

**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: Water Resources
WV Department of Environmental Protection, DWWM TITLE NUMBER: 47

CITE AUTHORITY: W. Va. Code § 22-11-4(a)(16)

AMENDMENT TO AN EXISTING RULE: YES NO

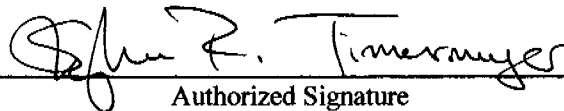
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: National Pollutant Discharge Elimination System (NPDES) Program

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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


Authorized Signature

QUESTIONNAIRE

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

DATE: July 27, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304 (304) 926-0495

LEGISLATIVE RULE TITLE: National Pollutant Discharge Elimination System (NPDES)
Program, 47CSR10

1. Authorizing statute(s) citation § 22-11-4(a)(16)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 6, 2007

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

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 17, 2007

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

Attached X No comments received

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:

“National Pollutant Discharge Elimination System (NPDES) Program”, 47CSR10

A. AUTHORITY:

W.Va. Code §22-11-4(a)(16)

B. SUMMARY OF RULE:

The rule establishes requirements governing the State NPDES Program, including application requirements, modification and reissuance procedures, public notice requirements and final permit issuance.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

The proposed revisions to the National Pollutant Discharge Elimination System Rule reflect updates/additions made to the various federal regulations that govern the NPDES program. The proposed changes also include specific language in section 14 of the rule relating to the Pretreatment Program to ensure that the rule is consistent with the most recent federal pretreatment regulations in 40 CFR Part 403, adopted in October 2005.

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

Although the State is delegated authority to administer the NPDES program under federal law, there is no direct federal counterpart regulation. Therefore, no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

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

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Monday – May 21, 2007

1:00 p.m. – 3:00 p.m.

601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

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

DEP:

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

VISITORS:

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

Randy Huffman, Deputy Cabinet Secretary - West Virginia Department of Environmental Protection called the meeting to order at 1:00 p.m.

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

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

- SB 337 – Establishing New Greenhouse Gas Inventory Program
Approved by Governor – April 4, 2007
- SB 425 – Relating to Water Pollution Control Revolving Fund
Approved by Governor – April 4, 2007
- SB 465 – Establishing Dam Safety Rehabilitation Revolving Fund
Approved by Governor – March 27, 2007
- SB 490 – Relating to Underground Storage Tank Insurance Fund
Approved by Governor – April 3, 2007
- SB 524 – Requiring Proof of Lawful Disposal of Solid Waste
Approved by Governor – March 28, 2007
- SB 588 – Removing Tax Expiration Date on Manufacturing or Production of Synthetic Fuel From Coal
Approved by Governor – April 4, 2007

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

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

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

COMMENT

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

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

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

DEP Response: Yes

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO₂ & PM NAAQS include correction of SO₂ annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour PM_{2.5} standards, and addition of measurement methods for PM_{2.5}. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO₂ and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

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

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

45CSR16 – Standards of Performance for New Stationary Sources

SUMMARY

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

COMMENT

No questions.

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

SUMMARY

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

COMMENT

No questions.

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

SUMMARY

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

COMMENT

No questions.

45CSR34 – Emission Standards for Hazardous Air Pollutants

SUMMARY

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

COMMENT

No questions.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

SUMMARY

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

COMMENT

No questions.

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

SUMMARY

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

COMMENT

No questions.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

SUMMARY

Annual CAIR SO₂ Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

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

COMMENT

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

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

Mr. Raney: How do we quantify sequestration?

DEP Response: Don't think we will get down to stationary source level. Agency will look at area

sources and biogenic activities. Once we get information, we will compile in an inventory.

Division of Water and Waste Management

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

SUMMARY

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

COMMENT

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

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

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

33CSR20 – Hazardous Waste Management System

SUMMARY

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

COMMENT

No questions.

33CSR30 – Underground Storage Tanks

SUMMARY

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

COMMENT

No questions.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

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

COMMENT

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

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

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

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

47CSR10 – National Pollutant Discharge Elimination System (NPDES)

SUMMARY

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

COMMENT

No questions.

47CSR34 – Dam Safety

SUMMARY

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

COMMENT

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

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

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

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

COMMENT

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

Mr. Raney: Suggested we start with 39.

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

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

Division of Mining and Reclamation

38CSR2 – Surface Mining Reclamation Rule

SUMMARY

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

COMMENT

No questions.

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

SUMMARY

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

COMMENT

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

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

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

DEP Response: Rule has to be consistent with statute.

47CSR30 – WV/NPDES Rules for Coal Mining Facilities

SUMMARY

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

COMMENT

No questions.

199CSR1 - Surface Mining Blasting Rule

SUMMARY

The proposed amendments change the following sections: 2.27. Adds the definition of “other structure” (structures built by the permittee); 2.38 Clarifies definition of “surface mine operation”; 3.2.C. Plan for blasting should include seismic monitoring when within 1000 ft of a structure, and performance specifications for blasting seismographs; 3.4. Areas of blasting that will be regulated for shaft and slope development; 3.6.c.3. Requiring field practice guidelines for blasting seismographs; 3.7a Request for alternate limits must have written consent of the owner; 3.9. Minimum qualifications and continuing education requirements for surveyor; 4.1.b. Allows the agency to consider blasting experience of applicants that was gained prior to the last three years; 4.5.d. Requires applicants who have been suspended or revoked in other states to show cause as to why should be issued a certification; 4.9.a.2 process for issuing a temporary suspension to a blaster and appeal rights; 4.13 Clarifies blasters responsibility of training the blasting crew; 5.2.a.3&4 Clarifies

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

COMMENT

No questions.

Office of Oil and Gas

35CSR3 – Coalbed Methane Wells Rule

SUMMARY

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

COMMENT

Is this the same rule that went through last year?

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

16.2.e – advertisement “15 days”

16.1.6.1 – “FOIA” issue that came out of the LRMRC.

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

DEP Response: Yes.

Ms. Hallinan: What is a field rule?

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

Division of Land Restoration

33CSR10 – Recycling Assistance Grant Program

SUMMARY

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

COMMENT

No questions.

60CSR3 – Voluntary Remediation and Redevelopment Rule

SUMMARY

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

COMMENT

Ms. Dooley: Are there grant dollars for brownfields?

DEP Response: Yes

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

ADVISORY COUNCIL MEETING MINUTES

Wednesday – May 30, 2007

10:00 a.m. – 12:00 p.m.

601 57th Street, SE, Charleston, WV

West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

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

DEP:

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

VISITORS:

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

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

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

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

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

COMMENT

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

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

45CSR8 – Ambient Air Quality Standards

SUMMARY

NAAQS rules 45CSR8, 45CSR9 & 45CSR12 have been combined for the 2008 legislative session. Rule 8 is now the complete NAAQS incorporation by reference rule, and 45CSR9 & 45CSR12 will be repealed and replaced. Revisions to SO₂ & PM NAAQS include correction of SO₂ annual primary standard from 0.003 to 0.030 ppm, addition of annual and 24-hour PM_{2.5} standards, and addition of measurement methods for PM_{2.5}. Revisions to CO & Ozone NAAQS include revocation of one-hour ozone standard except for Berkeley & Jefferson counties, identification of one-hour ozone maintenance areas, and addition of 8-hour primary and secondary ozone standards. Revisions to NO₂ and Lead NAAQS include addition of primary and secondary standards for lead, and addition of measurement methods for lead. Revisions also include general language updates, improved citing and consistency.

COMMENT

Karen Price: Section 4.2.c – PM_{2.5} Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m³. This should be 65 ug/m³, pursuant to 40 CFR 50.7.

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

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

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

45CSR39 – Control of Annual Nitrogen Oxides Emissions

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

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

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

45CSR41 – Control of Annual Sulfur Dioxide Emissions

Annual CAIR SO₂ Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

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

DEP Response: has removed the opt-in provisions in the three CAIR rules so that West Virginia can say that CAIR equals NO_x RACT for EGUs under the PM_{2.5} implementation rule.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

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

COMMENT

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

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

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

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

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

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

DEP Response: The agency will consider the issue.

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

DEP Response: It is authorized by the statute.

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

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

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

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

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

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

Division of Water and Waste Management

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

SUMMARY

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

15-23 of the West Virginia Code and this rule, and not the provisions of W. Va. Code § 22-15-10 or 33 CSR 1, shall govern the beneficial use of water treatment plant sludge. This rule does not apply to sewage sludge, products derived from sewage sludge, sludges regulated under 33 CSR 8, or materials regulated as hazardous waste under W. Va. Code §§22-18-1, et seq.

COMMENT

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

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

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

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

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

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

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

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

33CSR30 – Underground Storage Tanks

SUMMARY

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

COMMENT

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

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

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

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

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

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

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

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

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

DEP Response: The agency will consider.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

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

COMMENT

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

DEP Response: Yes, the agency followed all the requirements, federal and state, and required extensive information from the company. The agency also conducted two public meetings.

Bill Raney: Mr. Raney repeated his concern with the listing of trout waters in the rule and the fact that the list has to be approved by the Legislature. Karen Price agreed with this comment. Jackie Hallinan and Larry Harris did not agree with this comment.

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

DEP Response: Agency will consider.

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

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

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

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

COMMENT

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

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

DEP Response: Agency will take this under advisement.

Larry Harris: Is the nomination process adequate?

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

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

60CSR8 - Environmental Excellence Program

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

SUMMARY

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

COMMENT

Rick Roberts: Why is section 6.2 completely deleted?

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

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

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

Jackie Hallinan: The program is a good idea.

Meeting was adjourned by Deputy Cabinet Secretary Randy Huffman.

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

Bill...

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

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

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

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

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

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

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

Mining & Reclamation Rule (38 CSR 2)

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

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

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

401 Water Quality Certification Rule (47 CSR 5A)

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

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



West Virginia Coal Association

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July 18, 2006

Mr. Charles Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 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

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

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 1/2 acre of stream, WVCA suggests the agency delete this proposed revision. If the agency truly believes that this change is necessary, it should seek a legislative revision to 22-11-7(a) and only then seek to modify the rule.

~~6.2.d.1. Permanent impacts for coal related monetary mitigation will be assessed at \$200,000 per acre of impacts in watersheds greater than or equal to two hundred and fifty (250) acres from the toe of the farthest downstream permanent structure, and/or exceeds a 1/2 acre of loss or impact of stream. Monetary compensation for stream impacts resulting from coal related activities shall be assessed as follows:~~

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

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

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

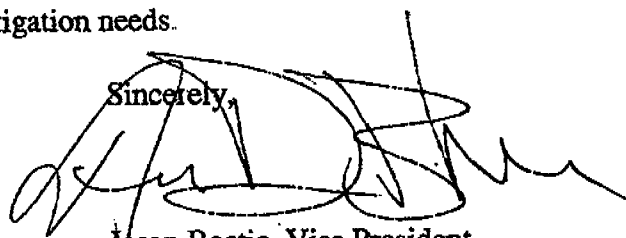
Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation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

A handwritten signature in black ink, appearing to read "Jason Bostic", written over a circular stamp or seal.

Jason Bostic, Vice President
Regulatory & Technical Affairs



West Virginia Coal Association

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

Via Electronic Mail: Gjshaffer@wvdep.org

Re: Comments on 2007 Triennial Review of Water Quality Standards

Dear Ms. Shaffer:

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

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

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

Trout Streams

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

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

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

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

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

We appreciate the agency's consideration of these comments)

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jason D. Bostic", written over the typed name below. The signature is somewhat stylized and includes a long horizontal stroke extending to the right.

Jason D. Bostic
West Virginia Coal Association



West Virginia Coal Association

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

July 17, 2006

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

Re: Comments on Proposed Revisions to 38 CSR 2

Dear Mr. Sturey:

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

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

WVCA appreciates the opportunity to provide comments to the West Virginia

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

Specific Comments

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

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

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

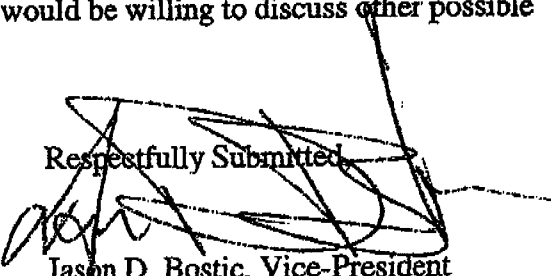
As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect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

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

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

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

Respectfully Submitted,


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

Surface Mining 38 CSR 2 (Agreement)
401 Certification 47 CSR 42 45CSR42
TRADUIT LISTINGS

2.5
"Biogenic Sources"
include
COAL

TITLE 45

LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

3.2 turned on
exemption into
an inclusion
5.3 "shall provide
information?"

§45-42-1. General.

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

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

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

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

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

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

1.2 Authority -- W.Va. Code §22-5-19

1.3. Filing Date --

1.4. Effective Date. -- June 1, 2008.

§45-42-2. Definitions.

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

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

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

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

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

Biogenic
Sources
include
COAL

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

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

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

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF₆).

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

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

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

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

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage

in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink.

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

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

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

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

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

§45-42-3. Applicability.

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

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

Any facility, etc.

hydrofluorocarbons	0.855
perfluorocarbons	1.09

sulfur hexafluoride	0.42
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Prep plants under title IV

only stationary sources

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

§45-42-4. Reporting Requirements.

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

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

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

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF₆

Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis.

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

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

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

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

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

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

entire Sorban Area / underground Area is a AREA SOURCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-42-7.Economic Development Potential.

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

§45-42-8.Inconsistency Between Rules.

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



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Biogenic substance

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

Examples

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

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

Cotton and wood is are biogenic constituents of contemporary origin.

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

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

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

§33-9-2. Definitions -- Section 2.5 defines "Beneficial Use" as "the use of a non-hazardous material for a specific beneficial purpose where it is done in a manner that protects groundwater and surface water quality, soil quality, air quality, human health, and the environment." We are concerned that it has not been adequately demonstrated that this filtrate is non-hazardous, and point to the current "Inter-sex" fish issue in the Potomac River drainage which illustrates that there are unanswered questions concerning unmonitored pollutants in sludge from both water and waste treatment facilities

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

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

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

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

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

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

Charles L. Harris
Professor of Biochemistry
West Virginia University
School of Medicine
304-293-7749

>>> "Patricia White" <PWHITE@wvdep.org> 05/21/07 4:21 PM >>>
Please be advised of the following meeting:

Comments on DEP Rules for 2007

Communicated by Larry Harris, Public Advisory Council Member

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

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

47CSR2 Water Quality

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

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

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

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

* Is this a use removal? Yes was the answer.

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

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

47CSR2 (Appendix E):

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

47CSR5A

47 CSR 5A (State Certification)

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

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

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

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

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

60 CSR5 Antidegradation

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

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

Other issues:

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

3.9 Which advisory committee is this phrase referring to:

5.5b is removed. Why?

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

Comments from Adam Webster (WVRC)

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

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

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

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

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

45CSR42 Greenhouse Gases

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

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

Air Quality and Emission Rules (see below)

45CSR8 Ambient Air Quality Standards

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

Here is what should be reinstated:

§45-8-2. Anti-Degradation Policy.

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

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

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

45CSR41 Control of Annual SO₂ emissions

45CSR6 Control of Air Pollution from Refuse Combustion

45CSR39 Nitrogen Oxides

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

Dr. Kotcon has raised the following issues:

45-CSR-8 Ambient Air Quality Standards

The standards for PM_{2.5} and Ozone are not adequately protective. I recommend that the standards be lowered from 15 $\mu\text{g}/\text{m}^3$ to 13 $\mu\text{g}/\text{m}^3$ in section 4.2.b., and from 0.08 ppm to 0.07 ppm in section 4.4.b.

The air standards (45-8-1) retains the standards for PM_{2.5} and ozone >that the EPA Clean Air Scientific Advisory Council has already >determined to be inadequate. Keeping these old standards will kill >dozens or hundreds of West Virginians each year.

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

Questions/Comments on DEP's 2007 Proposed Rules

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

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

Section 4.2.c – PM_{2.5} Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m³. This should be 65 ug/m³, pursuant to 40 CFR 50.7.

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

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

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

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

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

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

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

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

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

INDUSTRY'S REVISIONS

45CSR42

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

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

§45-42-1. General.

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

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

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

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

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

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

1.2 Authority -- W Va Code §22-5-19.

1.3. Filing Date --

1.4. Effective Date -- June 1, 2008.

§45-42-2. Definitions.

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

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

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

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

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

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

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

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

2.9. "Greenhouse gas" means the gaseous compounds: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (SF₆)

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

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

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

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

2.14. "Sequestration" means the physical process by which emissions of a greenhouse gas are directly captured for storage

in a reservoir, or the biologic process by which a greenhouse gas is indirectly removed from the atmosphere for storage in a sink

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

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

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

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

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

§45-42-3. Applicability.

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

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

nitrous oxide	32.6
perfluorocarbons	1.09
sulfur hexafluoride	0.42

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

§45-42-4. Reporting Requirements.

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

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

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

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas

hydrofluorocarbons	0.855
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emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF₆ Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis

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

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

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

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

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

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

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

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

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

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

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

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

5.5. The Secretary shall determine the form and format of the information submitted by the entities under subsections 5.3 and 5.4 to ensure

that the information is consistent as possible with developing regional, national, or international greenhouse gas emissions programs.

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

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

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

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

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

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

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

§45-42-7. Economic Development Potential.

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

§45-42-8. Inconsistency Between Rules.

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

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

- Section 2.3. The definition of “anthropogenic” should be revised to state that it is the “result of natural processes that have been influenced significantly by human activities”. Adding the term “significantly” makes the definition consistent with the definition of “biogenic” which means a “naturally occurring biological source or process that is not significantly affected by human actions or activity.”
- Section 3.1. Applicability. This section should be revised to clarify that only individual greenhouse gases emitted above the *de minimis* amounts are required to be reported. Otherwise, affected sources that trigger any of the *de minimis* amounts could be required to report emissions of all of the greenhouse gases even if they are below the *de minimis* amounts. We do not believe that this is DEP’s intent. Also, this section should be revised to clarify that the *de minimis* amounts do not include biogenic emissions.
- Section 4.1. Reporting Requirements. This section should be revised to require reporting of greenhouse gases at the same time the air emissions inventory reporting is required. Sources should not be required to report their emissions at two different times. This section should also be clarified so that only greenhouse gases emitted above the *de minimis* amounts are required to be reported.
- Section 4.2 should be revised so that “mobile” emissions of greenhouse gases are not required to be reported. This section should also be revised to clarify that only direct emissions and not indirect greenhouse gas emissions (e.g., emissions occurring offsite from electricity consumption) are required to be reported. The references in section 4.3 to programs like Climate Leaders could lead sources to include indirect and direct emissions in their reporting. This would lead to double counting of electric generation greenhouse gas emissions and to higher source emissions compared to the *de minimis* amounts.
- Section 4.6 should be added so that sources will not be subject to fees for reporting greenhouse gas emissions, as the purpose of such reporting is to create an inventory, not to generate fees.
- Section 5.3. This section should be revised to delete the requirement that certain entities, including trade associations, must provide relevant information on greenhouse gas emissions, reductions, capture and sequestration to the Secretary upon request. This requirement is not found in the statute and could be interpreted to require such entities to report reductions, which is also not required under the statute.

- Section 7.1. Economic Development Potential This section should be revised to require the DEP to also determine whether reduction and sequestration will result in a deterrent to net economic development – not just whether it will be an asset.
- Additional questions/issues:
 - A reasonable protocol for reporting greenhouse gas emissions from stationary sources should be developed. Affected sources should not be required to report emissions from individual units within a stationary source if such emissions are insignificant. Affected stationary sources should have the option to report all of its greenhouse gas emissions in the aggregate.
 - Over 30 states have signed on to “The Climate Registry”. Does West Virginia intend on signing on? The rule indicates that West Virginia will have its own registry independent of “The Climate Registry”. Does DEP intend to rely upon any greenhouse gas registry programs, such as the Chicago Climate Exchange Registry, in developing the registry program?

MEMORANDUM

TO: Karen Price
FROM: David L. Yaussy
DATE: May 29, 2007
SUBJECT: DEP Advisory Council Rules

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

No comment.

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

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

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

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

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

D. Requirements Governing Water Quality Standards.

Title 57, Series 2.

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

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

Memorandum
May 29, 2007
Page 2

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

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

DLY:shb

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: National Pollutant Discharge Elimination System (NPDES) Program, 47CSR10
 Type of Rule: Legislative Interpretive Procedural
 Agency: West Virginia Department of Environmental Protection
 Address: 601 57th Street, SE
Charleston, WV 25304
 Phone Number: (304) 926-0495 Email: lmcclung@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.

No fiscal impacts on state government are anticipated.

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: National Pollutant Discharge Elimination System (NPDES) Program, 47CSR10

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

None anticipated

MEMORANDUM

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

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

Date: May 9, 2007

Signature of Agency Head or Authorized Representative

TITLE 47
LEGISLATIVE RULES
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES
DIVISION OF WATER AND WASTE MANAGEMENT

FILED
 2007 JUL 27 PM 1:45
 OFFICE OF THE SECRETARY OF STATE

SERIES 10
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) PROGRAM

§47-10-1. General.

1.1. **Scope.** -- This legislative rule establishes requirements governing the State National Pollutant Discharge Elimination System (NPDES) Program.

1.2. **Authority.** -- W. Va. Code §22-11-4(a)(16).

1.3. **Filing Date.** -- ~~June 3, 2005.~~

1.4. **Effective Date.** -- ~~June 3, 2005.~~

1.5. **Former Rules** -- This legislative rule amends 47CSR10 "National Pollutant Discharge Elimination System (NPDES) Program" that was filed on ~~July 26, 1993~~ June 3, 2005 and became effective on ~~August 25, 1993~~ June 3, 2005.

§47-10-2. Definitions.

The definitions set forth in W. Va. Code 22-11-3 shall apply to this series along with the following definitions unless the context clearly indicates otherwise.

2.1. "Administrator" means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

2.2. "Applicable Standards and Limitations" means all State, interstate, and Federal standards and limitations to which a discharge or a related activity is subject under the Clean Water Act (CWA) and the State Act, including effluent limitations, water quality standards, standards of performance, toxic effluent standards or

prohibitions, best management practices, and pretreatment standards under Sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

2.3. "Application" means the forms prescribed by the chief and approved by EPA for applying for a permit or permit modification, including any additions, revisions or modifications to the forms.

2.4. "Average Monthly Discharge Limitation" means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

2.5. "Best Management Practices" ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the State. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

2.6. "C.F.R." means the Code of Federal Regulations and ~~includes those applicable portions of 40 CFR 125, 136, etc.~~ referenced throughout these rules effective ~~July 1, 1994~~ July 1, 2006, unless otherwise noted.

2.7. "Clean Water Act" ("CWA") (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law

97-117 and Public Law 95-576; 33 U.S.C. 1251 et seq.

2.8. "Construction Activity" means clearing, grading and excavation that result in a land disturbance of equal to or greater than one acre in size. Construction activity also includes disturbance of less than one acre total land area that is part of a large common plan of development or sale if the common plan will ultimately disturb equal to or greater than one acre. Construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

2.9. "Continuous Discharge" means any discharge which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

2.10. "Daily Discharge" means the discharge of a pollutant measured during a calendar day or within any specified period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

2.11. "Direct Discharge" means the discharge of a pollutant.

2.12. "Discharge" when used without qualification means the discharge of a pollutant for purposes of this series.

2.13. "Discharge of a Pollutant" means:

2.13.a. Any addition of any pollutant or combination of pollutants to waters of the State from any point source; and

2.13.b. This definition includes additions of pollutants into waters of the State from: surface runoff which is collected or channeled by man; storm water discharges from

construction activity; storm water discharges from a municipal separate storm sewer system; discharges through pipes, sewers or other conveyances owned by the state, a municipality, or other person which do not lead to a treatment work; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works. This term does not include an addition of pollutants by any indirect discharger.

2.14. "Discharge Monitoring Report" ("DMR") means the form(s) prescribed by the chief and approved by EPA for the reporting of self-monitoring results by permittees. (See WV/EPA Memorandum of Agreement.)

2.15. "Draft Permit" means a document prepared under section 10, indicating the chief's tentative decision to issue, modify, revoke and reissue, suspend or revoke a permit.

2.16. "Effluent Limitation" means any restriction established under State or Federal law on quantities, discharge rates, concentrations or other specified units of measure of pollutants which are discharged from point sources into waters of the State.

2.17. "Effluent Limitations Guidelines" means a regulation published by the Administrator under Section 304(b) of CWA to adopt or revise effluent limitations.

2.18. "Environmental Protection Agency" ("EPA") means the United States Environmental Protection Agency.

2.19. "Facility or Activity" means any point source or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under this series.

2.20. "General Permit" means a permit authorizing a category of discharges within a geographical area issued under subsection 13.6.

2.21. "Hazardous Substance" means any substance designated under 40 CFR Part 116 pursuant to Section 311 of CWA.

2.22. "Indirect Discharger" means a non-domestic discharger introducing pollutants to a publicly owned treatment works.

2.23. "Interference" means an indirect discharge which, along or in conjunction with a discharge or discharges from other sources, both: 2.23.a. Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and

2.23.b. Therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal in compliance with applicable statutory provisions, regulations or permits issued thereunder.

2.24. "Interstate Agency" means an agency of two (2) or more states, including West Virginia, established on or under an agreement or compact approved by the Congress, or any other agency of two(2) or more states including West Virginia, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

2.25. "Major Facility" means any facility or activity classified as such by the Regional Administrator in conjunction with the chief.

2.26. "Maximum Daily Discharge Limitation" means the highest allowable daily discharge.

2.27. "Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or a designated and approved management agency under Section 208 of CWA.

2.28. "Municipal Separate Storm Sewer System" ("MS4") means :

2.28.a. A conveyance or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains; and

2.28.b. Owned or operated by a State, city, town, county, district, association or other

publicbody (created pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes; and

2.28.c. Designated or used for collecting or conveying storm water; and

2.28.d. Which is not a combined sewer; and

2.28.e. Which is not a part of a Publicly Owned Treatment Works ("POTW")

2.28.f. The MS4 is determined by the Director to require NPDES permit coverage under the criteria established pursuant to 40 C.F.R.122.32.

2.29. "National Pollutant Discharge Elimination System" ("NPDES") means the National program for issuing, denying, modifying, revoking and reissuing, suspending, revoking, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements under Sections 307, 318, 402, and 405 of CWA, including any approved State program.

2.30. "National Pretreatment Standard" means any regulation containing pollutant discharge limitations promulgated by EPA in accordance with Section 307 (b) and (c) of the Clean Water Act which applies to indirect discharges. This term includes prohibitive discharge limits and local limits established pursuant to 40 CFR 403.5.

2.31. "New Discharger" means any building, structure, facility, or installation:

2.31.a.1. From which there is or may be a discharge of pollutants that did not commence the discharge prior to August 13, 1979;

2.31.a.2. Which has never received a finally effective NPDES permit for discharges at that site; and

2.31.a.3. Which is not a new source.

2.31.b. This definition includes an indirect discharger which commences discharging into waters of the State after August 13, 1979. It also includes any existing mobile point source that begins discharging at a location for which it does not have an existing permit.

2.32. "New Source" means any building, structure, facility or installation from which there is or may be a discharge of pollutants, the construction of which commenced:

2.32.a. After promulgation of standards of performance under Section 306 of CWA which are applicable to source; or

2.32.b. After proposal of standards of performance in accordance with Section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with Section 306 within one hundred twenty (120) days of their proposal.

2.33. "Owner or Operator" means the owner or operator of any facility or activity subject to regulation under this series. "Owner" owns or holds title to the facility. "Operator" is any person, firm or company who has responsibility for the overall operation of a facility or activity subject to regulation but does not include any employee, agent or independent contractor of the person with responsibility for the overall operation of a facility subject to regulation.

2.34. "Pass Through" means an indirect discharge which exits the POTW into waters of the State in quantities or concentrations which alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

2.35. "Permit" means an authorization issued by the chief to implement the requirements of this series.

2.36. "POTW" means a "Publicly Owned Treatment Works".

2.37. "Point Source" means any discernible, confined and discrete conveyance, including, but

not limited to, any pipe, ditch, channel, tunnel, conduit, concentrated animal feeding operations, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

2.38. "Primary Industry Category" means any industry category listed in Appendix A pursuant to Section 307(a) of the CWA.

2.39. "Privately Owned Treatment Works" means any device or system which is:

2.39.a. Used to treat wastes other than the owner's waste; and

2.39.b. Not a POTW.

2.40. "Process Wastewater" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

2.41. "Proposed Permit" means a State NPDES permit prepared after the close of the comment period (and, when applicable, any public hearing) which is sent to EPA for review before final issuance by the chief..

2.42. "Public Owned Treatment Works" ("POTW") means any treatment works owned by the State or any political subdivision thereof, any municipality or any other public entity, for the treatment of pollutants. This definition includes sewers, pipes or other conveyances only if they convey wastewater to a POTW providing treatment.

2.43. "Real Time Water Quality Control" means the establishment of an effluent limitation which is based upon a stream flow to discharge flow ratio, determined by the known characteristics of the stream and the discharge.

2.44. "Recommencing Discharger" means a source which recommences discharge after terminating operations.

2.45. "Regional Administrator" means the Regional Administrator of Regional Office (III) of the

Environmental Protection Agency, or an authorized representative.

2.46. "Schedule of Compliance" means a schedule of remedial measures in a permit, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and State Act and regulations.

2.47. "Secondary Industry Category" means any industry category which is not a primary industry category.

2.48. "Secretary" as used in this series is the Secretary of the Army.

2.49. "Sewage from Vessels" means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under Section 312 of CWA.

2.50. "Sewage Sludge" means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a treatment works. "Sewage" as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water runoff, that are discharged to or otherwise enter a treatment works.

2.51. "Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

2.52. "State" means the State of West Virginia.

2.53. "State Act" or "State Law" means the West Virginia Water Pollution Control Act, W. Va. Code 22-11-1, et seq.

2.54. "Storm Water" means storm water runoff, snow melt runoff, surface runoff and drainage.

2.55. "Total Dissolved Solids" means the total dissolved (filterable) solids as determined by the use of the method specified in 40 CFR Part 136.

2.56. "Toxic Pollutant" means any pollutant listed as toxic under Section 307(a)(1) of CWA.

2.57. "Variance" means any mechanism or provision under Sections 301 or 316 of CWA or under 40 CFR Part 125 or in the applicable effluent limitations guidelines which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on Sections 30(c), 301(g), 301(h), 301(I) and 316 (a) of CWA, where appropriate.

2.58. "Wetlands" means 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.

§47-10-3. Permits.

3.1. Permit requirement - no person shall discharge pollutants from a point source into State waters except as authorized pursuant to a State NPDES permit. A NPDES permit issued pursuant to this series shall be deemed to be a permit issued in accordance with Section 5 of the State Act.

3.2. Specific exclusions from NPDES permits.

3.2.a. It is recognized that the Federal NPDES program excludes certain discharges from needing a NPDES permit (although other Federal permits may be necessary) and that the State Act, in certain instances, is broader in scope than the Federal NPDES program. The discharge of dredged or fill material into navigable waters of the United States, for example, does not need a Federal NPDES permit; rather a 404 permit from the United States Army Corps of Engineers is required. The State Act regulates discharges into all waters of the State including groundwater; the Federal NPDES program, on the other hand,

regulates discharges into a less inclusive category of waters. In addition, the State Act requires permits for construction of a disposal system or part thereof and the discharge of pollutants into the State's waters; the Federal NPDES program, however, does not require permits for the construction of the facility but rather just for the discharge of pollutants from a point source into water of the United States. Finally, the natural Streams Preservation Act, W. VA. Code §22-11-1 et seq, requires a separate permit to modify any of the protected streams designated by the legislature.

3.2.b. The following discharges do not require a NPDES permit; however, the specification of exclusions under subdivision 3.2.a of this section shall not relieve any person of any requirement imposed by the State Act or regulations including State Act permit requirements.

3.2.b.1. Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes; or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than a means of transportation such as when used as an energy or mining facility, a storage facility, or when secured to a storage facility, or when secured to the bed of the water or waters of the State for the purpose of mineral or oil exploration or development.

3.2.b.2. Discharges of dredged or fill material into waters of the State which are regulated under Section 404 of CWA.

3.2.b.3. The introduction of pollutants into publicly or privately owned treatment works except as the chief may otherwise require under subdivision 6.3.k. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the State are eliminated.

3.2.b.4. Any introduction of

pollutants from non-point source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in subsection 13.1, discharges from concentrated aquatic animal production facilities as defined in subsection 13.2, and discharges from silvicultural point sources as defined in subsection 13.5.

3.2.b.5. Water, gas, or other material which is injected into a well either to facilitate production of oil or gas, or for disposal purposes and is approved by the State pursuant to applicable State law.

3.2.b.6. Return flows from irrigated agriculture.

3.2.b.7. Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR 1510 (The National Oil and Hazardous Substance Pollution Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

3.2.c. When issuing permits required under the State Act but not required by NPDES, the chief may follow the procedures set forth in this series.

3.3. NPDES permits issued by EPA.

3.3.a. The chief shall adopt as permits issued under the State Act all NPDES permits that have been issued by the Regional Administrator and taken effective prior to the effective date of this series which are transferred by the Regional Administrator and accepted by the chief for administration and enforcement.

3.3.b. Acceptance of a NPDES permit from the Regional Administrator shall not supersede any permit previously issued under the State Act. All provisions of both permits shall be in force; except, in the event of a conflict, the more stringent provisions shall apply. Such permits shall be deemed consolidated and considered as a single permit for the purposes of reporting, administration and enforcement.

3.3.c. Those unexpired permits

previously issued under the State Act shall be revoked by the chief whenever a new NPDES permit is issued for the same facility under this series; the issuance of the new permit shall constitute cause for revocation under the State Act. Any unexpired NPDES permit issued by the United States EPA shall not be enforceable by the chief upon the issuance of a NPDES permit under this series.

3.4. Effect of a permit.

3.4.a. Except for any toxic effluent standards and prohibitions imposed under Section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement with Sections 301, 302, 306, 307, 318, 403 and 405 of CWA. In addition, one who is in compliance with the terms and conditions of a permit shall not be subject to criminal prosecution under Section 19 of the State Act for pollution recognized and authorized by such permit. However, a permit may be revoked, suspended, revoked and reissued or modified during its term for cause as set forth in section 9.

3.4.b. The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

3.5. Duration and transferability of permits.

3.5.a.. Permits shall be effective for a fixed term not to exceed five (5) years.

3.5.b. A permit may be extended by the chief for a period not to exceed eighteen (18) months beyond its expiration date if the applicant has made a timely and complete application for permit reissuance. Timeliness of an application for permit reissuance is governed by subsection 4.3 of this rule . A complete application, for purposes of this extension, shall mean that the required number of copies of the application were submitted, including the permit application fee required by the Division of Environmental Protection's legislative rule 47CSR26, and the application forms were signed as required under subsection 4.6 of this rule. Completion, as set forth in this section, shall not preclude the chief from requesting additional information from the applicant during the

subsequent substantive review and does not result in the imposition of the regulatory time frame established in subdivision 4.2.f. When a permit is issued, the extended permit, if still effective, is automatically void.

3.5.c. Transfer of permits - Permits may be transferred from a permittee to another person by either modifying an existing permit, or by an automatic transfer under subsection 3.5.d of this section. In transferring a permit from a permittee to another person, the chief shall determine that the proposed permittee has all necessary permit responsibility.

3.5.d. Any permit may be automatically transferred to a new permittee if:

3.5.d.1. The current permittee notifies the chief on the forms prescribed by the chief at least thirty (30) days in advance of the proposed transfer date in paragraph 3.5.d.2 of this section;

3.5.d.2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of the permit and explaining the extent of permit responsibility, coverage, and liability between them; and

3.5.d.3. The chief does not notify the existing permittee and the proposed new permittee of his or her intent to require the transfer through permit modification or to require a new application be filed rather than agreeing to the transfer of the permit or his denial of the transfer request. If this notification is not received by the permittee and proposed new permittee within thirty (30) days after the chief's receipt of the permittee's notice under paragraphs 3.5.d.1 and 3.5.d.2, then the transfer is effective on the date specified in the agreement required by paragraph 3.5.d.2 of this section.

3.6. Prohibitions - No permit may be issued:

3.6.a. When the conditions of the permit do not provide for compliance with the applicable requirements of the CWA and State Act.

3.6.b. By the chief where the Regional Administrator has objected to issuance of the permit.

3.6.c. When, in the judgment of the Secretary, anchorage and navigation in or on any waters of the State would be substantially impaired by the discharge.

3.6.d. For the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste.

3.6.e. For any discharge inconsistent with a plan or plan amendment approved under Section 208(b) of CWA.

3.6.f. To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by Section 301(b)(1)(A) and 301(B)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate, before the close of the public comment period; that:

3.6.f.1. There are sufficient remaining pollutant load allocations to allow for the discharge; and

3.6.f.2. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

§47-10-4. Application for Permits.

4.1. Duty to apply.

4.1.a. Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits and persons excluded under subsection 3.2, shall submit a complete application in the manner and on a

form prescribed by the chief and in accordance with the following paragraphs and accompanied by the filing fee as prescribed in 47CSR26.

4.1.b. When a facility or activity is owned by one (1) person but is operated by another, the application should be submitted by the operator. The chief may require documentation of the permit responsibility and liability of the owner and operator and may propose and issue the permit to either one (1) or both the owner and operator, but only after notice to both the owner and operator; or, the chief may deny the permit until the responsible party or parties apply for the permit.

4.2. Completeness.

4.2.a. For the purposes of this section, the term "chief" includes an authorized representative except in subdivision 4.2.f.

4.2.b. The chief shall not begin the processing of a permit before receiving a complete application.

4.2.c. The chief shall review every application for completeness in not more than ninety (90) days. Upon completing the review, the chief shall notify the applicant in writing whether the application is complete. If the application is incomplete, the chief shall list the information necessary to make the application complete. When the application is for an existing source, the chief shall specify in the request for supplemental information a date for submitting the necessary information. The chief shall notify the applicant that the application is complete upon receiving this information.

4.2.d. If an applicant fails or refuses to submit the requested supplemental information, the permit application may be denied and appropriate enforcement action may be taken under the applicable provisions of the State Act.

4.2.e. The application shall be considered complete on the date on which the chief notifies the applicant to that effect as provided in subdivision 4.2.c of this section.

4.2.f. The chief shall have not more than ninety (90) days to act upon the completed

application; unless EPA has filed a written objection except this limitation may be extended by the period of time granted by the chief under paragraph 12.1.b.1 and subdivision 12.4.a of this rule .

4.2.g. For a period of one (1) year after date of this rule , the time period for completeness under subdivision 4.2.c and time period for acting upon a completed application under subdivision 4.2.f may be extended by the chief when necessary but in no case shall the combined time periods under these paragraphs exceed two hundred forty (240) days.

4.3. Time to apply - Any person proposing a new discharge shall submit an application at least one hundred eighty (180) days prior to commencing construction of the facility, unless permission for a shorter time period has been granted by the chief. Any person with an existing permit shall submit a new application at least one hundred eighty (180) days before the expiration date of the existing permit, unless permission for a shorter time period has been granted by the chief. Any person proposing to abandon a facility under W. Va. Code 22-11-8(b)(6) shall apply for and obtain a permit as required by that section at least one hundred eighty (180) days prior to abandonment.

4.4. Information required from applicant(s).

4.4.a. All applicants shall provide the chief a complete application in the manner and on a form prescribed by the chief. The form may require information in addition to that specified in this section.

4.4.a.1. The activities conducted by the applicant which require it to obtain permits.

4.4.a.2. Name, mailing address, and location of the facility for which the application is submitted.

4.4.a.3. Up to four (4) Standard Industrial Classification (SIC) codes which best reflect the principal products or services provided by the facility.

4.4.a.4. The operator's name, address, telephone number, ownership status,

including the name and address of the owner if different, and status as Federal, State, private, public, or other entity.

4.4.a.5. Other relevant permits as defined in 40 CFR 122.21(f)(6).

4.4.a.6. A topographic map (or other map drawing if a topographic map is unavailable) drawn to a reasonable scale and extending at least one (1) mile beyond the site, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

4.4.a.7. A brief description of the nature of the business.

4.4.b. Existing sewage, manufacturing, commercial, mining and silvicultural discharges shall also provide the following information to the chief, using application forms provided by the chief:

4.4.b.1. Outlet location. The latitude and longitude to the nearest second and the name and alphanumeric designation of the immediate receiving stream or river mile point where applicable.

4.4.b.2. Line drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under paragraph 4.4.b.3 of this section. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined, the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

4.4.b.3. Average flows and

treatment. A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outlet, including process wastewater, cooling water, sewage, and storm water runoff (including material storage area runoff), the average flow which each wastewater contributes; and a description of the treatment, if any, each wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Process, operations or production areas may be described in general terms (for example, "dye-making reactor", "distillation tower"). For a privately owned treatment works, this information may include the identity of each user of the treatment works.

4.4.b.4. Intermittent flows. If any of the discharges described in paragraph 4.4.b.3 of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for storm water runoff, spillage, or leaks.

4.4.b.5. Maximum production. If an effluent guideline promulgated under Section 304 of CWA applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure must reflect the actual production of the facility as required by subdivision 7.2.a.

4.4.b.6. Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement project, and a listing of the required and projected final compliance dates.

4.4.b.7. Effluent characteristics. Information on the discharge of pollutants is specified in this paragraph. When "quantitative data" for a pollutant is required, the applicant must collect a sample effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR 122.21(g)(7) and 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description

of the method. When an applicant has two (2) or more outlets with substantially identical effluents the chief may allow the applicant to test only one (1) outlet and report that the quantitative data also applies to the substantially identical outlet. The requirements in paragraphs 4.4.b.7.C and 4.4.b.7.D of this section that an applicant must believe to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. The chief may require that grab samples or composite samples be used for particular pollutants. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility).

4.4.b.7.A.

4.4.b.7.A.1. Every applicant must report quantitative data for every outlet for the following parameters relating to pollutants unless the prescribed form indicates that such data is not necessary:

- 4.4.b.7.A.1.a. Biochemical oxygen demand (BOD);
- 4.4.b.7.A.1.b. Chemical oxygen demand;
- 4.4.b.7.A.1.c. Total organic carbon;
- 4.4.b.7.A.1.d. Total suspended solids;
- 4.4.b.7.A.1.e. Ammonia (as N);
- 4.4.b.7.A.1.f. Temperature (both winter and summer); and
- 4.4.b.7.A.1.g. pH.

4.4.b.7.A.2. At the applicant's request, the chief may waive the

reporting requirements for particular point sources or for a particular industry category for one (1) or more of the pollutants listed in part 4.4.b.7.A.1. of this section if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

4.4.b.7.B. Each applicant with processes in one (1) or more primary industry category (see Appendix A) contributing to a discharge must report quantitative data for the following pollutants in each outlet containing process wastewater:

4.4.b.7.B.1. The organic toxic pollutants in the fractions designated in Table I of Appendix D (July 1, 1985) for the applicant's industrial category or categories; and provided, further, that testing and reporting for the base/neutral fraction in the Once-Through Cooling Water, Fly Ash and Bottom Ash Transport Water process wastestreams of the Steam Electric Power Plant industrial category shall not apply. Table II of Appendix D (July 1, 1985) lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromatography/mass spectrometry. A determination that an applicant fails within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes.

4.4.b.7.B.2. The pollutants listed in Table III of Appendix D (July 1, 1985) (the toxic metals, cyanide, and total phenols).

4.4.b.7.C.

4.4.b.7.C.1. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table IV of Appendix D (July 1, 1985) (Certain conventional and nonconventional pollutants) is discharged from each outlet. If an applicable effluent limitations guideline either directly limits the pollutant or, by its expressed terms, indirectly limits the pollutant through limitations on an indicator, or upon a specific request by the chief for certain Table IV pollutants at the

issuance of the application, or at such later time as provided in paragraph 4.4.b.12, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline or specifically requested by the chief, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

4.4.b.7.C.2. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in Table II or Table III of Appendix D (July 1, 1985) (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under subparagraph 4.4.b.7.B of this section, is discharged from each outfall. For every pollutant expected to be discharged in concentrations of 10 ppb or greater the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, where any of these four (4) pollutants are expected to be discharged in concentrations of 100 ppb or greater the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than 10 ppb, or in the case of acrolein, acrylonitrile, 2, 4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, in concentrations less than 100 ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under paragraph 4.4.b.H of this section is not required to analyze for pollutants listed in Table II of Appendix D (July 1, 1985) (the organic toxic pollutants).

4.4.b.7.D. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table V of Appendix D (July 1, 1985) (certain hazardous substances and asbestos) are discharged from each outlet. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report quantitative data it has for any pollutant.

4.4.b.7.E. Each applicant, except sewage facilities, must report qualitative data, generated using a screening procedure not

calibrated with analytical standards, for 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

4.4.b.7.E.1. Uses or manufactures 2, 4, 5-trichlorophenoxy acetic acid (2, 4, 5-t); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex,2,4,5,TP); 2-(2,4,5-trichlorophenoxy) ethyl 2, 2-dichloropropionate (Erbon); 0, 0-dimethyl 0-(2,4,5-trichlorophenyl) phosphorathiate (Ronnel); 2,4-5-trichlorophenol (TCP); or hexachlorophene (HCP); or

4.4.b.7.E.2. Knows or has reason to believe that TCDD is or may be present in an effluent.

4.4.b.8. Small business exemption. An applicant which qualifies as a small business under one (1) of the following criteria is exempt from the requirements in parts 4.4.b.7.B.1 or 4.4.b.7.C.1 of this section to submit quantitative data for the pollutants listed in Table II of Appendix D (July 1, 1985) (the organic toxic pollutants):

4.4.b.8.1. For all other applicants, gross total annual sales averaging less than one hundred thousand dollars (\$100,000) per year.

4.4.b.9. Used or manufactured toxics. A listing of any toxic pollutant which the applicant does or expects that it will during the next five (5) years use of manufacture as an intermediate or final product or by-product.

4.4.b.10. Biological toxicity tests. An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last three (3) years on any of the applicant's discharges or on a receiving water in relation to a discharge.

4.4.b.11. Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by paragraph 4.4.b.7 of this section, the identity of each laboratory or firm and the analyses performed.

4.4.b.12. Additional information. In addition to the information reported on the application form, applicants shall provide to the chief, at his or her request, such other

information as the chief may reasonably require to assess the discharges of the facility and to determine whether to issue a NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity to aquatic life of the discharges and requirements to determine the cause of the toxicity.

4.4.c. New and existing concentrated animal feeding operations and concentrated aquatic animal production facilities shall provide the following information to the chief, using the application form provided by the chief:

4.4.c.1. For concentrated animal feeding operations:

4.4.c.1.A. The type and number of animals in open confinement and housed under roof.

4.4.c.1.B. The number of acres used for confinement feeding.

4.4.c.1.C. The design basis for the runoff diversion and control system, if one exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor.

4.4.c.2. For concentrated aquatic animal production facilities:

4.4.c.2.A. The maximum daily and average monthly flow from each outlet.

4.4.c.2.B. The number of ponds, raceways, and similar structures.

4.4.c.2.C. The name of the receiving water and the source of intake water.

4.4.c.2.D. For each species of aquatic animals, the total yearly and maximum harvestable weight.

4.4.c.2.E. The calendar month of maximum feeding and the total mass of food fed during that month.

4.4.c.3. Any other information the chief may reasonably require.

4.4.d. Variance requests by non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

4.4.d.1. Fundamentally different factors. A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be made by the close of the public comment period under subsection 12.1. The request shall explain how the requirements of 40 CFR Part 125, Subpart D have been met.

4.4.d.2. Nonconventional pollutants. A request for a variance from the BAT requirements for CWA Section 301(b)(2)(F) pollutants (commonly called "Nonconventional Pollutants") pursuant to Section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to Section 301(g) of CWA because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:

4.4.d.2.A. Submitting an initial request to the Regional Administrator, as well as to the chief, stating the name of discharger, the permit number, the outlet number(s), the applicable effluent guideline, and whether the discharger is requesting a Section 301(c) or Section 301(G) modification or both. This request must have been filed not later than:

4.4.d.2.A.1. September 25, 1978, for a pollutant which is controlled by a BAT effluent guideline promulgated before December 27, 1977; or

4.4.d.2.A.2. Two hundred seventy (270) days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 28, 1977; and

4.4.d.2.B. Submitting a completed request no later than the close of the

public comment period under subsection 12.1 demonstrating that the applicable requirements of 40 CFR Part 125 have been met.

4.4.d.2.C. Requests for variance from effluent limitations not based on effluent limitation guidelines, need only comply with subparagraph 4.4.d.2.B of this section and need not be preceded by an initial request under subparagraph 4.4.d.2.A of this section.

4.4.d.3. Delay in construction of POTW. An extension under CWA Section 301(i)(2) of the statutory deadlines in Sections 301 (b)(1)(A) or (B)(1)(C) of CWA based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978, or one hundred eighty (180) days after the relevant POTW requested an extension under paragraph 4.4.e.1 of this section, whichever is later, but in no event may this date have been later than December 24, 1978. The request shall explain how the requirements of 40 CFR Part 125, Subpart J have been met.

4.4.d.4. Innovative technology. An extension under CWA Section 301(k) from the statutory deadline of Section 301(b)(2)(A) for best available technology based on the use of innovative technology may be requested no later than the close of the public comment period under subsection 1.2 for the discharger's initial permit requiring compliance with Section 301(b)(2)(A). The request shall demonstrate that the requirements of 40 CFR Part 125 have been met.

4.4.d.5. Water quality related effluent limitations. A modification under Section 302(b)(2) of requirements under Section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under subsection 12.1 on the permit from which the modification is sought.

4.4.d.6. Thermal discharge. A variance under CWA Section 316(a) for the thermal component of any discharge must be filed with a timely application for a permit under this section, except that if thermal effluent limitations are established under CWA Section

402(a)(1) or are based on water quality standards the request for a variance may be filed by the close of the public comment period under subsection 12.1. A copy of the request as required under 40 CFR Part 125, Subpart H, shall be sent to the chief as required under that section.

4.4.e. Variance requests by POTWs. A discharger which is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under either of the following statutory provisions as specified in this paragraph:

4.4.e.1. Delay in construction. An extension under CWA Section 301(i)(1) of the statutory deadlines in CWA Sections 301(b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before June 26, 1978.

4.4.e.2. Water quality based effluent limitation. A modification under CWA Section 302(b)(2) of the requirements under Section 302(a) for achieving water quality based effluent limitations shall be requested no later than the close of the public comment period under subsection 12.1 on the permit from which the modification is sought.

4.4.f. Expedited variance procedures and time extensions:

4.4.f.1. Notwithstanding the time requirements in subdivisions 4.4.d and 4.4.e of this section, the chief may notify a permit applicant before a draft permit is issued that the draft permit will likely contain limitations which are eligible for variance. In the notice the chief may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of 40 CFR Part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

4.4.f.2. A discharger who cannot

file a complete request required under subparagraphs 4.4.d.2.B or 4.4.d.2.C of this section may request an extension. The extension may be granted or denied at the discretion of the chief. Extensions shall be no more than six (6) months in duration.

4.5. Record keeping. Applicant shall keep records of all data used to complete permit applications and any supplemental information submitted for a period of at least three (3) years from the date the application is signed.

4.6. Signatories to permit applications and reports.

4.6.a. Applications. All permit applications shall be signed as follows:

4.6.a.1. For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

4.6.a.1.A. A president, secretary, treasurer, or vice-president of the corporation in charge of a principle business function, or any other person who perform similar policy or decision making functions for the corporation, or

4.6.a.1.B. The manager of one (1) or more manufacturing, production, or operating facilities employing more than two hundred fifty (25) persons or having gross annual sales or expenditures exceeding twenty-five million dollars (\$25,000,000) (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

NOTE: The chief does not require specific assignments or delegations of authority to responsible corporate officers identified in subparagraph 4.6.a.1.A. The chief will presume that these responsible corporate officers have the requisite authority to sign permit applications unless the corporation has notified the chief to the contrary. Corporate procedures governing authority to sign permit applications may provide for assignment or delegation to applicable corporate positions

under subparagraph 4.6.a.1.B rather than to specific individuals.

4.6.a.2. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

4.6.a.3. For a municipality, State, Federal, or other public agency: by either a principal executive officer of ranking elected official. For purposes of this section, a principal executive officer of a Federal agency includes:

4.6.a.3.A. The chief executive officer of the agency, or

4.6.a.3.B. A senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrator of EPA.)

4.6.b. Reports. All reports required by permits and other information requested by the chief, shall be signed by a person described in subdivision 4.6.a of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if

4.6.b.1. The authorization is made in writing by a person described in subdivision 4.6.a of this section;

4.6.b.2. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

4.6.b.3. The written authorization is submitted to the chief.

4.6.c. Changes to authorization. If an authorization under subdivision 4.6.b of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new

authorization satisfying the requirements of subdivision 4.6.b of this section must be submitted to the chief prior to or together with any reports, information, or applications to be signed by an authorized representative.

4.6.d. Certification. Any person signing a document under subdivisions 4.6.a or 4.6.b of this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

4.7. Filing fee. For all NPDES permits, the filing fees required under 47CSR26, shall apply, as though fully set forth herein.

§47-10-5. Conditions Applicable to All Permits.

The following conditions apply to all permits. All conditions shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these rules must be given in the permit.

5.1. Duty to comply:

5.1.a. The permittee must comply with all conditions of this permit. Permit noncompliance constitutes a violation of the CWA and State Act and is grounds for enforcement action; for permit modification, revocation and reissuance, suspension or revocation; or for denial of a permit renewal application.

5.1.b. The permittee shall comply with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic

pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

5.2. Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for a new permit at least one hundred eighty (180) days prior to expiration of the permit.

5.3. Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

5.4. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

5.5. Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls, and appropriate quality assurance procedures. Unless otherwise required by Federal or State law, this provision requires the operation of back-up auxiliary facilities or similar systems which are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of the permit. For domestic waste treatment facilities, waste treatment operators as classified by State Division of Health Rules authorized under Public Health Laws, W. Va. Code §16-1, will be required except that in circumstances where the domestic waste treatment facility is receiving any type of industrial waste, the chief may require a more highly skilled operator.

5.6. Permit actions. This permit may be modified, revoked and reissued, suspended, or revoked for cause. The filing of a request by the permittee for a permit modification, revocation

and reissuance, or revocation, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

5.7. Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

5.8. Duty to provide information. The permittee shall furnish to the chief, within a reasonable specified time, any information which the chief may request to determine whether cause exists for modifying, revoking and reissuing, suspending, or revoking this permit, or to determine compliance with this permit. The permittee shall also furnish to the chief, upon request, copies of records required to be kept by this permit.

5.9. Inspection and entry. The permittee shall allow the chief, or an authorized representative, upon presentation of credentials and other documents as may be required by law, to:

5.9.a. Enter upon the permittee's premises in which an effluent source or activity is located, or where records must be kept under the conditions of this permit;

5.9.b. Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;

5.9.c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

5.9.d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the State Act, any substances or parameters at any location.

5.10. Monitoring and records:

5.10.a. Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 as in effect October 8, 1991, unless other test procedures have been specified in the permit.

5.10.b. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

5.10.c. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for this permit, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the chief at any time.

5.10.d. Records of monitoring information shall include:

5.10.d.1. The date, exact place, and time of sampling or measurements;

5.10.d.2. The individual(s) who performed the sampling or measurements;

5.10.d.3. The date(s) analyses were performed;

5.10.d.4. The individual(s) who performed the analyses; if a commercial laboratory is used, the name and address of the laboratory;

5.10.d.5. The analytical techniques or methods used; and

5.10.d.6. The results of such analyses.

5.10.e. Monitoring results shall be reported on DMRs and at the intervals specified elsewhere in the permit.

5.10.f. If the permittee monitors any pollutant at any monitoring point specified in the permit more frequently than required by the permit, using approved test procedures or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

5.10.g. Calculations for all limitations

which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the chief in the permit.

5.10.h. The permittee shall not knowingly render inaccurate any monitoring device required to be used under this permit.

5.11. Signatory requirement. All applications, reports or information submitted to the chief shall be signed and certified as required in subsection 4.6.

5.12. Reporting requirements:

5.12.a. Planned changes. The permittee shall give notice to the chief of any planned physical alterations or additions to the permitted facility which may affect the nature or quantity of the discharge and of any planned changes in the method of operating the facility which may affect the nature or quantity of the discharge. Notice is required when:

5.12.a.1. The alteration or addition to a permitted facility may meet one (1) of the criteria for determining whether a facility is a new source in subdivision 13.7.b; or

5.12.a.2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under subdivision 5.12.f.

5.12.b. Anticipated noncompliance. The permittee shall give advance notice to the chief of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

5.12.c. Transfers. This permit is not transferable to any person except after notice to the chief. The chief may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary.

5.12.d. Compliance schedules. Reports of compliance or noncompliance with, or any

progress reports on interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than fourteen (14) days following each schedule date.

5.12.e. Immediate reporting:

5.12.e.1. The permittee shall report any noncompliance which may endanger health or the environment immediately after becoming aware of the circumstances by using the Office of Water Resources' Emergency Notification Number 1-800-642-3074. A written submission shall be provided within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate and prevent recurrence of the noncompliance.

5.12.e.2. The following shall also be reported immediately:

5.12.e.2.A Any unanticipated bypass which exceeds any effluent limitation in the permit;

5.12.e.2.B. Any upset which exceeds any effluent limitation in the permit; and

5.12.e.2.C. Violation of a maximum daily discharge limitation for any of the pollutants listed by the chief in the permit to be reported immediately. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

5.12.e.3. The chief may waive the written report on a case-by-case basis if the oral report has been received in accordance with the above.

5.12.e.4. Compliance with the requirements of paragraph 5.12.f of this section, shall not relieve a person of compliance with

47CSR11-1.

5.12.f. In addition to the above reporting requirements, all existing manufacturing, commercial, and silvicultural dischargers must notify the chief in writing as soon as they know or have reason to believe:

5.12.f.1. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "Notification Levels":

5.12.f.1.A. One hundred micrograms per liter (100 ug/l);

5.12.f.1.B. Two hundred micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

5.12.f.1.C. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with paragraphs 4.4.b.7 or 4.4.b.9; and

5.12.f.1.D. The level established by the chief in accordance with subdivision 6.3.g.5

5.12.f.2. That any activity has occurred or will occur which would result in any discharge (on a non-routine or infrequent basis) of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "Notification Levels":

5.12.f.2.A. Five hundred micrograms per liter (500 ug/l);

5.12.f.2.B. One milligram per liter (1 mg/l) for antimony;

5.12.f.2.C. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with subdivision 4.4.b.7; or

5.12.f.2.D. The level

established by the chief in accordance with subdivision 6.3.g.

5.12.f.3. That they have begun or expect to begin to use or manufacture as an intermediate or final product or by-product of any toxic pollutant which was not reported in the permit application under paragraph 4.4.b.9 and which will result in the discharge on a routine or frequent basis of that toxic pollutant at levels which exceed five (5) times the detection limit for that pollutant under approved analytical procedure.

5.12.f.4. That they have begun or expect to begin to use or manufacture as an intermediate or final product or by-product of any toxic pollutant which was not reported in the permit application under subdivision 4.4.b.9 and which will result in the discharge on a non-routine or infrequent basis of that toxic pollutant at levels which exceed ten (10) times the detection limit for that pollutant under approved analytical procedure.

5.12.g. Other noncompliance. The permittee shall report all instances of noncompliance not reported under the above paragraphs at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph 5.12.e.1 of this section.

5.12.h. Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the chief, it shall promptly submit such facts or information.

5.13. Bypass:

5.13.a. Definitions:

5.13.a.1. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility; and

5.13.a.2. "Severe Property Damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural

resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

5.13.b. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of subdivisions 5.13.c and 5.13.d of this section.

5.13.c. Notice:

5.13.c.1. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of the bypass; and

5.13.c.2. If the permittee does not know in advance of the need for a bypass, notice shall be submitted as required in paragraph 5.12.e.2 of this section.

5.13.d. Prohibition of bypass:

5.13.d.1. Bypass is permitted only under the following conditions, and the chief may take enforcement action against a permittee for bypass, unless:

5.13.d.1.A. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

5.13.d.1.B. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

5.13.d.1.C. The permittee submitted notices as required under subdivision 5.13.c of this section.

5.13.d.2. The chief may approve an anticipated bypass, after considering its adverse effects, if the chief determines that it will meet the three (3) conditions listed above in paragraph 5.13.d.1 of this section.

5.14. Upset:

5.14.a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

5.14.b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based effluent limitations if the requirements of subdivision 5.14.c of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

5.14.c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

5.14.c.1. An upset occurred and that the permittee can identify the cause(s) of the upset;

5.14.c.2. The permitted facility was at the time being properly operated;

5.14.c.3. The permittee submitted notice of the upset as required in 5.12.e.2 of this section; and

5.14.c.4. The permittee complied with any remedial measures required under subsection 5.4.

5.14.d. Burden of proof. In any

enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5.15. Removed substances. Where removed substances are not otherwise covered by the terms and conditions of this permit or other existing permit by the chief, any solids, sludges, filter backwash or other pollutants (removed in the course of treatment or control of wastewaters) and which are intended for disposal within the State, shall be disposed of only in a manner and at a site subject to the approval by the chief. If such substances are intended for disposal outside the State or for reuse, i.e., as a material used for making another product, which in turn has another use, the permittee shall notify the chief in writing of the proposed disposal or use of such substances, the identity of the prospective disposer or users, and the intended place of disposal or use, as appropriate.

§47-10-6. Establishing Permit Conditions.

6.1. In addition to conditions required in all permits, the chief shall establish conditions in permits as required on a case-by-case basis, to provide for an assure compliance with all applicable requirements of the CWA and State Act and regulations. An applicable requirement is a State or Federal or interstate compact, statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit and is also any requirement which takes effect prior to the modification or revocation and reissuance of a permit.

6.2. In the permit review and planning process or upon the request of a permit applicant or permittee, the chief may utilize Real Time Water Quality Control on a case-by-case basis when establishing permit conditions when the applicant demonstrates that the use of Real Time Water Quality Control will not violate water quality standards. In order to facilitate a determination or assessment of the applicability of Real Time Management Control, the chief may require a permit applicant or permittee to submit such information as deemed necessary.

6.3. Each permit shall include conditions meeting the following requirements when

applicable:

6.3.a. Technology-based effluent limitations and standards based on effluent limitations and standards under Section 301 of CWA or new source performance standards promulgated under Section 306 of CWA, or case-by-case effluent standards determined under Section 402(a)(1) of CWA, or a combination of the two (2) in accordance with 40 CFR Part 125. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of subdivision 13.7 (protection period).

6.3.b. Other effluent limitations and standards under Sections 301,302,303, 307, 318, and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the chief shall institute proceedings under these rules to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. (The provisions of 40 CFR 129 as of July 1, 1985, are hereby incorporated by reference.)

6.3.c. For any discharger within a primary industry category (see Appendix A), requirements under Section 307(a)(2) of CWA as follows:

6.3.c.1. After June 30, 1981, any permit issued shall include effluent limitations and a compliance schedule to meet the requirements of Sections 301(b)(2)(A), (C), (D), (E) and (F) of CWA whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits may include a condition stating that, if an applicable standard or limitation is promulgated under Sections 301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2) and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not listed in the permit, the permit shall be promptly modified or revoked and reissued to conform to that effluent standard or limitation.

6.3.d. Any more stringent requirements necessary to achieve water quality standards established pursuant to the CWA or the State Act and regulations, including requirements of other affected States. Nothing in this section precludes the application of Real Time Water Quality Control in achieving water quality standards.

6.3.e. Any requirements necessary to ensure consistency with the requirements of a Water Quality Management Plan approved by EPA under Section 208(b) of CWA.

6.3.f. For toxic pollutants, limitations established under subdivisions 6.3.a, 6.3.b or 6.3.c of this section to control pollutants meeting the criteria listed in paragraph 6.3.f.1 of this section. Limitations will be established in accordance with paragraph 6.3.f.2 of this section. An explanation of the development of these limitations shall be included in the fact sheet, if any:

6.3.f.1. Limitations must control all toxic pollutants which:

6.3.f.1.A. The chief determines are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee; or

6.3.f.1.B. The discharger does or may use or manufacture as an intermediate or final product or by-product.

6.3.f.2. The requirement that the limitations control the pollutants meeting the criteria of paragraph 6.3.f.1 of this section will be satisfied by:

6.3.f.2.A. Limitations on those pollutants; or

6.3.f.2.B. Limitations on other pollutants which, in the judgement of the chief, will provide the necessary treatment of the pollutants.

6.3.g. Notification level. A

"Notification Level" which exceeds the notification level of subdivision 5.1.f, upon a petition from the permittee or on the chief's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee.

6.3.h. Monitoring requirements. In addition to subsection 5.10, the following monitoring requirements:

6.3.h.1. To assure compliance with permit limitations, requirements to monitor:

6.3.h.1.A. The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

6.3.h.1.B. The volume of effluent discharged from each outlet;

6.3.h.1.C. Other measurements as appropriate, including pollutants in internal waste streams under subsection 7.9; pollutants in intake water for net limitations under subsection 7.8; frequency, rate of discharge, etc., for noncontinuous dischargers under subsection 7.5; and pollutants subject to notification requirements under subdivision 5.12.f; and

6.3.h.1.D. According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants having approved methods under that section, and according to a test procedure specified in the permit for pollutants with no approved methods.

6.3.h.2. Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

6.3.h.3. Requirements concerning the proper use, maintenance, and installation when appropriate as determined by the chief of monitoring equipment or methods (including biological monitoring methods when appropriate as determined by the chief).

6.3.i. Best management practices to control or abate the discharge of pollutants when:

6.3.i.1. Authorized under Section 304(e) of CWA for the control of toxic pollutants and hazardous substances from ancillary activities;

6.3.i.2. Numeric effluent limitations are infeasible; or

6.3.i.3. The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of CWA.

6.3.j. Reissued permits.

6.3.j.1. Except as provided in paragraph 6.3.j.2 of this section when a permit is renewed or reissued, interim limitations, standards or conditions must be at least as stringent as the final limitations, standards or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance).

6.3.j.2. When effluent limitations were imposed under Section 402(a)(1) of CWA in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, this paragraph shall apply unless:

6.3.j.2.A. The discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by the subsequently promulgated guidelines);

6.3.j.2.B. The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology Section 301(b)(2)(E) of CWA;

6.3.j.2.C. The circumstances on

which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance; or

6.3.j.2.D. There is increased production at the facility which results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

6.3.k. Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements of CWA and the State Act. Alternatively, the chief may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The chief's decision to issue a permit with no conditions applicable to any user, to impose conditions on one (1) or more users, to issue separate permits, or to require separate applications, and the basis for that decision shall be stated in the fact sheet for the draft permit for the treatment works, if any.

6.3.l. Grants. Any conditions imposed in grants made by the Administrator to POTWs under Sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under Section 301 of CWA.

6.3.m. Sewage sludge. Requirements under Section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works, in accordance with any applicable rules.

6.3.n. Navigation. Any conditions that the Secretary considers necessary to ensure that navigation and anchorage will not be substantially impaired.

6.3.o. Any alternative effluent

limitations or standard may be incorporated where warranted by "fundamentally different factors", under 40 CFR Part 125, Subpart D.

§47-10-7. Calculating NPDES Conditions.

7.1. Outlets and discharge points. All permit effluent limitations, standards, and prohibitions shall be established for each outlet or discharge point of the permitted facility, except as otherwise provided under subdivision 6.3.i and subsection 7.8 of this section.

7.2. Production-based limitations:

7.2.a. In the case of sewage facilities, permit limitations, standards, or prohibitions shall be calculated based on design flow.

7.2.a.1. Except in the case of sewage facilities, or as provided, in subparagraph 7.2.a.2.B. of this section, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitation; for example, monthly production shall be used to calculate average monthly discharge limitations.

7.2.a.2.

7.2.a.2.A. Where production-based limitations, standards or prohibitions apply, the chief may include a condition establishing alternate permit limitations, standards, or prohibitions based upon anticipated increased (not to exceed maximum production capability) or decreased production levels.

7.2.a.2.B. If the chief establishes permit conditions under subparagraph 7.2.a.2.A of this section:

7.2.a.2.B.1. The permit shall require the permittee to notify the chief at least two (2) business days prior to a month in

which the permittee expects to operate at a level higher than the lowest production level identified in the permit. The notice shall specify the anticipated level and the period during which the permittee expects to operate at the alternate level. If the notice covers more than one (1) month, the notice shall specify the reasons for the anticipated production level increase. New notice of discharge at alternate levels is required to cover a period or production level not covered by prior notice or, if during two (2) consecutive months otherwise covered by a notice, the production level at the permitted facility does not in fact meet the higher level designated in the notice.

7.2.a.2.B.2. The permittee shall comply with the limitations, standards, or prohibitions that correspond to the lowest level of production specified in the permit, unless the permittee has notified the chief under paragraph 7.2.b.B.(b)(A) of this section, in which case the permittee shall comply with the lower of the actual level of production during each month or the level specified in the notice.

7.2.a.2.B.3. The permittee shall submit with the DMR the level of production that actually occurred during each month and the limitations, standards, or prohibitions applicable to that level of production.

7.2.b. In the case of facilities and activities providing services and where water usage is not related to a product, limitations, standards, and prohibitions shall be based upon water usage. For those facilities covered by 46CSR1, sections 3 and 4, those requirements shall also be considered in these determinations.

7.3. Metals. All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as defined in 46CSR1, section 2, unless:

7.3.a. An applicable effluent standard or limitation has been promulgated under CWA and specifies the limitation for the metal in the dissolved or valent or total form; or

7.3.b. In establishing permit limitations on a case-by-case basis, it is necessary to

express the limitation on the metal in the dissolved or valent or total form in order to carry out the provisions of CWA; or

7.3.c. All approved analytical methods for the metal inherently measure only its dissolved form (e.g. hexavalent chromium).

7.4. Continuous discharges. For all continuous discharges, all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall unless impracticable be stated as maximum daily and average monthly discharge limitations.

7.5. Noncontinuous discharges. Discharges which are not continuous, shall be particularly described and limited, considering the following factors, as appropriate:

7.5.a. Frequency;

7.5.b. Total mass;

7.5.c. Maximum rate of discharge of pollutants during the discharge; or

7.5.d. Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure.

7.6. Mass limitations:

7.6.a. All pollutants limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

7.6.a.1. For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;

7.6.a.2. When applicable standards and limitations are expressed in terms of other units of measurement; or

7.6.a.3. If in establishing permit limitations on a case-by-case basis, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation, and permit conditions ensure that dilution will not be used as a substitute for treatment.

7.6.b. Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

7.7. Pollutants in intake water.

7.7.a. Upon request of the permittee, technology based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the permittee's intake water, if:

7.7.a.1. The applicable effluent limitations and standards specifically provide that they shall be applied on a net basis; or

7.7.a.2. The permittee demonstrates that the control system it proposes or used to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.

7.7.b. Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) should not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outlet or elsewhere.

7.7.c. Nor shall effluent limitations or standards be calculated on a "Net" basis for permittees whose intake water comes from underground water systems.

7.7.d. Credit shall be granted only to the extent necessary to meet the applicable limitation or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.

7.7.e. Credit shall be granted only if the permittee demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The chief may waive this

requirement if he finds that no environmental degradation will result.

7.7.f. This section does not apply to the discharge of raw water clarifier sludge generated from the treatment of intake water.

7.8. Internal waste streams. When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring requirements under subdivision 6.3.h shall also be applied to the internal waste streams.

7.9. Disposal of pollutants into wells, into POTWs, or by land application:

7.9.a. When part of a discharger's process wastewater is not being discharged into waters of the State because it is disposed into a well, into a POTW, or by land application thereby reducing the flow or level of pollutants being discharged into waters of the State, applicable effluent standards and limitations for the discharge in a NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one (1) of the following methods:

7.9.a.1 If none of the waste from a particular process is discharged into waters of the State, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

7.9.a.2. In all cases other than those described in paragraph 7.9.a.1 of this section, effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the State, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted to make them more stringent if discharges to

wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters.

7.9.b. Subdivision 7.9.a of this section shall not apply to the extent that promulgated effluent limitations guidelines:

7.9.b.1. Control concentrations of pollutants discharged but not mass; or

7.9.b.2. Specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into POTWs.

7.9.c. Subdivision 7.9.a of this section does not alter a discharger's obligation to meet any more stringent requirements established under sections 5 and 6 of this series.

§47-10-8. Schedules of Compliance.

8.1. General. The permit may, when appropriate, specify a schedule of compliance leading to compliance with the CWA and State Act and rules:

8.1.a. Any schedule of compliance shall require compliance as soon as possible, but in no case later than an applicable statutory deadline. In the case of permit conditions based on water quality standards established after July 1, 1977, a schedule of compliance may be used which shall assure that the discharge will not cause a violation of applicable water quality standards.

8.1.b. The first NPDES permit issued to a new source, or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.

8.1.c. Interim dates. If a permit

establishes a schedule of compliance which exceeds one (1) year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement:

8.1.c.1. The time between interim dates shall not exceed one (1) year.

8.1.c.2. If the time necessary for completion of any interim requirement is more than one (1) year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

8.2. Alternative schedules of compliance. A permit applicant or permittee may cease conducting regulated activities rather than continue to operate and meet permit requirements as follows:

8.2.a. If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued:

8.2.a.1. The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

8.2.a.2. The permittee shall cease conduction permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

8.2.b. If the decision to cease conduction regulated activities is made before issuance of a permit whose term will include the termination date, the permit shall contain a schedule leading to termination which will ensure timely compliance with applicable requirements, for compliance not later than statutory deadline.

8.2.c. If the permittee is undecided whether to cease conducting regulated activities, the chief may issue or modify a permit to contain two (2) schedules as follows:

8.2.c.1. Both schedules shall contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirement in a timely manner if the decision is to continue conducting regulated activities;

8.2.c.2. One (1) schedule shall lead to timely compliance with applicable requirements, and compliance no later than the statutory deadline;

8.2.c.3. The second schedule shall lead to cessation of regulated activities by a date which will ensure timely compliance with applicable requirements, or compliance no later than the statutory deadline; and

8.2.c.4. Each permit containing two (2) schedules shall include a requirement that after the permittee has made a final decision under paragraph 8.2.c.1 of this section it shall follow the schedule leading to compliance if the decision is to cease conduction regulated activities.

8.2.d. If the applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the chief.

§47-10-9. Modification, Revocation and Reissuance, Suspension and Revocation of Permits.

9.1. Actions by the chief.

9.1.a. Permits may be modified, revoked and reissued, suspended or revoked either at the request of any interested person or upon the chief's initiative. Permits may only be modified, revoked and reissued, suspended or revoked for the reasons specified in this section. When a permit is modified, only the conditions subject to modification are reopened. All other conditions of the permit shall remain in effect for the duration of the permit. All requests under this section shall be in writing submitted to the chief citing facts or reasons supporting the request and indicating under which subsection the request is being made. If a permit

modification is being requested under an emergency declared by the chief, an affidavit, signed by a person meeting the requirements of subsection 4.6 attesting to the emergency shall be filed with the request. The chief may require additional information, and in the case of a major modification, may require submission of a new permit application. For a reissuance under subdivision 9.2.b or subsection 9.3, the chief shall require submission of a new permit application.

9.1.b. If the chief decides the request is not justified, he or she shall send the requestor a brief written response given the reasons for the decision. Denials of such requests are not subject to public notice, comment, or hearings.

9.1.c.

9.1.c.1. If the chief tentatively decides to modify or revoke and reissue a permit and the modification is not made under subsection 9.5, he or she shall prepare a draft permit under section 10 and shall follow the public notice procedures in section 12. The chief may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the chief shall require the submission of a new application.

9.1.c.2. In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other conditions of the existing permit shall remain in effect for the duration of the permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

9.2. Causes for modification or permittee requested reissuance of permits.

9.2.a. Minor modifications. Permits may be modified by the chief for any good cause

(as defined in subsection 9.4 of this section) and unless such cause is specified in the following subsection 9.2.b, modification does not require the preparation of a draft permit or the public notice procedures of sections 10 and 12 respectively.

9.2.b. Modifications. The following are causes for modification, but not reissuance of a permit unless the permittee requests or agrees, and require the preparation of a draft permit under section 10 and the public notice procedures of section 12, unless an emergency is declared by the chief. If the permittee requests or agrees, then the following cause can be reason for a permit reissuance which will open the entire permit for comment and change.

9.2.b.1. Alterations. There are material and substantial alterations or additions to the permitted facility or activity which justify the application of permit conditions that are different or absent in the existing permit, including the acceptance of wastes from an indirect discharger under section 14.

9.2.b.2. Information. The chief has received new information. Permits may be modified during their terms for this cause only if information was not available at the time of permit issuance (other than revised rules, guidance, or test methods) which would have justified the application of different permit conditions at the time of issuance. For NPDES general permits this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

9.2.b.3. New rules. The standards or rules on which the permit was based have been changed by promulgation of amended standards or rules or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

9.2.b.3.A. For promulgation of amended standards or rules, when:

9.2.b.3.A.1. The permit condition to be modified was based on a promulgated rule, effluent limitation guideline, new source performance standard, pretreatment standard, or water quality standard;

9.2.b.3.A.2. The State has revised, withdrawn or modified that portion of the rule, effluent limitation guideline, new source rule performance standard, pretreatment standard, or water quality standard on which the permit condition was based; and

9.2.b.3.A.3. A permittee requests modification within ninety (90) days after the State Register notice of the action on which the request is based.

9.2.b.3.B. For judicial decision, when a court of competent jurisdiction has remanded and stayed State or Federal promulgated rules, if the remand and stay concern that portion of the rules on which the permit condition was based.

9.2.b.4. Modification and extension of compliance schedules:

9.2.b.4.A. The chief determines good cause exists for extension of a compliance schedule, such as an act of God, strike, flood or materials shortage or other events over which the permittee has little or not no control and for which there is no reasonably available remedy.

9.2.b.4.B. To modify a schedule of compliance to reflect the time lost during construction of an innovation or alternative facility, in the case of a POTW which has received a grant under Section 202(a)(3) of the CWA for one hundred percent (100%) of the costs to modify or replace facilities constructed with a grant for innovative or alternative wastewater technology under Section 202(a)(2).

9.2.b.4.C. In no case shall a compliance schedule be modified to extend beyond an applicable CWA statutory deadline for compliance.

9.2.b.5. Transfer of a permit under subdivision 3.5.c.

9.2.b.6. When the permittee has filed a timely request for a variance under CWA 301(c), 301(g), 301(I), 309(k), or for "fundamentally different factors" after compliance with the procedures of subsection

10.2 as applicable.

9.2.b.7. When required to incorporate an applicable CWA 307(a) toxic effluent standard or prohibition.

9.2.b.8. When required by the "Reopener" conditions in a permit, which are established in the permit under subdivision 6.3.c or 40 CFR 403.10(e).

9.2.b.9. Upon request of a permittee who qualifies for effluent limitations on a net basis under subsection 7.7.

9.2.b.10. When a discharger is no longer eligible for net limitations, as provided in subdivision 7.2.a.

9.2.b.11. As necessary under 40 CFR 403.8(e) (compliance schedule for development of pretreatment programs).

9.2.b.12. When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee.

9.2.b.13. When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant which was not reported in the permit application.

9.2.b.14. Upon failure of the chief to notify another State as required by subsection 12.1 whose waters may be affected by a discharge from this State.

9.2.b.15. A determination that the permitted activity endangers human health or the environment and can be regulated to acceptable levels by a permit modification.

9.2.b.16. Any of the reasons cited in subsection 9.4.

9.2.b.17. When the permittee's effluent limitations were imposed under 402(a)(1) of the CWA and the permittee demonstrates operation and maintenance costs that are totally disproportionate from the

operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline, but in no case may the limitations be made less stringent than the subsequent guideline.

9.2.b.18. To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.

9.2.b.19. When the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under Section 402(a)(1) of the CWA and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of pollution control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline).

9.2.b.20. Upon request by the permittee, following final adoption by the Board of amendments to its rules consistent with changes in EPA rules adopted as a result of the legal challenge to EPA rules in the case of *Natural Resources Defense Council v. EPA*, No. 80-1607 and consolidated cases, or other cases challenging EPA's NPDES rules, a permit may be reopened for the limited purpose of changing any conditions in this permit which were based upon rules which have subsequently been so amended, provided that the request is made within six (6) months of adoption of the new rules.

9.3. Reissuance. When a permit is reissued under this subsection, the entire permit is reopened, just as if the permit has expired. Reissuance requires a draft permit under section 10 and the public notice procedures of section 12. Processing of a reissuance application does not exempt the permittee from compliance with any permit term or condition. The following are causes for reissuance:

9.3.a. Cause exists for revocation under subsection 9.4 and the chief determines reissuance is appropriate.

9.3.b. The permit was issued prior to July 1, 1974 and has not expiration date.

9.4. Suspension and revocation of permits.

9.4.a. The following are causes for revocation or suspension of a permit or for denying a permit renewal application:

9.4.a.1. Noncompliance by the permittee with any condition of the permit; or

9.4.a.2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

9.4.a.3. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation; or

9.4.a.4. A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit.

9.4.b. If the chief tentatively decides to suspend or revoke a permit he or she shall issue a notice of intent to suspend or revoke. A notice of intent to suspend or revoke a permit is a type of draft permit which follows the same procedures as any draft prepared under section 10 and shall fulfill the requirements of notice required under Section 12 of the State Act.

9.5. Minor modifications of permits. Upon the consent of the permittee, the chief may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section without preparing a draft permit or following the procedures of section 12, or procedures in Section 12 of the State Act. Minor modifications may only:

9.5.a. Correct typographical errors.

9.5.b. Require more frequent monitoring or reporting by the permittee.

9.5.c. Change in interim compliance

date in a schedule of compliance, provided the new date is not more than one hundred twenty (120) days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement.

9.5.d. Allow for a change in ownership or operational control of a facility where the chief determines that no other change in the permit is necessary, provided that any forms prescribed by the chief, including a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees have been submitted to the chief.

9.5.e. Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge.

9.5.f. Delete a point source outlet when the discharge from that outlet is terminated and does not result in discharge of pollutants from other outlets except in accordance with permit limits.

9.5.g. Allow disposal system equipment substitution, when the substituted equipment would not require new or different permit conditions.

9.5.h. Allow rerouting of discharge lines, when the rerouted line would not discharge to a different receiving stream and would not require new or different permit conditions.

9.5.i. Allow relocation of elements of treatment facilities or disposal systems, when the relocation would not require new or different permit conditions (for example, relocation due to topography or equipment failures).

9.5.j. Allow the addition of wastes from indirect dischargers under paragraph 14.2.b.2.

9.5.k. Incorporate substantial modifications of POTW Pretreatment Programs after approval is granted in accordance with the procedures of 40 CFR 403.18.

§47-10-10. Draft Permits.**10.1. Administration.**

10.a. Once an application is complete, the chief shall tentatively decide whether to prepare a draft permit or to deny the application.

10.b. If the chief tentatively decides to issue a general permit, he or she shall prepare a draft general permit under subdivision 10.1.c of this section.

10.c. If a draft permit is to be prepared by the chief, it shall contain the following information:

10.c.1. All conditions under sections 5 and 6;

10.c.2. All compliance schedules;

10.c.3. All monitoring requirements;
and

10.c.4. Effluent limitations, standards, prohibitions and conditions and all variances that are to be included.

10.d. All draft permits shall be provided permittees and shall be accompanied by a fact sheet if required under section 11 and shall be publicly noticed and available for public comment in accordance with section 12.

10.2. Decision on variances.

10.2.a. The chief may grant or deny requests based on 40 CFR Part 125 and concurrence with EPA for the following variances:

10.2.a.1. Extensions under CWA Section 302(I) based on delay in completion of a publicly owned treatment works;

10.2.a.2. After consultation with the Regional Administrator, extensions under CWA Section 301(k) based on the use of innovative technology; or

10.2.a.3. Variances under CWA Section 316(a) for thermal pollution.

10.2.b. The chief may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

10.2.b.1. A variance based on the presence of "fundamentally different factors" from those on which an effluent limitations guideline was based;

10.2.b.2. A variance based on the economic capability of the applicant under CWA Section 301(c); or

10.2.b.3. A variance based upon certain water quality factors under CWA Section 301(g).

10.2.c. The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval, a request for a variance listed in subdivision 10.2.b of this section that is forwarded by the chief.

10.2.d. The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under subdivision 10.2.c of this section. If the Deputy Assistant Administrator approves the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under 40 CFR 124.64.

§47-10-11. Fact Sheet.

11.1. A fact sheet shall be prepared for every draft permit for a major facility or activity, for every general permit and for every draft permit that incorporates a variance and for every draft permit which the chief finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The chief shall send this fact sheet to the applicant and, on request, to any other person and to the persons required under subdivision 12.1.e.

11.2. When a term or condition of the final permit differs from the draft permit the chief shall prepare a statement of basis that briefly describes each change from the changes in the draft permit and the reasons for them. The statement of basis shall be sent to the applicant, and, on request to any other person.

11.3. The fact sheet shall include, when applicable:

11.3.a. A brief description of the type of facility or activity which is the subject of the draft permit.

11.3.b. The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being discharged.

11.3.c. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions.

11.3.d. Reasons why any requested variances or alternatives to required standards do or do not appear justified.

11.3.e. A description of the procedures for reaching a final decision on the draft permit including:

11.3.e.1. The beginning and ending dates of the comment period under subsection 12.1 and the address where comments will be received;

11.3.e.2. Procedures for requesting a hearing and the nature of that hearing; and

11.3.e.3. Any other procedures by which the public may participate in the final decision.

11.3.f. Name and telephone number of a person to contact for additional information.

11.3.g. Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions including a citation to the applicable effluent limitation guideline or performance standard provisions and reasons why they are applicable

or an explanation of how the alternate effluent limitations were developed.

11.3.h. When the draft permit contains any of the following conditions, a full and documented explanation of the reasons by such conditions are appropriate:

11.3.h.1. Limitations to control toxic pollutants under subdivision 6.3.f;

11.3.h.2. Limitations on internal waste streams under subsection 7.8;

11.3.h.3. Limitations on indicator pollutants under 40 CFR 125.3(g);

11.3.h.4. For every permit to be issued to a privately owned treatment works, an explanation of the chief's decision on regulation of users under subdivision 6.3.k;

11.3.h.5. Conditions under subdivision 6.3.d; or

11.3.i. When appropriate, a sketch or detailed description of the location of the discharge described in the application.

§47-10-12. Public Comment, and Hearings and Effective Date of Permit.

12.1. Public notice.

12.1.a. Scope:

12.1.a.1. Public notice shall be given that the following actions have occurred:

12.1.a.1.A. A draft permit has been prepared; and

12.1.a.1.B. A hearing has been scheduled under subsection 12.3.

12.1.a.2. Public notices may describe more than one (1) permit or permit action.

12.1.b. Timing;

12.1.b.1. Public notice of the preparation of a draft permit shall allow at least

thirty (30) days for public comment. Upon request of the permittee, the public comment period will be extended for an additional thirty (30) days. Further extension of the comment period may be granted by the chief for good cause shown but in no case may the further extension exceed an additional thirty (30) days.

12.1.b.2. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two (2) notices may be combined.

12.1.c. Methods. Public notice shall be given by the following methods:

12.1.c.1. By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

12.1.c.1.A. The applicant;

12.1.c.1.B. Any other State or Federal agency which the chief knows has issued or is required to issue a permit for the same facility or activity under any of the following Federal programs: RCRA, UIC, 404 and PSD;

12.1.c.1.C. Federal, State, and interstate agencies with jurisdiction over fish, wildlife resources, public health, the State historic Preservation Unit of the Division of Culture and History, and other appropriate government authorities, including any affected states and including the United States Army Corps of Engineers;

12.1.c.1.D. Any State agency responsible for plan development under the CWA Section 308(b)(2), 208(b)(4) or 303(e);

12.1.c.1.E. Any user identified in the permit application of a privately owned treatment works;

12.1.c.1.F. Persons on a mailing list developed by:

12.1.c.1.F.1. Including those who request in writing to be on the list;

12.1.c.1.F.2. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

12.1.c.1.F.3. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters or environmental bulletins. (The chief may update the mailing list from time to time by requesting written indication of continued interest from those listed. The chief may delete from the list the names of any person who fails to respond to such a request.

12.1.c.1.G. Any unit of local government having jurisdiction over the area where the facility is proposed to be located.

12.1.c.2. By the chief publishing the public notice as a Class I legal advertisement in a qualified newspaper with the largest circulation for the county where the discharge will occur. The cost of the publication will be born by the applicant who must send a certificate of publication to the Division within twenty (20) days after publication.

12.1.c.3. Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

12.1.d. Contents:

12.1.d.1. All public notices. All public notices issued under this part shall contain the following minimum information:

12.1.d.1.A. Name and address of the office processing the permit action for which notice is being given;

12.1.d.1.B. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by

the permit, except in the case of general permits;

12.1.d.1.C. A brief description of the business conducted at the facility or activity described in the permit application or in the draft permit, when there is no application;

12.1.d.1.D. Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, fact sheet, and the application;

12.1.d.1.E. A brief description of the comment procedures required by subsections 12.2 and 12.3 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and

12.1.d.1.F. A general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement will be satisfied by a map or description of the permit area.

12.1.d.2. Public notices for hearings. In addition to the requirements of paragraph 12.1.d.1. of this section, public notice of a hearing shall contain the following information:

12.1.d.2.A. Reference to the date of previous public notices relating to the permit;

12.1.d.2.B. Date, time, and place of the hearing; and

12.1.d.2.C. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

12.1.d.3. Special requirements. Public notice of a draft permit for a discharge where a CWA Section 316(a) request has been filed shall include:

12.1.d.3.A. A statement that the

thermal component of the discharge is subject to effluent limitations under CWA Sections 301 or 306 and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under Section 301 or 306;

12.1.d.3.B. A statement that a Section 316(a) request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge under Section 316(a) and a brief description, including a quantitative statement of the alternative effluent limitations, if any, included in the request; and

12.1.d.3.C. If the applicant has filed an early screening request under 40 CFR 125.72 for a Section 316(a) variance, a statement that the applicant has submitted such a plan.

12.1.e. In addition to the general public notice described in paragraph 12.1.d.1 of this section, all persons identified in paragraphs 12.1.c.1.A, 12.1.c.1.B, subparagraphs 12.1.c.1.C, 12.1.c.1.D, and 12.1.c.1.G of this section shall be mailed a copy of the fact sheet, if any, and notification of where to inspect or how to receive a copy of the draft permit and application.

12.2. Public comments and requests for public hearings. During the public comment period provided under subsection 12.1, any interested person may submit written comments on the draft permit and may request a public hearing, if no public hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in subsection 12.4.

12.3. Public hearings.

12.3.a. The chief shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The chief also may hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

12.3.b. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing under subdivision 12.1.b shall automatically be extended to ten (10) days after the close of any public hearings under this section.

12.3.c. A tape recording or written transcript of the hearing shall be made available to the public, upon request.

12.4. Reopening of the public comment period.

12.4.a. If any data, information or arguments submitted during the public comment period raise substantial new questions concerning a permit, or if as a result of comments submitted by someone other than the permittee of the chief determines to revise any condition of the permit that had been sent to initial public notice, the chief shall take one (1) or more of the following actions:

12.4.a.1. Prepare a new draft permit, appropriately modified, under section 10;

12.4.a.2. Prepare a revised fact sheet under section 11 and reopen the comment period under this section; or

12.4.a.3. Reopen or extend the comment period under subsection 12.1 to give interested persons an opportunity to comment on the information or arguments submitted.

12.4.b. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice shall define the scope of the reopening.

12.5. Response to comments.

12.5.a. At the time that any final permit is issued, the chief shall issue a response to comments. This response shall:

12.5.a.1. Specify which provisions,

if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

12.5.a.2. Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

12.5.b. The response to comments shall be delivered to any person who commented or any person who requests the same.

12.6. Public comment by government agencies.

12.6.a. If during the comment period for a draft permit, the District Engineer of the United States Army Corps of Engineers advises the chief in writing that anchorage and navigation of any of the waters of the State would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advises the chief that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the chief shall include the specified conditions in the permit. Review or appeal of denial of a permit under this section or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers and may not be made under the provisions of this part. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall be stayed in the State NPDES permit for the duration of that stay.

12.6.b. If during the comment period, any other State or Federal agency with jurisdiction over fish, wildlife, or public health advises the chief in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial risk to public health, impairment of fish, shellfish, wildlife resources, the chief may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of the CWA and State Act.

12.6.c. In appropriate cases the chief

may consult with one (1) or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

12.7. Public access to information.

12.7.a. Any information, except effluent data, application forms and information in permits, submitted pursuant to these rules may be claimed as confidential by the submitter. Any such claim must be asserted at the time of submission in the manner prescribed on the application form or in the case of other submissions, by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, the chief may make the information available to the public without further notice.

12.7.b. Any information claimed to be confidential shall be forwarded to the Regional Administrator for his or her concurrence in any determination of confidentiality.

12.7.c. Such information shall be subject to appropriate Federal regulations governing confidentiality.

12.8. Issuance and effective date of permit.

12.8.a. After the close of the public comment period under subsection 12.2 on a draft permit, the chief shall issue a final permit decision. The chief shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing the decision. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.

12.8.b. A final permit decision shall become effective not less than thirty (30) days after the date of notice of the decision under subdivision 12.8.a of this section.

§47-10-13. Special NPDES Programs.

13.1. Concentrated animal feeding

operations.

13.1.a. Permit requirement. Concentrated animal feeding operations are point sources subject to the NPDES permit program.

13.1.b. Definitions:

13.1.b.1. "Animal Feeding Operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

13.1.b.1.A. Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of forty-five (45) days or more in a twelve (12) month period, and

13.1.b.1.B. Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

13.1.b.2. Two (2) or more animal feeding operations under common ownership are considered, for the purposes of this rule, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

13.1.b.3. "Concentrated Animal Feeding Operation" means an "Animal Feeding Operation" which meets the criteria in Appendix B, or which the chief designates under subdivision 13.1.c of this section.

13.1.c. Case-by-case designation of concentrated animal feeding operations:

13.1.c.1. The chief may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the State. In making this designation the chief shall consider the following factors:

13.1.c.1.A. The size of the animal feeding operation and the amount of wastes reaching waters of the State;

13.1.c.1.B. The location of the animal feeding operation relative to waters of

the State;

13.1.c.1.C. The means of conveyance of animal wastes and process wastewaters into waters of the State;

13.1.c.1.D. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the State; and

13.1.c.1.E. Other relevant factors.

13.1.c.2. No animal feeding operation with less than the numbers of animals set forth in Appendix B shall be designated as a concentrated animal feeding operation unless:

13.1.c.2.A. Pollutants are discharged into the waters of the State through a man-made ditch, flushing system, or other similar man-made device; or

13.1.c.2.B. Pollutants are discharged directly into the waters of the State which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

13.1.c.3. A permit application shall not be required from a concentrated animal feeding operating designated under this paragraph until the chief has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

13.2. Concentrated aquatic animal production facilities.

13.2.a. Permit requirement. Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the permit program.

13.2.b. Definition. "Concentrated Aquatic Animal Production Facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C, or which the chief designates under subdivision 13.2.c of this section.

13.2.c. Case-by-case designation of concentrated aquatic animal production facilities:

13.2.c.1. The chief may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to the waters of the State. In making this designation the chief shall consider the following factors:

13.2.c.1.A. The location and quality of the receiving waters of the State;

13.2.c.1.B. The holding, feeding, and production capacities of the facility;

13.2.c.1.C. The quantity and nature of the pollutants reaching waters of the State;

13.2.c.1.D. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the state; and

13.2.c.1.E. Other Relevant factors.

13.2.d. A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the chief has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

13.3. Aquaculture projects.

13.3.a. Permit requirements. Discharges into aquaculture projects, as defined in this section, are subject to the permit program through Section 318 of CWA.

13.3.b. Definitions:

13.3.b.1. "Aquaculture Project" means a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable

freshwater plants or animals.

13.3.b.2. "Designated Project Area" means the portions of the waters of the State within which the permittee or permit applicant plans to confine the cultivated species, using a method or plan or operation (including, but not limited to, physical confinement) which, on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants, and be harvested within a defined geographic area.

13.4. Separate storm sewers.

13.4.a. Permit requirement. Separate storm sewers, as defined in this section are point sources subject to the permit program. Separate storm sewers may be permitted either individually or under a general permit. A permit for discharges into the waters of the State from a separate storm sewer covers all conveyances which are a part of that separate storm sewer system, even though there may be several owners or operators of these conveyances. However, discharges into separate storm sewers from point sources which are not part of the separate storm sewer systems may also require a permit.

13.4.b. Definition:

13.4.b.1. "Separate Storm Sewer" means a conveyance or system of conveyances (including pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and which is either:

13.4.b.1.A. Located in an urbanized area as designed by the United States Bureau of the Census according to the criteria in 39 FR 15202 (May 1, 1974); or

13.4.b.1.B. Not located in an urbanized area but designated under subdivision 13.4.c of this section.

13.4.b.2. Except as provided in paragraph 13.4.b.3 of this section, a conveyance or system of conveyances operated primarily for

the purpose of collecting and conveying storm water runoff which is not located in an urbanized area and has not been designated by the chief under subdivision 13.4.c of this section is not considered a point source and is not subject to the provisions of this series.

13.4.b.3. Conveyances which discharge process wastewater or storm water runoff contaminated by contact with wastes, raw material, or pollutant-contaminated soil, from land or facilities used for industrial or commercial activities, into waters of the State or into separate storm sewers are point sources subject to the requirements of this series but are not separate storm sewers for purposes of this section. As used in this paragraph, "Wastes" does not include sand, silt and gravel.

13.4.b.4. Whether a system of conveyances is or is not a separate storm sewer for purposes of this section shall have no bearing on whether the system is eligible for funding under Title 2 of CWA.

13.4.c. Case-by-case designation of separate storm sewers. The chief may designate a storm sewer not located in an urbanized area as a separate storm sewer. This designation may be made to the extent allowed or required by EPA promulgated effluent guidelines for point sources in the separate storm sewer category; or when:

13.4.c.1. A Water Quality Management plan under Section 208 of CWA which contains requirements applicable to such point sources is approved; or

13.4.c.2. The chief determines that a storm sewer is a significant contributor of pollution to the waters of the State. In making this determination the chief shall consider the following factors:

13.4.c.2.A. The location of the discharge with respect to waters of the State;

13.4.c.2.B. The size of the discharge;

13.4.c.2.C. The quantity and nature of the pollutants reaching waters of the

State; and

13.4.c.2.D. Other relevant factors.

13.5. Silvicultural activities.

13.5.a. Permit requirement. Silvicultural point sources, as defined in this section, are point sources subject to the permit program.

13.5.b. Definitions:

13.5.b.1. "Silvicultural Point Source: means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the State. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA Section 404 permit.

13.5.b.2. "Rock Crushing and Gravel Washing Facilities" means facilities which process crushed and broken stone, gravel, and riprap.

13.5.b.3. "Log Sorting and Log Storage Facilities" means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking).

13.6. General permits.

13.6.a. Coverage. The chief may issue a general permit in accordance with the

following:

13.6.a.1. Area. The general permit shall be written to cover a category of discharges described in the permit under paragraph 13.6.a.2 of this section, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:

13.6.a.1.A. Designated planning areas under Sections 208 and 303 of CWA;

13.6.a.1.B. Sewer districts or sewer authorities;

13.6.a.1.C. City, County, or State political boundaries;

13.6.a.1.D. State highway systems;

13.6.a.1.E. Standard metropolitan statistical areas as defined by the United States Office of Management and Budget; and

13.6.a.1.F. Any other appropriate division or combination of boundaries.

13.6.a.2. Sources. The general permit may be written to regulate, within the area described in paragraph 13.6.a.1 of this section, either:

13.6.a.2.A. Separate storm sewers; or

13.6.a.2.B. A category of point sources other than separate storm sewers if the sources all:

13.6.a.2.B.1. Involve the same or substantially similar types of operations;

13.6.a.2.B.2. Discharge the same types of wastes;

13.6.a.2.B.3. Require the same effluent limitations or operating conditions;

13.6.a.2.B.4. Require the same or similar monitoring; and

13.6.a.2.B.5. In the opinion of the chief, are more appropriately controlled under a general permit than under individual permits.

13.6.b. Administration:

13.6.b.1. In general. General permits may be modified, revoked and reissued, suspended, or revoked in accordance with the applicable requirements of section 9 of this series.

13.6.b.2. Requiring an individual permit:

13.6.b.2.A. The chief may require any person authorized by a general permit to apply for and obtain an individual permit. Any interested person may petition the chief to take action under this subparagraph. Cases where an individual permit may be required include the following:

13.6.b.2.A.1. The discharge(s) is a significant contributor of pollution as determined by the factors set forth in paragraph 13.4.c.2;

13.6.b.2.A.2. The discharger is not in compliance with the conditions of the general permit;

13.6.b.2.A.3. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

13.6.b.2.A.4. Effluent limitation guidelines are promulgated for point sources covered by the general permit; or

13.6.b.2.A.5. A Water Quality Management Plan containing requirements applicable to such point sources is approved.

13.6.b.2.B The chief may require any owner or operator authorized by a

general permit to apply for an individual permit as provided in subparagraph 13.6.b.2.A of this section, only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual permit the general permit as it applies to the individual permittee shall automatically terminate. The chief may grant additional time upon request of the applicant.

13.6.b.2.C. Any owner or operator authorized by a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit an application under section 4, with reasons supporting the request, to the chief no later than ninety (90) days after the general permit notice in accordance with subsection 12.1.

13.6.b.3. Upon issuance of a general permit, the chief shall cause to be published a notice of issuance as a Class I legal advertisement in a qualified daily or weekly newspaper within the geographical area affected by the subject of the permit, and by any other means reasonably calculated to give notice of issuance to the persons affected by it.

13.7. New sources and new discharges.

13.7.a. Definitions:

13.7.a.1. "Site, "New Source", and "New Discharger" are defined in section 2.

13.7.a.2. "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

13.7.a.3. "Existing Source" means any source which is not a new source or a new discharger.

13.7.a.4. "Facilities or Equipment" means buildings, structures, process or production equipment or machinery which form a permanent part of the new source and which

will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source of water pollution treatment for the source.

13.7.b. Criteria for new source determination.

13.7.b.1. Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets that definition of "new source" in section 2, and

13.7.b.1.A. It is constructed at a site at which no other source is located; or

13.7.b.1.B. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

13.7.b.1.C. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the chief shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.

13.7.b.2. A source meeting the requirements of subparagraphs 13.7.b.1.A, 13.7.b.1.B or 13.7.b.1.C of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See section 2.

13.7.b.3. Construction on a site at which an existing source is located results in a modification subject to section 9 rather than a new source or a new discharger if the construction does not create a new building, structure, facility, or installation meeting the criteria of subparagraphs 13.7.b.1.B or 13.7.b.1.C of this section but otherwise alters, replaces, or adds to existing process or

production equipment.

13.7.b.4. Construction of a new source as defined under section 2 has commenced if the owner or operator has:

13.7.b.4.A. Begun, or caused to begin as part of a continuous on-site construction program:

13.7.b.4.A.1. Any placement, assembly, or installation of facilities or equipment; or

13.7.b.4.A.2. Significant site preparation work including clearing, excavation or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source equipment; or

13.7.b.4.B. Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under this paragraph.

13.7.c. Effect of compliance with new source performance standards:

13.7.c.1. Except as provided in subparagraph 13.7.c.2 of this section, any new discharger, the construction of which commenced after October 18, 1972, or new source which meets the applicable promulgated new source performance standards before the commencement of discharge, may not be subject to any more stringent new source performance standards or to any more stringent technology-based standards under Section 301(b)(2) of CWA for the shortest of the following periods:

13.7.c.1.A. Ten (10) years from the date that construction is completed;

13.7.c.1.B. Ten (10) years from the date the source begins to discharge process or other nonconstruction related wastewater; or

13.7.c.1.C. The period of depreciation or amortization of the facility for the purposes of Section 167 or 169 (or both) of the Internal Revenue Code of 1954.

13.7.c.2. The protection from more stringent standards of performance afforded by paragraph 13.7.c.1 of this section does not apply to:

13.7.c.2.A. Additional or more stringent permit conditions which are not technology based; for example, conditions based on water quality standards, or toxic effluent standards or prohibitions under Section 307(a) of CWA; or

13.7.c.2.B. Additional permit conditions controlling pollutants listed as toxic under Section 307(a) of the CWA and which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method of control the toxic pollutants or hazardous substances.

13.7.c.3. When a NPDES permit issued to a source with a "Protection Period" under paragraph 13.7.c.1 of this section will expire on or after the expiration of the protection period, such permit shall require the owner or operator of the source to comply with the requirements of Section 301 and any other applicable requirements of CWA immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall be allowed except when necessary to achieve compliance with requirements promulgated less than three (3) years before the expiration of the protection period.

13.7.c.4. The owner or operator of a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall install and have in operating condition, and shall "Start Up" all pollution control equipment required to meet the conditions of its permit before beginning to discharge. Within the shortest feasible time (not to exceed ninety (90) days), the owner or

operator must meet all permit conditions.

13.7.c.5. After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

§47-10-14. Pretreatment Program.

14.1. All indirect dischargers and POTW's shall comply with the requirements of the Clean Water Act and the regulations at 40 CFR 403 promulgated thereunder.

14.1.a. Prohibited discharges. Pollutants introduced into POTW's by indirect discharger shall not cause pass through or interference. These general prohibitions apply to all indirect dischargers. The following pollutants may not be introduced into a POTW:

14.1.a.1. Pollutants which create a fire or explosion hazard in the POTW, including, but not limited to wastestreams with a closed cup flashpoint of less than 140° Fahrenheit or 60° Centigrade using the test methods specified in 40 CFR 261.21.

14.1.a.2. Pollutants which cause corrosive structural damage to the POTW, and in no case discharges with pH lower than 5.0, unless the works is specifically designed to accommodate such discharges.

14.1.a.3. Solid or viscous pollutants in amounts which will cause obstruction to the flow in sewers or other interference with the operation of the POTW.

14.1.a.4. Any pollutant, including oxygen demanding pollutants (BOD, etc.) released in a discharge of such volume or strength which singly or by interaction with other pollutants, as to cause interference in the POTW.

14.1.a.5. Heat in amounts which will inhibit biological activity in the POTW resulting in interference but in no case heat in such quantities that the temperature at the treatment works influent exceeds 40 degrees C (104 degrees F) unless the works is designed to

accommodate such heat.

14.1.a.6. Petroleum oil, non-biodegradable cutting oil, or products of mineral oil origin in amounts that will cause Interference or Pass Through.

14.1.a.7. A daily pollutant loading in excess of that allowed by ~~contract~~ individual control mechanism with the POTW or by Federal, State, or local law.

14.1.a.8. Pollutants which result in the presence of toxic gases, vapors or fumes within the POTW in a quantity that may cause acute worker health and safety problems.

14.1.a.9. Any trucked or hauled pollutants, except at discharge points designated by the POTW.

14.1.b. Categorical standards. In addition to the prohibited discharges listed in subdivision 14.1.a, any indirect dischargers that is subject to a Categorical Pretreatment Standard established under 40 CFR Chapter I Subchapter N and 40 CFR 403.6 shall comply with the specific requirements of such standard and shall also comply with applicable requirements of 40 CFR 403.12.

14.2. POTW reporting and permit requirements.

14.2.a. Existing indirect discharges to publicly owned treatment works. Any publicly owned treatment works accepting non-domestic wastes from indirect dischargers shall report to the chief, the names of indirect dischargers, quantity and characteristics of indirect discharges, and any other information or data deemed necessary by the chief to evaluate the discharge with regard to its impact on the permittee's capacity to meet all applicable State and Federal requirements on treatment, water quality standards, effluent limitations and reliable operation and maintenance of the treatment works, and with regard to compliance with National Pretreatment Standards.

14.2.b. Proposed indirect discharges to publicly owned treatment works. A publicly owned treatment works contemplating

acceptance of a new or increased non-domestic wastewater from an indirect discharger shall file an application to modify its permit and shall provide such information and data as deemed necessary by the chief to evaluate the discharge with regard to its impact on the permittee's capability to meet all applicable State and Federal requirements on treatment, water quality standards, effluent limitations, reliable operation and maintenance of the treatment works, and with regard to compliance with National Pretreatment Standards.

14.2.b.1. Those proposed indirect discharges considered by the chief to be a significant indirect discharges considered by the chief to be a significant increase or to have potential for significant impact on the existing or planned POTW can be incorporated into the POTW's permit only by modification in accordance with subsection 9.2.

14.2.b.2. Those proposed indirect discharges considered by the chief to have no significant increase or impact on the existing or planned publicly owned treatment works may be incorporated into the POTW's permit by minor modification in accordance with subsection 9.5.

14.2.b.3. Those publicly owned treatment works that have developed and received approval of a POTW Pretreatment Program in accordance with subdivision 14.4.a are exempt from the requirements of this section.

14.3. Reporting requirement for indirect dischargers. Indirect dischargers currently discharging or proposing to discharge into a POTW shall be required to submit to the chief of the Office of Water Resources the information required in 40 CFR 403.12. The chief may require additional information. The chief shall insure compliance with pretreatment standards by indirect dischargers.

14.4. Local POTW pretreatment program.

14.4.a. POTWs are required to develop and submit a local pretreatment program in accordance with 40 CFR Part 403 if the total design flow of the treatment facility is greater than five (5) MGD. POTWs with total design

flow less than five (5) MGD may be required to develop and submit a pretreatment program if the chief determines that circumstances warrant such development. Such programs shall be incorporated into the permit issued to the POTWs. All POTWs required to have a program must have an approved pretreatment program no later than July 1, 1983. POTW's identified as being required to develop a POTW pretreatment program after July 1, 1983 shall develop and submit such a program not later than one (1) year after written notification of such identification from the chief. After obtaining the chief's approval of a POTW Pretreatment Program, the POTW shall implement the approved program in accordance with all requirements of 40 CFR Part 403.

14.4.b. When a local program is not required under subdivision 14.4.a. of this section, the chief shall administer and enforce the pretreatment program in accordance with the provisions of this section.

14.5. Variances from categorical standards for indirect dischargers. Indirect dischargers may apply to the chief for variances from categorical pretreatment standards if factors relating to such users are fundamentally different from the factors considered during development of a categorical pretreatment standard applicable to that discharger. The chief shall act upon variances in accordance with 40 CFR Part 403.

§47-10-15. Federal Effluent Limitations Guidelines and Standards Incorporation.

15.1. The provisions of 40 CFR Chapter 1, Subchapter N, Parts ~~400-460~~ 400-471 as in effect July 1, 1985, are hereby incorporated by reference.

15.2. (Reserved.)

§47-10-16. Enforcement.

16.1. General. The provisions of this Series may be enforced by all of the applicable provisions of the State Act, including:

16.1.a. Orders issued by the chief in accordance with Sections 11, 12, 15 and 19 of

the State Act;

16.1.b. Civil penalties and injunctive relief in accordance with Section 22 of the State Act; and

16.1.c. Criminal penalties in accordance with Section 24 of the State Act.

16.2. Citizen participation. The chief shall provide for public participation in enforcement by the following:

16.2.a. Investigating and providing a written response to all signed, written complaints from citizens;

16.2.b. Not opposing intervention by any citizen when permissive intervention is authorized by statute or rule; and

16.2.c. Publishing notice in a newspaper of general circulation in the county in which the discharge is located at least thirty (30) days prior to the final settlement of any civil action or consent order issued by the Board. This notice will identify the person discharging, the specific enforcement action to be taken, and the name and address where information on the proposed settlement can be obtained. The chief shall consider all comments received during the thirty (30) day period.

§47-10-17. Conflict of Interest.

17.1. Members of the Environmental Quality Board shall be bound by the conflict of interest requirements contained in W. Va. Code §22B-1-11

17.2. The chief of the Office of Water Resources shall not be a person who receives or has during the previous two (2) years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

17.2.a. For the purposes of this section:

17.2.a.1. "Significant Portion of Income" means ten percent (10%) or more of gross personal income for a calendar year, except that it means fifty percent (50%) or more

of gross personal income for a calendar year if the recipient is over sixty (60) years of age and is receiving that portion under retirement, pension, or similar arrangement.

17.2.a.2. "Permit Holders or Applicants for a Permit" does not include any department or agency of the State.

17.2.a.3. "Income" includes retirement benefits, consultant fees, and stock dividends.

17.2.b. For the purposes of this section,

income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

§47-10-18. Conflicting Provisions.

In the event of any inconsistency or conflict between any provision of this section and any provisions of 47CSR11, the provisions of this section shall control.

Appendix A -- NPDES Primary Industry Categories**Industry Category**

Adhesives and Sealants
Aluminum Forming
Auto and Other laundries
Battery Manufacturing
Coal Mining
Coil Coating
Copper Forming
Electrical and Electronic Components
Electroplating
Explosives Manufacturing
Foundries
Gum and Wood Chemicals
Inorganic Chemicals Manufacturing
Iron and Steel Manufacturing
Leather Tanning and Finishing
Mechanical Products Manufacturing
Nonferrous Metals Manufacturing
Ore Mining
Organic Chemicals Manufacturing
Paint and Ink Formulation
Pesticides
Petroleum Refining
Pharmaceutical Preparations
Photographic Equipment and Supplies
Plastics Processing
Plastic and Synthetic Materials Manufacturing
Porcelain Enameling
Printing and Publishing
Pulp and Paper Mills
Rubber Processing
Soap and Detergent Manufacturing
Steam Electric Power Plants
Textile Mills
Timber Products Processing

Appendix B -- Criteria for Determining a Concentrated Animal Feeding Operation

An animal feeding operation is a concentrated animal feeding operation for purposes of subsection 13.1 if either of the following criteria are met:

(a) More than the number of animals specified in any of the following categories are confined:

- (1) 1,000 slaughter and feeder cattle,
- (2) 700 mature dairy cattle (whether milked or dry cows),
- (3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),
- (4) 500 horses,
- (5) 10,000 sheep or lambs,
- (6) 55,000 turkeys,
- (7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),
- (8) 30,000 laying hens or broilers (if the facility has a liquid manure handling system),
- (9) 5,000 ducks, or
- (10) 1,000 animal units; or

(b) More than the following number and types of animals are confined:

- (1) 300 slaughter or feeder cattle,
- (2) 200 mature dairy cattle (whether milked or dry cows),
- (3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),
- (4) 150 horses,
- (5) 3,000 sheep or lambs,
- (6) 16,500 turkeys,
- (7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),
- (8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),
- (9) 1,500 ducks, or
- (10) 300 animal units;

and either one of the following conditions are met: pollutants are discharged into navigable waters through a man-made ditch, flushing system or other similar man-made device; or pollutants are discharged directly into waters of the State which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a twenty-five (25) year, 24-hour storm event.

The term "animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over twenty-five (25) kilograms (approximately fifty-five (55) pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

The term "man-made" means constructed by man and used for the purpose of transporting wastes.

Appendix C -- Criteria for Determining a Concentrated Aquatic Animal Production Facility

A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of subsection 13.2 if it contains, grows, or holds aquatic animals in either of the following categories:

(a) Cold water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least thirty (30) days per year but does not include:

(1) Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and

(2) Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.

(b) Warm water fish species or other warm water aquatic animals in ponds, raceways, or other similar structures which discharge at least thirty (30) days per year but does not include:

(1) Closed ponds which discharge only during periods of excess runoff; or

(2) Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.

"Cold water aquatic animals" include, but are not limited to the Ameiuride, Centrarchidae and Cyprinidae families of fish; e.g., respectfully, catfish, sunfish and minnows.

Appendix D -- Permit Testing Requirements

Table I -- Testing Requirements for Organic Pollutants by Industrial Category for Existing Dischargers

Industrial category	GC/MS fraction 1			
	Volatile	Acid	Base/ neutral	Pesticide
Adhesives and Sealants	(*)	(*)	(*)
Aluminum Forming	(*)	(*)	(*)
Auto and Other Laundries	(*)	(*)	(*)	(*)
Battery Manufacturing	(*)	(*)
Coil Coating	(*)	(*)	(*)
Copper Forming	(*)	(*)	(*)
Electric & Electronic Components	(*)	(*)	(*)	(*)
Electroplating	(*)	(*)	(*)
Explosives Manufacturing	(*)	(*)
Foundries	(*)	(*)	(*)
Gun and Wood Chemicals	(*)	(*)	(*)	(*)
Inorganic Chemicals Manufacturing	(*)	(*)	(*)
Iron & Steel Manufacturing	(*)	(*)	(*)
Leather Tanning and Finishing	(*)	(*)	(*)	(*)
Mechanical Products Manufacturing	(*)	(*)	(*)
Nonferrous Metals Manufacturing	(*)	(*)	(*)	(*)
Ore Mining	(*)	(*)	(*)	(*)
Organic Chemicals Manufacturing	(*)	(*)	(*)	(*)
Paint and Ink Formulation	(*)	(*)	(*)	(*)
Pesticides	(*)	(*)	(*)	(*)
Petroleum Refining	(*)	(*)	(*)	(*)
Pharmaceutical Preparations	(*)	(*)	(*)
Photographic Equipment & Supplies	(*)	(*)	(*)	(*)
Plastic and Synthetic Materials Manufacturing	(*)	(*)	(*)	(*)
Plastic Processing	(*)
Porcelain Enameling	(*)	(*)	(*)
Printing and Publishing	(*)	(*)	(*)	(*)
Pulp and Paper Mills	(*)	(*)	(*)	(*)
Rubber Processing	(*)	(*)	(*)
Soap and Detergent Manufacturing	(*)	(*)	(*)
Steam Electric Power Plants	(*)	(*)	(*)
Textile Mills	(*)	(*)	(*)	(*)
Timber Products Process Processing	(*)	(*)	(*)	(*)

I The toxic pollutants in each fraction are listed in Table II

* Testing required.

Appendix D- Continued

Table II -- Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GS/MS)

Volatiles

1V	acrolein
2V	acrylonitrile
3V	benzene
5V	bromoform
6V	carbon tetrachloride
7V	chlorobenzene
8V	chlorodibromomethane
9V	chloroethane
10V	2-chloroethylvinyl ether
11V	chloroform
12V	dichlorobromomethane
14V	1,1-dichloroethane
15V	1,2-dichloroethane
16V	1,1-dichloroethylene
17V	1,2-dichloropropane
18V	1,2-dichloropropylene
19V	ethylbenzene
20V	methyl bromide
21V	methyl chloride
22V	methylene chloride
23V	1,2,2,2-tetrachloroethane
24V	tetrachloroethylene
25V	toluene
26V	1,2-trans-dichloroethylene
27V	1,1,1-trichloroethane
28V	1,1,2-trichloroethane
29V	trichloroethylene
31V	vinyl chloride

Acid Compounds

1A	2-chlorophenol
2A	2,4-dichlorophenol
3A	2,4-dimethylphenol
4A	4,6-dinitro-o-cresol
5A	2,4-dinitrophenol
6A	2-nitrophenol
7A	4-nitrophenol
8A	p-chloro-m-cresol
9A	pentachlorophenol
10A	phenol
11A	2,4,6-trichlorophenol

Appendix D- Continued

Base/Neutral

1B	acenaphthene
2B	acenaphthylene
3B	anthracene
4B	benzidine
5B	benzo(a)anthracene
6B	benzo(a)pyrene
7B	3,4-benzofluoranthene
8B	benzo(ghi)perylene
9B	benzo(K)fluoranthene
10B	bis(2-chloroethoxy)methane
11B	bis(2-chloroethyl)ether
12B	bis(2-chloroisopropyl)ether
13B	bis(2-ethylhexyl)phthalate
14B	4-bromophenyl phenyl ether
15B	butylbenzyl phthalate
16B	2-chloronaphthalene
17B	4-chlorophenyl phenyl ether
18B	chrysene
19B	dibenzo(a,h)anthracene
20B	1,2-dichlorobenzene
21B	1,3-dichlorobenzene
22B	1,4-dichlorobenzene
23B	3,3'-dichlorobenzidine
24B	diethyl phthalate
25B	dimethyl phthalate
26B	di-n-butyl phthalate
27B	2,4-dinitrotoluene
28B	2,6-dinitrotoluene
29B	di-n-octyl phthalate
30B	1,2-diphenylhydrazine (as azobenzene)
31B	fluoranthene
32B	fluorene
33B	hexachlorobenzene
34B	hexachlorobutadiene
35B	hexachlorocyclopentadiene
36B	hexachloroethane
37B	indeno(1,2,3-cd)pyrene
38B	isophorone
39B	naphthalene
40B	nitrobenzene
41B	N-nitrosodimethylamine
42B	N-nitrosodi-n-propylamine
43B	N-nitrosodiphenylamine
44B	phenanthrene
45B	pyrene
46B	1,2,4-trichlorobenzene

Appendix D- Continued

Pesticides

1P	aldrin
2P	alpha-BHC
3P	beta-BHC
4P	gamma-BHC
5P	delta-BHC
6P	clordane
7P	4,4'-DDT
8P	4,4'-DDE
9P	4,4'-DDD
10P	dieldrin
11P	alpha-endosulfan
12P	beta-endosulfan
13P	endosulfan sulfate
14P	endrin
15P	endrin aldehyde
16P	heptachlor
17P	heptachlor epoxide
18P	PCB-1242
19P	PCB-1254
20P	PCB-1221
21P	PCB-1232
22P	PCB-1248
23P	PCB-1260
24P	PCB-1016
25P	toxaphene

Table III -- Other Toxic Pollutants: Metals, Cyanide, and Total Phenols

Antimony, Total
 Arsenic, Total
 Beryllium, Total
 Cadmium, Total
 Chromium, Total
 Copper, Total
 Lead, Total
 Mercury, Total
 Nickel, Total
 Selenium, Total
 Silver, Total
 Thallium, Total
 Zinc, Total
 Cyanide, Total
 Phenols, Total

Appendix D - Continued

Table IV -- Conventional and Nonconventional Pollutants required to be Tested by Existing Dischargers If Expected to be Present

Bromide
 Chloride
 Chlorine, Total Residual
 Color
 Fecal Coliform
 Fluoride
 Nitrate-Nitrite
 Nitrogen, Total Organic
 Oil and Grease
 Phosphorus, Total
 Radioactivity
 Sulfate
 Sulfide
 Sulfite
 Surfactants
 Aluminum, Total
 Barium, Total
 Boron, Total
 Cobalt, Total
 Iron, Total
 Magnesium, Total
 Molybdenum, Total
 Manganese, Total
 Tin, Total
 Titanium, Total

Table V -- Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present**Toxic Pollutants**

Asbestos

Hazardous Substances

Acetaldehyde
 Allyl alcohol
 Allyl chloride
 Amyl acetate
 Aniline
 Benzonitrile
 Benzyl chloride
 Butyl acetate
 Butylamine
 Captan

Appendix D - Continued

Carbaryl	Propylene oxide
Carbofuran	Pyrethrines
Carbon disulfide	Quinoline
Chlorpyrifos	Resorcinol
Coumaphos	Strontium
Cresol	
Crotonaldehyde	
Cyclohexane	
Strychnine	
Cyclohexane	
2,4-D(2,4-Dichlorophenoxy acetic acid)	
Diazinon	
Dicamba	
Dichlobenil	
Dichlone	
2,2-Dichloropropionic acid	
Dichlorvos	
Diethyl amine	
Dimethyl amine	
Dinitrobenzene	
Diquat	
Disulfoton	
Diuron	
Epichlorohydrin	
Ethanolamine	
Ethion	
Ethylene diamine	
Ethylene dibromide	
Formaldehyde	
Furfural	
Guthion	
Isoprene	
Isopropanolamine	
Kelthane	
Kepone	
Malathion	
Mercaptodimethur	
Methoxychlor	
Methyl mercaptan	
Methyl methacrylate	
Methyl parathion	
Mevinphos	
Mexacarbate	
Monoethyl amine	
Monomethyl amine	
Naled	
Napthenic acid	
Nitrotoluene	
Parathion	
Phenolsulfanate	
Phosgene	
Propargite	

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

IN THE MATTER OF:

PROPOSED RULE 47CSR10

National Pollutant Discharge
Elimination System (NPDES)

TRANSCRIPT OF PROCEEDINGS had or testimony of adduced pursuant to the West Virginia Rules of Civil Procedure in the above-entitled action, on the 17th day of July, 2007, commencing at 6:30 p.m. and concluding at 7:00 p.m., at the office of the West Virginia Department of Environmental Protection, 601 57th Street, S.E., Cooper's Rock Training Room, Charleston, Kanawha County, West Virginia, pursuant to notice to all interested parties.

BEFORE: GREG ADOLFSON, Facilitator, Executive Office

ORIGINAL

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

APPEARANCES: YUGOSH PATEL, West Virginia Department of
 Environmental Protection
 DREW MCCALLISTER, Attorney at Law
 Spilman Thomas & Battle

I N D E X

Reporter's Certificate.....Page 6

1 MR. ADOLFSON: Good evening. My name is Greg
2 Adolfson, and I'm the Facilitator for tonight's meeting.
3 The purpose of tonight's hearing is to accept comments on
4 Proposed Rule 47 Code of State Regulations Section 10, the
5 National Pollutant Discharge Elimination System.

6 Please make sure that you have signed in
7 and indicated if you are going to make a comment. Comments
8 shall be limited to the proposed revisions to the rule.
9 Copies of the rules are available from the Secretary of
10 State's Office or from the DEP webpage at
11 [www.WVDEP.org/2008 Rules](http://www.WVDEP.org/2008%20Rules).

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

20 First up to comment?

21 (No response.)

22 MR. ADOLFSON: If there are initial comments, we
23 will wait until the entire hearing period is over before we
24 close.

1 (WHEREUPON, a recess was taken,
2 after which the proceedings
3 continued as follows:)

4 MR. ADOLFSON: This completes our official
5 comment period. We will file our rule with our responses
6 to your comments with the Secretary of State's Office.
7 Please sign up to be on our public notice mailing list, and
8 you can reach us at 304-926-0440. Thanks again for your
9 interest and your participation.

(WHEREUPON, the hearing was closed.)

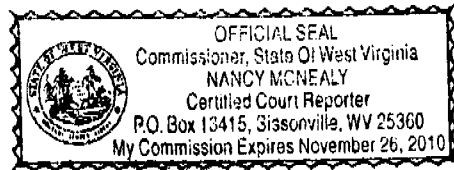
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

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

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

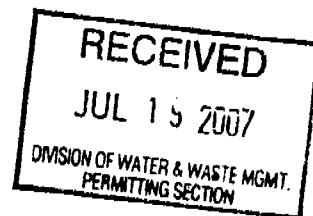
Given under my hand this 20th day of July, 2007.

My commission expires November 26, 2010.



Nancy McNealy

Certified Verbatim Reporter



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To: <MFALQUERO@WVDEP.ORG>
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WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

PUBLIC INFORMATION OFFICE

CHARLESTON, WEST VIRGINIA 25304

DAVID L. YAUSSY
ATTORNEY AT LAW

P.O. BOX 1791
CHARLESTON, WV 25326

DIRECT DIAL: (304) 347-8358
E-MAIL: dly@ramlaw.com

July 17, 2007

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BY HAND DELIVERY

Public Information Office
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

PUBLIC INFORMATION OFFICE

Re: **Comments on the National Pollutant Discharge
Elimination System Program Proposed Rules**

To Whom It May Concern:

Please find enclosed herewith the **COMMENTS OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION AND THE WEST VIRGINIA OIL & NATURAL GAS ASSOCIATION REGARDING THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM, 47 C.S.R. 10.**

Please contact me with any questions you may have regarding the enclosed.

Very truly yours,

David L. Yaussy

Counsel for
West Virginia Manufacturers Association
and
West Virginia Oil and Natural Gas Association

DLY/sjs

Enclosures

cc: Ms. Karen Price (w/encl.)
Mr. Nicholas DeMarco (w/ encl.)

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
AND THE
WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION
REGARDING THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) PROGRAM
47 C.S.R. 10**

July 17, 2007

I. INTRODUCTION

The West Virginia Manufacturers Association (WVMA) is a trade group composed of manufacturers and related businesses that are dedicated to the advancement of manufacturing activities in West Virginia. The WVMA regularly comments on rules of interest to its members. It is concerned about the effect of new rules on West Virginia businesses. The West Virginia Oil & Natural Gas Association (WVONGA) serves the entire oil and gas industry. WVONGA members are engaged in exploration, production, gathering, processing, transmission, storage, sales and distribution of natural gas. The WVMA and WVONGA offer the following comments on the West Virginia Department of Environmental Protection's (DEP) proposed *National Pollutant Discharge Elimination System (NPDES) Program* rule, 47 C.S.R. 10.

II. COMMENTS

A. The rule must be updated to reflect changes within the structure of the DEP.

The WVMA believes that the rule must be updated in order to reflect structural changes within the administration of the DEP. The rule refers to the "chief" throughout. These references should be changed to the "Director" in order to maintain consistency within DEP regulations.

B. DEP should clarify that intake water credit is available for water quality-based limits.

We urge the DEP to include a new subsection in the rule to clarify that a permit writer has the authority to take into account the presence of intake water pollutants in setting water quality effluent limitations. Section 7.7 should not be interpreted as precluding such credit for

water quality-based limits. As the rule is currently written, it is unclear whether a permittee may only receive credit for intake pollutants in setting technology-based effluent limits.

This issue was addressed by the United State Environmental Protection Agency (EPA) in 1984. 49 Fed. Reg. 38027 (September 26, 1984). The EPA determined that permit writers under the federal NPDES program are authorized to allow credits for pollutants contained in the intake water. It further recognized the "complex balancing and consideration of many facilities and many factors" such that "a permit writer may take into account the presence of intake water pollutants, as appropriate." EPA's concern was that in meeting effluent limitations, "the permittee should not be responsible for additional incidental removal of intake pollutants where this would result in significant additional costs." This is a concern that we feel the DEP should recognize and address as well. It is consistent with ORSANCO's recent adoption of a credit for intake water under Section V.C.2 of 47 C.S.R. 10.

Accordingly, we propose the following language to be added to Section 7.7:

Nothing in this rule shall preclude consideration of intake pollutants in setting water quality-based limits. A permit writer may take into account the presence of intake water pollutants when setting water quality-based limits.

C. Post TMDL effluent limitations for sources that are not contributing to the water quality violation.

We urge the DEP to clarify in its rule that water quality based effluent limitations need not be imposed on a source in the event a TMDL has been calculated for the same receiving stream and for the same pollutants, when the DEP has not assigned a wasteload allocation to that source. Only those sources that have a reasonable potential to contribute to a water quality violation should have water quality-based limits imposed.

We suggest the following language added to Section 6.3.d:

When a total maximum daily load has been developed for a water body, more stringent requirements are not necessary for any discharger that is not contributing to the condition where the TMDL was developed.

D. Permit Extensions past the expiration date of the permit.

The rule currently prohibits the DEP from granting permit extensions greater than 18 months past the expiration date under Section 3.5.b. We feel that the rule should be amended to

allow permit extensions for greater than 18 months, provided that the permittee has made a timely and complete application for reissuance and the delay of the reissuance is not caused by the permittee. The DEP (either the permit writer or the Director) should have the authority to grant permit extensions past 18 months, where necessary.

E. Small business exemption for monitoring waivers.

We believe that the small business exemption for monitoring waivers under Section 4.4.b.8.1 should be modified to allow more small businesses to fit within the definition. The rule currently defines a small business as one generating less than \$100,000. We believe this should be increased to \$1,000,000 because setting gross annual sales at \$100,000 excludes a number of businesses that would otherwise be considered a "small business" and could benefit from this exemption.

III. CONCLUSION

The WVMA and WVONGA appreciate the opportunity to provide comments on the proposed changes to the West Virginia NPDES rules. We hope they will be given careful consideration. We also concur with the comments of the West Virginia Chamber of Commerce, especially those comments regarding water intake credit and post TMDL effluent limitations.

Karen S. Price / REX
Karen S. Price, President

West Virginia Manufacturers Association

Nicholas DeMarco / REX
Nicholas DeMarco, Executive Director

West Virginia Oil & Natural Gas Association

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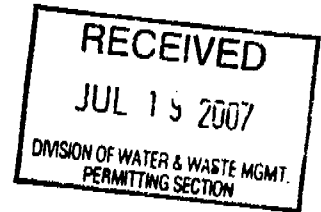
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From: <Mailroom@wvdep.org>
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Subject: Delivery Received

A delivery was received in the mailroom addressed to your attention. Please make arrangements with your office's designated mailroom contact for pickup. Please do not send a response to this email.

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CHARLESTON, WEST VIRGINIA 25304

DAVID L. YAUSSY
ATTORNEY AT LAW

P.O. BOX 1791
CHARLESTON, WV 25326

DIRECT DIAL: (304) 347-8358
E-MAIL: dly@ramlaw.com

July 17, 2007

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BY HAND DELIVERY

Public Information Office
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

PUBLIC INFORMATION OFFICE

Re: **Comments on the National Pollutant Discharge
Elimination System Program Proposed Rules**

To Whom It May Concern:

Please find enclosed herewith the **COMMENTS OF THE WEST VIRGINIA
MANUFACTURERS ASSOCIATION AND THE WEST VIRGINIA OIL & NATURAL
GAS ASSOCIATION REGARDING THE NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM (NPDES) PROGRAM, 47 C.S.R. 10.**

Please contact me with any questions you may have regarding the enclosed.

Very truly yours,

David L. Yaussy

Counsel for
West Virginia Manufacturers Association
and
West Virginia Oil and Natural Gas Association

DLY/sjs

Enclosures

cc: Ms. Karen Price (w/encl.)
Mr. Nicholas DeMarco (w/ encl.)

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
AND THE
WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION
REGARDING THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) PROGRAM
47 C.S.R. 10**

July 17, 2007

I. INTRODUCTION

The West Virginia Manufacturers Association (WVMA) is a trade group composed of manufacturers and related businesses that are dedicated to the advancement of manufacturing activities in West Virginia. The WVMA regularly comments on rules of interest to its members. It is concerned about the effect of new rules on West Virginia businesses. The West Virginia Oil & Natural Gas Association (WVONGA) serves the entire oil and gas industry. WVONGA members are engaged in exploration, production, gathering, processing, transmission, storage, sales and distribution of natural gas. The WVMA and WVONGA offer the following comments on the West Virginia Department of Environmental Protection's (DEP) proposed *National Pollutant Discharge Elimination System (NPDES) Program* rule, 47 C.S.R. 10.

II. COMMENTS

A. The rule must be updated to reflect changes within the structure of the DEP.

The WVMA believes that the rule must be updated in order to reflect structural changes within the administration of the DEP. The rule refers to the "chief" throughout. These references should be changed to the "Director" in order to maintain consistency within DEP regulations.

B. DEP should clarify that intake water credit is available for water quality-based limits.

We urge the DEP to include a new subsection in the rule to clarify that a permit writer has the authority to take into account the presence of intake water pollutants in setting water quality effluent limitations. Section 7.7 should not be interpreted as precluding such credit for

water quality-based limits. As the rule is currently written, it is unclear whether a permittee may only receive credit for intake pollutants in setting technology-based effluent limits.

This issue was addressed by the United State Environmental Protection Agency (EPA) in 1984. 49 Fed. Reg. 38027 (September 26, 1984). The EPA determined that permit writers under the federal NPDES program are authorized to allow credits for pollutants contained in the intake water. It further recognized the "complex balancing and consideration of many facilities and many factors" such that "a permit writer may take into account the presence of intake water pollutants, as appropriate." EPA's concern was that in meeting effluent limitations, "the permittee should not be responsible for additional incidental removal of intake pollutants where this would result in significant additional costs." This is a concern that we feel the DEP should recognize and address as well. It is consistent with ORSANCO's recent adoption of a credit for intake water under Section V.C.2 of 47 C.S.R. 10.

Accordingly, we propose the following language to be added to Section 7.7:

Nothing in this rule shall preclude consideration of intake pollutants in setting water quality-based limits. A permit writer may take into account the presence of intake water pollutants when setting water quality-based limits.

C. Post TMDL effluent limitations for sources that are not contributing to the water quality violation.

We urge the DEP to clarify in its rule that water quality based effluent limitations need not be imposed on a source in the event a TMDL has been calculated for the same receiving stream and for the same pollutants, when the DEP has not assigned a wasteload allocation to that source. Only those sources that have a reasonable potential to contribute to a water quality violation should have water quality-based limits imposed.

We suggest the following language added to Section 6.3.d:

When a total maximum daily load has been developed for a water body, more stringent requirements are not necessary for any discharger that is not contributing to the condition where the TMDL was developed.

D. Permit Extensions past the expiration date of the permit.

The rule currently prohibits the DEP from granting permit extensions greater than 18 months past the expiration date under Section 3.5.b. We feel that the rule should be amended to

allow permit extensions for greater than 18 months, provided that the permittee has made a timely and complete application for reissuance and the delay of the reissuance is not caused by the permittee. The DEP (either the permit writer or the Director) should have the authority to grant permit extensions past 18 months, where necessary.

E. Small business exemption for monitoring waivers.

We believe that the small business exemption for monitoring waivers under Section 4.4.b.8.1 should be modified to allow more small businesses to fit within the definition. The rule currently defines a small business as one generating less than \$100,000. We believe this should be increased to \$1,000,000 because setting gross annual sales at \$100,000 excludes a number of businesses that would otherwise be considered a "small business" and could benefit from this exemption.

III. CONCLUSION

The WVMA and WVONGA appreciate the opportunity to provide comments on the proposed changes to the West Virginia NPDES rules. We hope they will be given careful consideration. We also concur with the comments of the West Virginia Chamber of Commerce, especially those comments regarding water intake credit and post TMDL effluent limitations.

Karen S. Price / REK
Karen S. Price, President

West Virginia Manufacturers Association

Nicholas DeMarco / REK
Nicholas DeMarco, Executive Director

West Virginia Oil & Natural Gas Association

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WEST VIRGINIA CHAMBER OF COMMERCE
The Voice of Business in West Virginia

July 17, 2007

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JUL 17 2007

Lisa McClung, Director
Division of Water and Waste Management
Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304

WATER QUALITY STDS

Re: Comments on Proposed Revisions to Existing Legislative Rule 47 CSR 10

Dear Ms. McClung:

These comments are filed on behalf of the West Virginia Chamber of Commerce ("the Chamber"). The Chamber is West Virginia's largest, most influential general business organization, representing all business sectors in every region of the state. Members range from small business enterprises to mid-size manufacturers to tourism destinations to energy companies to Fortune 500 corporations. However, small businesses are the core of our membership -- making up 85 percent of the West Virginia Chamber's companies and firms.

1. Rule Update

The Chamber appreciates the Department of Environmental Protection's ("DEP") effort to update parts of 47 CSR 10, the National Pollutant Discharge Elimination System (NPDES) Program rule. Given that this important rule has not been updated in this manner for many years, the Chamber urges the DEP to take a broader look at opportunities to update the rule that could result in program improvements and efficiencies while remaining consistent with the existing comprehensive regulatory framework. Examples of such changes are set forth below.

2. Use and variance determinations

The Chamber urges the DEP to consider revisions to the rule that would amplify the permit writer's role (a) in applying the appropriate existing and designated uses to receiving waters and (b) in the approval of variances from specific water quality criteria. With the authority with respect to water quality standards having been delegated by the Legislature to DEP we believe it is appropriate to give consideration to procedural changes that will allow the standards to be implemented more effectively and efficiently. While use categories are set forth in 47 CSR 2, they are interpreted and applied by the DEP's Division of Water and Waste Management ("DWWM") staff in the context of a permit application. In addition, we believe it makes no sense to set up an entirely separate procedure for the review and approval of site specific water quality variance outside the permitting process. We urge the agency to consider revisions to these rules to allow the implementation of these provisions of the rule in an efficient and rational manner.

3. Intake Water Credit

The Chamber urges that DEP include a new subsection in the rule to make it explicitly clear that a permit writer has the inherent authority to take into account the presence of intake water pollutants in setting water quality based effluent limitations.

It is important to add this new subsection to make it clear that the existing Section 7.7 (authorizing credit for intake pollutants in setting technology based effluent limits) should not be interpreted as precluding such credit for water quality based limits.

This matter was expressly addressed by Unites States Environmental Protection Agency ("USEPA") in the Federal Register, dated September 26, 1984 (49 Fed. Reg. 38027) in which USEPA made it expressly clear that permit writers under the federal NPDES program are clearly authorized to allow credit for pollutants contained in the intake water. The following is a statement appearing in the preamble to EPA's final NPDES rules that appeared:

Another industrial commenter wanted net credits to be available for water quality-based standards. A State also raised water quality concerns. The proposed regulation included a section stating that the regulation did not preclude consideration of intake pollutants in setting water quality based limits. For the following reasons, EPA is deleting this section as unnecessary. This regulation deals only with technology-based standards. The Clean Water Act's requirement to protect and enhance water quality is not conditioned on factors such as intake water quality and it would be inappropriate for EPA to impose such a condition. Eligibility for a net credit under these regulations does not imply any right to violate water quality standards. However, EPA recognizes that implementation of water quality-based standards is a complex balancing and consideration of many facilities and many factors and that, in setting water quality based permit limitations, a permit writer may take into account the presence of intake water pollutants, as appropriate. Of course, in any case limits must be adequate to meet the water quality objectives of the Clean Water Act when considered along with control requirements for other dischargers to the stream.

An environmental group maintained that the provision that dischargers need not incur significant additional expense to remove intake pollutants amounts to an economic variance which is illegal under the Clean Water Act. EPA does not agree with this contention. EPA is not authorizing variances from the applicable effluent limitations based on the costs to a particular permittee to meet these. Rather, EPA is recognizing that in meeting these limitations the permittee should not be responsible for additional incidental removal of intake pollutants where this would result in significant additional costs. EPA believes this comports with the Fourth Circuit ruling in *Appalachian Power*. In addition, we note that net credits are only available to the extent needed to meet applicable limitations."

In addition, ORSANCO'S recently adopted pollution control standards explicitly authorize credit for intake water. *See* ORSANCO Pollution Control Standard's Section V.C.2.

Thus, West Virginia's program must make it clear that credit for intake water is allowed. Otherwise, West Virginia's rules will be inconsistent with and more stringent than applicable requirements of USEPA and ORSANCO.

Accordingly, we propose that a new subsection be added to the rule to read as follows:

7.7.g. Nothing in this rule shall preclude consideration of intake pollutants in setting water quality based limits. A permit writer may take into account the presence of intake water pollutants, as appropriate.

Further, the Chamber suggests that for clarity the DEP include an appropriate definition of intake water in the rule.

4. Post TMDL Effluent Limits

In addition, the Chamber believes it is critical for DEP to make it clear in its rule that water quality based effluent limitations need not be imposed on a source in the event a TMDL has been performed for the same receiving stream and for the same pollutants and it has been determined that the source involved is not subject to any restriction as a result of the TMDL determination. If a TMDL has identified sources that should be subject to load allocations in order to achieve compliance with a standard, and those identified sources do not include other sources discharging into the same stream, DEP should logically not be authorized or required to impose water quality based effluent limitations on the sources determined not to be culpable and for which no pollutant reduction allocation was deemed necessary.

Accordingly, we urge that a new sentence be added to the end of subsection 6.3.d. to read as follows:

"It shall not be necessary to include any such requirement in a permit if a TMDL has determined that the receiving stream is violating one or more water quality standards as the result of discharges by one or more sources other than the source that is the subject of the permit."

In addition to the comments set forth above, the Chamber endorsed the comments being filed by the West Virginia Manufacturers Association on this rule.

We appreciate the opportunity to provide these comments and the efforts of the agency to maintain an up-to-date regulatory program.

Sincerely,



Thomas M. Boggs
Vice President

From: "O'Neill, Ashley L." <ashley.oneill@klgates.com>
To: <smandirola@wvdep.org>
Date: 7/17/2007 2:04:20 PM
Subject: Comments to Title 47-2 and 47-10

Mr. Mandirola,

Please find the attached transmittal letter and comments to Title 47, Series 2 and Title 47, Series 10, submitted on behalf of Koppers Inc. Please confirm that you have received and are able to view these comments.

Thank you,

Ashley L. O'Neill

<<S. Mandirola Transmittal Letter.pdf>> <<Koppers Comments to 47-2.pdf>> <<Koppers Comments to 47-10.pdf>>

Ashley L. O'Neill
K&L Gates
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(412) 355 - 8607
(412) 355 - 6501 (fax)

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CC: "Komoroski, Kenneth" <kenneth.komoroski@klgates.com>

K&L|GATES

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July 17, 2007

Ashley L. O'Neill
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Via E-Mail smandirola@wvdep.org

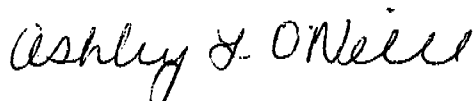
Mr. Scott G. Mandirola
Program Manager
Water Quality Standards Program
Division of Water and Waste Management
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: Comments 59 47 C.S.R. 2 and 47 C.S.R. 10

Dear Mr. Mandirola:

Enclosed please find Koppers Inc.'s comments regarding the proposed revisions to the West Virginia Regulations governing Water Quality Standards and the NPDES Permit Program, 47 C.S.R. 2 and 47 C.S.R. 10, respectively.

Very truly yours,



Ashley L. O'Neill

ALO:cam
Enclosures

**Comments On
Title 47 Legislative Rules
Department of Environmental Protection
Division of Water and Waste Management**

**Series 10
National Pollutant Discharge Elimination System (NPDES) Program**

The following comments to 47 C.S.R. 10 National Pollutant Discharge Elimination System (NPDES) Program are intended to illustrate certain aspects of the West Virginia NPDES permitting program that place an unnecessary burden on permit holders or place permit holders in the difficult position of either being unable to comply with the terms of their permit or being unable to determine whether or not they are in compliance.

For example, WVDEP often requires permit holders to conduct water quality studies as a condition of their NPDES permit. These studies, however, are often duplicative of studies properly conducted by ORSANCO for the same pollutant and for the segment of water. Accordingly, WVDEP should adopt the most recent studies conducted by ORSANCO in its NPDES permitting program unless there are compelling reasons for requiring additional studies.

Further, the situation may arise in which a permit limit is below the practical quantitation limit for a given pollutant. This puts permit holders in the difficult position being unable to reliably ascertain whether or not they are in compliance with the conditions of their permit. In order to alleviate the burden placed on permit holders in such situations, the regulations should be amended to include exceptions to the certification of compliance requirement where compliance is unable to be reliably ascertained using currently available technology. Additionally, the regulations should be revised to make clear that no effluent limitations that are below the practical quantitation limit for a given pollutant may be enforced and that the minimum effluent limit is the practical quantitation limit.

The following comments point out portions of the proposed regulations which require clarification or amendment and include suggested revisions which will alleviate the burden placed on permit holders without diminishing the level of protection afforded to the state's waters.

Comments to § 47-10-2 - Definitions

2.6. "C.F.R." The definition of Code of Federal Regulations should be amended to reflect the current version of the Code of Federal Regulations

rather than the version dated July 1, 2006. The CFR is amended throughout the calendar year and is published annually at the beginning of July each year. The federal government (EPA) maintains an up to date version of the CFR for environmental regulations on line. The definition should be amended as follows:

"C.F.R." means the current version of Code of Federal Regulations as amended from time to time.

2.17 The definition of "Effluent Limitations Guidelines" should be amended as follows:

"Effluent Limitations Guidelines" means national technology-based effluent limits and standards promulgated by the Administrator of EPA under Section 304(b) of the CWA and codified at 40 CFR Chapter 1, Subchapter N.

Comments to § 47-10-3 - Permits

3.5.b. Eighteen Month Extension. This section should be eliminated and replaced with the provision found in 40 CFR § 122.6:

The conditions of an expired permit continue in force until the effective date of a new permit if the permittee has submitted a timely application which is complete and the Director, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit.

Business should not be subject to having their NPDES permit expire, potentially threatening their ability to continue in operation, or this unnecessary limit on extensions. If a new permit is not issued through no fault of the permittee, such potential disruption of business continuation is unfair and unnecessary.

If the Department will not replace this rule, it should at least be modified. This rule provides that NPDES Permits may be extended for a period not to exceed eighteen months beyond the expiration date if the applicant has made a timely and complete application for reissuance.

The regulation should be amended to provide flexibility for extending permits beyond eighteen months provided the permittee has made a timely and complete application for reissuance and the permit has not been reissued through no fault of the permittee. There are numerous examples in other states where permits have not been reissued for much longer than eighteen months beyond expiration.

Comments to § 47-10-5 - Conditions Applicable to All Permits

5.10.a. Monitoring and records. This section references the version of 40 CFR Part 136 in effect as of October 8, 1991, as the source for test procedures for the NPDES permit program. This section must be revised to reflect the current version of 40 CFR Part 136. See prior comment regarding the definition of C.F.R.

5.12.e. Immediate reporting. The term "immediate" in sections 5.12.e.1 and 5.12.e.2. should be amended to "... *as soon as is reasonably possible, but not later than 24 hours*..." There are circumstances where a permittee may be involved in emergency response or rescue operations, or where some amount of time is needed to assess whether the noncompliance "... may endanger health or the environment", which are the criteria that establish the need for "immediate" reporting.

5.15. Removed substances. The parenthetical term "... (removed in the treatment or control of wastewaters)..." should be amended to include "intake waters" as well as "wastewaters".

Comments to § 47-10-7. Calculating NPDES Conditions

7.2.a.2.B.3. Reporting monthly production with monthly discharge monitoring reports. This requirement is burdensome and serves no useful purpose. There are other standard conditions that require that the permittee notify the permit authority in the event production at the facility changes significantly. Furthermore, it is highly unlikely the Department would seek to modify a permit based on fluctuations in monthly production.

Other Items

1. Background Water Quality - Ohio River

ORSANCO has a network of Ohio River water quality monitoring stations that includes most of the Ohio River locks and dams. This network has been in place for many years and the water quality data are collected with proper sample collection techniques and sensitive analytical methods approved by U.S. EPA. The data are representative of background water quality of the Ohio River for downstream dischargers within the same pools. WVDEP often requires dischargers to conduct additional background water quality studies immediately upstream of

their respective outfalls. These studies require deployment of sampling crews in boats to collect the same type of water quality analyses as conducted by ORSANCO. Depending on the pollutants analyzed and the number of times samples must be obtained, these studies can cost from \$30,000 to \$60,000. WVDEP should adopt in its NPDES permit regulations the use of the most recent ORSANCO background water quality data, the only exceptions being where the ORSANCO data may not address a particular pollutant or class of pollutants found in the outlet under study.

2. Dissolved Metals Translators – Ohio River

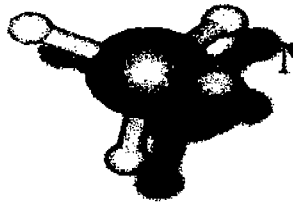
“Dissolved metals translators” provide a means to account for the “total” and dissolved” portions of metals in the receiving water and in the discharges from a facility when developing NPDES permit effluent limits for many metals. ORSANCO has conducted extensive studies throughout the Ohio River to develop site-specific “dissolved metals translators” for each pool of the River. As noted above for background water quality, WVDEP often requires dischargers to conduct additional studies for “dissolved metals translators” at their expense. This often duplicates the work conducted by ORSANCO. WVDEP should adopt in its NPDES regulations the use of ORSANCO dissolved metals translators in lieu of discharger studies unless there are compelling reasons for a discharger study.

3. Situations in which permit limits are below practical quantitation limits

C.S.R. 47-10-4.6.d requires that any person signing a document submitted to the agency certify that information submitted is true, accurate, and complete and acknowledge awareness of significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. This section applies to the submission of reports of compliance with permit limits that are regularly included in the reporting requirements of an NPDES permit. In situations where an NPDES permit contains an effluent limit that is below the practical quantitation limit for a particular pollutant, corporate officials are placed in the impossible position of being required to sign a certification that they are in compliance with their NPDES permit, even though it is not possible to accurately measure pollutant concentrations at the given level.

Accordingly, C.S.R. 47-10 and related provisions should be revised to include a statement providing that, in situations where the effluent limit

provided in an NPDES permit for a given pollutant is less than the practical quantitation limit for that pollutant, no certification of compliance with the particular effluent limitation is required, to make clear that no limit which is below the practical quantitation limit may be enforced, and that, in such instances where the calculated limit would be below the practical quantitation limit, the practical quantitation limit shall be the limit.



MOUNTAIN STATE CARBON

Wilbur B. Winland
President

Phone: 740-283-5640
E-mail: winlandwb@wpsc.com

July 13, 2007

Ms. Lisa A. McClung
Director, Division of Water & Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

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JUL 17 2007

WATER QUALITY STDS

Mr. Scott G. Mandirola
Assistant Director, Water Quality Standards Program
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: **Comments on Public Noticed Proposed Amendments to
Requirements Governing Water Quality Standards and
National Pollutant Discharge Elimination System (NPDES) Program**

Dear: Ms. McClung and Mr. Mandirola:

I would like to thank you for the opportunity to comment on the recently Public Noticed proposed amendments to the current Title 47, Series 2 rules dealing with the "Requirements Governing Water Quality Standards" and also Title 47, Series 10 rules dealing with the "National Pollutant Discharge Elimination System (NPDES) Program".

Mountain State Carbon, LLC. (MSC) operates a metallurgical coke facility in Follansbee, West Virginia and is currently covered under an existing WV/NPDES Permit which has been extended. Any changes to the WQS will impact future NPDES permit renewals of our Coke Plant and thereby the potential viability of our plant operations. MSC and its employees, many of whom live in the upper Ohio River Valley, have a vested interest in the environmental health of the Ohio River and its many benefits, including drinking water, recreation and industrial water supply for many area businesses. For this reason we are most interested in protecting this vital resource, as well as maintaining a healthy business climate in which to support our families. It is with this dual interest we offer the enclosed comments on the proposed WQS.

We trust that WVDEP will give due consideration to our comments before finalizing changes to WQS.

Sincerely,

Wilbur B. Winland
President

Enclosures (2)

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JUL 17 2007

WATER QUALITY STDS

**Comments On
Title 47 Legislative Rules
Department of Environmental Protection
Division of Water and Waste Management
Series 10
National Pollutant Discharge Elimination System (NPDES) Program**

§47-10-2. Definitions

- 2.6. "C.F.R." The definition of Code of Federal Regulations should be amended to reflect the current version of the Code of Federal Regulations rather than the version dated July 1, 2006. The CFR is amended throughout the calendar year and is published annually at the beginning of July each year. The federal government (EPA) maintains an up to date version of the CFR for environmental regulations on line. The definition should be amended as follows:

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§47-10-3. Permits

- 3.5.b. Eighteen Month Extension. This section should be eliminated and replaced with the provision found in 40 CFR § 122.6:

The conditions of an expired permit continue in force until the effective date of a new permit if the permittee has submitted a timely application which is complete and the Director, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit.

Business should not be subject to having their NPDES permit expire, potentially threatening their ability to continue in operation, or this unnecessary limit on extensions. If a new permit is not issued through no fault of the permittee, such potential disruption of business continuation is unfair and unnecessary.

If the Department will not replace this rule, it should at least be modified. This rule provides that NPDES Permits may be extended for a period not to exceed eighteen months beyond the expiration date if the applicant has made a timely and complete application for reissuance. The regulation should be amended to provide flexibility for extending permits beyond eighteen months provided the permittee has made a timely and complete application for reissuance and the permit has not been reissued through no fault of the permittee. There are numerous examples in other states where permits have not been reissued for much longer than eighteen months beyond expiration. Perhaps there should be a provision that would allow a permittee to petition the Director, WVDEP and/or the Environmental Quality Board to extend the permit beyond the eighteen month period when circumstances merit. See also section 4.2.g., where the same comment applies.

§47-10-5. Conditions Applicable to All Permits

5.10.a. Monitoring and records. This section references the version of 40 CFR Part 136 in effect as of October 8, 1991, as the source for test procedures for the NPDES permit program. This section must be revised to reflect the current version of 40 CFR Part 136. See prior comment regarding the definition of C.F.R.

5.12.e. Immediate reporting. The term "immediate" in sections 5.12.e.1 and 5.12.e.2. should be amended to "... *as soon as is reasonably possible, but not later than 24 hours...*" There are circumstances where a permittee may be involved in emergency response or rescue operations, or where some amount of time is needed to assess whether the noncompliance "... may endanger health or the environment", which are the criteria that establish the need for "immediate" reporting.

5.15. Removed substances. The parenthetical term "... (removed in the treatment or control of wastewaters)..." should be amended to include "intake waters" as well as "wastewaters".

§47-10-7. Calculating NPDES Conditions

7.2.a.2.B.3. Reporting monthly production with monthly discharge monitoring reports. This requirement is burdensome and serves no useful purpose. There are other standard conditions that require that the permittee notify the permit authority in the event production at the facility changes significantly. Furthermore, it is highly unlikely the Department would seek to modify a permit based on fluctuations in monthly production.

Other Items1. Background Water Quality – Ohio River

ORSANCO has a network of Ohio River water quality monitoring stations that includes most of the Ohio River locks and dams. This network has been in place for many years and the water quality data are collected with proper sample collection techniques and sensitive analytical methods approved by U.S. EPA. The data are representative of background water quality of the Ohio River for downstream dischargers within the same pools. WVDEP often requires dischargers to conduct additional background water quality studies immediately upstream of their respective outfalls. These studies require deployment of sampling crews in boats to collect the same type of water quality analyses as conducted by ORSANCO. Depending on the pollutants analyzed and the number of times samples must be obtained, these studies can cost from \$30,000 to \$60,000. WVDEP should adopt in its NPDES permit regulations the use of the most recent ORSANCO background water quality data, the only exceptions being where the ORSANCO data may not address a particular pollutant or class of pollutants found in the outlet under study.

2. Dissolved Metals Translators – Ohio River

“Dissolved metals translators” provide a means to account for the “total” and dissolved” portions of metals in the receiving water and in the discharges from a facility when developing NPDES permit effluent limits for many metals. ORSANCO has conducted extensive studies throughout the Ohio River to develop site-specific “dissolved metals translators” for each pool of the River. As noted above for background water quality, WVDEP often requires dischargers to conduct additional studies for “dissolved metals translators” at their expense. This often duplicates the work conducted by ORSANCO. WVDEP should adopt in its NPDES regulations the use of ORSANCO dissolved metals translators in lieu of discharger studies unless there are compelling reasons for a discharger study.

3. Situations in which permit limits are below practical quantitation limits

C.S.R. 47-10-4.6.d requires that any person signing a document submitted to the agency certify that information submitted is true, accurate, and complete and acknowledge awareness of significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. This section applies to the submission of reports of compliance with permit limits that are regularly included in the reporting requirements of an NPDES permit. In situations where an NPDES permit contains an effluent limit that is below the practical quantitation limit for a particular pollutant, corporate officials are placed in the impossible position of being required to sign a certification that they are in compliance with their NPDES permit, even though it is not possible to accurately measure pollutant concentrations at the given level.

Accordingly, C.S.R. 47-10 should be revised to include a statement providing that, in situations where the effluent limit provided in an NPDES permit for a given pollutant is less than the practical quantitation limit for that pollutant, no certification of compliance with the particular effluent limitation is required, to make clear that no limit which is below the practical quantitation limit may be enforced, and that, in such instances where the calculated limit would be below the practical quantitation limit, the practical quantitation limit shall be the limit.

Bud E. Smith
Director,
Environmental Control



Phone: 304-234-2662
Fax: 304-234-2613
smithbe@wpsc.com

July 13, 2007

Ms. Lisa A. McClung
Director
Division of Water & Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

RECEIVED

JUL 17 2007

WATER QUALITY STDS

Mr. Scott G. Mandirola
Assistant Director
Water Quality Standards Program
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: **Comments on Public Noticed Proposed Amendments to Requirements Governing Water Quality Standards and National Pollutant Discharge Elimination System (NPDES) Program**

Dear: Ms. McClung and Mr. Mandirola:

Please find enclosed our comments on the recently Public Noticed proposed amendments to the current Title 47, Series 2 rules dealing with the "Requirements Governing Water Quality Standards" (WQS) and also Title 47, Series 10 rules dealing with the "National Pollutant Discharge Elimination System (NPDES) Program".

Wheeling Corrugating Company, a Division of Wheeling-Pittsburgh Steel Corporation, operates a steel coil painting facility in Beech Bottom, West Virginia which is currently covered under an existing WV/NPDES Permit. Any changes to the WQS will impact future NPDES permit renewals of our Beech Bottom Plant and thereby the potential viability of our plant operations. Wheeling Corrugating Company and its employees, many of whom live in the upper Ohio River Valley, have a vested interest in the environmental health of the Ohio River and its many benefits, including drinking water, recreation and industrial water supply for many area businesses. For this reason we are most interested in protecting this vital resource, as well as maintaining a healthy business climate in which to support our families. It is with this dual interest we offer the enclosed comments on the proposed WQS.

We trust that WVDEP will give due consideration to our comments before finalizing changes to WQS.

Very truly yours,

Bud E. Smith

Director, Environmental Control



Enclosures (2)

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JUL 17 2007

WATER QUALITY STDS

**Comments On
Title 47 Legislative Rules
Department of Environmental Protection
Division of Water and Waste Management
Series 10
National Pollutant Discharge Elimination System (NPDES) Program**

§47-10-2. Definitions

2.6. "C.F.R." The definition of Code of Federal Regulations should be amended to reflect the current version of the Code of Federal Regulations rather than the version dated July 1, 2006. The CFR is amended throughout the calendar year and is published annually at the beginning of July each year. The federal government (EPA) maintains an up to date version of the CFR for environmental regulations on line. The definition should be amended as follows:

"C.F.R." means the current version of Code of Federal Regulations as amended from time to time.

2.17 The definition of "Effluent Limitations Guidelines" should be amended as follows:

"Effluent Limitations Guidelines" means national technology-based effluent limits and standards promulgated by the Administrator of EPA under Section 304(b) of the CWA and codified at 40 CFR Chapter 1, Subchapter N.

§47-10-3. Permits

3.5.b. Eighteen Month Extension. This section should be eliminated and replaced with the provision found in 40 CFR § 122.6:

The conditions of an expired permit continue in force until the effective date of a new permit if the permittee has submitted a timely application which is complete and the Director, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit.

Business should not be subject to having their NPDES permit expire, potentially threatening their ability to continue in operation, or this unnecessary limit on extensions. If a new permit is not issued through no fault of the permittee, such potential disruption of business continuation is unfair and unnecessary.

If the Department will not replace this rule, it should at least be modified. This rule provides that NPDES Permits may be extended for a period not to exceed eighteen months beyond the expiration date if the applicant has made a timely and complete application for reissuance. The regulation should be amended to provide flexibility for extending permits beyond eighteen months provided the permittee has made a timely and complete application for reissuance and the permit has not been reissued through no fault of the permittee. There are numerous examples in other states where permits have not been reissued for much longer than eighteen months beyond expiration. Perhaps there should be a provision that would allow a permittee to petition the Director, WVDEP and/or the Environmental Quality Board to extend the permit beyond the eighteen month period when circumstances merit. See also section 4.2.g., where the same comment applies.

§47-10-5. Conditions Applicable to All Permits

5.10.a. Monitoring and records. This section references the version of 40 CFR Part 136 in effect as of October 8, 1991, as the source for test procedures for the NPDES permit program. This section must be revised to reflect the current version of 40 CFR Part 136. See prior comment regarding the definition of C.F.R.

5.12.e. Immediate reporting. The term "immediate" in sections 5.12.e.1 and 5.12.e.2. should be amended to "*... as soon as is reasonably possible, but not later than 24 hours...*" There are circumstances where a permittee may be involved in emergency response or rescue operations, or where some amount of time is needed to assess whether the noncompliance "*... may endanger health or the environment*", which are the criteria that establish the need for "immediate" reporting.

5.15. Removed substances. The parenthetical term "... (removed in the treatment or control of wastewaters)..." should be amended to include "intake waters" as well as "wastewaters".

§47-10-7. Calculating NPDES Conditions

7.2.a.2.B.3. Reporting monthly production with monthly discharge monitoring reports. This requirement is burdensome and serves no useful purpose. There are other standard conditions that require that the permittee notify the permit authority in the event production at the facility changes significantly. Furthermore, it is highly unlikely the Department would seek to modify a permit based on fluctuations in monthly production.

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“Dissolved metals translators” provide a means to account for the “total” and dissolved” portions of metals in the receiving water and in the discharges from a facility when developing NPDES permit effluent limits for many metals. ORSANCO has conducted extensive studies throughout the Ohio River to develop site-specific “dissolved metals translators” for each pool of the River. As noted above for background water quality, WVDEP often requires dischargers to conduct additional studies for “dissolved metals translators” at their expense. This often duplicates the work conducted by ORSANCO. WVDEP should adopt in its NPDES regulations the use of ORSANCO dissolved metals translators in lieu of discharger studies unless there are compelling reasons for a discharger study.

3. Situations in which permit limits are below practical quantitation limits

C.S.R. 47-10-4.6.d requires that any person signing a document submitted to the agency certify that information submitted is true, accurate, and complete and acknowledge awareness of significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. This section applies to the submission of reports of compliance with permit limits that are regularly included in the reporting requirements of an NPDES permit. In situations where an NPDES permit contains an effluent limit that is below the practical quantitation limit for a particular pollutant, corporate officials are placed in the impossible position of being required to sign a certification that they are in compliance with their NPDES permit, even though it is not possible to accurately measure pollutant concentrations at the given level.

Accordingly, C.S.R. 47-10 should be revised to include a statement providing that, in situations where the effluent limit provided in an NPDES permit for a given pollutant is less than the practical quantitation limit for that pollutant, no certification of compliance with the particular effluent limitation is required, to make clear that no limit which is below the practical quantitation limit may be enforced, and that, in such instances where the calculated limit would be below the practical quantitation limit, the practical quantitation limit shall be the limit.

RECEIVED

Comments on WVDEP proposed changes to:

JUL 17 2007

Water Quality Standards and NPDES permit regulations

Public Hearing, Charleston, WV, July 16, 2007

WATER QUALITY STDS

On behalf of Mountain State Carbon LLC; Wheeling Corrugating Company and Wheeling-Pittsburgh Steel Corporation, I am pleased to provide a brief summary of our comments on the changes to the Water Quality Standards (WQS) and NPDES permit regulations proposed by the West Virginia Department of Environmental Protection (WVDEP). Our detailed comments will be filed with the WVDEP before the close of the comment period tomorrow, and I offer a copy of them to you at this public hearing this evening.

Like other states, some of West Virginia's borders are formed by rivers, such as the Potomac, Big Sandy and the Ohio River. When West Virginia creates new environmental regulations, such as these proposed changes to the Water Quality Standards (WQS) and NPDES permit regulations, they may or may not be compatible with those imposed on the same river by the different states, such as Pennsylvania, Ohio and Kentucky. Since these other states must also meet with EPA approval of such regulations, then the citizens of all states, including West Virginia, can be assured that the waters in their bordering rivers are being protected.

It is our assessment that the proposed changes to the WVDEP WQS and NPDES permit regulations are more stringent than those of bordering states. While the term "more stringent" typically implies more protection, it is not necessarily the case. It can also simply mean more stringent regulatory requirement compliance based on regulatory penchant, but not necessarily on science. In some of the proposed changes, the limits are not technically achievable with conventional treatment technologies, and we have found that analytical methods are not available to detect low enough to determine whether discharges are in compliance. We have also found that in some of these cases the WVDEP's regulations and policies provide reasonable flexibility to address these issues while still providing the necessary protection of designated uses. It is these situations that weigh heavily on the manufacturing sector and, as time goes on, will influence decisions regarding plant expansions and location of new facilities.

When Pennsylvania, Ohio and Kentucky have WQS and issue NPDES permits that are protective of human health and the environment of the Ohio River, then why would West Virginia want "more stringent" WQS? Would the Ohio River water be significantly cleaner on the West Virginia side? Of course not, although the overall river water quality may be improved to some degree, but what price would be paid for such improvement that is above and beyond that determined by the United States Environmental Protection Agency? Let me suggest one answer to that question.

Wheeling Pittsburgh Steel Corporation owns or is a partner in nine steel mills whose wastewaters are discharged into the Ohio River or one of its upstream tributaries, the Monongahela. These plants include three in West Virginia, five in Ohio and one in Pennsylvania, and all have NPDES permits for their wastewater discharges. Many of our employees and their families live in communities along these rivers from which they enjoy the benefits of drinking water, recreation and industry. We believe they all will continue to enjoy such benefits if the WQS and NPDES permit rules are the same for all three states. We also believe that any additional benefit that may be gained from more stringent WQS and NPDES permit rules by West Virginia will be potentially negated by the impact on the business climate in these communities. It could be argued that this impact could be better exemplified by a change in the sign on the bridges entering West Virginia that would state, "West Virginia, open for a little bit cleaner water on our side, but more business on the other"!

We believe if WVDEP incorporates our comments provided under separate cover, the bridge signs will not have to be changed. Thank you.

MITTAL

July 16, 2007

Mr. Scott Mandirola
Assistant Director - Water Quality Standards
West Virginia Department of Environmental Protection
Water Quality Standards Program
601 57th Street SE
Charlestown, WV 25304

RECEIVED

JUL 17 2007

WATER QUALITY STDS

Dear Mr. Mandirola:

**RE: Comments on Proposed Water Quality Standards
TITLE 47 - LEGISLATIVE RULES - DEPARTMENT OF ENVIRONMENTAL
PROTECTION - SERIES 2 - REQUIREMENTS GOVERNING WATER
QUALITY STANDARDS**

**Comments on Proposed NPDES Permit Regulations
TITLE 47 - LEGISLATIVE RULES - DEPARTMENT OF ENVIRONMENTAL
PROTECTION - SERIES 10 - NATIONAL POLLUTANS DISCHARGE
ELIMINATION SYSTEM (NPDES) PROGRAM**

Please find enclosed Mittal Steel USA - Weirton Inc.'s comments on the proposed changes to the West Virginia Water Quality Standards at 47 CSR 2 and regulations for the National Pollutant Discharge Elimination System Program at 47 CSR 10. Please pay particular attention to the comments we provided regarding the Harmon Creek socio-economic variance and the ½ mile rule as it pertains to the Ohio River main channel at Browns Island.

Thank you for the opportunity to provide these comments.

Sincerely yours,

Mittal Steel USA - Weirton Inc.



Paul W. Tomiczek, III, REM, P.E.
Manager - Environmental & Security

Enclosures

cc: Gary Amendola, P.E.

**Comments On
Title 47 Legislative Rules
Department of Environmental Protection
Series 2
Requirements Governing Water Quality Standards**

§47-2-5. Mixing Zones

Overlap of Mixing Zones

The current 47CSR2, section 5.2.h.5 prohibits mixing zones from overlapping one another. Based on a recent Environmental Quality Board ruling¹, the Department has been interpreting this prohibition to prevent the overlap of a mixing zone from any downstream outlet, whether or not the downstream outlet discharges the pollutant in question. This prohibition can have the effect of truncating mixing zones based solely on the location of downstream discharges that actually would have a dilutive (beneficial) effect on in-stream concentrations of the pollution in question. This prohibition is not necessary to protect designated human health or aquatic life uses. Furthermore, the Environmental Quality Board Ruling was recently overturned by the Circuit Court of Kanawah County.² Section 5.2.h should be amended as follows:

5.2.h. Mixing zones shall not:

5.2.h.5. Overlap one another for discharges of the same pollutant.

Outlets in Close Proximity

There may also be circumstances where it may make sense to consider together outlets located in reasonable proximity that discharge the same pollutant when developing mixing zones. The following paragraph taken from the 2006 ORSANCO Pollution Control Standards should be inserted as a new section under section 5.2. to accommodate such circumstances:

If mixing zones from two or more proximate sources interact or overlap, the combined effect must be evaluated to ensure that applicable values will be met in the area where any applicable mixing zones overlap.

¹ Final Order of the West Virginia Environmental Quality Board: Appeal No 05-17-EQB, Appeal No. 05-18-EQB; July 24, 2006.

² Final Order, Civil Action No. 06-AA-125, Circuit Court of Kanawah County, West Virginia; June 22, 2007.

47CSR2, sections 5.2.h.6 & 7.2.a.2. Mixing Zones & Category A ½ Mile Zones

In its current state, proposed rule 47-2-5.2.h.6 prohibits the overlap of a mixing zone with any Category A half-mile zone, regardless of whether such overlap poses any risk that the concentrations designated for Water Use Category A would be exceeded. This prohibition is more stringent than is necessary to protect Category A half-mile zones from pollution. Accordingly, the prohibition set forth in 47-2-5.2.h.6 should be replaced with the following language taken from the 2006 ORSANCO Pollution Control Standards.

No mixing zone shall adversely impact water quality so as to interfere with potable or industrial water supplies, bathing areas, reproduction of fish, other aquatic life and wildlife.

Also, the proposed rules should be revised to clarify that the prohibition set forth at C.S.R. 47-2-7.2.a.2 for discharges in excess of Category A concentrations applies only to discharges that occur within the half-mile zone, and that Category A designations and standards should only be applied for discharges within one-half mile of a drinking water intake.

§47-2-7. West Virginia Waters

47CSR2, sections 5.2.h.6 & 7.2.a.2. Mixing Zones & Category A ½ Mile Zones

See above comments under §47-2-5 that apply also to section 7.2.a.2

One-Half Mile Rule for Ohio River Main Channel at Brown's Island

47CSR2, section 7.2.a.2. establishes a one-half (1/2) mile zone upstream of Category A public water supplies where discharges in excess of public water supply criteria are prohibited. In previous versions of this section and in the current proposed version, an exception was made for total iron for Ohio River main stem at Brown's Island. Previous versions and the current proposed version also required that Weirton Steel Corporation submit a report of its drinking water intake to the West Virginia Bureau for Public Health and the West Virginia Department of Environmental Protection before March 1, 2007. Weirton Steel (now Mittal Steel USA – Weirton Inc). The required report was filed in a timely manner on February 12, 2007. The report demonstrated the Weirton Plant drinking water intake treatment plant produces finished water with total iron concentrations typically not-detect (i.e., < 0.05 mg/L) in comparison the drinking water standard of 1.5 mg/L. Given the performance of the drinking water treatment plant and other circumstances set out in the report, Mittal Steel requested the variance for the half-mile rule for total iron be made permanent. Mittal Steel is renewing that request with these comments. Following is proposed language for section 7.2.a.2 (underlined sentence new):

7.2.a.2. *Each segment extending upstream from the intake of a water supply public (Water Use Category A), for a distance of one-half (1/2) mile or to the nearest headwater, must be protected by prohibiting the discharge of any pollutants in excess of the concentrations designated for this Water Use Category in section 8 herein. In addition, within that one-half (1/2) mile zone, the Secretary may establish for any discharge, effluent limitations for the protection of human health that require additional removal of pollutants than would otherwise be provided by this rule. (If a watershed is not significantly larger than this zone above the intake, the water supply section may include the entire watershed to its headwaters. This provision shall not apply for the Category A criterion for total iron to the Ohio River main channel (between Brown's Island and the left descending bank) between river mile points 61.0 and 63.5).*

Water Quality Design Flow

47CSR2, section 7.2.b. requires that all West Virginia water quality standards, whether they be for protection of aquatic life or human health "...shall apply at all times when flows are equal to or greater than the minimum mean seven (7) consecutive day drought flow with a ten (10) year return frequency (7Q10)." EPA has developed recommended water quality criteria for protection of human health and has recommended that the criteria for many substances, including polynuclear aromatic hydrocarbons and mercury, be applied in state water quality standards at the harmonic mean flow (HMF) rather than at the 7Q10. EPA's stated basis for recommending the HMF as the water quality design flow for human health criteria is that the principal routes of exposure are through consumption of drinking water and consumption of fish, and that the toxicological endpoints upon which the criteria are based consider lifetime exposures rather than short term exposures such as would be important for acute aquatic life criteria.

For the upper reach of the Ohio River in West Virginia, the 7Q10 and harmonic mean flows are as follows:

7Q10	5,880 cfs
HMF	20,500 cfs

The HMF is approximately 3.5 times greater than the 7Q10. Consequently, as noted below, water quality-based effluent limits based on the 7Q10 flow and human health are more restrictive than necessary as measured against limits calculated on the basis of the harmonic mean flow and human health criteria as recommended by EPA.

Many states and ORSANCO have adopted the EPA human health criteria and have applied those criteria in their respective water quality standards at the harmonic mean flow. Because existing and proposed West Virginia water quality standards for many substances (e.g., polynuclear aromatic hydrocarbons) are in the low nanogram per liter (ng/L) range, preliminary water quality-based effluent limits calculated from the 7Q10

flow and existing or proposed water quality standards for these substances often results in effluent limits that are not attainable and not measurable with current commercially available state-of-the-art analytical methods.

The following amended 47CSR2, subsection 7.2.b is proposed (new language underlined) to implement EPA's recommended use of the harmonic mean flow for human health criteria:

7.2.b. In the absence of any special application or contrary provision, water quality standards for protection of aquatic life shall apply at all times when the flows are equal to or greater than the minimum mean seven (7) consecutive day draught flow with a ten (10) year return frequency. In the absence of any special application or contrary provision, water quality standards for protection of human health shall apply at all times when the flows are equal to or greater than the harmonic mean flow (HMF). NOTE: With the exception of section 7.2.c.5 listed herein exceptions do not apply to trout waters, nor to the requirements of section 3, herein.

Harmon Creek Water Quality Variance

The previous version of section 7.2.d.16.2. provided a temporary socio-economic variance for Weirton Steel Corporation (now Mittal Steel USA – Weirton Inc.) for certain water quality criteria for the lower reach of Harmon Creek extending from Weirton Outlet 004 to the confluence of Harmon Creek with the Ohio River. The variance remained in effect until July 1, 2007. This proposed version of section 7.2.d.16.2. would extend the temporary socio-economic variance until July 1, 2009. In response to the temporary socio-economic variance, with advice and consultations with the Department, Mittal Steel conducted extensive technical and financial assessments of its operations and extensive biological studies of Harmon Creek including characterization of macroinvertebrates and fish communities at locations upstream and downstream of Outlet 004. On January 23, 2007, Mittal Steel filed a petition to permanently change the use designation and selected water quality criteria for the lower reach of Harmon Creek. The Department advised Mittal Steel that there was insufficient time to fully review that petition and conduct the necessary interagency reviews and coordination with EPA such that the petition could be properly addressed in this rulemaking. The Department also advised that it is proposing to extend the temporary socioeconomic variance until July 1, 2009, to allow time for proper consideration of Mittal Steel's petition. Mittal Steel requests that its petition and the expected review prior to July 1, 2009, be acknowledged in the final version of section 7.2.d.16.2.

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JUL 17 2007

WATER QUALITY STDS

**Comments On
Title 47 Legislative Rules
Department of Environmental Protection
Division of Water and Waste Management
Series 10
National Pollutant Discharge Elimination System (NPDES) Program**

§47-10-2. Definitions

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- 3.5.b. Eighteen Month Extension. This regulation provides that NPDES Permits may be extended for a period not to exceed eighteen months beyond the expiration date if the applicant has made a timely and complete application for reissuance. The regulation should be amended to provide flexibility for extending permits beyond eighteen months provided the permittee has made a timely and complete application for reissuance and the permit has not been reissued through no fault of the permittee. There are numerous examples in other states where permits have not been reissued for much longer than eighteen months beyond expiration. Perhaps there should be a provision that would allow a permittee to petition the Director, WVDEP and/or the Environmental Quality Board to extend the permit beyond the eighteen month period when circumstances merit. See also section 4.2.g., where the same comment applies.

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Other Items

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Accordingly, C.S.R. 47-10 should be revised to include a statement providing that, in situations where the effluent limit provided in an NPDES permit for a given pollutant is less than the practical quantitation limit for that pollutant, no certification of compliance with the particular effluent limitation is required, to make clear that no limit which is below the practical quantitation limit may be enforced, and that, in such instances where the calculated limit would be below the practical quantitation limit, the practical quantitation limit shall be the limit.

47CSR10

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

RESPONSE TO COMMENTS

The following is a response to the comments provided during the public comment period on the Department of Environmental Protection's rule, 47CSR10-- "National Pollutant Discharge Elimination System." Written comments were accepted until July 17, 2007. A public hearing was held on July 17, 2007. Written comments were received and each will be addressed below. The agency's response is limited to the proposed revisions to the rule.

I. COMMENTER: The West Virginia Manufacturers Association and West Virginia Oil and Natural Gas Association

COMMENT A: *The rule must be updated to reflect changes within the structure of the DEP.*

RESPONSE A: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future. The proposed revisions to the rule were very limited in scope, only ensuring that the most recent federal regulations are incorporated by reference. To address any other substantial issues at this point would not be fair to the general public.

COMMENT B: *DEP should clarify that intake water credit is available for water quality-based limits.*

RESPONSE B: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT C: *Post TMDL effluent limitations for sources that are not contributing to the water quality violation.*

RESPONSE C: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT D: *Permit Extensions past the expiration of the permit.*

RESPONSE D: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT E: *Small business exemption for monitoring waivers.*

RESPONSE E: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

II. COMMENTER: West Virginia Chamber of Commerce

COMMENT A: *Rule Update*

RESPONSE A: The Agency appreciates your comments.

COMMENT B: *Use and variance determinations*

RESPONSE B: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future. The proposed revisions to the rule were very limited in scope, only ensuring that the most recent federal regulations are incorporated by reference. To address any other substantial issues at this point would not be fair to the general public.

COMMENT C: *Intake Water Credit*

RESPONSE C: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT D: *Post TMDL Effluent Limits*

RESPONSE D: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

III. COMMENTER: Koppers Inc.'s

COMMENT A: *47-10-2- Definitions*
"C.F.R." means the current version of Code of Federal Regulations as amended from time to time.

RESPONSE A: The DEP disagrees with the suggestion to remove a specific date in the definition. According to State case law, an agency cannot incorporate future regulations by reference, that is, those that have not been promulgated at the time the rule is going through the rulemaking process. The West Virginia State Supreme Court has ruled in State v. Grinstead that this is an unlawful delegation of authority and that the Legislature as well as the general public has the right to know exactly what regulations are being incorporated. The July 1, 2006 date in the proposed definition is the most recent publication of the federal NPDES regulations that is in currently in effect.

"Effluent Limitations Guidelines" means national technology-based effluent limits and standards promulgated by the Administrator of EPA under Section 304(b) of the CWA and codified at 40 CFR Chapter 1, Subchapter N.

RESPONSE A: The agency disagrees that the definition needs a specific reference to federal regulations, especially in light of section 15 of the rule.

COMMENT B: *47-10-3- Permits*

RESPONSE B: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future. The proposed revisions to the rule were very limited in scope, only ensuring that the most recent federal regulations are incorporated by reference. To address any other substantial issues at this point would not be fair to the general public.

COMMENT C: *47-10-5- Conditions Applicable to All Permits*

RESPONSE C: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT D: *47-10-7- Calculating NPDES Conditions*

RESPONSE D: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT E: *Background Water Quality – Ohio River*

RESPONSE E: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT F: *Dissolved Metals Translators – Ohio River*

RESPONSE F: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT G: *Situations in which permit limits are below practical quantization limits*

RESPONSE G: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

IV. COMMENTER: Mountain State Carbon

COMMENT A: *47-10-2- Definitions*
“C.F.R.” means the current version of Code of Federal Regulations as amended from time to time.

RESPONSE A: The DEP disagrees with the suggestion to remove a specific date in the definition. According to State case law, an agency cannot incorporate future regulations by reference, that is, those that have not been promulgated at the time the rule is going through the rulemaking process. The West Virginia State Supreme Court has ruled in State v. Grinstead that this is an unlawful delegation of authority and that the Legislature as well as the general public has the right to know exactly what regulations are being incorporated.

The July 1, 2006 date in the proposed definition is the most recent publication of the federal NPDES regulations that is in currently in effect.

“Effluent Limitations Guidelines” means national technology-based effluent limits and standards promulgated by the Administrator of EPA under Section 304(b) of the CWA and codified at 40 CFR Chapter 1, Subchapter N.

RESPONSE A: The agency disagrees that the definition needs a specific reference to federal regulations, especially in light of section 15 of the rule.

COMMENT B: *47-10-3- Permits*

RESPONSE B: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future. The proposed revisions to the rule were very limited in scope, only ensuring that the most recent federal regulations are incorporated by reference. To address any other substantial issues at this point would not be fair to the general public.

COMMENT C: *47-10-5- Conditions Applicable to All Permits*

RESPONSE C: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT D: *47-10-7- Calculating NPDES Conditions*

RESPONSE D: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT E: *Background Water Quality – Ohio River*

RESPONSE E: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT F: *Dissolved Metals Translators – Ohio River*

RESPONSE F: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT G: *Situations in which permit limits are below practical quantization limits*

RESPONSE G: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

V. COMMENTER: Wheeling Corrugating Company

COMMENT A: *47-10-2- Definitions*

“C.F.R.” means the current version of Code of Federal Regulations as amended from time to time.

RESPONSE A: The DEP disagrees with the suggestion to remove a specific date in the definition. According to State case law, an agency cannot incorporate future regulations by reference, that is, those that have not been promulgated at the time the rule is going through the rulemaking process. The West Virginia State Supreme Court has ruled in State v. Grinstead that this is an unlawful delegation of authority and that the Legislature as well as the general public has the right to know exactly what regulations are being incorporated. The July 1, 2006 date in the proposed definition is the most recent publication of the federal NPDES regulations that is in currently in effect.

“Effluent Limitations Guidelines” means national technology-based effluent limits and standards promulgated by the Administrator of EPA under Section 304(b) of the CWA and codified at 40 CFR Chapter 1, Subchapter N.

RESPONSE A: The agency disagrees that the definition needs a specific reference to federal regulations, especially in light of section 15 of the rule.

COMMENT B: *47-10-3- Permits*

RESPONSE B: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future. The proposed revisions to the rule were very limited in scope, only ensuring that the most recent federal regulations are incorporated by reference. To address any other substantial issues at this point would not be fair to the general public.

COMMENT C: *47-10-5- Conditions Applicable to All Permits*

RESPONSE C: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT D: *47-10-7- Calculating NPDES Conditions*

RESPONSE D: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT E: *Background Water Quality – Ohio River*

RESPONSE E: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT F: *Dissolved Metals Translators – Ohio River*

RESPONSE F: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT G: *Situations in which permit limits are below practical quantization limits*

RESPONSE G: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

VI. COMMENTER: **Mittal Steel USA – Weirton Inc.**

COMMENT A: *47-10-2- Definitions*
 “C.F.R.” means the current version of Code of Federal Regulations as amended from time to time.

RESPONSE A: The DEP disagrees with the suggestion to remove a specific date in the definition. According to State case law, an agency cannot incorporate future regulations by reference, that is, those that have not been promulgated at the time the rule is going through the rulemaking process. The West Virginia State Supreme Court has ruled in State v. Grinstead that this is an unlawful delegation of authority and that the Legislature as well as the general public has the right to know exactly what regulations are being incorporated. The July 1, 2006 date in the proposed definition is the most recent publication of the federal NPDES regulations that is in currently in effect.

“Effluent Limitations Guidelines” means national technology-based effluent limits and standards promulgated by the Administrator of EPA under Section 304(b) of the CWA and codified at 40 CFR Chapter 1, Subchapter N.

RESPONSE A: The agency disagrees that the definition needs a specific reference to federal regulations, especially in light of section 15 of the rule.

COMMENT B: *47-10-3- Permits*

RESPONSE B: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future. The proposed revisions to the rule were very limited in scope, only ensuring that the most recent federal regulations are incorporated by reference. To address any other substantial issues at this point would not be fair to the general public.

COMMENT C: *47-10-5- Conditions Applicable to All Permits*

RESPONSE C: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT D: *47-10-7- Calculating NPDES Conditions*

RESPONSE D: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT E: *Background Water Quality – Ohio River*

RESPONSE E: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT F: *Dissolved Metals Translators – Ohio River*

RESPONSE F: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.

COMMENT G: *Situations in which permit limits are below practical quantization limits*

RESPONSE G: This subject is not under consideration for change at this time but in light of the commenter's interest, it may be at some point in the future.