

WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

Form #3

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

AGENCY: Office of Water Resources
Division of Environmental Protection TITLE NUMBER: 47

CITE AUTHORITY 22-11-4(a)(14)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 47 CSR 11A

TITLE OF RULE BEING PROPOSED: Waste Loads

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

William Brannon



BUREAU OF ENVIRONMENT
10 McJunkin Road
Nitro, WV 25143-2506

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

August 26, 1996

Ms. Judy Cooper
Director, Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

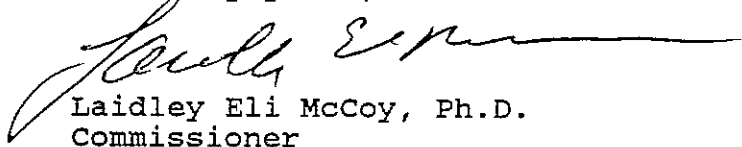
RE: 47CSR11A - "Waste Loads"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office the above-referenced rule as an Agency-Approved Rule and submission to the Legislative Rule-Making Review Committee.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Mark Scott at 759-0515.

Sincerely yours,


Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

DATE: August 29, 1996

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: William D. Brannon, Office of Water Resources

LEGISLATIVE RULE TITLE: Waste Loads

1. Authorizing statute(s) citation Chapter 22, 11-4(a)(14)
2.
 - a. Date filed in State Register with Notice of Hearing
July 23, 1996
 - b. What other notice, including advertising, did you give of the hearing?
In-depth (DEP Monthly Newsletter), Public Notice Bulletin
 - c. Date of Hearing(s) August 26, 1996
 - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached ☒ No comments received
 - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
August 30, 1996
 - f. Name and phone number(s) of agency person(s) to contact for additional information:
William D. Brannon Telephone number 304-558-2108

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

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

NA

- b. Date of hearing: _____

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

- d. Attach findings and determinations and reasons:

Attached _____

BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 47CSR11A Legislative Rule - Waste Loads

A. AUTHORITY: WV CODE CHAPTER 22, ARTICLE 11-4(a)(14)

B. SUMMARY OF RULE:

This Legislative rule is intended to clarify the intent of the waste load allocation in regard to its use in the planning and design of wastewater treatment facilities. It also establishes time limits, transferability and assignment procedures.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

Historically, the agency has used the waste load allocation to provide applicants for domestic sewage wastewater facility permits guidance on developing treatment processes which will protect water quality standards. The waste load allocation is a planning tool for the applicant and, as such, conveys no rights or privileges associated with property or water use. Upon issuance of a National Pollutant Discharge Elimination System permit, the discharge limitations imposed effectively eliminate the need for and existence of the waste load allocation.

Issues relating to the sale and transfer of waste load allocations, interpretations regarding waste loads as a property right, and the use of the waste load allocation to limit and/or prevent development have arisen in recent months which require the agency to establish procedures clarifying its intent and use as a planning tool.

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

There is no federal counterpart regulation

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with Section 22-1A-1 and 3(c), the Director 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:

This proposed rule was reviewed by the Council at its meeting on July 17, 1996. The only comment received questioned the time limits contained in the rule. The commentor suggested extending the availability of the waste load beyond the proposed 12 month period to provide for adequate planning. This comment is addressed in the Responsiveness Summary.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 47 CSR 11A - WasteloadsType of Rule: ☒ Legislative ☐ Interpretive ☐ ProceduralAgency Division of Environmental ProtectionAddress 1201 Greenbrier St.Charleston, WV 25311

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ N/A	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

This rule will not cause a fiscal impact to the agency, the public or the affected community.

3. Objectives of these rules:

To clarify the intent and establish procedures for the use of the wasteload allocation for the design of wastewater treatment facilities.

Rule Title: 47 CSR 11A - Wasteloads

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

No impact

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

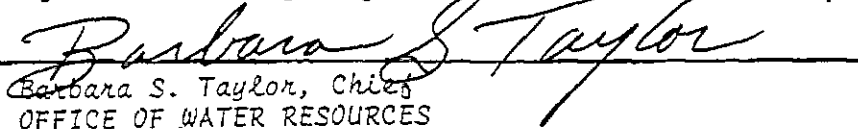
No impact

C. Economic Impact on Citizens/Public at Large.

No impact

Date: 7/11/96

Signature of Agency Head or Authorized Representative


Barbara S. Taylor, Chief
OFFICE OF WATER RESOURCES

47CSR11A

TITLE 47
LEGISLATIVE RULE
BUREAU OF THE ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES

SERIES 11A
WASTE LOADS

47-11A-1. General.

1.1 Scope -- This rule provides the agency's interpretation of the rights and privileges associated with waste load allocations using the provisions of 47CSR10 and 47CSR11, National Pollutant Discharge Elimination System (NPDES) Program and Special Rules respectively. It is further the purpose of this rule to explain the procedures used in requesting and transferring a waste load determination and the length of time for which that determination is applicable.

1.2 Authority -- W. Va. Code 22-11-4(a)(14).

1.3 Filing Date. --

1.4 Effective Date. --

1.5 This is a new rule interpreting the provisions of 47CSR10, National Pollutant Discharge Elimination System (NPDES) Program and 47CSR11 Special Rules. This rule applies to current holders of wasteload allocations and all applicants for wasteload allocations.

1.6. Constitutional Takings Determination -- As a legislative rule, the director has determined that his rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America. The director further finds that his rule is consistent with the Declaration of Policy provided for in 22-11-2 of the WV Code.

47-11A-2. Definition.

2.1 Waste Load Allocation -- Means a calculation to determine a stream's capacity, which takes into consideration a margin of safety, to assimilate a potential discharge within the immediate receiving watershed. This allocation is used by the applicant to plan and complete wastewater treatment works design in preparing to make application for an NPDES permit, and is used by the office of water resources in developing permit effluent limits.

47-11A-3. Interpretation of the Waste Load Allocation Concept.

3.1. The Special Rule, 47CSR11 includes miscellaneous provisions related to the NPDES program. In particular, section 6 of that rule contains provisions titled "Waste load allocations for sewage discharges." Subsection 6.1 of that rule clearly indicates that waste load allocations are provided only to assist in the planning of waste water treatment works while preparing a (NPDES)/Water Pollution Control Permit application. Nowhere in the provisions of this subsection are any other rights provided the applicant other than as stated above. Furthermore, paragraph 3.4.b of 47CSR10, National Pollutant Discharge Elimination System (NPDES) Program, states that the issuance of a permit does not convey any property rights of any sort or any exclusive privilege.

3.2 Because an NPDES permit does not convey any special right or privilege, and that such permit can be revoked, suspended or modified; it is clear then that a calculation, such as the waste load allocation, used in planning the application for the permit can carry no greater right or privilege than the permit which finally results.

3.3 Accordingly then, a waste load allocation is no more than a calculation of the quantity of waste which can be discharged into a stream at a given location on a given date without violating the state's water quality standards provided for in 46CSR1, Requirements Governing Water Quality Standards. Further, the waste load allocation for a point on a stream could range from zero to the maximum allowable depending upon development/discharges, including nonpoint sources, industrial, mining and domestic discharges in the watershed. Waste load allocations then are not a right that runs with any particular piece of property.

3.4. The changing nature of a stream's ability to assimilate wastes, forces a wasteload allocation to be temporary. As a practical matter, a potential applicant for an NPDES Permit needs to know the discharge limitations to be imposed in the permit, so that an appropriate treatment facility can be designed.

47-11A-4. Waste Load Allocation Procedure.

4.1. In order to provide the services identified in Subsection 3.4 of this rule, the Office of Water Resources will incorporate the calculated values of a wasteload allocation as discharge limitations in a WV/NPDES Permit, provided that a complete WV/NPDES Permit application is submitted within six months after the applicant receives the wasteload allocation. If a potential permit applicant can demonstrate that application preparation has begun, but, if the applicant demonstrates to the Chief that despite good faith efforts, a complete application

cannot be submitted in the six-month time frame, then the Chief may grant one six-month extension of the wasteload allocation. Requests for an extension must be in writing to the Chief. A wasteload allocation terminates automatically upon submission of the complete WV/NPDES Permit application.

4.2. At times, planned development may cause the submission of multiple wasteload allocation requests which, if granted, could exceed the watershed's assimilative capacity. Requests for wasteload allocations will therefore be processed on a first-come, first-served basis. If a wasteload allocation is granted that precludes the granting of subsequent allocations, then the latter allocation(s) will be denied. Applicants that have been denied an allocation may have their name put on a waiting list. If the potential permit applicant holding the wasteload allocation does not submit a complete permit application in the time frame specified above, then the allocation will be rescinded and the next applicant(s) on the waiting list will be offered an allocation. Waiting list activities will also be conducted on a first come, first serve basis.

4.3. As stated previously, the wasteload allocation process was designed specifically for potential permit applicants to plan wastewater treatment works. The Chief may deny a request for a wasteload allocation if it is believed that the applicant does not intend to pursue, or is unable to accomplish development as indicated in the request. The Chief may require the submission of information as necessary to determine the validity of a request for a wasteload allocation.

4.4. Application forms will be provided by the Chief which shall include, but not be limited to, a statement identifying the source of the applicant's right to enter in and upon the real property adjacent to the receiving stream to install or construct the proposed point source. Such a statement, acceptable to the Chief, shall be a condition precedent to receiving a wasteload allocation. Though not limited to these forms of real property interests, such interests as may be acceptable to the Chief for purposes of granting wasteload allocations are recorded deeds, leases, options, real estate contracts and easements. Wasteload allocations are planning tools only and do not create interests in real property.

47-11A-5. Transfer or Assignment of Wasteload Allocation.

Once a wasteload allocation is granted to a potential permit applicant, that allocation may be transferred or assigned with the written approval of the Chief. Because wasteload allocations are granted with the expectation that a complete WV/NPDES Permit application will be timely filed with the Office of Water

Resources, the approval of a transfer or assignment of a wasteload allocation will not alter the time limitation of Section 41-11A-4.1 for the filing of a complete WV/NPDES Permit application by the proposed transferee. No approval of a transfer or assignment of a wasteload allocation shall be granted by the Chief except on compliance by the proposed transferee with all of the requirements of these regulations for the original issuance thereof and upon forms provided by the Chief.

**DIVISION OF ENVIRONMENTAL PROTECTION**

GASTON CAPERTON
GOVERNOR

10 McJunkin Road
Nitro, WV 25143-2506

LAIDLEY ELI MCCOY, PH.D.
DIRECTOR

A public hearing on proposed regulation 47CSR11A, Wasteloads, was held at the Division of Environmental Protection's Nitro office on Monday, August 26, 1996.

The hearing was called to order at 6 p.m. Only one member of the public attended, and submitted written comments. Being no further comments, the hearing was closed at 6:05 p.m.

A copy of the sign-in sheet is attached.

Director's Office

Phone: (304) 759-0515 Fax: (304) 759-0526



Division of Environmental Protection
Public Hearing 8/26/96 Public Hearing Sign-In
47 CSR 11A (wastelands)

Name	Address	I would like to comment
1. David Yaussy	Robinson & McElwee P.O. Box 1791 Charleston, WV 25326	<input checked="" type="checkbox"/>
2.		
3.		
4.		
5.		
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ROBINSON & McELWEE

P.02

CLARKSBURG OFFICE
P.O. BOX 125
CLARKSBURG, WEST VIRGINIA 26302
TELEPHONE (304) 822-5022
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LAW OFFICES
ROBINSON & McELWEE
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LEXINGTON, KENTUCKY 40502
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500 UNITED CENTER
500 VIRGINIA STREET, EAST
CHARLESTON, WEST VIRGINIA 25301

DAVID L. YAUSSEY
DIRECT DIAL NO. (304) 347-8258

August 27, 1996

Mr. Brian Farkas
Public Information Office
Division of Environmental Protection
10 McJunkin Road
Nitro, WV 25143-2506

Dear Mr. Farkas:

Enclosed please find for filing the Comments of the West Virginia Manufacturers Association Regarding Waste Loads 47 C.S.R. 11A. Please substitute these comments for those that were provided to you August 26, 1996.

If you have any questions regarding these comments, please feel free to contact me.

Sincerely yours,



David L. Yaussy

DLY:shb

Enclosure

cc: Ms. Karen S. Price/w./enc.
Mr. Robert L. Foster/w./enc.

**Comments of the
WEST VIRGINIA MANUFACTURERS ASSOCIATION
regarding
WASTE LOADS
47 C.S.R. 11A**

L Introduction

The West Virginia Manufacturers Association (WVMA) welcomes the opportunity to comment on proposed 47 C.S.R. 11A - Waste Loads. This rule may be intended to explain how waste load allocations (WLAs) are developed for publicly-owned treatment works and other dischargers of domestic sewage, and to clarify that such WLAs do not represent property rights. If so, the WVMA urges the Office of Water Resources (OWR) to make the application of the rule clearer in the final rule proposal, or to amend 47 C.S.R. 11, Section 6 to address the new concerns the OWR is raising in this new rule.

Proposed 47 C.S.R. 11A is written broadly, in a manner that might allow it to be applied to facilities other than POTWs. If it is intended to apply in that fashion, the rule must be seen as one part of the substantial changes that are being made in the manner in which water quality standards are implemented in West Virginia. Other changes include a lawsuit brought against EPA for the manner in which it has allegedly failed to enforce the total maximum daily load (TMDL) program in West Virginia; the OWR's recently-proposed guidance for mixing zone calculations, and the OWR's movement toward a watershed management approach to water quality standards. Rather than allowing all of these initiatives to result in a disjointed approach to water quality management, the WVMA urges the OWR to rethink its approach to WLAs, and to consider the formation of a task force to advise it on implementing water quality standards.

Because it is not entirely evident how the rule is meant to be applied, the WVMA offers the following comments, which assume that WLAs will be done for all types of dischargers. If the OWR intends the rule to have a more limited application, please consider the comments as indicative of the WVMA's interest in water quality management, and its concerns regarding any water quality implementation program the OWR may develop.

II. Comments

A. Taking of Private Property

Section 1.6 of the proposed rule states that it will not result in the taking of private property, and Section 3.3 states: "[w]asteload allocations . . . are not a right that runs with any particular piece of property." The WVMA agrees that there is no right to discharge a particular quantity of a substance into waters of the state, nor is there a right to a particular share of the total pollutant loading that a river can assimilate. However, owners of property located along streams and rivers and beside lakes, which includes industrial facilities, have certain riparian and littoral rights. See, e.g., 78 *Am. Jur.* 2d 261. We believe that those riparian and littoral rights include the right to reasonable use of a river for discharge of pollutants. If this rule is an attempt to deprive the riparian or littoral owner of one or more such rights, there is a taking of private property within the meaning of W. Va. Code § 22-1A-3.

B. Fiscal Note

The WVMA disagrees with the OWR's conclusions that the proposed rule "will not cause a fiscal impact to the agency, the public or the affected community." Agency staff will be required to perform WLAs, and to incorporate them into NPDES permits. If that is not already being done (and

we assume it is not, or this rule would not be needed) there will presumably be additional expenses for staff and modeling.

Even if the WLAs can be done by existing staff, so there is no additional agency cost, the stated objective of the rule is to help in the design of wastewater treatment facilities. As drafted, the proposed rule would appear to apply to existing plants, and to their wastewater facilities. If wastewater facilities have to be modified to meet WLAs, there will be additional expense for the regulated community. That expense should be estimated in the rule.

C. Definition of Waste Load Allocation

"Waste load allocation" is defined as "a calculation to determine a stream's capacity, which takes into consideration a margin of safety, to assimilate a potential discharge within the immediate receiving watershed." 47 C.S.R. 11A-2.1. This definition leaves unanswered a host of questions. How is stream capacity determined at the 7Q10 low flow, the harmonic mean, or at high flow, when certain pollutant loadings will be highest? At what point in the stream is capacity determined? Is the calculation made for all pollutants for which there are water quality standards, all those that are being discharged in the watershed, or just pollutants of concern on the Section 303(d) list of water quality-impaired streams? Why is there a margin of safety, and what is it? Is a margin of safety redundant if it has been calculated into the TMDL calculation?

Part of the difficulty in understanding how the WLA is meant to apply is the fact that it so closely resembles, but is not quite like, a TMDL. As stated in Section 3.3, "a waste load allocation is no more than a calculation of the quantity of wastes which can be discharged into a stream at a given location at a given date without violating the state's water quality standards. . . ." This is similar to a TMDL, which is described in U.S. EPA's *Technical Support Document for Water*

Quality-based Effluent Limits EPA/505/2-90-001 (March 1991) (TSD) as "the sum of the individual WLAs for point sources and load allocations (LAs) for nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments." TSD at 67. However, Section 3.3 also states that the available WLA will depend on, among other things, discharges from nonpoint sources, which suggests that the WLA does not represent a total loading calculation. These two positions appear are contradictory, and require resolution.

We believe the TSD approach to determining WLAs should be considered by the OWR. The OWR must first properly calculate the total load, and then apportion that load among those who contribute to the loading. The portion attributable to point sources, or the WLA, would then be divided among individual point source dischargers. All of this would require large amounts of data, extensive work and opportunities for public comment that are not provided by this rule.

D. Application of Proposed Rule

In Section 3.1 the proposed rule refers to 47 C.S.R. 11, Section 6, which is concerned with sewage discharges. Sewage is not defined in Series 11, but is defined in the Water Pollution Control Act as "water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such groundwater infiltration and surface waters as may be present. . . ." W. Va. Code §22-11-3(2). Given the reference to 47 C.S.R. 11, it is not clear whether Series 11A will apply only to sewage loading, or to industrial, nondomestic discharges as well. If it is only to apply to those point sources regulated under 47 C.S.R. 11, Section 6, and only to the parameters that are referred to in that section, that point could be made more clearly in both the Scope subsection and in the definition of "waste load allocation."

Assuming that it is to apply to industrial discharges, the WVMA believes the rule is unworkable as written. It appears to be intended to establish an orderly basis for determining those who will be allowed to use the assimilative capacity of the state's waterbodies, and the WVMA applauds the OWR for its foresight. However, the proposed rule raises so many unanswered questions (some of which are noted in these comments) that a great deal of confusion is likely to result. Accordingly, we urge the OWR to withdraw the rule and consider development of a comprehensive approach to water quality issues.

E. Obtaining Waste Load Allocations

Section 4.2 addresses multiple requests for WLAs, and suggests that existing dischargers may already have WLAs. This is contradicted, however, by the Statement of Circumstances Which Require Rule, which states that "upon issuance of a National Pollutant Discharge Elimination System permit, the discharge limitations imposed effectively eliminate the need for an existence of the waste load allocation" and by Subsection 4.1 which provides that "[a] waste load allocation terminates automatically upon submission of the complete WV/NPDES Permit application." If a NPDES permit holder no longer has a WLA, how can it be transferred under Section 5 of the proposed rule, or with the transfer of a NPDES permit? A WLA does not disappear when a permit is issued; it is subsumed into the permit in the form of discharge limitations. As such, it remains in existence and must be transferrable.

We assume that WLAs that are incorporated into NPDES permits will retain their priority when it comes time for renewal, but how will priority of right be established where the total load allocation in a river, or for all industrial dischargers, is reduced? Will there be a list of dischargers,

with the last discharger on the list being eliminated as the WLA is reduced, or will all dischargers be given the same percentage of a lower total share? These issues require further consideration.

F. Trading of Waste Load Allocations

The WVMA strongly supports trading of waste load allocations, but only to those who can use them as provided in Section 4. Also, Section 5 of the rule should clarify that not only can individual point source dischargers trade shares of WLAs, but a point source may also obtain a greater share of the WLA by reducing loading from nonpoint sources.

G. Determining Waste Load

Section 3.3 states that a WLA "could range from zero to the maximum allowable" depending on a variety of consideration. The rule should clarify that discharges of substances at concentrations that equal, or are lower than, water quality criteria are not prohibited even if there is no available share of the WLA to be apportioned to the discharger. The WLA represents a share of the assimilative capacity, not a total loading amount. If a discharger's effluent meets water quality criteria at end-of-pipe, even in a part of the river where water quality standards are already being violated, the discharger is complying with water quality standards, and no share of the WLA is needed in order for the discharge to continue.

III. Conclusion

The WVMA agrees that the state needs to develop an orderly process for allocating discharge rights where water quality standards are being violated. The WVMA respectfully suggests, however, that more work needs to be done on this rule before it is officially promulgated. The OWR should consider the development of an overall strategy for the implementation of water quality standards before promulgating this rule.

Thank you for the opportunity to offer these comments. Please contact David Yaussy or Robert Foster if you should have any questions about these comments.

Karen S. Price, President
West Virginia Manufacturers Association

August 23, 1996

Prepared by:

David L. Yaussy
ROBINSON & McELWEE
600 United Center
500 Virginia Street, East
Charleston, WV 25301

RECEIVED

AUG 26 1996

WATER RESOURCES

**The
West Virginia Mining and
Reclamation Association**

1624 Kanawha Blvd., E, Charleston, WV 25311

**and the
West Virginia Coal
Association**

1301 Laidley Tower, Charleston, WV 25301

comments in response to

The Proposed Legislative Rules
(Waste Loads)
47 CSR Series 11A

Division of Environmental Protection,
Office of Water Resources

August 26, 1996

I. ABOUT THE PUBLIC HEARING:

A. OUR REPRESENTATION:

The West Virginia Mining and Reclamation Association and the West Virginia Coal Association represent over 400 coal producing companies and associate member companies who provide products and services to the coal industry. Our comments on this proposed regulation are on behalf of all of the members of the WVMRA and the WVCA.

B. OUR APPRECIATION FOR THIS OPPORTUNITY:

Our members are grateful for this opportunity to offer suggested improvements to this rule.

II. BACKGROUND:

A. THE INDUSTRY:

The coal mining industry in West Virginia produced 167 million tons of high quality coal in 1995 for domestic and foreign use as an energy source for the production of electricity, steel and a host of other applications. Employment directly in West Virginia mines and indirectly in the mining support trades and the hundreds of millions of dollars of taxes generated by coal related sources are the **economic backbone** of the Mountain State.

A recent study found that one out of every ten payroll dollars in West Virginia comes from the coal industry. It was further revealed that one of every three business tax dollars being collected by the State comes directly from the coal industry.

Every influence which alters the production of West Virginia coal changes the fragile **competitive balance** between coal mines here and coal mines in other coal producing states and other nations. Therefore, every change in statutory or regulatory standard must be made with the potential economic impacts of those changes foremost in the minds of those considering such changes.

III. OUR COMMENTS ABOUT WASTE LOADS:

How much pollution can a watershed stand? Answers to this question are as different as the people willing to offer them. Members of the environmental community often suggest that no pollution is acceptable. Some business-oriented commenters might suggest that the amount of pollution is irrelevant. Somewhere in between these two answers lies the best answer.

The zero tolerance philosophy of many of the environmentalists in West Virginia, no doubt, has led them to their public positions: opposing new highways, new power lines, new pulp plants, and on some occasions new permits to mine. We believe the environmentalists see the application of waste loads as a means to the abolition of new industry in West Virginia.

The ongoing lawsuit by the Ohio Valley Environmental Council against the EPA is perhaps a good example of negative environmental intervention. The suit appears to be designed to force the State of West Virginia to establish Total Maximum Daily Loads (TMDL) of pollutants for our watersheds. Once the TMDL of a watershed is established then the waste load allocation for each entity discharging into the stream will be established. Sound simple, sounds fair, but is it?

The environmental community seems content to take off on missions without solid scientific foundation. Remember they proclaimed: The earth is getting colder - a new ice age in on the horizon. And don't forget their latest forecast: The earth is getting warmer - we must stop the pollution that is causing global warming. Is it getting colder or warmer? They don't have a clue because they often use computer models based on illogical or unfounded assumptions. But the environmental movement doesn't let "facts" get in the way of their agenda.

Implementing TMDLs in West Virginia with unreliable sampling techniques or before all affected parties agree on acceptable levels of pollutants in the streams is premature and unwise. Yet that is where the enviros are driving the EPA and the DEP.

Waste load allocations appear to be directly tied to TMDLs. Once the TMDL on a stream is established, then the waste load for each contributing polluter is allocated. Therefore, if there is an error in the TMDL setting process, then there will be an error in the waste load allocation.

The consequences could be severe, perhaps catastrophic, on the economy of the state. If two contributing polluters on the same stream account for all the waste load the stream is permitted to have, then a new discharging source will be unable to get a portion of the waste load and unable to get an NPDES permit. That means no new plants or new mines on that watershed. Can West Virginia afford to deny permits to new employers? Of course not.

Consider an extreme situation: A scientist analyzes a three foot catfish caught in the Mississippi River at New Orleans. The fish contains evidence of pollution from an upstream source. What portion of the Mississippi watershed gets a new TMDL or waste load allocation? Which plants or mines will be denied new permits?

To regionalize the discussion, how about a three foot catfish caught in the Ohio River at Huntington? If this fish is contaminated, then where are the waste load restrictions placed? On facilities discharging from the West Virginia side into the Ohio, or facilities on the Kanawha, the New, or the Monongalia? Or should the EPA curtail facilities discharging from locations in the States of Ohio or Pennsylvania that ultimately flow into the Ohio River and by the sampling location at Huntington?

West Virginia businesses are under the jurisdiction of one EPA district and businesses in the other part of the watershed inside the State of Ohio are under a different EPA district. What if the interpretation of the standards or procedures for waste loads and TMDL differ substantially between the two EPA districts? Will one state's businesses (and employees) be punished disproportionately and fail to be able to compete with those in the other state?

What if a watershed already has a low pH, will it be closed to all new permit applicants despite their ability to provide a discharge that is of a substantially better quality than the stream into which they are discharging? There are just too many questions that have not yet been answered.

The staff at the DEP prepared this proposed rule with the intention of clarifying some questions about waste loads. DEP staffers remain concerned about permittees who gather up waste load allocations for the purposes of either cornering the market of allocations for a watershed in anticipation of their future investments or for the enhancement of the selling value of their property. We appreciate the DEP's concern about such situations. However, publishing another waste load rule before we have answers to all the TMDL and waste load questions is premature.

IV. SUMMARY:

We believe that further implementation of this or other waste load allocation rules should be postponed until we can be sure we are not over-reacting to TMDLs and other federally mandated standards.

We reserve the right to comment further when facts about the issues of TMDLs and waste loads are established.

Thanks again to the agency for this opportunity to comment.

(end of comments)

(no attachments)

RESPONSIVENESS SUMMARY

Three commentors responded to the Waste Load rule. One of the comments came from the Environmental Protection Advisory Council. Comments were also received from the West Virginia Manufacturers Association and combined comments from the West Virginia Mining and Reclamation Association and the West Virginia Coal Association. Copies of the comments from the Associations are attached.

The comment received from the Environmental Protection Advisory Council questioned the reason for limiting the availability of the waste load to twelve (12) months. The commentor suggested that for planning purposes, applicants may need more time. The agency acknowledges that the waste load is a planning tool, both for the applicant and the agency itself, and that to develop a sewage treatment methodology a certain amount of time is necessary. For that reason, the agency has historically provided a six month time period with the opportunity for unlimited extensions, upon request, by the applicant. That time period has in most cases been more than adequate to allow the applicant to design a treatment method and begin the application process for an NPDES permit. At that point the NPDES process is initiated which provides the permit applicant with additional time to construct the facility. The time limitation has only become an issue in recent years and is a significant reason for the development of the Waste Load Legislative Rule.

In some areas of the state development pressures have reduced receiving streams' assimilative capacities to the point where additional discharges must be controlled or limited to ensure water quality protection. In those areas, some holders of waste loads have perceived them as entitlements akin to property rights and have inappropriately used them to influence property sales, land transfers and to inhibit development. The agency contends that the waste load is only intended as a planning tool and should convey no right or privilege other than that which is provided for in the NPDES permit which ultimately results from the process. Therefore, in response to the commentor, and in keeping with the intent of the Rule, the agency will retain the time limitations as proposed.

The comments received from the Manufacturers and the Coal Associations related to the perception that the proposed rule was directly linked to issues being debated in a pending lawsuit surrounding development of Total Maximum Daily Loads (TMDL's) for the state. Issues raised by both commentors reflected concern about the potential impact TMDL development would have on development and existing state industry. While the agency acknowledges that those concerns are valid and will be considered subsequent to the resolution of the lawsuit, it suggests that the proposed Waste Load rule is not intended to represent the process by which TMDL's will be developed.

The Waste Load rule is intended to clarify the intent of the waste load allocation established in Section 6 of 47 C.S.R. 11

in regard to its use as a planning tool in the design of wastewater treatment facilities, specifically sewage treatment facilities. It is not intended to be applied to other potential water quality impacts, specifically industrial or mining sources. The current waste load allocation process has been in effect since 1977 and has effectively provided the agency and applicants with information necessary to design sewage treatment facilities while maintaining water quality standards. The proposed rule represents only a clarification of procedures which have, as noted above, resulted in inappropriate use of the waste load.

The specific comments provided by the West Virginia Manufacturers' Association, therefore, are issues which the agency will consider in the development of future rules associated with TMDL development and implementation. Such rules will be developed in an open forum with input by representatives of industry, the environmental community and the general public.

MINUTES

DEP ADVISORY COUNCIL

July 17, 1996

The special meeting of the DEP Advisory Council was held July 17, 1996, at DEP's headquarters in Nitro, West Virginia. The meeting was called to order at 1:00 p.m. by Chairman Eli McCoy.

ATTENDING - Advisory Council:

Eli McCoy (Chairman)	William Raney
William Samples	Larry Harris
Rick Roberts	Jacqueline Hallinan

DEP:

Mark Scott	Jerry Ray
Dick Cooke	Mike Dorsey
Ken Ellison	Dale Farley
Britt Ludwig	Wendy Radcliff
Ken Politan	Charlie Sturey
Ken Ward	

Eli McCoy began the meeting by welcoming the Council members to the Nitro Office for a special meeting that was scheduled to discuss the proposed amendments to DEP's 1997 rules. Mark Scott said that in accordance with WV Code §22-1-3(c), which requires the Director of the Division of Environmental Protection to consult with the Advisory Council prior to proposing any new rule and that Council's recommendations will be recorded and made part of the rule package when it is filed with Legislative Rule-Making and the Secretary of State's Office the end of August.

Mark briefly reviewed the proposed rules provided to the Council. He noted that an amendment to an existing Environmental Quality Board rule was filed recently regarding water quality standards. Since this is a Board rule, and only requires the approval of the Director for filing, it is not part of the DEP rule package the Council has before them. He stated that a copy will be made available to them if they would like to review it.

47CSR35 - "Hazardous Waste Management Rule"

Mike Dorsey, Office of Waste Management, gave the Council a brief explanation of the Hazardous Waste Management Rule. He

explained that all the proposed amendments, excluding one sentence, were made to adopt the federal hazardous waste regulations by reference.

Bill Samples asked Mike whether someone complying with the federal rule would also be in compliance with the state requirements.

Mike replied that if you are complying with the federal rules, you are also considered in compliance with the state rule.

No specific comments on the rule were made by the Council.

46CSR32 - "Underground Storage Tank Insurance Trust Fund"

Ken Ellison, Office of Waste Management, gave a brief summary of the changes that are being proposed for the Underground Storage Tank Insurance Fund. General discussion was held concerning changes in the UST rule, but no specific comments were made by the Council.

Proposed Brownfields Legislation

Ken Ellison also explained the proposed Brownfields Legislation.

Bill Samples asked if remediation standards are being developed.

Ken answered yes, they are in the process, but they are very preliminary at this point.

Bill Raney asked if the Brownfields rule will supersede other existing federal or state requirements.

Ken said no - all other environmental rules have to be adhered to.

Bill Samples asked about the time frame on the proposed rule package.

Ken stated that the rule-drafting committee, which is totally voluntary, has set a date of September to try to get the first draft out. The law states that the agency only has to propose the rule within a year of the effective date of the law.

Bill Samples said he believes it is important to get this in place and implemented as soon as possible.

Larry Harris asked if the rule-drafting committee seems to be working toward a consensus.

Ken stated that the Governor had requested Dr. Mary Wimmer, Professor of Biochemistry at WVU, and Dr. Paul Hill, Chief Executive Officer of the National Institute for Chemical Studies, to co-chair the rule-making committee, and he feels they are the real strength to achieving a consensus. He believes that the participants are taking this task seriously and trying very hard to reach a consensus.

Jackie Hallinan asked Ken what appears to be the most contentious issue.

Ken replied that the most contentious issues are risk assessment and risk management. There still needs to be a consensus on a range of scientific and technical parameters to use in risk assessment, and there is a different degree of certainty as to what the results will be depending on which parameters are selected. Risk management decisions have to be made within a framework that recognizes that the risk assessor may not be able to quantify the risk for many constituents. At that point, the risk management decision becomes more of a combination of analysis and deliberation of all the interested and affected parties' issues.

Since these rules are still in draft form, no specific comments were made by the Council.

47CSR38 - "Solid Waste Management Rule"

Dick Cooke, Office of Waste Management, briefly described the changes proposed in the Solid Waste Management rule. To receive EPA approval, one sentence in the state code pertaining to the \$8,000 per acre cap on bonding needs to be removed.

Bill Samples asked if EPA has a limit set per acre. Dick said that EPA does not have a limit.

Bill Samples said that as far as the code change DEP is simply eliminating the \$8,000 cap without substituting and not imposing any restriction on bonding. Dick replied that is correct.

38CSR2 - "Surface Mining & Reclamation Rules"

Charlie Sturey, Office of Mining & Reclamation, explained the changes in the Surface Mining and Reclamation Rule. He also stated that all changes in the rule have a corresponding code change.

The main concerns in the surface mining rule were as follows:

11.6 - Site Specific Bonding - Removal of the \$5,000 cap: Bill Raney asked the basis for removing the cap. Director McCoy stated that removal of the \$5,000 cap was at the insistence of OSM. OSM believes that the cap when set at \$5,000 would be insufficient to reclaim some areas, i.e., coal preparation areas or sites we have bonded at higher costs.

14.11 - Procedures to Obtain Inactive Status - Bill Raney said he has concerns regarding the 10-year cap on inactive status for prep plants or load-out facilities; especially for the larger facilities that maintain good security.

Eli stated that prior to 1988 there was a problem with reclamation of inactive sites, and regulations were promulgated to take care of the problem. He said it doesn't seem to be a big problem now. He also stated that inactive status can be renewed and regardless of what the agency's action may be, the decision can be appealed before the Surface Mine Board, and they can overrule any agency decision if they believe otherwise.

Eli asked Bill Raney if, from industry's point of view, he would like to see those numbers removed and propose some idea to allow the inactive status to be extended longer.

Bill Raney stated that longer is not necessarily the concern; going into active and back into inactive is, but feels this is not the time to work out the details.

Larry Harris asked if we have a list of those inactive sites. Eli said DEP does have a database list of over 200 inactive sites.

After Section 14.15 "Contemporaneous Reclamation Standards" of the surface mining rule was explained, Bill Raney stated he would like to go on record stating that this requirement in the state rule is in excess of all federal requirements.

Larry Harris asked if there is a tax or fee charged on the basis of disturbed acres. Charlie Sturey replied that the bond is not released.

A discussion was then held on Section 28 of the Code as it relates to special authorization for reclamation of existing abandoned coal on 5 acres or less if they are doing a certain type of project.

The main concern with this proposed change was the removal is limited to 5 acres. Rick Roberts asked what happens if you

have a 40-acre development site and 20 acres of coal needs to be removed. Director McCoy stated he did not realize there is a 5-acre limit in the rule. He said DEP needs to look into that and weigh the pros and cons of limiting the removal to 5 acres.

47CSR30 - "WV/NPDES Regulations for Coal Mining Facilities"

Ken Politan, Office of Mining and Reclamation, explained the changes in the NPDES Regulation for Coal Mining Facilities. There was general discussion among the Council members but no specific comments concerning the changes.

47CSR11A - "Wasteloads"

Jerry Ray, Office of Water Resources, gave a brief review of the proposed new wasteload rule and explained the reason for the new rule. He said the Office of Water Resources had originally planned to file it as an Interpretative rule, but after review by the Secretary of State's Office, it will be filed as a Legislative rule.

Rick Roberts expressed his concern with limiting the wasteload allocation to 12 months. He believes that with limitations on funding to construct wastewater treatment facilities, or the time it takes to obtain other permits, the time frame should be extended and asked if there is a waiver to extend the permit in certain circumstances. Jerry Ray answered no, there is no waiver.

Director McCoy stated that the problem with wasteload allocations has only existed in the last 5 years. In the past, anyone could obtain a wasteload allocation and continue to get it renewed for an undetermined amount of time. There is a potential for someone to get a wasteload allocation, never use it, and then sell their property and believe they are selling a wasteload allocation with it to get greater value from the property.

38CSR10 - "Environmental Advocate"

Wendy Radcliff, DEP's Environmental Advocate, explained to the Council the circumstances behind refiling the Advocate rule. When the office was created in 1994, DEP was asked to promulgate rules setting forth the duties of the advocate office. DEP filed those rules as Interpretive rules with approval from the Secretary of State's office. A legislative performance audit of the Advocate office was conducted in April of this year. One of the recommendations was to refile the rules as legislative rules. These are identical to the interpretive rules filed in 1994.

There were no comments from the Council members.

45CSR1 - "Confidential Information"; 45CSR25 - "To Prevent and Control Air Pollution From Hazardous Waste Treatment, Storage, or Disposal Facilities"; "45CSR34 - Emission Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 63"; and 45CSR16 - "Standards of Performance for New Stationary Sources Pursuant to 40 CFR Part 60"

Dale Farley, Chief of the Office of Air Quality said that three of these rules (45CSR25, 45CSR34, and 45CSR16) are incorporating by reference federal requirements that are necessary to keep the program up to date under Title 5. He then went on to explain the federal requirements to the Advisory Council.

There were no substantive comments from the Council members on these three DEP rules.

Dale briefed the Council members on the fourth DEP rule - "Confidential Information". Compared to the other sections in DEP, Air Quality seems to deal more with confidential information than any other. He said the most significant change in the rule would allow DEP to move away from the situation of inspecting the files, identifying all the documents, and then reviewing them again to determine if the files are confidential.

Jackie Hallinan said she had read the proposed rule and believes it is a step in the right direction to hopefully improve the FOIA process when information requested is contained in files that also house confidential information.

After the discussion of the Air Quality rules, Mark Scott reminded the Council members that they could also submit written comments on any of the proposed rules until the close of the public hearing for that particular rule. He told the Council that DEP will mail them a list of the public hearings that will include the date, time, and location.

Director McCoy then adjourned the meeting at approximately 4:00 p.m.