

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Division of Environmental Protection TITLE NUMBER: 47

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

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW _____

AMENDMENT TO AN EXISTING RULE: YES____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

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

TITLE OF RULE BEING ADOPTED: Waste Loads

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS December 23, 1996



Mark A. Scott
Deputy Director
Division of Environmental
Protection



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

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

November 1, 1996

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

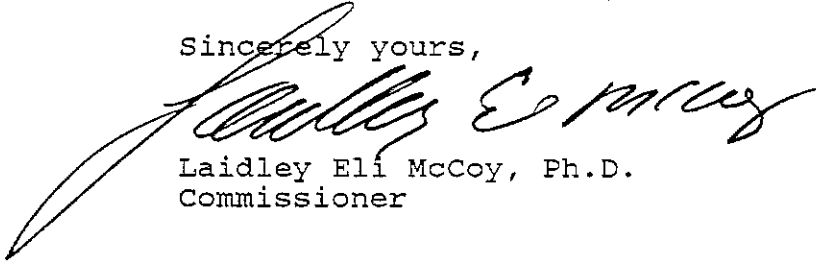
RE: 47CSR11A - "Waste Loads"

Dear Ms. Cooper:

In response to your phone conversation with Carrie Chambers on Thursday, October 31, we are requesting that you approve the withdrawal of the above-referenced Legislative rule as it was filed in your Office on August 30, 1996. After review by the Legislative Rule-Making Review Committee (copy attached) and subsequent discussions with you, it was determined that the rule should be refiled as a Procedural rule.

Therefore, since this rule has gone through all appropriate rule-making procedures as a Legislative rule, we are also requesting your approval to refile 47CSR11A as an agency-adopted Procedural rule with an effective date of December 1, 1996.

Sincerely yours,


Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

cc: Mark A. Scott
Joe Altizer
Barbara Taylor
Carrie Chambers

47CSR11A

TITLE 47
PROCEDURAL 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. -- November 22, 1996.

1.4. Effective Date. -- December 1, 1996.

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 procedural 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. No where 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 subsection 4.1 of this rule 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.

**BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION**

BRIEFING DOCUMENT

Rule Title: 47CSR11A - Procedural Rule - "Waste Loads"

A. AUTHORITY: WV Code Chapter 22, Article 11-4(a)(14)

B. SUMMARY OF RULE:

This procedural 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 applications 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 §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 will be reviewed by the Council at its meeting on July 17, 1996. Recommendations of the Council and the Director's response to the Council's recommendations will be included in the August 30, 1996 filing with the Secretary of State's Office and Legislative Rulemaking Review Committee.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 47 CSR 11A - Wasteloads

Type of Rule: X Legislative Interpretive Procedural

Agency Division of Environmental Protection

Address 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

**DIVISION OF ENVIRONMENTAL PROTECTION**

GASTON CAPERTON
GOVERNOR

10 McJunkin Road
Nitro, WV 25143-2506

LAIDLEY EU 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 8/26/98 Public Hearing Sign-In
47 CSR 11A (wastelands)

Name	Address	I would like to comment
1. David Yaussey	Robinson & McElwain P.O. Box 1791 Charleston, WV 25326	<input checked="" type="checkbox"/>
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ROBINSON & McELWEE

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CHARLESTON, WEST VIRGINIA 25301

DAVID L. YAUSSEY
DIRECT DIAL NO. (304) 347-8388

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. Yaussey

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**

I. 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.

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SECRETARY OF STATE
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(Plus all the volunteer
help we can get)

TO: BILL BRANNONAGENCY: DEP - WATER RESOURCES

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: December 5, 1996

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 11A TITLE: 47 DEP - WATER RESOURCES

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SIGNED: [Signature]TITLE OF PERSON SIGNING: Assistant ChiefDATE: 1-7-97

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

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