: replacing habitat value losses off site from project area with different kinds of habitats. This may result in significant differences in fish and wildlife populations.

6.2.b. For stream impacts/loses to aquatic resources, compensatory mitigation projects shall be completed at a ratio appropriate to the type of waters impacted, consistent with state or federal standards as required by the Federal Clean Water Act, for the types and locations of waters impacted. Stream restoration projects must use accepted and approved methods to restore the stream back to its natural condition.

6.2.b.1. Compensatory mitigation shall be required for all permanent and temporary stream impacts resulting from coal related activities in watersheds greater than or

equal to two hundred and fifty (250) acres and/or when the activity results in a stream loss or impact exceeding one half (1/2) acre of stream. The drainage area and ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

6.2.c. Compensation for wetlands must occur for impacts cumulatively greater than one-tenth (1/10) acre and above at the following ratios.

6.2.c.1. Impacts to open water wetlands are to be replaced at a ratio of one (1) unit created for each unit impacted.

6.2.c.2. Impacts to emergent wetlands are to be replaced at a ratio of two (2) units created for each unit impacted.

6.2.c.3. Impacts to scrub-shrub type wetlands are to be replaced at a ratio of three (3) units created for each unit impacted.

6.2.c.4. Impacts to forested wetlands are to be replaced at a ratio of three (3) units created for each unit impacted.

6.2.c.5. An applicant for a proposed project who desires to provide compensatory in-kind mitigation prior to the disturbance of the mitigable resource, will comply with the following criteria:

6.2.c.5.A. Mitigation ratio will be at one (1) unit created to every one (1) unit impacted.

6.2.c.5.B. Mitigation shall be completed 12 months prior to the impact of the resource.

6.2.c.5.C. Mitigation plans will meet the review and approval of the Department of Environmental Protection and Division of Natural Resources. Satisfactory completion will be determined by concurrence of DEP an DNR prior to final approval of mitigation obligation.

6.2.c.6. In certain instances, the Secretary may consider the acquisition of existing wetlands. All wetlands acquired, using the acquisition method of mitigation, shall either be deeded to the West Virginia Division of Natural Resources' Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee. Acquisition ratios are the following:

6.2.c.5.i. Five (5) units to every one (1) unit for open body wetlands;

6.2.c.5.ii. Ten (10) units to every one (1) unit for wet meadow wetlands and;

6.2.c.5.iii. Fifteen (15) units to every one (1) unit for scrub-shrub and forested wetlands.

6.2.d. In lieu of in-kind compensation projects, monetary compensation can be collected for loss of resources. Specifically for activities that meet the definition of surface mining operations the money shall be deposited in the Stream Restoration Fund (W. Va. Code §22-1-14) and expended for restoration and enhancement of streams and water resources of the State, which have been impacted by coal mining. Monetary compensation may be acceptable if in-kind compensation or acquisition of existing wetlands cannot be accomplished.

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

6.2.d.1.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) linear feet shall be monetary compensated at a rate of $20,000 per acre per each five (5) year term and/or prorated for each year the impact occurs.

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.

6.2.d.2. Permanent impacts for non-coal monetary mitigation will be assessed at the rate of $100.00 per lineal foot of stream lost, and $30,000 per acre of wetland replaced based on the ratios in section 6.2.c.

6.2.d.3. A payment plan over three (3) years shall be allowed.

6.2.e. Where payment or compensation projects are deferred, the Secretary may require the applicant to post a payment bond in a form satisfactory to the Secretary, to be effective until compensation is made or the in-kind project is satisfactorily completed. The bond shall be released upon satisfactory completion of compensation or payment as determined by the Secretary.

6.2.f. In lieu of monetary compensation, applicants can make in-kind donations of land that would be suitable for lake development, water resources improvement, creation, or facilities associated with recreation. Such sites must have the Division of Natural Resources, Wildlife Resources Section approval for the department's consideration.

6.3. Monitoring Requirements.

6.3.a. A compensatory mitigation site shall be monitored until success criteria outlined in the restoration plan has been met.

6.3.b. Monitoring reports shall be submitted yearly until the project has been determined complete and successful for three concurrent years.

§47-5A-7. Appeal of Certification.

7.1. Standing for Requesting and Appeal Hearing; Requests; Decision.

7.1.a. Any person whose property, interest in property, or other constitutionally protected interests, under West Virginia State Constitution Article 3, Section 10, are directly affected by the Department's certification or certification denial, may request a hearing within fifteen (15) days after notification of the certification decision.

7.1.b. A person described under subdivision 7.1.a. shall make such a request to the Secretary. The request for hearing shall identify the interest directly affected and set forth the manner in which the person is aggrieved or adversely affected.

7.1.c. The Secretary shall decide whether to hold such hearing.

7.2. Appeal Hearing.

7.2.a. If the request for a hearing is granted, the Secretary, or his designated appointee acting as a hearing examiner, will hold the hearing within sixty (60) days from the date of the appeal request. All hearings will normally be held in

Charleston at a place specified by the Secretary. The Secretary, however, may hold the hearing at another location or time.

7.2.b. The parties to the proceeding shall be the aggrieved person, who shall be known as the appellant and the Department of Environmental Protection which shall be the appellee.

7.2.c. In conducting the hearing, the Secretary or his designated appointee acting as a hearing examiner, shall follow the procedures contained in the W. Va. Code §29A-5-1 entitled "Contested Cases." Both parties may be represented by counsel.

7.2.d. Parties may seek discovery and may make various motions as outlined in the West Virginia Rules of Civil Procedure, Rules 7-16 and 26-37, which rules shall generally apply.

7.2.e. After the hearing the Secretary shall decide the issues presented and shall notify the parties of such decision.

47-5A-8. Enforcement of Certification Provisions.

8.1. General. -- The Clean Water Act provides that any certification condition becomes a term or condition of any federal license or permit. 33 U.S.Code §1341 (d). Certification conditions, therefore, are subject to the enforcement mechanisms available for enforcing the terms or conditions of the federal license or permit to which they attach. In addition, other enforcement mechanisms under the W. Va. Code may be available. See e.g., W. Va. Code 22-1-3(a), 22-11-24, and 22-11-25.

BEFORE THE WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF MINING AND RECLAMATION

COPY

****

IN THE MATTER OF:

Public Hearing Regarding Proposed Changes to the 47 CSR 5A - Rules For Individual State Certification Of Activities Requiring a Federal Permit

****

Transcript of proceedings had at a hearing held in the aforementioned matter on Tuesday, July 18, 2006, beginning at 6:18 p.m. at the West Virginia Department of Environmental Protection, Canaan Valley Room, 601 - 57th Street, S.E., Charleston, Kanawha County, West Virginia, pursuant to notice.

APPEARING ON BEHALF OF WV DEP:

Ms. Cindy Lawson, Presiding Officer

Ms. Yvonne Anderson

ACCURATE REPORTING SERVICE, INC.
526 SEVENTH STREET
HUNTINGTON, WEST VIRGINIA 25701

(304) 522-9637 * (304) 345-9891 * (606) 329-2154

MS. LAWSON: Good evening. I am Cindy Lawson, Public Relations Officer for the West Virginia Department of Environmental Protection, and I have been appointed by the Secretary to conduct this hearing for the Division of Mining and Reclamation.

The purpose of this hearing is to receive oral and/or written comments regarding proposed changes to 47 CSR 5A, Rules for Individual State Certification of Activities Requiring a Federal Permit.

This hearing is being held on this 18th day of July, 2006, at 6:18 p.m. at the West Virginia DEP Office at 601 - 57th Street, Charleston, West Virginia 25304.

The proposed 47 CSR 5A rule changes are as follows:

Page 4, Page 7 and Page 7 to 8. Structure of the rule is reorganized. Changes are proposed in order to clarify the information needed for the state certification of activities requiring a federal 404 permit.

At this time, 6:19 p.m., there are no persons present to comment. Written comments

were submitted by Jason Bostic of the West Virginia Coal Association.

Therefore, this hearing is adjourned at 6:19 p.m.

(The hearing was concluded at 6:19 p.m.)

- 0 -

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Basil J. Ferrebee, Certified Court Reporter, Registered Professional Reporter, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings had in the aforementioned matter, as reported by me in stenographic characters and transcribed into the English language.

Given under my hand this 18th day of July, 2006.

Basil J. Ferrebee, CCR, RPR

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

PROPOSED RULE HEARING

RULE: Rules for Individual State Certification of Activities Requiring a Federal Permit – Title 47

DATE: July 18, 2006 **LOCATION:** 601 57th Street, Charleston, WV 25304

REGISTRATION

*NOTE: **PLEASE PRINT** - If information is not **complete or legible**, notification of decision will not be provided by DMR*

FULL NAME *(Only one name per line)*	**COMPLETE MAILING ADDRESS** *Include Address, City, State, and Zip Code*	**REPRESENTING**	**"X" IF SPEAKING**	**"X" IF SUBMITTING COMMENTS**
JASON BOSTIC	P.O. Box 3923 Charleston WV 25339	West Virginia Coal Association		X

West Virginia Coal Association

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

July 18, 2006

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

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

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

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

General Comments

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

History of State § 401 Mitigation Requirements.

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

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

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

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

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

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

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

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

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

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

Federal Mitigation Requirements are Comprehensive.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

Specific Comments

Page 4 4.2.f.2.A. Economic 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 ½ acre assessments shall be measured starting from the toe of the most downstream permanent or temporary impact (excluding stream crossings) in which the activity occurs.

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

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

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

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

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

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

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

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

each year the impact occurs.

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

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

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

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

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

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

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

Sincerely,

Jason Bostic, Vice President
Regulatory & Technical Affairs

West Virginia Coal Association

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

June 30, 2006

A

Water Docket
Environmental Protection Agency
Docket Center Room B102
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Via electronic mail: ow-docket@epamail.epa.gov

Attention Docket ID No EPA-HQ-OW-2006-0020 and/or RIN 0710-AA55

Re: Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency Compensatory Mitigation for Losses of Aquatic Resources; Proposed Rule, 71 Fed. Reg. 15520 (Mar. 28, 2006).

To Whom It May Concern:

Pursuant to the Federal Register Notice published on March 28, 2006 seeking comments on revisions to the joint mitigation regulations maintained by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, the West Virginia Coal Association hereby submits the attached comments and observations for the agencies review and consideration.

The West Virginia Coal Association appreciates the opportunity to review and comment on these proposed revisions and we look forward to future dialogue with both agencies on this important subject.

Sincerely,

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

Comments of the West Virginia Coal Association: Draft Federal Mitigation Rule

The West Virginia Coal Association (WVCA) appreciates the opportunity to share its views on this draft mitigation rule. This issue is extremely important to our members, because most coal extraction methods employed in West Virginia require section 404 permits issued by the U.S. Army Corps of Engineers.

WVCA is a state coal trade association representing the interests of companies engaged in the mining of coal within the state of West Virginia. WVCA's producing membership accounts for over 80 percent of the Mountain State's underground and surface coal production. WVCA also represents some 250 associate members that supply an array of services to the mining industry. These associate members include permitting, environmental and engineering consulting firms, mining equipment manufacturers, coal transportation companies, coal consumers and land and mineral holding companies. WVCA's primary goal is to enhance the viability of West Virginia coal as a source of domestic energy by facilitating environmentally-responsible coal mining through reasonable, equitable and achievable state and federal policy and regulation.

Mining-related impacts to jurisdictional waters are unavoidable in the steeply-sloped terrain of Central Appalachia and West Virginia regardless of the actual mining method used to extract the coal. While WVCA appreciates the

magnitude of the proposed changes to the federal mitigation rules and their applicability to all permitted discharges, we feel the agencies have inadvertently ignored the specifics of coal mining-related mitigation by first failing to acknowledge the unique environmental, topographic and regulatory setting within which West Virginia's coal industry operates. As we explain in more detail in subsequent comments, coal mining in West Virginia occurs in steeply-sloped terrain in areas where the coal resource is situated. This steep terrain is permeated by small, ephemeral and intermittent headwater streams that serve to drain natural runoff into larger, more substantial perennial stream systems. Unlike other dredge and fill activities that are subject to the joint Corps-EPA mitigation requirements, the majority of impacts from coal mining operations in West Virginia and elsewhere are temporary in nature. Through the requirements of other statues and regulatory programs, streams and areas subject to coal mining must be reclaimed or restored to the maximum extent possible to their pre-disturbance conditions and appearances. WVCA also believes that the agencies have once again fixated on situations and problems unique to wetlands impacts and mitigation while failing to properly consider stream impacts and mitigation projects such as those that would result from mining-related activities in West Virginia and Central Appalachia.

Our comments will be divided into several sections in order to convey our concerns and comments with the draft mitigation rule. First, we address the recent U.S. Supreme Court decision regarding the scope of the section 404 program.

Second, we will describe coal mining activities within the Mountain State that necessitate unavoidable impacts to jurisdictional waters and describe how mitigation requirements apply to mining-related impacts to jurisdictional waters. Finally, we will offer specific comments on the wording of the rule.

I. General Comments

Rapanos Decision

The Corps and EPA Have No Statutory Authority to Impose Mitigation in Headwater Streams under the Supreme Court Decision in Rapanos.

The Proposed Rule assumes without analysis that "waters of the United States" as traditionally defined by the Corps and EPA under their regulations, are subject to mitigation under the terms of the permit section 404 permit. Under a decision issued by the United States Supreme Court on June 19, 2006 in *Rapanos, et ux v. United States*, No. 04-1034, it is unlikely that the Clean Water Act (CWA) provides any jurisdiction for the Corps either to require a permit or to impose mitigation for activities in intermittent or ephemeral streams in the Appalachian Region.

The application of the Court's decision in *Rapanos* to intermittent and ephemeral streams in West Virginia is complicated by two facts. First, the two lower court cases reviewed and discussed by the Court, by their terms, involve wetlands and not "the other waters" of the U.S. present in streams and tributaries of streams. Second, although the decision in *Rapanos* was adverse to the Corps, its precise holding is complicated by the fact that the decision is not represented by

a single opinion of the Court. Instead, four members of the Court joined a plurality opinion and a single member, Justice Kennedy, concurred in the decision but wrote an opinion that analyzes the issue in a way markedly different from the plurality.

Nevertheless, under either opinion, section 404 of the CWA is unlikely to provide the Corps with jurisdiction to require a permit or mitigation for activities related to surface coal mining.

Under the plurality opinion authored by Justice Antonin Scalia, the intermittent and ephemeral streams that comprise the vast majority of jurisdictional waters impacted by coal mining can never constitute waters of the United States as defined by the criteria of his opinion. "First, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." (Slip Op. at 24). By their nature intermittent and ephemeral streams are "impermanent," meaning that their flow is at best seasonal, episodic and generally related to precipitation. For this reason there is no continuous surface connection with the perennial stream that may qualify – frequently at a distance of miles – as a stream that is a "navigable water" as traditionally defined.

Even if Justice Kennedy's different analysis is followed, the Corps is unlikely to fare any better. Relying upon the test settled upon in *Solid Waste*

Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), Justice Kennedy explains that in order to constitute "'navigable waters'" under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made. 531 U.S. at 167" (Kennedy, J., *concurring in judgment*, Slip Op. at 1). There is no question that the Kennedy analysis, wetlands adjacent to or perennial streams flowing into traditionally navigable waters are within the Corps jurisdiction .("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone").(Kennedy, J., *concurring in judgment*, Slip Op. at 23) As Justice Kennedy accepts CWA section 404 jurisdiction for wetlands *adjacent* to perennial streams, it seems reasonable to assume that he would find jurisdiction over those streams as well.

It appears equally certain, however, stream channels more remote from navigable waters, or channels that serve as no more than conduits for infrequent flows are outside of the jurisdiction of the CWA.

> The Corps' existing standard for tributaries, however, provides no such assurance. . . . Yet the breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it--precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated

> ponds held to fall beyond the Act's scope in *SWANCC*. (Kennedy, J., *concurring in judgment*, Slip Op. at 24)

This language in the concurring opinion rejects the basis for Corps jurisdiction – tributaries of perennial streams under 33 CFR 328.2(a)(5) - over the vast majority of the intermittent and ephemeral drainages that characterize West Virginia's topography. If, as Justice Kennedy's opinion suggests, this "breadth of this standard" is an inadequate basis for the assertion of federal jurisdiction, then it likewise provides no basis for requiring mitigation.

For this reason, we suggest that the Corps and EPA consider revising its proposed rule to exclude the requirement of mitigation for this class of streams.

West Virginia Coal Mining—Background

Coal continues to play an important role in supplying the energy needs of the United States and, more than any other domestic fuel resource, helps to assure this country's energy independence by providing a reliable, domestic source for electricity generation and industrial consumption of energy. Coal is America's most abundant fuel resource and it is provided to the market by a highly-trained and specialized workforce. Coal mining in the United States is also heavily regulated by mature environmental regulatory programs, including a specific federal statute directed specifically at coal mining. The federal Surface Mining Control and Reclamation Act (SMCRA), (30 U.S.C. 1201, *et.seq.*) expressed the

importance of coal mining to the future economic security of the United States when in stating Congressional intent:

> Surface and underground mining operations affect interstate commerce, contribute to the economic well being, security and general welfare of the Nation and should be conducted in an environmentally sound manner.[1]

> It is the purpose of this chapter to...assure that coal supply essential to the Nation's energy requirements, and its economic and social well-being is provided and strike a balance between protection of the environment...and the Nation's need for coal as an essential source of energy. [2]

West Virginia is the nation's second largest coal producing state. Coal mining operations in West Virginia produced over 159 million tons of coal last year. West Virginia coal is used extensively by domestic utility companies to produce electricity. Metallurgical coal mined in West Virginia represents some the highest quality coal found anywhere in the world, and both domestic and international steel companies rely on this coal to produce coke for use in the iron making process.

Coal extraction in West Virginia is accomplished generally by underground or surface mining. Both methods of coal extraction require the placement of fill structures, commonly referred to as "valley fills" in acknowledgment of the steeply-sloped terrain that exists in West Virginia, within CWA section 404

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[1] Surface Mining Control & Reclamation Act, 30 U.S.C. 1201(j).
[2] Surface Mining Control & Reclamation Act, 30 U.S.C. 1201(f).

jurisdictional waters. Construction of these valley fills necessitates section 404 authorization from the Corps of Engineers (Corps).

Underground mining techniques, which account for the majority of West Virginia's coal production, utilize machinery to drive tunnels under the surface of the land. These tunnels are situated in coal seams so as the machinery advances further underground, coal is removed. Using a combined system of vehicle haulage and conveyor belts, the coal extracted from the seam is transported to the surface.[3] In underground mining, it is impossible to separate coal from the rock partings that lie above, within or below the coal seam. This inherent material is removed along with the coal and transported to the surface. In order to provide a saleable product that is free from these impurities, these rock partings are removed from the coal in a preparation plant using combined mechanical and chemical separation procedures:

> Underground mining methods extract everything within the coal seam and sometimes several inches of top or bottom rock. Raw "coal" from most deep mines today actually contains only about 50% coal by weight. The remainder is actually in-seam impurities or out-of-seam dilution that must be separated from the coal to produce a marketable product. [4]

Once removed from the coal, these partings, now referred to as coal refuse, are placed in engineered and permitted structures referred to as refuse fills. In some cases the coal refuse is used to construct an embankment of a dam that serves as a source of water used in the coal preparation plant process. Known as coal refuse

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[3] See Generally "Underground Mining Methods", pages III-I.3-11, Draft Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005.
[4] *Bragg v. Robertson.* Report of O. Eugene Kitts, 1998

dams, these structures along with refuse fills, are subject to the requirements of five separate regulatory programs and are designed to the strictest engineering standards to assure their stability and safety. In addition to the CWA section 404 permitting and mitigation requirements, these structures are permitted and reviewed by the federal Mine Safety and Health Administration, the state West Virginia Department of Environmental Protection (both the mining and water resources programs), and the federal Office of Surface Mining Reclamation and Enforcement. Most, if not all of the coal removed using underground mining techniques must be cleaned in the preparation plant process before it is shipped to consumers, making coal refuse fills and dams vital to the continued existence of the underground mining industry in West Virginia and the country:

> Whatever is not shipped to a [coal] customer from a preparation plant goes into a refuse disposal facility. It is not unusual for a plant to handle over 1,000 tons per hour of coal refuse. An operation of that magnitude must have access to a large disposal site within relatively close proximity to the plant. Without the ability to construct valley fills for coal refuse disposal, deep mining in West Virginia would become virtually impossible.[5]

In addition to the required refuse structures, underground mining operations in West Virginia fall under the jurisdiction of the section 404 program because of the pre-mining construction activities that are necessary to provide access to the coal seam. The installation of an underground mine generally requires the construction of a valley fill as rock and earth is removed from the mountainous area and a flat area, or "bench" is created that allows access to the coal seam and provides an area

[5] *Bragg v. Robertson.* Report of O. Eugene Kitts, 1998

for critical underground mining infrastructure such as bathhouses, electrical power installations, access roads and underground ventilation facilities:

> Development of underground mine portal facilities in southern West Virginia often requires the construction of valley fills for permanent disposal of excess material and for temporary storage of mine face-up spoil. A typical small deep mine installation includes a portal bench excavation, a stockpile bench cut into the hillside, and a valley fill as close to possible to provide spoil storage and to serves as a parking and supply storage area.[6]

Surface coal mining techniques, which account for the majority of national coal production and roughly 38% of West Virginia's coal production, involve the mechanical removal of overlying native earth and rock or "overburden" to reach underlying coal seams. While surface mining includes a variety of methods, the overall objective is the same: coal extraction through surface removal of overburden. Under any method of surface mining, most of the excavated overburden is returned to the mined-out areas to eliminate the contours of the mineral extraction areas. Referred to generally as "backfilling", this restoration eliminates the contours and appearance of the mined areas such as coal pits and highwalls and restores the approximate original contour (AOC) or the original, pre-mining topographic contours and appearance of the area . However, not all of the overburden can be returned to the original areas due to the "swell factor" of the native rock and soil. This "excess overburden" is typically placed in valley fills that are constructed in jurisdictional waters. The need for fills results from the

[6] *Bragg v. Robertson.* Report of O. Eugene Kitts, 1998.

swell factor- the physical expansion of the fractured rock and soil- which can increase its volume by 15-40%:

> The primary reason for using valley fills is that excavation of overburden results in a greater volume of material than was present on the mine site before mining. When bedrock is broken up forming spoil, void spaces are left between the individual rock fragments, causing them to occupy a greater volume than the original, unbroken rock. This expansion is referred to as swell and typically represents a volume increase of about 40%. Compaction of soil during backfilling partially offsets swell as the rock fragments are squeezed together by the weight of overlying material, but this shrinkage factor will not completely return the spoil to its solid or bank volume.
>
> Particularly on steep-sloped mine sites, the excess spoil generated by the swell factor cannot be completely backfilled on the mine bench without construction of potentially unstable slopes or substantial deviation from AOC. The maximum amount of spoil that can be returned to the mined bench is constrained by SMCRA slope stability and design requirements (i.e, the slope at which backfills can be constructed)...[7]

The mining processes and methods described above result in two categories of impacts to jurisdictional waters. The first are temporary impacts that occur as the small, ephemeral and intermittent streams are "mined through" or temporality disturbed as coal extraction is taking place. During the reclamation process, these streams are reconstructed. Mine throughs constitute the majority of mining-related impacts to jurisdictional waters. The second category of impacts can be categorized as permanent, and result from the construction of valley fills and coal refuse structures.

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[7] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page III.K-3, "Swell Factor and Excess Spoil".

The Reclamation Process and the Unique Opportunity for On-Site Mitigation

As stated previously, the mining process in West Virginia, unlike other permitted impacts to jurisdictional waters, is largely temporary in nature- when coal mining is completed SMCRA requires the land to be restored to its natural, pre-mining appearance of steeper slopes. This requirement also leads to the reestablishment of stream channels to route runoff from the mined and resorted area:

> SMCRA, in order to protect society and the environment from the adverse effects of surface coal mining operations, requires that reclaimed surface coal mining operations restore the land to a condition capable of supporting, at a minimum, the pre-mining uses. Thus, to the extent technologically and economically feasible, the SMCRA hydrologic reclamation plan would provide for the restoration of aquatic and riparian habitat to fulfill SMCRA performance standards to minimize impacts on-site; prevent material damage off-site; and enhance fish, wildlife and related environmental resources where practicable.[8]

Because of the unique coupling of mining regulatory requirements and topographic reality in West Virginia and Central Appalachia, most mining-related impacts to jurisdictional waters are temporary in nature—i.e. the federal statutory requirement for restoration of the mined area results in the recreation of steep slopes which in turn requires stream channels be re-constructed to properly drain natural runoff. The Programmatic Environmental Impact Statement on Mountaintop Mining and past regulatory initiatives from the Corps have acknowledged this unique situation:

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[8] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-5.

> SMCRA is a comprehensive program to regulate surface coal mining and reclamation operations. SMCRA requirements are similar to the CWA section 404 relative to aquatic resources.[9]
>
> 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 the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.[10]

Despite these recent regulatory acknowledgements by the Corps and EPA, in the proposed rule at issue the agencies have chosen to ignore this excellent opportunity for on-site, in-kind replacement of impacted aquatic resources by prohibiting activities required under other regulatory programs from serving as mitigation for CWA section 404 purposes. WVCA will address this deficiency in more detail in our specific comments.

In addition to ignoring the unique, temporal nature of the majority of mining-induced impacts to jurisdictional waters, the proposed rule at issue continues what has become a far too common problem with all documents and guidelines from both agencies related to mitigation--- a reliance on studies, data and evidence conducted on wetlands and wetlands mitigation to develop policies for all stream and wetlands mitigation.

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[9] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-9.
[10] "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining." U.S. Army Corps of Engineers. May 7, 2004

The National Research Council's "Compensating for Wetlands Losses under the Clean Water Act", which is cited continuously throughout the proposed rule as the impetus for revising the federal mitigation rules, was explicit in analyzing the topic of mitigation solely in terms of wetlands. By consensus wetlands are unique resources because they exist as a transitional zone between aquatic property (whether flowing or still waters) and upland areas. Wetlands do vary in their environment between areas that are merely moist, seasonally inundated or permanently flooded, by soil types, by vegetation, by the different creatures that inhabit the different types of wetlands, and by the different functions that each of these features in combination can serve.

The Environmental Assessment prepared by the agencies for the proposed rule at issue suffers the same deficiency, referencing the NRC report extensively and almost exclusively to problems associated with mitigation projects associated with wetlands.

In contrast, mining operations in West Virginia and elsewhere in Central Appalachia rarely impact true wetlands. In fact, the occurrence of wetlands is extremely rare in this region: "Wetland resources do not seem to be a major landcover type in the steep slope terrain of West Virginia."[11] By and large, most mining-related, 404 authorized impacts within West Virginia are to small headwater streams which are ephemeral or intermittent in nature and differ vastly from wetlands:

[11] "A Review of Wetland Resources in Steep Slope Terrain of West Virginia." EPA. 2000.

> Generally, ephemeral streams have a discrete channel and flow in direct response to precipitation events. In contrast, flow in intermittent streams is periodic or seasonal and based on the presence of groundwater.
>
> Generally, headwaters streams originate at high elevations in the study area.[12]

I. General Comments—Preamble

As stated in our previous comments, we believe that the current rule suffers from the agencies' historically myopic view of mitigation—the agencies have used perceived and reported problems associated with wetlands impacts and mitigation in order to write standards which apply to all mitigation, including stream mitigation. Additionally, we believe the rule has ignored specific conditions and circumstances applicable to mining industry in West Virginia and nationally.

In the preamble to the proposed rule, the agencies state:

> The proposed regulations are also intended to account for regional variations in aquatic resource types, functions, and values and apply equivalent standards to each type of compensatory mitigation to maximum extent practicable.

Despite this introductory proclamation, the draft regulations do exactly the opposite by proposing specific changes aimed at remedying problems associated with wetlands mitigation. A similar proclamation is made with respect to the different forms of mitigation:

> We also believe the proposed rule establishes, to an extent that is feasible and practical, equivalent standards for all forms of

[12] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page III.K-3, "Swell Factor and Excess Spoil".

> compensatory mitigation, given the basic differences between the current mechanisms for providing compensatory mitigation…

Other parts of the draft regulation's preamble, the proposed regulations and guidance on the draft proposal issued by the agencies however, leave a general feeling that mitigation banking is the preferred means of mitigation in all circumstances and that promoting mitigation banks over other forms of mitigation is the true intent of the changes. For example, in the joint "question and answer" document prepared by the Corps and EPA, one of the questions the agencies pose for themselves and then answer in an attempt to explain the rule is "why does this rule encourage mitigation banking?" In the draft regulations at issue, similar representations are made in the preamble:

> …we believe success rates of compensatory mitigation projects will improve and entrepreneurs and others will be encouraged to develop mitigation banks. Improving the processes applicable to the development and approval of mitigation banks is expected to result in more mitigation banking proposals, which would provide more compensatory mitigation in advance of authorized impacts to waters of the United States.

This apparent preference for bank-provided mitigation is extremely troubling for WVCA and its members and is a manifestation of the agencies' focus on wetlands mitigation and impacts.

Mitigation banks in West Virginia and Central Appalachia would be hard-pressed to replace the aquatic resources impacted by mining related activities. As previously noted, unlike other permitted section 404 activities that are permanent in nature, the majority of mining-related activities are temporary and occur in

high-gradient, ephemeral and intermittent streams. The structure and function of these streams can be replaced within the impacted area through reclamation. The functions of headwater streams are summarized in the Mountaintop Mining/ Valley Fill Environmental Impact Statement:

> Even where inaccessible to fish, these small streams provide high levels of water quality and quantity, sediment control, nutrients and wood debris for downstream reaches of the watershed. Intermittent and ephemeral headwater streams are, therefore, often largely responsible fro maintaining the quality of downstream riverine processes and habitat...[13]

Previous guidance from the Corps directed specifically at coal mining acknowledged the opportunities for mitigation as the mined area is reclaimed:

> Surface mining activities can result in the creation of intermittent and/or perennial streams depending in the on-site hydrological conditions...applicants are encouraged to optimize these opportunities for on-site mitigation. [14]

Clearly, maintaining the agencies' past guidance and preference for in-kind replacement of headwater streams satisfies the objectives of the CWA section 404 program as cited in other portions of the preamble to the proposed rule:

> Locating compensatory mitigation projects where they will provide the desired habitat type and functions to appropriately offset impacts will support the "no overall net loss" for wetland acreage and function.

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[13] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page III.C-1, "Appalachian Aquatic Systems".

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

Land use and ownership patterns will also limit the viability of mitigation banks within West Virginia and Central Appalachia:

> The two most important features of the study area [central Appalachia] are the natural landscape and the ownership of potentially mineable coal beneath the surface. The steep slopes and the narrow, flood prone river valleys severely constrain the available supply of developable land. Most of the land is in forest cover and human population is concentrated in stream valleys.
>
> In many coal producing areas, the surface and subsurface ownership rights are held by different parties.[15]

The establishment of a mitigation bank under the land use and ownership patterns that exist in West Virginia will be very difficult. In the steeper terrain where headwater streams exist that are normally impacted by mining operations, the land is usually owned by a holding company that will eventually lease the land for natural resource extraction use—coal mining, oil and gas production or timbering. It is highly unlikely that such holding companies would surrender these areas for mitigation banking purposes when the land offers much more economic potential as resources are extracted and/or the slopes of the area reduced for other development. Unable to acquire suitable headwater stream replacement areas, mitigation banks in West Virginia will forced further and further downstream from the actual impact that necessitates the 404 authorization and mitigation. As these mitigation banking sites are forced further and further away, the effectiveness of whatever mitigation is undertaken by the banks is reduced.

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[15] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page III.R-1, "Land Use and Potential Development".

> In the NRC Report, the committee concluded that a watershed approach would improve decision making and state that wetland functions must be understood from a watershed prospective to fulfill the objectives of the Clean Water Act. The committee noted that an automatic preference for in-kind and on-site compensatory mitigation is inconsistent with a watershed approach since there are circumstances in which on-site or in-kind mitigation is neither practicable nor environmentally preferable.

As stated before, the NRC report that is quoted above and relied on by the agencies as the basis for rewriting the mitigation rule examined only wetlands mitigation- not stream mitigation as will occur for mining impacts in West Virginia. WVCA feels that the agencies' continued reliance on the NRC report has unfairly distorted and biased on-site, in-kind mitigation as a means of achieving "no net loss" of waters. For example, accepting the defined function of headwater streams as identified by the federal regulatory agencies in the mountaintop mining /valley fill Environmental Impact Statement- as a source of energy input for the downstream reaches of the watershed, then the most "environmentally preferable" form of mitigation for impacts to these water bodies should be the in-kind replacement of the same stream segments. As we noted previously, the mining and reclamation process provides the perfect opportunity for such in-kind replacement. **In such cases where in-kind, on-site replacement is possible, it should be the preferred method of mitigation and not unfairly disadvantaged for the sake of promoting mitigation banking or larger watershed restoration.** Ignoring such opportunities for the direct replacement of

aquatic resources and functions is contrary to the overreaching goals expressed in subsequent parts of the preamble:

> In addition to supporting the objective of the Clean Water Act, the proposed rule will support the "no overall net loss" goal for functions, through appropriate site selection for wetlands mitigation projects. *Locating compensatory mitigation projects where they will provide the desired habitat type and functions to appropriately offset impacts will support the "no overall net loss" goal for wetland acreage and function* (emphasis added).

II. General Comments--- Watershed Approach

As our previous comments have demonstrated, application of the "watershed approach" to mining related impacts to headwater streams in West Virginia is inappropriate. Unlike the traditional wetlands that serve as the basis for the NRC report, the headwater streams impacted by mining operations serve as the very beginning of a given watershed instead of being situated further downstream in the larger riverine system. Unlike wetlands and other water resources impacted by other fill activities that are permanent in nature, mining disturbances to these largely ephemeral and intermittent streams are only temporary, with reclamation serving to reconstruct streams and restore their function. In the agencies rush to promote the watershed approach and mitigation banking, the preamble ignores the ability of in-kind, on-site mitigation to better achieve the objectives and goals of the CWA, despite all previous rulemaking and guidance from the Corps and EPA advocating such a position:

> In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.[16]
>
> 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.[17]
>
> 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.[18]

WVCA strongly recommends that the agencies rearrange the hierarchy of mitigation as discussed in the preamble and the draft rule to reflect a preference for on-site, in-kind mitigation if available and practicable. Otherwise, the best opportunity for actual stream replacement and no net loss of wetlands will be lost because of the agencies' desire to create more mitigation banking opportunities.

III. Specific Comments—Proposed Regulations

Definitions At least eight of the definitions in the proposed rule have their origin in the 1995 Mitigation Bank Guidance Notice. Many of the other definitions originate at least conceptually in the NRC document. Overall, the definitions suffer generally in their lack of specificity and contribute to a vagueness that surrounds the proposal. Specific criticisms are noted below.

- Credit means a unit of measure (e.g., a functional or area measure) representing the accrual or attainment of aquatic functions at a

[16] Regulatory Guidance Letter No.01-1. U.S. Army Corps of Engineers, October 31, 2001.
[17] Regulatory Guidance Letter No.02-2. U.S. Army Corps of Engineers, December 24, 2002.
[18] Compensatory Mitigation Guidelines- Huntington District . U.S. Army Corps of Engineers, Huntington, WV District. January 30, 2004.

compensatory mitigation site. The measure of function is based on the aquatic resources restored, established, enhanced, or preserved.

- Debit means a unit of measure (e.g., a functional or area measure) representing the loss of aquatic functions at an impact or project site. The measure of function is based on the aquatic resources impacted by the authorized activity.

- Enhancement means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

- Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland or deepwater site. Establishment results in a gain in aquatic resource area.

- Functions means the physical, chemical, and biological processes that occur in aquatic resources and other ecosystems.

- Impact means adverse effect.

- Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

- Re-establishment means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

- Rehabilitation means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

- Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

The preceding definitions are grouped together because they express two key concepts: change (credit or debit) in the function or area of the resource affected; and the methods by which the resource is affected. Much of the problem with the definitions is lack of clarity as to what is meant and why some terms are limited. For example, "credit" should simply be defined as a "gain" at a compensatory mitigation site just as "debit" denotes a "loss" at project site.

"Impact" means strictly an adverse effect when the noun normally is neutral and is preceded by an adjective that denotes what kind of impact is achieved. This is problematic for mining sites because it fails to recognize that many intermittent and ephemeral streams in Central Appalachia permanently impacted by valley fills are significantly impaired by previous mining. Thus, a stream bed of a specific length and measurable area that collects AMD may be filled with excess spoil. In the process of creating the fill, the AMD may be neutralized and the discharge improved. In this example, it is difficult to understand how either "area" defined as total stream length or "function" defined as water quality is adversely impacted. Therefore, the assumption that all project sites are found at undisturbed locations, demonstrate valuable functions and that all impacts will be adverse should be reconsidered.

Similarly, credits can be earned by one of three acts: restoration, enhancement or establishment. Each of these acts results in the gain of either resource function or area, but not both. It is not clear why establishing an aquatic resource where none previously existed does not create both function and area. Likewise, it is unclear why the authors believe that restoration provides either re-establishment which results in an area gain but not function, or rehabilitation that results in a gain in function but not area. In short, the distinctions and segregation of each type of manipulations seems artificial and difficult to define in actual application. As for "preservation" it is unclear how the agencies expect this method to be incorporated in any system of mitigation when it is not eligible for credit as it adds neither function nor area when adopted.

Definitions of "function", " services" and *"values"*

The agencies do not sufficiently articulate the meaning and implications of each term and how they will or can be implemented in mitigation policies. For example, "Functions means the physical, chemical, and biological processes that occur in aquatic resources and other ecosystems. The primary purpose of compensatory mitigation is to replace lost aquatic resource functions at the impact site". If "functions" are those processes occurring in aquatic resources, then what is the meaning of the phrase "other ecosystems"? If the terrestrial environment on riparian lands interacts with the aquatic environment (as it surely does), then what is the responsibility of a permittee to mitigate by enhancement, restoration or establishment that terrestrial environment? In as much as the CWA section

404(b)(1) Guidelines have historically limited their application to the aquatic environment, this very sentence suggests a significant expansion of the agencies' authority under section 404.

Another issue is one of the significance of the process. One can imagine an enormous range of biological, physical and chemical processes that occur in an aquatic resource. The fact that those processes occur and are perhaps even measurable, does not make those processes significant.

33 CFR 332.3

This provision of the rule identifies many of the specific reasons why the proposal will be problematic for coal development in West Virginia and elsewhere. Within this proposed provision, the agencies would be prohibited from considering work performed under other regulatory programs as mitigation for authorized impacts to waters of the United States. Additionally, it requires that a functional assessment of loss be made at the time of permit application, that mitigation be in place before the project is commenced, that a mitigation site be identified and approved prior to commencing the development on the project site, that a mitigation plan be subject to public comment prior to permit issuance, authorizes the district engineer to require upland buffers and that financial assurances be issued to guarantee mitigation success.

With respect to 33 CFR 332.3(b), "Location and Type of Compensatory Mitigation", the reliance on the watershed approach and an apparent biased

preference for mitigation banking presents issues and challenges that have been commented on previously.

33 CFR 332.3(e)

In this section of the proposed rule, the agencies acknowledge that in-kind mitigation is most likely to replace functions lost to permitted activities:

> In general, in-kind mitigation is preferable to out-of-kind mitigation because is most likely to compensate for the functions, services and values lost at the impact site.

WVCA totally supports this statement, but believes that it should be expanded to include a further preference for on-site mitigation. Historically the agencies have recognized the environmental importance of replacing lost functions in an area with the same functions in the same area. Only now, with these proposed regulations which appear to be motivated by the primary goal of benefiting commercial mitigation banks, have the agencies ever expressed any other preference.

Coupling the now restated preference for in-kind mitigation with the historical preference for on-site mitigation further advances the programmatic success of the agencies mitigation program by assuring "no net loss" of aquatic resources. WVCA urges the agencies to revise this provision to include a further reference to on-site mitigation.

33 CFR 332.3(f)

WVCA shares the agencies' belief that a functional assessment provides a useful tool for analyzing impacts and assessing mitigation requirements. For several years now, a functional assessment, referred to as the "Central Appalachian Protocol", has been used by the Corps' Huntington (West Virginia) District as the basis for mitigation projects associated with authorized impacts to headwater streams. Our enthusiasm for this provision is tempered by the broad discretion afforded to individual district engineers. WVCA agrees that functional assessments should and must account for regional and activity-specific factors. **However, certain Corps districts have applied this broad discretion as a means to include water quality parameters within functional assessments.** These parameters are used in a surrogate fashion, and are NOT subject to regulation under the section 402 National Pollutant Discharge Elimination System (NPDES) water discharge permitting process because the proper state agencies have chosen not to regulate these parameters with a promulgated water quality standard. Water quality standards, legally and properly promulgated through established rulemaking protocols and implemented through the section 402 permitting process are the appropriate way to regulate water quality-related concerns:

> A water quality standard defines the water quality goals for a water body, or portion thereof, by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by protecting water quality through anti-degradation provisions. States adopt water quality standards to protect public health or welfare,

> enhance the quality of water, and serve the purposes of the Clean Water Act.[19]
>
> Water quality standards are the foundation of [a]water-quality based control program mandated by the CWA. The four basic elements in establishing water quality standards are designated uses, water quality criteria, anti-degradation policy, and general policies for implementation. The states specify, based upon scientific criteria, the appropriate water uses to be achieved and protected.
>
> Water quality standards are adopted by the states under section 303 of the CWA, subject to EPA approval.[20]
>
> Discharges of pollutants through point sources to waters of the U.S. require permits issued under the NPDES program, authorized by the CWA.
>
> Activities authorized under SMCRA and CWA section 404 proposals for surface coal mining operations…must comply with any applicable NPDES effluent limits. [21]

Individual states and EPA maintain expansive regulatory programs to achieve the above-cited regulatory program objectives. In West Virginia, the state Department of Environmental Protection (WV DEP) maintains the water quality standards program. Any changes to these state-maintained water quality standards are noticed for public review and comment pursuant to state rulemaking statutes and requirements, with EPA having ultimate approval authority for changes to water quality standards and designated uses. WV DEP issues section 402 NPDES permits to coal mining operations with appropriate water quality discharge limits

[19] U.S. Environmental Protection Agency. Water Quality Standards Handbook: Second Addition. August 1994.
[20] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-38.
[21] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. Page II.C-41.

in order to protect the designated use of the streams below any section 404 authorized activity.

In addition to the water quality standards and section 402 permitting programs, the water quality impacts of dredge and fill activities are further scrutinized by yet another state implemented program- the section 401 state water quality certification for federally-authorized activities:

> 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. A CWA section 404 permit for MTM/VF [mining operation] proposals cannot be issued unless a section 401 certification is issued or waived for a particular proposal. The state may consider anti-degradation, technology-based effluent limitations, and water quality requirements in determining whether to certify the proposal under CWA section 401. [22]

Under this regulatory structure, individual states certify that an activity authorized by the issuance of federal permit (such as a section 404 permit from the Corps) will not violate state water quality standards. In West Virginia, this 401 certification program is maintained by the WV DEP through statute, rules and associated permitting applications and review procedures.

The inclusion of surrogate parameters within any section 404 initiative ignores the vast regulatory program maintained under section 402 of the CWA specifically to regulate water quality standards and designated stream uses and circumvents the public notice and comment procedures required in the federal

[22] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-42.

CWA and associated state programs. **Implementation of surrogate parameters by individual Corps districts under the guise of functional assessments used to implement the section 404 program represents an incursion on behalf of these districts into the section 402 programs maintained by EPA or properly delegated to the states.** WVCA urges the agencies to revise the language in the proposed rule to recognize the existence of the section 401 and 402 programs by stating that functional assessments conducted as part of the section 404 program will not impose water quality parameters.

33 CFR 332.3(j)

WVCA is particularly concerned with this provision of the proposed regulation. The motivation for this blanket exclusion is lacking, and we believe it unfairly biases activities that are subject to other regulatory programs for the purposes of promoting mitigation banks. As noted in our previous comments, coal mining operations are subject to a comprehensive statute and set of regulations that address coal extraction specifically. Under the SMCRA program's requirements for reclamation and restoration of the mined area to a environmental state equal to or better than what existed before facilitates the reconstruction of headwater streams as the original topography and drainage patterns of the area are restored. As previously cited:

> SMCRA, in order to protect society and the environment from the adverse effects of surface coal mining operations, requires that reclaimed surface coal mining operations restore the land to a condition capable of supporting, at a minimum, the pre-mining uses. Thus, to the extent technologically and economically feasible, the

> SMCRA hydrologic reclamation plan would provide for the restoration of aquatic and riparian habitat to fulfill SMCRA performance standards to minimize impacts on-site; prevent material damage off-site; and enhance fish, wildlife and related environmental resources where practicable.[23]

Mine reclamation practices that are required under SMCRA MUST be considered when assessing compensatory mitigation for the section 404 program for two reasons: First, reclamation of the mined area presents the best opportunity for in-kind, on-site recreation of the headwater streams that are affected by coal mining and second, to disregard SCMRA required activities when calculating mitigation would be to require mitigation simply for the sake of requiring more mitigation. As noted in our other comments, the opportunities for off-site, in-kind or off-site out-of-kind mitigation activities are unfortunately limited in West Virginia. Further, these off-site activities, whether they are in-kind or out-of-kind, would fall far short of providing the direct environmental benefit realized from the on-site, in-kind replacement that is possible on mined areas.

In previous rulemaking and guidance initiatives, the agencies have recognized the environmental advantages of the close relationship of the mining program and the section 404 mitigation requirements:

> 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

[23] Draft Programmatic Environmental Impact Statement. Corps, EPA et.al. 2000. page II.C-51.

> 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 hydrological conditions…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. [24]

In order to remedy the environmental shortcomings and regulatory duplicity posed by the draft regulation, WVCA suggests that it be revised as follows:

"Reclamation projects, as required by other federal, state and local regulatory programs are counted towards compensatory mitigation credits at a one-to-one ratio.

33 CFR 332.3(k)

This section of the proposed regulation further requires that a permittee's proposed mitigation project be subject to public notice and comment along with the permit. For traditional, permanent development-related fill activities that are subject exclusively to the requirements of the section 404 program and no other regulatory programs, this provision will probably be a trivial concern. For coal mining operations that are subject to the extensive public notice and comment

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

provisions of the SMCRA regulatory program, this will be extremely problematic and could conceivably result in an endless cycle of public notice, comment, revision and public notice. Because the headwater streams that are impacted by mining operations are reconstructed during the reclamation process, any change to the associated SMCRA permit issued by the state or section 404 permit issued by the Corps could potentially affect the design and configuration of the post-mining mitigation. Under this scenario, if the mining plan in the SMCRA permit is revised in response to concerns raised under that regulatory program which leads to some change in the post-mining land form and stream reconstruction patterns, then the mitigation plan will be have to again be published for public notice and comment. Likewise, if the mitigation plan is revised in response to public comments, it could conceivably result in changes to the associated SMCRA plan and require public notice and comment under that regulatory program as well. **WVCA urges the agencies to revise the proposed regulation to better align the sequencing of comments for the section 404 permit, its required mitigation and the notice and comment provisions associated with the mining regulatory program.**

<u>33 CFR 332.3(m)</u>

The requirement to have mitigation in place before a project commences is a literal impossibility in the context of mining operations for several reasons. **First among them is that on-site, in-kind mitigation cannot occur until activity on the 404-permitted undertaking is sufficiently complete to begin the**

process of constructing the on-site mitigation. This is particularly true for mining-related mitigation as stream reconstruction has traditionally been incorporated into the design of the reclamation so that the land form is not established until the mineral is removed and the reclamation is performed. This provision is also problematic, just as mitigation banking will be, based on land ownership patterns in West Virginia. Few coal mining operations anywhere in West Virginia or the United States are performed on land owned by the mining operator. Instead, the mining operator through a mineral lease, secures the right to mine and remove the mineral and then reclaim the land as required by lease. Following the conclusion of mining and reclamation, the land reverts back to the owners. In previous guidance related to coal mining and conservation easements, the Corps itself acknowledged the unique land ownership patterns that exist in the Central Appalachian coal fields:

> Historically, the Corps has emphasized the utility of conservation easements for mitigation projects… this has proved challenging for surface coal mining in much of Appalachia.
>
> Experience has shown that obtaining conservation easements is frequently not practicable because multiple owners hold the mineral, oil and gas, timbering and grazing rights. Additionally, many property owners are reluctant to establish conservation easements that may actually or perceptually restrict their ability to use their land and its resources.

Because similar land use restrictions as imposed by conservation easements would extend to up-front mitigation, the Corps' observation applies here as well. WVCA strongly urges the agencies, in light of the previously-issued, mining-specific

guidance referenced above, to revise the proposed regulations in order to remove the requirement for mitigation to be in place before the commencement of operations.

33 CFR 332.2(n)

The language in this provision of the draft regulations provides that "the district engineer shall require sufficient financial assurances" to ensure mitigation success. The wording of the proposed rule is troublesome in that extraordinary deference provided to the district engineers for the purposes of determining the financial assurances necessary will lead to subjective and inconsistent interpretations across the various Corps districts. Such inconsistency will frustrate the permitting and planning efforts of the regulated community. WVCA suggests that clear and concise guidance on financial assurances for mitigation projects.

As with other provisions of the proposed rule, the agencies have chosen to ignore the provisions of other regulatory programs that may provide the same desired financial assurances. Under the mining regulatory program of SMCRA, coal mining operators are required to post reclamation bonds to assure that the mined land will be restored and all conditions of the mining permit satisfied. Since on-site, in-kind mitigation for headwater streams will be accomplished during the mining reclamation process, WVCA suggests there is an excellent opportunity to reduce regulatory duplicity by allowing the district engineer to accept the assurances required under other regulatory programs such as SMCRA.

33 CFR 332.5

The proposed rule expresses an unqualified preference for performance standards. Generally, WVCA supports this provision, as it provides a reasonable and predictable method by which to judge the success of mitigation projects. WVCA would only observe that performance standards should be modeled after the functional assessment protocol utilized initially to assess impacts. Otherwise, permittees and the agencies would be confronted with comparing different measurements and then subjectively determining whether or not mitigation has been successful. WVCA also believes, as previously noted, that performance standards should not include water quality parameters as they are properly addressed by other regulatory programs.

33 CFR 332.7(a)

With this provision of the proposed regulation, the agencies have mandated that compensatory mitigation project sites be given extraordinary protection through the execution of land control agreements. WVCA believes that this provision of the proposed rule ignores the continued jurisdiction of state and federal environmental regulatory programs and equates to a land management and distribution exercise which compromises private property rights and one that is beyond the authority of the agencies to regulate under section 404. The draconian requirements contained within this provision again ignore the specific situations encountered in West Virginia and with mining operations. This proposal also ignores past guidance issued by the agencies with respect to mitigation site

protection measures and the coal mining industry in West Virginia and Central Appalachia. We also believe this is just one other example of the agencies bias against on-site, in-kind mitigation in favor of commercial mitigation banks.

The move by the agencies to require land-use restriction measures such as conservation easements is generally troubling for two reasons. First, future dredge and fill activities that could potentially impact a mitigation site are subject to the jurisdiction of the Corps under the section 404 program and would require the same level of permitting and public review as any 404 activity anywhere. Even activities that occur outside the agencies jurisdiction of waters of the United States would be subject to other regulatory processes. Specific to West Virginia and coal mining, these other programs and requirements would include the entire SMCRA and CWA section 402 permit application, review and approval process in addition to the section 404 program. The reality that the agencies have not surrendered their permitting authority over sites that are mitigation projects appears to have been forgotten in this proposal. The second general concern regarding conservation easements is that by imposing such land-use restriction measures, the agencies have effectively extended the scope and reach of the 404 program far beyond its current statutory limits to cover upland areas.

The particular situations confronted in the mining industry and in West Virginia serve to make conservation easements even more impractical. As we have noted in other comments, mining companies rarely own the land from which coal is extracted. Instead, long-term leases that provide for coal removal and then

reclamation are executed, with the mined and reclaimed area reverting back to its original owners. Past guidance (previously cited in comments regarding mitigation banks) from the agencies with respect to mining and mitigation has acknowledged the difficulty in obtaining land-use restriction instruments in the coal fields of Appalachia:

> Historically, the Corps has emphasized the utility of conservation easements for mitigation projects... this has proved challenging for surface coal mining in much of Appalachia.
>
> Experience has shown that obtaining conservation easements is frequently not practicable because multiple owners hold the mineral, oil and gas, timbering and grazing rights. Additionally, many property owners are reluctant to establish conservation easements that may actually or perceptually restrict their ability to use their land and its resources. [25]

In the same guidance document, the Corps admits:

> ...as critical and desirable as they are when they can be obtained, conservation easements have not and should not be considered mandatory requirements. Lack of an easement has and should not disqualify a mitigation proposal...

By ignoring this past guidance from the Corps on conservation easements for mining-related mitigation the agencies will drive mining operations to seek the services of commercial mitigation banks and abandon on-site, in-kind mitigation as unworkable even though direct replacement of the impacted aquatic resources within the impact area is clearly the most environmentally sound means to provide

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

mitigation. WVCA suggests that the agencies remove this requirement completely, or at the very least, revise the proposed regulation to once again provide the flexibility afforded by the Corps' previous guidance on this issue.

IV. Conclusion

Through an effort to establish uniform requirements for all mitigation types, the proposed regulations offered within this rulemaking have removed the flexibility that is necessary for a regulatory program that is national in scope to function and achieve the purpose and goals of the statute. These consequences, whether intended or not, are manifested in the draft regulation's preference for mitigation banking, its disregard of other regulatory program requirements, and its generally disturbing trend towards morphing the section 404 permitting and mitigation process into a land-use restriction and land redistribution program. WVCA feels that significant revision of the proposal is necessary to restore the 404 program's historical acknowledgement of regional and activity-specific circumstances. These local conditions require a departure from traditionally-accepted mitigation that is practiced to offset impacts to true wetlands in areas of intensive and permanent urban development and to provide a regulatory program and requirements that achieve the best possible environmental benefit for the region and setting.

The federal mitigation program as applied in West Virginia to the mining industry has been developed over the past several years to the point where maximum environmental benefit is achieved through stream reconstruction on-site

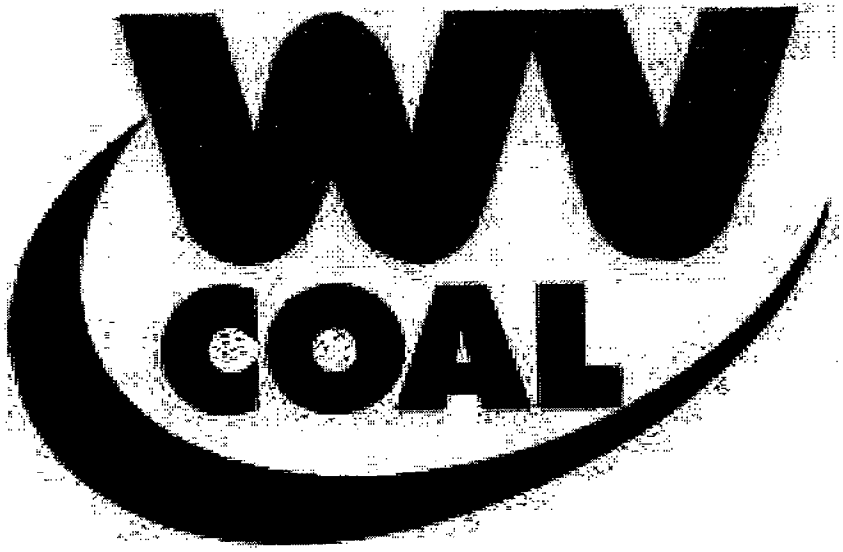
and in-kind by way of the reclamation process. For permanent impacts to streams, such as those affected by the construction of permanent excess spoil and coal refuse fills, a combination of on-site and off-site and in-kind and out-of-kind mitigation has been pursued. Several guidance documents issued over the past several years (and referenced extensively in these comments) have built on the conclusions of the multi-agency programmatic Environmental Impact Statement and provided a viable and stable mitigation program for mining impacts to waters of the United States.

WVCA feels the agencies have overlooked the remarkable progress that has been made with respect to mitigating headwater stream impacts from coal mining operations in West Virginia. The stability and environmental performance that exists today in the mining-related 404 program is a testimony to the durability and wisdom of the previously issued regulatory guidance that acknowledges mining's unique regulatory and regional setting. WVCA believes that any movement by the agencies that disregards this guidance, either through this rule or otherwise, will reverse years of progress and cause general regulatory confusion on behalf of the permittees and the agencies. Further, the agencies apparent preference for mitigation banks and restrictive land-use instruments will ultimately serve to restrict development, coal or otherwise, in Central Appalachia and West Virginia to little or no environmental benefit.

WVCA strongly suggests that the agencies review the guidance issued to date with respect to coal mining operations, headwater stream mitigation and the

section 404 program's interaction with SMCRA and revise the proposed regulations in order to preserve and build on these past regulatory successes.

The Central Appalachian Protocol



B

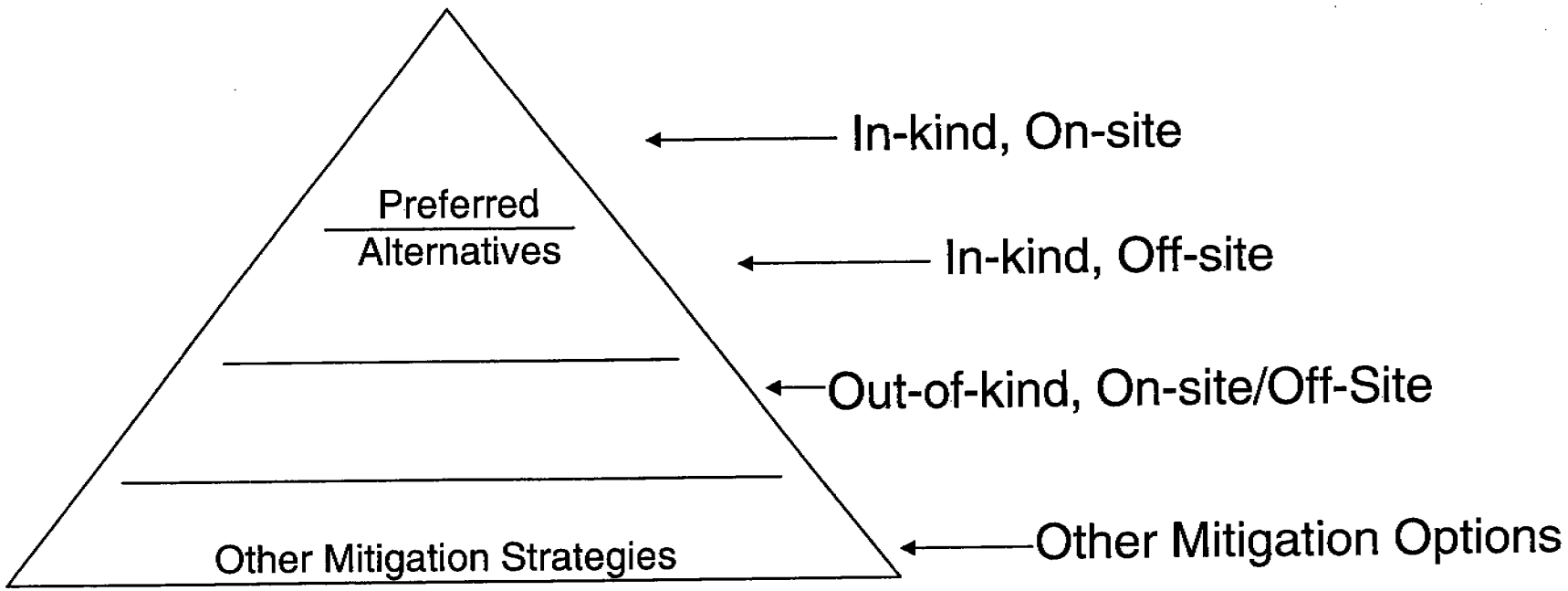
A Quantifiable Method for Performing a Functional Assessment of Stream Impacts and Mitigation Projects.

WEST VIRGINIA COAL ASSOCIATION
ENVIRONMENTAL – TECHNICAL COMMITTEE

Mitigation Strategies

Regulatory guidance (RGL-02) for mitigation encourages the use of a functional approach when developing Compensatory Mitigation Plans. This guidance provides for a tiered (value) approach to developing appropriate mitigation measures.

Mitigation Pyramid



Mitigation Measures

Functional Mitigation can include several different concepts.

Ordered examples of these concepts include:

- Stream Replacement/Enhancements (preferred).
- Watershed Cleanup/Easements.
- Sponsored Infrastructure Development.
- Public Recreational Facilities.
- Mitigation Banks.
- In-Lieu Fee Programs.
- Preservation by Land Purchases/Donations.

Concerns Regarding Current Mitigation Practices/Policies

- Difficult to objectively substantiate/document value of impacted areas/mitigated areas.
- Subjective Authorization Process leads to uncertainty/challenges.
- Uncertainty leads to difficulty in determining mitigation costs/permit implementation.
- Current practices result in subjective/speculative benefits.
- Performance standards are subjective/inconsistent.

Functional Assessment of Stream Impacts and Mitigation Objectives

- Protocols for aquatic habitat assessment derived from functional assessment methods used by regulatory agencies.
- Quantifying impacts/mitigation is correlated to stream classification.
- Protocols include objective results oriented implementation and monitoring plans.
- Mitigation plans using functional assessment protocols should result in EA supporting a FONSI or Minimal Impact Determination.

Functional Assessment Methods

Assessment Methods may include but are not limited to:

- Bank Erosion Hazard Index
- Stream Visual Assessment Protocol
- Rapid Bioassessment Protocol
- Wadeable Stream Assessment

PROTOCOL BASIS
PHYSICAL HABITAT UNIT

Physical Habitat Unit:

- Used to quantify project's impacts to jurisdictional waters.
- Used to quantify mitigation measures to be used to offset project's impacts.
- Used in model to provide an objective representation that impacts are minimized.

Why Use A Physical Habitat Approach When Assessing Function?

It has been documented that if a stream has a healthy riparian zone and optimal in-stream features, aquatic community health is functioning at a high level and:

- Biological Diversity And Productivity In Streams Is Directly Linked To Habitat Complexity And Relative Stability.
- Naturally Functioning Streams Promote The Availability Of Complex Habitats.

Physical Habitat Unit Method – A Functional Assessment Methodology

- Physical Habitat Unit protocols have been used to develop successfully implemented Mitigation Plans for surface mining projects.

- Models quantifying impacts/mitigation measures are included as the basis for the Mitigation Plan.

- Protocols generally incorporate preferred mitigation measures-stream replacement/enhancements through: in-kind, on-site; in-kind, off-site; out-of-kind, on-site; out-of-kind, off-site methods.

Physical Habitat Unit Protocol

•Protocols use accounting procedures to quantify the project's "Losses/Impacts" on jurisdictional waters and the Mitigation Plan's "Gains/Enhancements."

•Quantities are expressed as Physical Habitat Units.

•Protocols' functional assessment process quantifies impact areas and mitigation areas.

• Protocols require "Gains/Uplift quantities of proposed mitigation areas to equal or exceed the "Losses/Impacts" quantities from areas impacted by project. This should result in minimal impact finding.

Physical Habitat Unit Method

Protocols using Physical Habitat Units' concept allow:

- Agencies to objectively review Mitigation Plans and defend EA decisions.
- Development of performance standards and monitoring plans to ensure mitigation success.
- Applicants to use multiple mitigation measures to off-set project's impacts to jurisdictional waters.
- Mitigation measures oriented to site specific needs and to be designed using a holistic watershed approach.
- Development of values for temporal losses.

How the Physical Habitat Unit Method Works

A Physical Habitat Unit is derived using a four step process:

1. The jurisdictional area of the stream is determined.
2. The quality of the aquatic habitat is assessed using an ecological measure recognized by regulatory agencies.
3. The stream classification is determined and assigned an appropriate constant.
4. Physical Habitat Unit is calculated.

Develop Physical Habitat Unit Quantities for: Impacted Areas, Proposed Mitigation Areas Baseline, and Proposed Mitigation Areas Post-Enhancement Condition

- Quantify existing condition of impacted areas using Physical Habitat Units;
- Quantify existing baseline conditions of proposed mitigation area using Physical Habitat Units; and
- Quantify projected conditions of proposed mitigation areas or projects including but not limited to Physical Habitat Units for stream systems to be established or enhanced;
- Determine quantify of excess Physical Habitat Units gained (projected quantities – base line quantities) with gains referred to as Gain or Uplift.

Quantifying Impacts Using the Physical Habitat Unit

- **Examples – Two Different Methods**

Method 1

Impacts						
Site	RBP Score	Riparian Score	Ecological Unit	Area Acres	Stream Classification Factor	Physical Habitat Units
1	127	93	69.86	0.507	4	141.69
2	–	87	71.31	0.080	2	11.41
3	–	94	77.05	0.031	1	2.39
				0.618	Net Displacement	155.49

Method 2

Impacts					
Location	Affected Segment (Acres)	Habitat Assessment Value (HAV Index)	Segment Classification	Stream Classification Factor	Physical Habitat Units
1	0.1221	152	Perennial	2	37.1148
2	0.9685	152	Intermittent	1	147.2120
3	1.5256	152	Ephemeral	0.5	115.9456
TOTAL	2.6162			Net Displacement	300.2724

Mitigation Plan Design

- Design a Mitigation Plan that may include features such as stream system establishment, stream system enhancement or other watershed improvement features.
- Calculate quantities of Physical Habitat units for each proposed mitigation feature and determine quantities of Gain or Uplift.
- Include sufficient mitigation features to ensure that impact quantities are offset (equal to or greater than impacts) by gains or uplifts.

Baseline Conditions and Post-Enhancement Conditions

Method 1

Baseline Conditions

Proposed Mitigation						
Site	RBP Score	Riparian Score	Ecological Unit	Area Units	Stream Classification Factor	Physical Habitat Units
A	126	76	62.65	0.23	4	57.39
B	112	71	57.10	0.66	4	150.97
C	109	84	61.68	0.17	4	42.43
D	130	88	68.57	0.16	4	43.88
E	116	81	62.20	0.26	4	65.18
F	135	99	74.32	0.28	4	82.65
G	119	85	64.59	0.48	4	124.26
H	117	89	65.73	1.74	4	457.45
					Totals	1,024.21

Post-Enhancement Conditions

Proposed Mitigation							
Site	RBP Score	Riparian Score	Ecological Unit	Area Units	Stream Classification Factor	Physical Habitat Units	Net Units
A	147	85	71.59	0.23	4	65.57	8.19
B	135	90	70.64	0.66	4	186.76	35.79
C	135	95	72.68	0.17	4	50.01	7.57
D	148	97	76.75	0.16	4	49.12	5.24
E	137	90	71.14	0.26	4	74.55	9.37
F	155	106	82.19	0.28	4	91.40	8.75
G	140	99	75.57	0.48	4	145.40	21.14
H	136	99	74.57	1.74	4	517.54	60.09
					Totals	1,180.36	156.14

Baseline Conditions and Post-Enhancement Conditions

Method 2 **Baseline and Post-Enhancement Conditions**

Proposed Mitigation					
Location	Affected Segment (Acres)	Habitat Assessment Value (HAV Index)	Segment Classification	Stream Classification Factor	Physical Habitat Units
Site 1 – Baseline	3.2719	43	I	1.0	140.69
Site 1 – Post-Enhancement	3.2719	135	I	1.0	441.71
TOTAL – Mitigation	3.2719			Net Enhancement Units	301.01

Comparing Impacts to Enhancements

Gain/Uplift in Physical Habitat Units Resulting from the Mitigation Project should Equal or Exceed the Impacts from the Proposed Project.

Method 1 Comparison

Impact	155.49 Units
Mitigation	156.14 Units

Method 2 Comparison

Impact	300.27 Units
Mitigation	301.01 Units

Mitigation results in sufficient units to offset loss

Summary

- Allows professional discretion to choose appropriate habitat rating methods;
- Concept is flexible and adaptable to site specific issues;
- Procedure is objective and can be replicated;
- Habitat basis approach results in parameters that can be controlled by the applicant and agency;
- Compensatory Mitigation Pan must contain results oriented performance standards and monitoring procedures; and
- Provides the agency with a quantifiable and objective basis to support agency decision making process and final decision.

2006 PROPOSED REVISIONS TO THE RULES FOR INDIVIDUAL STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL PERMIT (47 CSR 5A) RESPONSE TO COMMENTS

I. General Comment of the West Virginia Coal Association (WVCA)

WVCA is very concerned about the WVDEP's proposal to add detail to its 401 Mitigation Program, particularly at this time. The State's mitigation requirements, at least as they relate to mitigation for activities permitted by a Clean Water Act (CWA) 404 Permit, have become obsolete and duplicative.

AGENCY RESPONSE:

The revisions being proposed are a combination of clarifying the application information needed for the State 401 Certification and listing the compensation requirements for the impact associated with the proposed project. The purpose of this rulemaking is to incorporate the current practices by the agency in reviewing the State 401 Certification Application, and the compensation required for the loss of State resource. The proposed revisions are in-kind replacement ratios and monetary compensation rates that the State has been requiring for several years. Placing these requirements in the rule will lead to a more efficient permitting process in that the Compensation Agreements will be completed correctly at the time of submittal of the application.

II. General Comment of the West Virginia Coal Association (WVCA)

The State's mitigation program as maintained by the WVDEP and implemented through the 401 rules is not required component of the federal 404 Permitting program. The State's mitigation requirements as maintained in the 401 Certification process is duplicative because the Corps is requiring federal mitigation plans as part of the 404 permitting process.

AGENCY RESPONSE:

The agency disagrees with the interpretation of the WVCA. A federal 404 Permit cannot be issued without a State issued 401 Certification or waiver. If no State 401 Certification is issued or if the State denies the 401 Certification the Corps of Engineers cannot issue the federal 404 permit. Furthermore, when a State 401 Certification is issued it becomes a term and condition of the federally issued 404 Permit. The State's condition is enforceable by the federal government by either the Corps of Engineers or the Environmental Protection Agency (EPA). Section 404(t) specifically preserves the ability of states to regulate discharges of fill. The existence of the federal 404 Program in no way preempts state law governing the discharge of fill material. The State's mitigation requirements can be found in

Chapter 22, Article 11, Section 7a of the Water Pollution Control Act and 47 CSR 5A the legislative rule.

III. General Comment of the West Virginia Coal Association (WVCA)

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 WV Code 22-11-7a(a)(2)(C) to rely on and give credit for federally mandated mitigation to satisfy any state mitigation needs.

AGENCY RESPONSE:

The State required compensation for the loss of the resources first through policy and currently mandated by the statute referenced above and legislative rule long before the Corps of Engineers began requiring compensation on these projects. The proposed revisions will not change our current practice nor how the coal industry is currently being regulated. The purpose of the proposed revisions is to codify the agency's current practice. Inconsistencies with Section 404 of the CWA should not occur, when Section 404 clearly specifically preserves the rights of states to regulate discharges of fill within their borders. The current issued Nationwide Permit No. 21 (NWP 21) has language that reads "In cases where OSM or the State has required mitigation for the loss of aquatic habitat, the Corps may consider this in determining appropriate mitigation under Section 404," as it relates to mitigation. Since the reissuance of this NWP 21, any compensation required by the State is accepted by the Corps and is credited towards the compensation that the Corps requires. The State, in accordance with WV Code 22-11-7a(a)(2)(C), does give credit for the Corp's required compensation to the extent that it satisfies the State's compensation requirements. Both the Corps and DEP are utilizing one another's compensation requirements to satisfy their specific requirements in order to prevent duplication of compensation.

IV. Specific comment of the West Virginia Coal Association (WVCA)

Specific to 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. 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.

AGENCY RESPONSE:

Upon review and consideration of the comment, and in light of the existing language in this rule, the agency has decided that this provision does not need to be added to the rule at this time. The agency does not view the provisions of this rule to be an exclusive recitation of the application contents necessary for all certifications. The agency believes that current regulations justify the request for this information when necessary for any individual certification application. Therefore, the agency will continue its practice of requesting this information when necessary to process applications in order to fulfill its obligations under the Clean Water Act. The agency particularly notes the discussion of the ruling in *OVEC v. Horinko*, 279 F.S. 732 (S.D.W.Va. 2003) with regard to anti-degradation review of 401 Certifications issued under section 404 of the Clean Water Act.

V. Specific comment of the West Virginia Coal Association (WVCA)

Specific to: **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.

AGENCY RESPONSE:

The definition of the "Ordinary High Water Mark" is currently in the rule at Section 2.11. There is nothing new being added to the current review process. The activity being authorized by a 404 Permit must be certified by the State. In order for the State to certify the activity being authorized by a 404 Permit, the impact caused by the activity must be delineated. The delineated impact must be the same for both the 404 and the 401 requests. The State in its certification review process has long required the measurements of the stream to be measured up to the beginning of the Ordinary High Water Mark. Mitigation has also been assessed by past practice to include the entire stream segment impacted up to the beginning of the Ordinary High Water Mark. The Corp requires all segments of the impacted stream considered to be Waters of the United States to be measured and compensated for, and the State must certify the impact regardless if State mitigation is required or not.

VI. Specific comment of the West Virginia Coal Association (WVCA)

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

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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) linear feet shall be monetary compensated at a rate of $20,000 per acre per each five (5) year term and/or prorated for each year the impact occurs.

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

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

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

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

AGENCY RESPONSE:

The "1/2 acre" threshold is already part of the approved rule in Section 6.2.d.1. The proposed language outlining the monetary mitigation for temporary impacts is simply putting into rule how the State has conducted mitigation for temporary impacts through past practices. It also clarifies the mitigation to be assessed on the stream impact length rather than length of culvert or relocated stream segment. Confusion has arisen from applicants and reviewers using the length of culvert pipes rather than the length of the stream channel to be impacted in assessing the amount of compensation required. These proposed changes clarify the conditions and requirements.

VII. Specific comment of the West Virginia Coal Association (WVCA)

Specific to: **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 § 401certification 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.

AGENCY RESPONSE:

The current rule is silent for the monetary compensation for coal, but specific to non-coal activities as it relates to wetland impacts. Again, the agency is codifying current practices into the proposed rule. The proposed rule change would simply clarify what the intent of the rule was to begin with to make the assessed value the same for coal as it is for non-coal. Without the clarification, one could argue that the only monetary compensation allowed under rule would have to be assessed at $200,000 per acre. The $30,000 per acre of wetland was an average value of wetlands constructed throughout the State on previous compensation projects.