

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #3 □

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2003 JUL 31 P 3:16

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Department of Environmental Protection - Water TITLE NUMBER: 47

CITE AUTHORITY: 22-11-2 et.seq.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 30

TITLE OF RULE BEING AMENDED: WV/NPDES Rules for Coal Mining Facilities

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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

Stephanie R. Timmerman

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 25, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Environmental Protection

Administrative Conference Room
10 McJunkin Rd.
Nitro, WV 25143

LEGISLATIVE RULE TITLE: ~~Title 47 Series 30 WV/NPDES Rules for Coal Mining Facilities~~

1. Authorizing statute(s) citation 22-11-1 et seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 13, 2003

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

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 21, 2003

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

Attached x No comments received

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

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

Charlie Sturey, Environmental Program Manager II

Division of Mining and Reclamation

#10 McJunkin Road

Nitro, WV 25143

phone 759-0510

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

NA

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

Pages 6 & 7

3.1. Permit Requirements; Exemptions; ~~Prohibitions.~~

3.1.a. Permit Requirements. ~~Except as authorized by a WV/NPDES permit no person shall:~~

3.1.a.1. Except as authorized by a WV/NPDES permit no person shall:

3.1.a.1.A. Discharge pollutants from a point source associated with any coal mine, preparation plant, and all refuse and waste there from;

3.1.a.1.B.2. Make, cause, or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet from a facility for the discharge of pollutants or the effluent there from into the waters of the State;

3.1.a.1.C.3. Acquire, construct, install, modify, or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated waste or effluent from any facility into the waters of the State, or any extension to or addition to such disposal system;

3.1.a.1.D.4. Extend, modify, add to or increase in volume or concentration any pollutants or effluent from any point source associated with any facility in excess of the discharges or disposition specified or permitted under any existing permit; or

3.1.a.1.E.5. Construct, install, modify, open, reopen, operate, or abandon any coal mine, coal preparation plant, or coal preparation plant associated areas whenever such facilities have associated with them or might reasonably be expected to have associated with them a discharge into or pollution of waters of the State except that a WV/NPDES permit shall be required for any coal preparation plant regardless of whether it has, may have or might reasonably be expected to have a discharge.

3.1.a.2.b. A WV/NPDES permit issued pursuant to Section 3 of these rules shall be deemed to be a permit issued in accordance with Article 11 and CWA.

3.1.a.3e. No facility may be an indirect discharger.

3.1.b. Exemptions

3.1.b.1 Discharges of dredged or fill material into waters of the State which are regulated under Section 404 of CWA. Do not require a NPDES permit for the activities regulated under section 404 of the CWA. This exemption shall not relieve any person of any requirement imposed by the State Act or regulations including State Act permit requirements.

b. Date of hearing or comment period:

NA

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

NA

d. Attach findings and determinations and reasons:

Attached NA

**2004 PROPOSED REVISIONS TO THE WV COAL NPDES RULE (47 CSR 30)
RESPONSE TO COMMENTS**

I. West Virginia Highlands Conservancy and the West Virginia Coalition.

Both organizations had concerns with the change 10.2.d.2. The concerns are as follows (1) ambiguous time period and (2) company sending the notification.

AGENCY RESPONSE:

The agency has decided to withdraw the changes to 10.2.d.2 in order to address the concerns stated at the public hearing.

July 21, 2003

Let's go ahead and get started.

My name is Jessica Greathouse and I am the communications officer for the Department of Environmental Protection and we are here tonight for two separate rule hearings.

One Title 47 Series 30 NPDES rules for coal mining facilities and one on Title 38 Series 2 West Virginia Surface Mining Reclamation Rule.

We will start off with the NPDES Rules For Coal Mining Facilities. I will start with a brief summary of the rule and then ask for comments. When you come up to make your comment state your name as clearly as possible, also your affiliation and then follow-up with your comment. Once we are finished with comments that will be the close of the formal record. This hearing is for NPDES Rules For Coal Mining Facilities Title 47 Series 30. The proposed amendment to this rule are being made to clarify when and who it is sent to public notice. The persons on the mailing list, maintained by the Secretary and to recognize that the federal NPDES program excludes certain discharges from needing a NPDES permit.

Is there anyone in attendance that would like to make a comment on this rule?

My name is Cindy Rank and I am with the West Virginia Highlands Conservancy. Speaking on behalf of the mining committee. The West Virginia Highlands Conservancy has long been involved and interested in the fair, accurate and equitable application of water quality standards at mine sites across WV. One of the problems with the public notice requirements in the water discharge permit for coal mining in WV has been the inaccessibility of timely notice of draft permits to interested members of the public. This is especially true because of the problematic short time frame for response in thirty days.

We recognize that DEP does not even require a company to inform the agency when it submits public notice of its draft permit, but rather only requires confirmation sometime before the close of the comment period (e.g. the last day). And for that reason all previous attempts by DEP to inform the general public have been halfhearted and certainly not timely. We recognize that we were receiving them In-Depth but sometimes that would be two or three months after the fact that the permit is being issued. So unless you had received this paper there was no way that the parties in the program would be able to comment in the 30-day time frame.

For the DEP to now require the applicant, the coal company, to send public notice to persons on a mailing list is equally worthless unless some useful timeframe is inserted into the notification process. Simply requiring an applicant to send a copy of the advertisement to the names on the DEP maintained list at the same time the applicant submits it to the newspaper wouldn't be ideal, but it would be a far cry better than what is happening now (i.e. nothing). And it would add a minimum level of usefulness to what is being proposed in 47CSR30-10.2.d.2.

Thank you for the opportunity to comment.

Is there anyone else that would like to comment on Title 47 Series 30? If not today is the last date of the comment period and so at the end of this hearing officially closes the formal record for Title 47 Series 30.

Excuse me I have written comments that I would like to offer.

OK you can submit written comments to me now.

On to the West Virginia Surface Mining Reclamation Rule. Title 38 Series 2

The proposed amendments to this rule are being made (1) to ensure reclamation techniques and husbandry which are conducive to productive forestlands and wildlife habitat are followed when successful achievement of the post mining land use demands good tree and/or shrub survivability (2) to change various sections of the rule to be consistent with its federal counterpart and (3) correct sections of the rule not approved by the Federal Office of Surface Mining.

Is there anyone that would like to make formal comments for the record?

Good evening my name is Lawrence Beckerle. I am here tonight as Chairman of the West Virginia State Chapter of Quail Unlimited and I have 14 pages of comments which was perhaps not really enough but it's a start to point out some of the problems with the rules that have been proposed. As quite typical for bureaucracy they have followed a cookbook approach that results in a number of problems and I will try to bring that out to you today in the few comments that I have this evening. I am sure if you don't want to look into the 14 pages of comments I have. However, since I am here as the Chairman of Quail Unlimited I would like to point out that the regulations discriminate against Bobwhite Quail in a number of ways and they also discriminate against many native trees and shrubs. For example the restriction against using materials for "topsoil" that have a pH greater than 6.5 will make it impractical to grow about one fourth of the trees native to West Virginia and neighboring states and about one third of the native shrubs. There are shrubs and trees prefer pHs over 6.5 up to about 8.5 and the rule suggest using a pH material between 5 and 6.5 with an average of around 5.5, that is good for some species but not good for all. Part of the problems with rules that only allow the 10% variance below 5.5 and only 10% variance above 5.5. Wildlife need diversity and using such a restrictive pH range setting it at 5.5 you limit diversity wildlife whether it be wildlife, Bob White quail, birds, butterflies or what have you. Bob White quail in some ways would be a better example because there has been more research done on how such narrow limits can affect the species for example using nitrogen fixing plants in larger amounts and greater variety of legume seeds than seeds of any other plant family, typically legume do best at pHs around neutral. There are a number

of course that do better at lower pH's but when you restrict that range and you take out the plants that survive at that high of a pH range and limit the food availability to those animals that require those seeds to survive through winter months and so on. There is another issue here and I am getting ahead of myself but maybe I should since I've got so much to cover in that regulations actually go so far as to strongly recommend certain species for herbaceous ground cover. And what is interesting about that list and I give a reference, and I give book references on each one of the comments as much as possible that each of the grasses and legume that people use are non native to the United States. It seems a bit perplexing to me that with 200 native grasses in WV over 100 native nitrogen fixtures, a couple thousand other herbaceous species that they could not find even one native species that they could strongly recommend that coal operators use on surface mining land. Some of those native plants are quite important to wildlife habitat. Partridge pea is one of the critical ones for Bob White quail we have a number of native left of these, I believe about 18 native to the eastern US. There are six paspalum species native to WV – grasses that sometimes grow in people's yards. The seed produced by those are nearly as nutritious as oats. The reason that this is so critical, when DEP just specifies and strongly recommends non-native species for coverage, is that it keeps the door closed for utilizing native species in a more productive way. On one hand you deny ¼ of the timber heritage and 1/3 of the shrub heritage by the rule on pH. On the other hand by setting what can be planted which is strong preference towards; of course the permittees are going to put those in a permit because it helps their permit get through quicker. The argument will come back and say; well I am not sure these seeds are available. Well DEP by setting what is to be planting, determines the marketplace. So the West Virginia State Tree Nursery for example would produce a cucumber tree if DEP says that is one of the preferred species. As long as DEP says it is not one of the preferred species then they are not going to produce those ceiling because they can't be sure of a sell for those seedlings. They need to be assured of 10-20,000 seedlings, being able to sell that many seedlings. Something similar could happen with the Paspalum species. That is something that could be screened from lawn cutting and peoples yards where they have allowed native grasses to take hold and so if DEP were to strongly recommend these native species it would help create a new opportunity for producing these plants in WV and probably help create a new industry. We are keeping ourselves locked in the past by some very narrow regulations. The kinds of things I didn't cover is things such as they list Red Maple as the high dollar species. Currently Red Maple is a little bit higher but if you look at the long term Pennsylvania study showed that Red Maple has increased 400% in the last 30 years because the high deer population and lack of fire and as with anything else as the supply keeps increasing usually the price goes down so the long term effect of Red Maple probably will become like it historically has been a low dollar species rather than a high dollar species. Those kind of technical errors I tend to shy away from because I really didn't have time to go into more and I thought there were other issues that were much more important than that. One of the things that is a problem here that I alluded

to before is that the plans because they are so narrow and restricted are uniformly unimaginative. Bob White quail and other species typically depend on a patchwork pattern of vegetation types and no vegetation type that it is really depend on should be more than 300 feet from the next vegetation type. These planting plans that DEP insists on is typical 400 acres or 1000 acres or so on. Now one thing I want to bring out here to is that the rules tend to limit how coal companies can revegetate land. The percent groundcover is another issue and the regulations as proposed allow about 30% of the ground to be bare. The ground should be 30-60% bare and that is one of the reasons they do so well on small farms where there is wheat corn and soybeans growing because they need that bare ground to find seed. One of the problems with the regs is that they insist on uniform percent coverage regardless of the percent slope and this really needs to be broken down towards the percent slope so that it more accurately reflects the need for erosion control on those sites. I have actually given a list of proposed breakdown on slope classifications that might be used. One category would be say land is no steeper than typical highway, land that is no steeper than the old style mobile homes, land that is no steeper than typical roof on a standard home. Again this addresses safety issues as well as by having different plans based on slope percents that would help create the patchwork pattern for their survival. Another reason that this is important is different species of plants are more sensitive to competition than others and so when you designate a particular percent of cover you allow some species to compete in that site and you exclude others. Some of our shell barren endemics for example are very sensitive to competition and without some of the more open areas those species would never have a chance to be used on surface mine lands. Unfortunately one of the ecotypes which was referred to as the remarkable population of Kate's mountain clover was eliminated by some road construction this past year and I had great hopes of finding seeds and proposing that be used in surface mines, but that ecotype may be extinct. I did notice that in the rules among other things they essentially outlaw the use of all vetches and all clovers and I question that because we have Carolina clover, Kate's mountain clover and so on. Why would you outlaw the use of these native clovers? The same thing the regs says outlaw vetches. We have American vetch, Carolina vetch which are native to WV. Why outlaw these native plants? It could suggest that in the case of outlawing all vetches including native vetches that DEP is trying to discourage any inclusion of any moist soil areas which those plants are dependent on and one way to avoid the issue is to outlaw the use of the plant so that they will not have to directly deal with the fact that they are outlawing the femoral pool, fernal pools and other systems for catching and retaining rain water on the mine site as opposed to the drainage handbook which tends to encourage running water off the mine site. Those kinds of rules are long overdue for being changed. The other problems relate to, it was good to see after several years of pushing tall fescue that DEP is finally taking an approach that they want to limit the use of Kentucky 31 fescue. The problem is that they named a variety of tall fescue and they didn't use a scientific name which could suggest that ok nobody uses Kentucky 31 anymore, but we will let you use other varieties of tall fescue and we will still have the

problems with the birth defects in deer, the limitation on growing tree and so on that result from the entophyte fungus that infects the tall fescue and related species. So any non-native fescue should not be allowed on a surface mine area. A point here is that the wildlife management plan is to be written by a wildlife biologist in DNR and that causes me some concern for a number of reasons. When the fish and wildlife habitat plans were being written it seems that species they were using were highly invasive species. Or at least that is what I found on some of these sites after these sites were reclaimed and I have been to a number of sites where those species were used. To this day on wildlife management areas they will protect those plantings. There have been migratory songbirds that fill up on those species, die of exhaustion before they can get to their wintering ground. So my concern that with the past history that DNR will make the same kind of mistakes. There is also it seems to me a history of DNR taking care of what is considered the bread and butter species and they tend to ignore the other animals. For example on the Stonewall Jackson wildlife management area there were abundant quail until the area was taken over by DNR for management. Now the wild population of quail is extinct there. My fear is that DNR will continue to neglect Bob White quail and songbirds. I have some serious concerns about DNR writing those plans. I think they will do what they always have done. Rather than being more imaginative I can understand why you would want DNR to review plans that are written but maybe they should not be the people who actually write them. With that I will conclude and hand in my comments.

Is there anyone else that would like to make a comment?

I am Margaret Janes with the Appalachian Center. We believe that the proposed changes are not only unnecessary, but they are also illegal. The proposed rules would significant weaken current law and leave the state surface mining program less stringent than federal law. We ask DEP to enforce existing law and begin to use the tools available to it to protect the State's irreplaceable forest. In addition, we really fail to understand why DEP developed these rules in secret. We were surprised to learn that the rules were even being considered. DEP knew at the time that it began drafting these rules that there were experts and citizens who had worked for years to improve reforestations of mined sites. DEP did not consult with or even tell those experts or citizens what it was planning to do. The result of this policy of exclusion and secrecy is that these rules, if enacted, would allow the devastation of the region forests to continue. Currently DEP authorizes mining companies to convert the most productive and diverse temperate hardwood forest in the world into degraded scrubland. Rather than enforcing the state's surface mining law, DEP has developed a practice of turning a blind eye while mining companies illegally destroy hundreds of thousand of acres of WV's forests. DEP's proposed rules are little more than an attempt to codify its past lax enforcement. State and federal regulations require land to be reclaimed to its premining condition. Because almost all the strip mining sites in the state support valuable and productive mixed-species hardwood forests prior to mining,

the state's reclamation law must require mining companies to either reclaim to a higher or better public or economic use or restore the post mining sites to productive forests. The forestlands not only produce trees, but it is the best habitat for fish and wildlife in southern WV and in fact the predominant type. There is no existing natural fish and wildlife use in WV that resemble the scrubland that is proposed in 7.7. Clearly the appropriate fish and wildlife use is high quality forestland. Federal regulators have specified that a higher and better use is not simply whatever a landowner or coal operator deems it to be. OSM has said that in some situations a regulatory authority may have to weigh the benefits to the landowner against benefits to the community. OSM also recognizes that Congress did not intend for the post mining land use to be the lowest common denominator. DEP has an obligation to determine whether proposed land use is in fact higher or better or the same as a premining land use. It may not authorize proposed changes from forests to "fish and wildlife habitat" or some other bogus proposal. DEP must require coal operators to retain and use topsoil and disallow operators' reliance upon topsoil substitutes that cannot grow hardwood trees. Given the clear obligation of coal operators to reclaim land at least to the level of its premining use. Given the fact that most of the isolated places in the state will not support industrial or commercial development DEP has no choice under current law but to require operators to save all of the topsoil on the site in order to reforest the land to its prior condition. Because the alkaline shales typically approved by DEP as topsoil substitutes cannot grow trees and because there is no substitute that is as effective for growing trees as the native soil, DEP must require the native topsoil to be retained and reused for forestry uses. It is absurd to allow coal operators to save only two feet of the pre-mining soil with no guarantee that any of the soil will be in the O, A and C horizons. In fact DEP regulations completely ignore the necessity to save and carefully handle the soil in these upper reaches of the soil to preserve the native seed pool. Even the recently-released Mountaintop EIS written by DEP former coal industry lobbyists and the Bush administration in order to whitewash the irreversible damage caused to the state by mountaintop removal mining. Even that acknowledges that existing topsoil is extremely important. In conclusion DEP may not authorize under current law the sham post-mining uses that have dominated WV mine sites, DEP must not now use its failure to enforce the current law as an excuse to weaken the law. DEP must find the will to hold operators to the letter of the law. It must no longer allow the use of "fish and wildlife habitat" or of topsoil substitutes that cannot grow trees on forestland sites. The agency must enforce the law by requiring operators to retain the native topsoil and to plant native hardwood trees. It must require operators to preserve the native seed pool and assure not only short-term survival of the seedlings, but also that trees meet realistic productivity standards before bond is released. In short the agency must assure that post-mining uses are at least as good as the pre-mining uses. Because the proposed regulations fail in all these areas, DEP should focus on its duty to enforce current law rather than on weakening it with the proposed regulations.

Is there anyone else that would like to make comments? Come forward please.

I'm Chris Hamilton with the West Virginia Coal Association. I, like some of the other speakers will be submitting written comments separate from my oral remarks, which you will not find in the written comments. Nonetheless, on behalf of the West Virginia Coal Association we would also question the liability of these revisions and would recommend that the agency develop some more reasonable, achievable standards. We also understand that some of these provisions, aside from the fact that it may have apparent conflict with existing provisions may also in an attempt to comply with the proposed revisions lead to some operational and safety problems as well as increasing overall cost of mining reclamation. Although we share the agency's goal of promoting greater tree growth, we question whether or not the recipe for achieving that shared goal is contained within this proposal.

The remainder of Chris Hamilton's comment was not audible on tape.

Is there anyone else who would like to make comments this evening on this rule?

If not that concludes the public hearing for the West Virginia Public Mining and Reclamation Rule Title 38 Series 2. The comment period ends today. This is the close of the formal record. Thank you for coming.

**COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION:
2004 PROPOSED REVISIONS TO THE WV SURFACE MINING &
RECLAMATION RULE (38 CSR 2)
JULY 21, 2003**

Pursuant to the public comment period established by the West Virginia Department of Environmental Protection (WV DEP) on the proposed changes to the West Virginia Mining and Reclamation rules, the West Virginia Coal Association (WVCA) submits the following comments and observations.

INTRODUCTION

WV DEP has proposed changes to several sections of the existing state mining and reclamation rule (38 CSR 2). These revisions include two completely new sections directed at forestland and wildlife habitat and several changes to address OSM disapprovals or required program amendments. Of these revisions, the two new sections are of the greatest concern to members of WVCA because they exceed corresponding federal regulations, will create conflicts with other federal and state mining and reclamation standards, cause operational and safety problems and increase the cost of effective reclamation.

PROPOSED NEW SECTIONS: 38 CSR 2.7.6 Forestland; 38 CSR 2.7.7 Wildlife

In the "Briefing Document" attached to the proposed rules the agency states:

...Current reclamation practices have created three prevalent problems that inhibit proper tree survivability and growth. They are (1) Excessive compaction of the rooting (growth) medium (soil or approved soil substitute); (2) Selection of inappropriate rooting medium and (3) excessive compaction for the herbaceous ground cover species established to control

erosion.

Current reclamation practices may have indeed restricted tree growth on reclaimed mine sites, but the agency has failed to provide any evidence that this is true. *Further, the agency ignores why these measures are implemented in West Virginia:* the current requirements of the federal regulatory program. Erosion control and soil stabilization are reoccurring themes in both the Surface Mining Control and Reclamation Act (SMCRA) and the implementing federal regulations. Similar provisions are found in the West Virginia Mining and Reclamation Rules:

14.3. Topsoil.

14.3.a. Removal. Prior to disturbance of an area, topsoil shall be removed from the area to be disturbed in a separate layer and if not immediately redistributed, it shall be segregated and stockpiled in a separate stable location as specified in the preplan. Stockpiled topsoil shall remain in place until used for redistribution unless otherwise approved by the Secretary. Stockpiled topsoil shall be protected from excessive compaction. *Where the removal of vegetative material, topsoil or other materials may result in erosion, the Secretary may limit the size of the area from which these materials are removed at any one time.*

14.8 Steep Slope Mining

14.8.a.4. The material used to backfill and eliminate the highwall shall be sufficiently compacted or otherwise mechanically stabilized so as to insure stability of the backfill with a static safety factor of 1.3. Placement of woody materials in the fill shall be prohibited unless the Secretary first determines that the method of placement of woody material will not deteriorate the future stability of the backfilled area.

The rule provisions cited above work against reforestation by requiring excessive compaction yet the agency has ignored these rules and other similar requirements and promulgated new standards for forestation. The new section 38 CSR 2.7.6 will create a conflicting standard in the existing regulatory program if the previously cited sections of state rules are left unchanged.

Absent a change to existing rules that mandate excessive compaction and the introduction of herbaceous ground cover to assure rapid erosion control the new sections 7.6 and 7.7 will be of no benefit. The new sections will serve only to confuse and confound the existing regulatory requirements by introducing new language and mandates that clearly conflict with one of the overall themes of the federal and state mining laws: erosion control and stability.

As required by WV Code §22-1-3a, in the briefing document WV DEP makes what at best is a shallow attempt to address the issue of federal stringency:

There are no direct federal counterparts to this new proposed §38-2-7.6 and §38-2-7.6... Because the proposed new sections of this rule ensures that the requirements at 30 CFR §816.111 are achieved, the Secretary has determined that the proposed rule is no more or less stringent than the applicable federal regulations.

Comparing the expansive and detailed proposed state rules with the requirements of 30 CFR §816.111 is erroneous. The cited federal regulations provide general guidelines for revegetation while the proposed state rule mandates that certain procedures be followed

and instructs the operator to use certain soil mixes. The federal requirements provide the flexibility for site-specific revegetation plans that best fit a mined area's revegetation requirement. The federal regulations allow an operator to propose a revegetation plan tailored to the specific mined area. The proposed state rules remove that much needed flexibility and install rigid requirements-*the proposed new state rules thereby exceed the corresponding federal requirements.*

According to WV Code §22-1-3a, state rules can exceed federal counterparts only when

...the director provides specific written reasons which demonstrate that such provisions are reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety, taking into consideration the scientific evidence, specific environmental characteristics of West Virginia or an area thereof, or stated legislative findings policies or purposes relied upon by the director in making such determination. In the case of specific rules that have a technical basis, the director shall provide the specific technical basis upon which the director has relied.

In the case of proposed sections 7.6 and 7.7, WV DEP has failed to comply with the code's instructions. The agency has only provided a general statement regarding current reclamation practices. No supporting evidence has been supplied to illustrate why the proposed new rules will achieve tree growth at a better rate than existing rules.

The proposed new sections will also result in serious mining and reclamation operational difficulties. The two new sections mirror the current requirements in the

Commercial Forestry rules that were enacted several years. The commercial forestry guidelines are intended for application to mines receiving a variance from the Approximate Original Contour requirement of state and federal law. During negotiations over the rule, concerns expressed regarding the physical practicality of implementing the specific requirements of the Commercial Forestry rule on steel-sloped areas such as an AOC mine led the agency to include the "50% slope exclusion" waving the topsoil reapplication requirements on slopes that exceed a steepness of 50%. Ultimately OSM did not approve the exclusion during its primacy review of the proposed rules, but that does not alleviate the operational, safety and stability concerns that led WV DEP to include the provision. Concerns will be even greater on an AOC permit *where practically all* of the soil reapplication area will be steeply sloped. Operating equipment on slopes of this nature presents concerns for the safety of the equipment operator. Attempting to achieve stability and erosion control when the soil mixtures are applied to steeper areas is also a concern. Again, application of these proposed rules will result in conflicting regulatory requirements: achieve stability and minimize erosion or grow trees.

PROPOSED REVISIONS TO 38 CSR -9.3g.

The proposed revisions are intended to bring West Virginia's mining and reclamation rules in conformity with the corresponding federal regulations. WVCA has no comments on this change.

PROPOSED REVISIONS TO 38 CSR2-14.14.a.1.

Minor revision to clarify existing regulatory procedure. WVCA has no comment on this change.

PROPOSED REVISION TO 38 CSR 2-14.15.g.

OSM disapproved WV DEP's proposed deletion of this language during the federal agency's primacy review of the contemporaneous reclamation rules. While WVCA understands that WV DEP is bound by the primacy/oversight structure of SMCRA to address the OSM disapproval, we feel it is inappropriate for the federal agency to review and require changes to state programs where there are no federal counterparts. The two topics at issue, contemporaneous reclamation and bonding, lack specific federal counterparts. The majority of OSM's contemporaneous reclamation regulations have been suspended indefinitely. As a result, the federal program lacks the complexity and detail of West Virginia's contemporaneous reclamation rule yet OSM feels qualified to object to specific language in the state rule. The same observation can be made with respect to West Virginia's Alternative Bonding System. SMCRA and OSM regulations permit the establishment of an alternative bonding system but go no further. Essentially, with the disapproval of the language at issue OSM has comments on an issue for which it knows nothing and has no basis for a primacy/oversight decision.

PROPOSED REVISION TO 38 CSR 2-20.1.a.6.

The proposed revisions are intended to bring West Virginia's mining and

reclamation rules in conformity with the corresponding federal regulations. WVCA has no comments on this change.

PROPOSED REVISION TO 38 CSR 2-22.5.a.

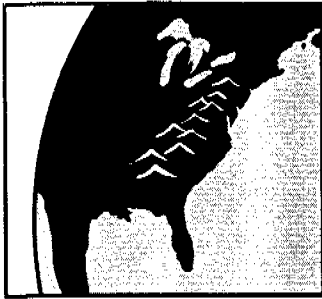
This change is proposed to address a required OSM amendment and to conform West Virginia rules to federal regulations. WVCA has no comments on this proposed change.

PROPOSED DELETION OF 38 CSR 2-23

While WVCA cannot comprehend why OSM would want to pursue a required program amendment that has the ultimate effect of wasting coal resources, we understand that WV DEP is required by the primacy/oversight structure to address OSM's concerns. For the record, WVCA vigorously oppose the deletion of this section as a section that will work counter to goals of SMCRA by leading the unnecessary wasting of coal resources uncovered during commercial development activity.

PROPOSED CHANGES TO 38 CSR 2-24

These changes are being proposed to bring West Virginia's mining and reclamation rule into conformity with federal regulations. WVCA has no comments on these proposed changes.



Appalachian Center

for the Economy and the Environment

Main Office:
P.O. Box 507
Lewisburg, W.V. 24901
ph: 304-645-9006
fax: 304-645-9008

Charleston Office:
227 Capitol Street
Suite 4000
Charleston, W.V. 25301
ph: 304-414-3000

July 21, 2003

Mr. Charlie Sturey
Division of Mining and Reclamation
Department of Environmental Protection
10 McJunkin Road
Nitro, WV 25143

Dear Mr. Sturey:

Please accept these comments on the Division's proposed changes to administrative rules 38 CSR 2 regarding forestry reclamation.

We believe that the proposed changes are not only unnecessary, but also that they are illegal. Indeed, the proposed rules would significantly weaken current law, thereby leaving the State surface mining program less stringent than federal law.¹ We ask that your agency begin to use the tools available to it under current law to protect the State's irreplaceable forests.

Further, we do not understand why the DEP developed these rules in secret. We were surprised to learn that such rules were even being considered when they were unveiled in their current form. The DEP well knew at the time that it began drafting these rules that there were experts and citizens who had worked for years to improve reforestation of mined sites. Nevertheless, the DEP did not consult with or even tell those experts or citizens what it was planning to do. The result of this policy of exclusion and secrecy is that these proposed rules, if enacted, would allow the devastation the region's forests to continue.

The DEP's practice of routinely excluding the public from participation in the rulemaking process often results in weak and poorly considered rules. Rather than indulging its penchant for secrecy, engaging in back-room dealmaking and relying on experts that are "bought and paid for" by the mining industry, the DEP should encourage public participation in a more transparent rule-making process.

¹ It is important to point out that these proposed regulations cannot apply to mountaintop removal mines, as they purport to, because only the commercial forestry/forestry regulations already in place apply to mines that receive variances from the general obligation to restore post-mining sites to AOC.

Currently, DEP inexplicably continues to authorize mining companies to convert the most productive and diverse temperate hardwood forests in the world into degraded scrubland (e.g. "fish & wildlife habitat"). Rather than enforcing the State's surface mining law, the DEP has developed a practice of turning a blind eye while mining companies illegally destroy hundreds of thousands of acres of West Virginia's irreplaceable forests. DEP's proposed rules are little more than an attempt to codify its past lax enforcement.

Federal mining regulations require mined lands to be reclaimed to support the uses those lands were capable of supporting before they were mined, or support a higher or better use. 30 C.F.R. § 816.133. State regulations similarly require land to be reclaimed to its pre-mining condition or to the "highest and best" use. 38 C.S.R. § 2-7.1.c. Because almost all of the strip mining sites in the State support valuable and productive mixed-species hardwood forests prior to mining, the State's reclamation law must require mining companies to either reclaim to a higher or better public or economic use or restore the post mining sites to productive forests.

The federal Office of Surface Mining has consistently observed that state regulators must require mining companies to reclaim land so that it is capable of supporting its original use, or a higher or better use. For instance, OSM stated that "[t]he Office considers the criteria for identification and achievement of postmining land uses to be essential for achieving the purposes of the Act, and for enabling the regulatory authority to judge proposals as reasonably achievable and consistent with land uses and planning in the surrounding area. (Sections 515(c)(3)(B) and (C) of the Act)." 44 Fed. Reg. 15,242 (1979).

Further, OSM said:

The Act's legislative history makes clear that Congress did not intend for the postmining use of land which had been improperly managed to be limited to its most recent premining use. Congress intended for the postmining use of land to be based on its 'potential utility' for a number of uses before mining, not some low use which may have resulted from mismanagement. (S. Rept. 95-128, 95th Cong., 1st Sess. 76-77 (1977)). The Office believes that it is possible to make useful distinctions between land under good and poor management and that the several characteristics of properly and improperly managed lands can be described for most land uses. This information together with the extent and reversibility of damage to improperly managed lands can be determined by the regulatory authority.

Id. at 15,243.

Federal regulators also have specified that a higher and better use is not simply whatever a landowner or coal operator deems it to be. Congress and the Legislature must be presumed to have knowingly used the phrase "higher or better," and DEP may not

read the words out of the law. In originally approving the permanent program regulations, OSM pointed out that:

A few commenters suggested that the introductory paragraph of Section 816.133(c) be changed to require approval of the landowner rather than mere consultation. The Office recognizes that regulatory authority approval for a postmining land use which is in conflict with goals of the landowner may present many problems. However, since the additional requirement of landowner approval is not authorized by the Act, these suggestions were rejected and no changes were made.

Id.

OSM also has said that, "In some situations, a regulatory authority may have to weigh the benefits to the landowner against benefits to the community in making. . .[the] . . .determination [of what is a higher or better use]. 48 Fed. Reg. 39,894 (1983).

OSM also has recognized that:

The Act's legislative history makes clear that Congress did not intend for the postmining use of land which had been improperly managed to be limited to its most recent premining use. Congress intended for the postmining use of land to be based on its 'potential utility' for a number of uses before mining, not some low use which may have resulted from mismanagement. (S. Rept. 95-128, 95th Cong., 1st Sess. 76-77 (1977)). The Office believes that it is possible to make useful distinctions between land under and poor management and that the several characteristics of properly and improperly managed lands can be described for most land uses.

44 Fed. Reg. 15,243 (1979).

Finally, according to OSM, "[t]he regulatory authority has the responsibility for making the determination whether an alternative postmining land use should be allowed and must use all the available information and comments." 48 Fed. Reg. 39,898 (1983).

Therefore, DEP has the obligation to determine whether a proposed land use is indeed "higher or better" or the same as the pre-mining land use. It may not authorize proposed changes from forests to "fish and wildlife habitat" or some other bogus proposal.

To this end, DEP must require coal operators to retain and use topsoil, and disallow operators' reliance upon topsoil substitutes that cannot grow hardwood trees. Given the clear obligation of coal operators to reclaim land at least to the level of its premining use (and given the fact that most of the isolated places where these mines are

located will not support industrial or commercial development), DEP has the obligation under current law to require operators to save (and not stockpile) all of the topsoil on the site. Because the alkaline shales typically approved by DEP as topsoil substitutes cannot grow trees, and because there is no other substitute that is as effective for growing trees as the native soil, DEP must require the native topsoil to be retained and reused for forestry uses. It is absurd to allow, as the proposed regulations would, coal operators to save only two feet of the pre-mining soil (with no guarantee that any of the soil in the upper horizons – O, A and C horizons – would be saved by operators). Indeed, DEP's regulations completely ignore the necessity to save and carefully handle the soil in these upper reaches of the soil to preserve the native seed pool.

Even the recently-released *Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement*, written by DEP, former coal industry lobbyists and the Bush administration to whitewash the irreversible damage caused to the State by mountaintop removal mining, acknowledges that Congress stressed the importance of using existing topsoil:

Topsoil has nearly all of the living matter that makes the collection of sand, silt, and clay a living soil capable of sustaining plant life. It is not just soil pH and nutrients that makes a medium suitable for plant growth and development. This is the reason why the surface mining act and State regulations at 38CSR2.14.3.a. require the saving of topsoil. Recognizing that all topsoil is not created equally, topsoil substitutes are permissible, provided the new material can be shown to be as good as or better than the original topsoil.

Page III.B-11, EPA 9-03-R-00013 (June 2003).

Further, federal regulations say that:

Selected overburden materials may be substituted for, or used as a supplement to topsoil if the operator demonstrates to the regulatory authority that the resulting soil medium is equal to, or more suitable for sustaining vegetation than, the existing topsoil, and the resulting soil medium is the best available in the permit area to support revegetation.

30 C.F.R. § 816.22 (emphasis added).

Similarly, DEP's current mining and reclamation regulations say that:

Any substitute material used for top soiling must be capable of supporting and maintaining the approved postmining land use. This determination of capability shall be based on the results of appropriate chemical and physical analysis of overburden and topsoil. These analyses shall include at a minimum depth, thickness, and areal extent of the substitute structure or soil horizon, pH, texture class, percent coarse fragments and nutrient

content. A certification of analysis shall be made by a qualified laboratory stating that:

14.3.c.1. The proposed substitute material is equally suitable for sustaining vegetation as the existing topsoil;

14.3.c.2. The resulting soil medium is the best reasonably available in the permit area to support vegetation; and

14.3.c.3. The analyses were conducted using standard testing procedures.

38 C.S.R. § 2-14.3.c.

In conclusion, DEP may not authorize, under current law, the sham post-mining uses that have dominated West Virginia mine sites. DEP must not now use its failure to enforce the current law as an excuse to weaken the law. Rather, DEP must muster the will to hold operators to the letter of the law. It must no longer allow the use of "fish and wildlife habitat" (or other degraded uses) or of topsoil substitutes that cannot grow trees on forestland sites.

The agency must enforce the law by requiring operators to retain the native topsoil and to plant native hardwood trees; it must require operators to preserve the native seed pool and assure not only short-term survival of the seedlings, but also that trees meet realistic productivity standards before bond is released. In short, the agency must assure that post-mining uses are at least as good as the pre-mining uses. Because the proposed regulations fail in all of these areas, DEP should focus on its duty to enforce current law rather than on weakening it with the proposed regulations.

Sincerely,



Margaret Janes
Senior Policy Analyst

West Virginia Highlands Conservancy

Frank Young, President
Rt. 1, Box 108
Ripley WV 25271
304-372-3945
e-mail: fyoung@wvhighlands.org

July 21, 2002

Matthew Crum, Director
Division of Mining and Reclamation
Department of Environmental Protection
10 McJunkin Road
Nitro WV 25143

Dear Director Crum:

Please accept these, my comments on the Division's proposed changes to administrative rules 38 CSR 2 regarding forestry reclamation.

Ms. Cindy Rank, Chairwoman of the WV Highlands Conservancy's mining committee, may offer other comments on these administrative rules.

My comments herein address only section 10.2.a.2. (Timing), and other sections related to Publication and Proof of Publication of mining applications, changes in permits, NPDES permits, and any other actions related to publication and furnishing Proof of Publication of notice to the public.

Under 10.2.c. and other sections of the rules the applicant is required to furnish Proof of Publication of notice, but only "Before the expiration of the WV/NPDES notice period in 10.2.a.A. of these rules,", and similar language in other "Proof of Publication" references.

We believe that this rather ambiguous time period for the applicant to provide Proof of Publication to the agency can be too long, and does not allow the public to know that the notice was published and that the comment period is running unless one happens to see the actual published notice in some daily or weekly newspaper.

We believe that requiring Proof of Publication to the agency as soon as possible after publication would permit the agency to inform citizens, either upon inquiry or by agency notice in the agency's publications and otherwise, of a pending application and the related comment period.

Requiring Proof of Publication as soon as possible after publication is not unprecedented among West Virginia public agencies. The West Virginia Public Service Commission (PSC) for example, which accepts applications for and issues many hundreds of permits, rate changes and other administrative orders annually, requires, in its rules, that the applicant provide the publishing newspaper's "Affidavits of Publication" to that agency "as soon as possible" after publication.

The result is that proofs of publications are usually returned to the PSC within 10 days to two weeks after publication and the agency can inform the public, either upon inquiry or through other agency notice, that an application for operating authority, a rate change, or other act has been published, and that, in the case of a 30 day comment period, that some 15 or so days remain in which comments will be accepted.

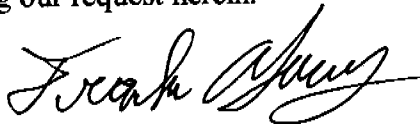
But without timely notice of publication to the agency, the agency cannot accurately inform the public of when a comment period either starts or ends.

The attached three (3) pages show some examples of PSC rules requiring proof of publication "as soon as possible" after publication. And the last page attached hereto shows examples of PSC Orders background discussions where the PSC notes that applicants made return notice of publications no later than about two (2) weeks after publication.

For the reasons stated herein, the West Virginia Highlands Conservancy respectfully requests that Proofs of Publications under the rule changes being considered here be made to the DEP as soon as possible, and no later than 15 days following the publication of the notice of the application, change, or of whatever is being published.

Thank you for considering our request herein.

Frank Young, President
West Virginia Highlands Conservancy



From: PSC rules

150CSR1

additional copies thereof, substantially in the form of Form No. 3 attached hereto.

10.2. Change of rates.

A public utility or motor carrier desiring to change its rates, rules and/or regulations shall comply with the Commission's Rules for the Construction and Filing of Tariffs, 150 CSR 2.

10.3. Certificate of convenience and necessity.

10.3.a. Any public utility, person or corporation, or other entity required by statute to obtain from the Commission a certificate of convenience and necessity or a certificate of need, shall comply with the following as applicable. (For motor carrier certificates of convenience and necessity, see 150 CSR 9.)

10.3.b. Any public service district intending to file an application for a certificate of convenience and necessity shall, at least thirty (30) days prior to the date it intends to file its application, pre-file with the Commission's Executive Secretary, an original and twelve (12) copies of, a letter from the public service district attaching a completed Pre-Filing Notice in the form of Form No. 13, attached hereto, and a report describing the scope of the proposed project. (This report may be an engineering report if such report is available at the time of pre-filing.) (Only one copy of the engineering report is necessary.) At the same time that the public service district pre-files its application with the Commission, it shall; (1) give notice to the public of its pre-filing by publishing its Pre-Filing Notice in the form of Form No. 13 as a Class II legal advertisement in a qualified newspaper(s), published and of general circulation in each county where the public service district's customers reside, and (2) separately mail Form No. 13 to each of its resale customers, via certified mail, return receipt requested. The public service district shall file affidavits of publication provided by the newspaper(s) with the Commission as soon as possible after the Pre-filing Notice of Filing is published.

10.3.c. Any public utility, person or corporation, or other entity, other than a public service district, intending to file an application for a certificate of convenience and necessity pursuant to W. Va. Code §24-2-11 shall, at least thirty (30) days prior to the date it intends to file its application, give the Commission notice of its intent to file an application by filing with the Commission's Executive Secretary, an original and two (2) copies of, a letter of notification. The Commission may modify or waive this requirement.

10.3.d. To file an application for a certificate of convenience and necessity pursuant to W. Va. Code §24-2-11, a public utility, person or corporation, or other entity, shall, thirty (30) days following a pre-filing by a public service district as described in Rule 10.3.b., or the filing of a notice of intent to file a certificate application as described in Rule 10.3.c., file with the Commission's Executive Secretary, an original and twelve (12) copies of, its application for a certificate of convenience and necessity. To be acceptable, an application shall include; (i) a completed Form No. 4, attached to these Rules, (ii) a completed Form No. 14 with the exception that the utility shall leave blank the date of the order and the case number, and (iii) for water and sewer utilities - all information included on the checklist appearing at Rule 26.1 of these Rules. When the Executive Secretary's office has assigned a case number, a completed Form No. 14 will be issued to the utility as an order requiring publication of the Notice of Filing as a Class I legal advertisement in a qualified newspaper(s), published and of general circulation in each county where the utility provides service, and requiring that the utility separately mail Form No. 14 to each of its resale customers, via certified mail, return receipt requested. The utility shall file affidavits of publication provided by the newspaper(s) with the Commission as soon as possible after the Notice of Filing is published. Furthermore, whenever a utility seeks a rate increase in a certificate application, the utility shall, within thirty (30) days of the date the Commission issues the completed Form No. 14, have completed the mailing of separate notices to each of its customers by one or a combination of the following methods: (i) inclusion of Form No. 14 as a bill insert; (ii) separately mailing Form No. 14; or (iii) only for utilities that bill by

postcard instead of in an envelope, and who elect not to separately mail Form 14, inclusion of a statement on a postcard billing as follows: "This utility is seeking a rate increase. Details available in newspaper publications or at the utility office after [utility to insert date application filed with Commission] by calling [utility to insert utility office telephone number]."

NOTE: (See section 26.1 Appendix checklist for water and sewer utilities filing applications for certificates of convenience and necessity.)

10.3.e. Any public utility, person or corporation, desiring to construct a high voltage transmission line of two hundred thousand (200,000) volts or higher, shall file its notice of intent to file an application, and its application for a certificate of convenience and necessity in accordance with Rules 10.3.a, 10.3.c. and 10.3.d. In addition to the information required by Rule 10.3.d., the application shall include all of the information required by Rule 9 of the Commission's Rules for the Government of Electric Utilities, 150 CSR 3, and by W. Va. Code §24-2-11a.

10.3.f. Any person, association, firm or corporation desiring to operate as a common or contract carrier by motor vehicle in the transportation of persons or property for hire over the public highways of this State shall file an application for a certificate of convenience and necessity or a permit to operate as a common or contract motor carrier, together with twelve (12) copies thereof, in the form identified in section 10.1 et seq. of the Commission's Rules for the Government of Motor Carriers of Passengers and Property, 150 CSR 9.

10.3.g. An owner and/or operator of a commercial solid waste facility must obtain a certificate of need before commencing any additional or new commercial solid waste facility activities not explicitly authorized by an existing certificate of need, regardless of whether such additional or new activities would require a major permit modification from the West Virginia Department of Environmental Protection, when such activities would have a significant impact upon rates, upon the applicant, upon the applicant's competitors, or upon the public. Such additional or new commercial solid waste activities include, but are not limited to, the following -- composting activities, recycling activities, and transfer station activities -- regardless of the location of such activities relative to the currently permitted commercial solid waste activity.

1. An owner and/or operator of a commercial solid waste facility shall apply for a certificate of need by filing a completed Form No. 15, attached hereto, together with twelve (12) copies of the same with the Commission's Executive Secretary. In addition to Form No. 15, the utility shall file a completed Form No. 17 with the exception that the utility shall leave blank the date of the order and the case number. When the Executive Secretary's office has assigned a case number, a completed Form No. 17 will be issued to the utility as an order requiring publication of the Notice of Filing as a Class I legal advertisement in a qualified newspaper(s), published and of general circulation in each county in the watershed where the commercial solid waste facility is or will be located, and in a newspaper certified by the Secretary of State to have statewide circulation. The utility shall file affidavits of publication provided by the newspaper(s) with the Commission as soon as possible after the Notice of Filing is published.

2. An owner and/or operator of an existing commercial solid waste facility may file an application for an amendment of a certificate of need and for expedited processing, in the form attached hereto as Form No. 16, together with twelve (12) copies of the same, and receive expedited processing of its application, if the owner and/or operator seeks to engage in additional activities within the facility's permitted acreage, if the activity is determined not to have a significant impact upon rates, upon the applicant, upon the applicant's competitors, or upon the public, regardless of whether the new activities have been classified as a major modification by the Department of Environmental Protection. In addition to Form No. 16, the utility shall file a completed Form No. 17 with the exception that the utility shall leave blank the date of the order and the case number. When the

Executive Secretary's office has assigned a case number, a completed Form No. 17 will be issued to the utility as an order requiring publication of the Notice of Filing as a Class I legal advertisement in a qualified newspaper(s), published and of general circulation in each county in the watershed where the commercial solid waste facility provides, or will provide service, as indicated in its certificate application and/or its Department of Environmental Protection permit. The utility shall file affidavits of publication provided by the newspaper(s) with the Commission as soon as possible after the Notice of Filing is published.

3. After receiving Form No. 16, the Commission may issue the applicant an amended certificate of need without a hearing, unless the Commission determines that the planned expansion or construction has a significant impact upon rates, upon the applicant, upon the applicant's competitors, or upon the public. In the alternative the Commission may, if appropriate, issue an order requiring the applicant to file a standard application for a certificate of need in the form of Form No. 15.

10.4. Contracts between utilities.

10.4.a. Whenever a public utility, except railroads other than street railroads, desires to enter into any contract with any other utility to operate its line or plant or to enter into any contract to operate their lines or plants in connection with each other (except physical connections between utilities supplying the same service or commodity for temporary purposes only) the utilities shall file a joint petition with the Commission for authority so to do, together with twelve (12) additional copies thereof, substantially in the form of Form No. 5. Such petition shall set forth the names and addresses of the petitioners, a detailed statement describing the proposed contract, the effect it will have upon the service of the petitioners, the consideration to be paid for the service to be rendered, whether or not any other utility will be affected by the proposed operation and a statement why the prayer of the petition should be granted.

10.4.b. If the connection is physical between utilities supplying the same service for temporary purposes only, the parties thereto shall immediately give notice to the Commission, in writing, of such connection. Said notice shall state the names and addresses of the parties, the utility service in which they are engaged, the location of the physical connection and a description thereof and the reason it was made.

10.5. To control or acquire property of another utility.

A public utility, except railroads other than street railroads, desiring to purchase, lease or in any other manner acquire control, direct or indirect, over the franchise, licenses, permits, plant, equipments, business or other property of any other utility shall file with the Commission its application for authority so to do, together with twelve (12) additional copies thereof, substantially in the form of Form No. 6. Such petition shall set forth the name and address of the petitioner, the name and address of the utility whose property, etc., is sought to be acquired, the financial condition of the petitioner and of the utility whose property, etc., is sought to be acquired, the property, etc., to be acquired and location thereof, the terms and conditions of the proposed transaction, the effect of the proposed transaction upon the service of the parties thereto, the method of financing the transaction and whether or not any other utility will be affected, and, if so, in what respect, and a statement of the reasons why the prayer of the petition should be granted.

10.6. Sale of franchises, permits and plant.

A public utility, except railroads other than street railroads, desiring to assign, transfer, lease, sell or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property, or any part thereof, (except tangible personal property not necessary or useful, nor which will become necessary or useful in the future, in the performance of its duties to the public), shall file with the Commission its application for authority so to do, together with twelve (12) additional copies thereof, substantially in the form of Form No. 7.

From: WV PSC Background for Orders

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 25th day of September, 2002.

CASE NO. 02-1189-E-CN

NEDPOWER MOUNT STORM LLC
5160 Parkstone Drive, Suite 260
Chantilly, Virginia 20151

Application for a Certificate of Convenience and Necessity to Authorize Construction and Operation of a Wholesale Windpower Electric Generating Facility and Related Interconnection Transmission Facilities in Grant County, West Virginia.

COMMISSION ORDER

Background

(excerpt) "On September 6, 2002, the Applicant filed an Affidavit of Publication from the *Grant County Press* evidencing publication of a Notice of Filing for this case on August 20, 2002."

15-days after
15-remaining

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA- CHARLESTON

Issued: July 16, 2003

CASE NO. 03-0570-SWF-CN

NICHOLAS COUNTY SOLID WASTE AUTHORITY
Application for a certificate of need to expand the present limited area by installing a new liner system in a Phase 3 and 4 expansion.

PROCEDURAL ORDER

Background

(excerpt) "On July 10, 2003, the Authority filed its affidavits of publication indicating that the Notice of Filing was published in The Nicholas Chronicle, Nicholas County, on June 19 and June 26, 2003; in The West Virginia Daily News, Greenbrier County, on June 18 and 25, 2003; in the Pocahontas Times, Pocahontas County, on June 19, 2003; and in the Webster Echo, Webster County, on June 18 and June 25, 2003. "

14-days after
16-remaining

West Virginia Rivers Coalition

801 N. Randolph Avenue
Elkins, West Virginia 26241

(304) 637-7201 tel
(304) 637-4084 fax

www.wvrivers.org

Facsimile Transmittal Form

Date: July 21, 2003

Number of Pages (including cover page): Three

To:

Mrs CHARIE SMITH
304.759.0510
10 McJunkin Rd
NITZO, WV

From:

J. Muller

message

Comments re: WV/NPDES rules for Coal Mining Facilities.
22-11-1 47 CSR 30

A hard copy is being sent by mail.



JEREMY P. MULLER
EXECUTIVE DIRECTOR

WEST VIRGINIA
RIVERS COALITION



WEST VIRGINIA RIVERS COALITION

801 N. Randolph Avenue • Elkins, West Virginia 26241 • (304) 637-7201 • www.wvrivers.org

July 18, 2003

Mr. Charlie Sturey
Office of Water and Waste Management
West Virginia Department of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

Dear Mr. Sturey:

West Virginia Rivers Coalition (WVRC) objects to the proposed amending of 47CSR30, "WV/NPDES Rules for Coal Mining Facilities." We oppose this proposed rule change because it exacerbates two fundamental problems with the West Virginia Department of Environmental Protection's (DEP's) handling of coal NPDES public notice procedures.

First, DEP has consistently ignored the requirements of Section 10.2.d.2. No area lists or mailing lists exist. Shifting the burden of sending public notices from DEP to applicants will not ensure that this section is implemented. In fact, applicants could be expected to be even less responsive to this rule than DEP currently is, if that were possible.

Second, relying on applicants for this process will only compound an already serious issue: DEP often does not know when coal NPDES public comment periods begin and end, and instead rely on applicants. DEP's Public Notice Bulletin is entirely useless for learning about public comment periods for coal NPDES permits. Permit writers often do not know when permits they write are open for comment. Instead of shifting the burden to applicants, any rule change should do the opposite and clarify that, with the exception of legal advertisements, it is DEP's sole responsibility to notify the public through the lists specified in Section 10.2.d.2 and through the inclusion of public comment period dates in the Public Notice Bulletin.

The purpose of public notice of a proposed or pending permit is for the citizens of West Virginia to (a) be aware of the proposed action, (b) to have the time to research the action, and (c) to be able to bring concerns of the action to the appropriate agency's attention, or to demonstrate to the agency endorsement of the proposed action.



The aforementioned have been hampered by DEP's handling of public notice procedures, especially relating to coal mining. We fail to see how handing these duties over to a coal company (applicant) who has profits at stake and wishes to see the proposed permit granted will result in a better and more timely informed citizenry. This is especially troublesome because these coal companies (applicants) know that the greater public notice given to any particular permit allows for a greater opportunity for those opposed to the proposed action to comment against the proposed action, and in some cases, organize substantial opposition.

Those charged with ensuring that the public has the opportunity to review the proposed activity and pending permit, should have nothing to lose or gain via the public notice and comment process. We wish DEP would not shirk away from its public notice duties, but instead stand up and be held accountable for informing West Virginians of proposed coal mining activities.

I thank you for your attention to this most important matter.

Sincerely,



Jeremy P. Müller
Executive Director



west
virginia
highlands
conservancy

MAILING ADDRESS • P. O. Box 306 • Charleston, West Virginia 25321

Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

FAX

FROM: Cindy Rank, Chair
Mining Committee
HC 78, Box 227
Rock Cave, WV
26234

phone: (h) 304 924-5802
(o) 304 924-6263

DATE: 7-20-03

RE: Proposed Regs 38 CSR 2 + 47 CSR 30

TO: WV DEP

pages (including this) 3

ADDITIONAL MESSAGE:

There is a chance i will not be able to be in Nitro Monday night for the public hearing on DEP's proposed Regs —

In case i'm not, please accept these brief comments on behalf of WVHC Mining Committee

Thanks

Cindy



west
virginia
highlands
conservancy

MAILING ADDRESS • P. O. Box 306 • Charleston, West Virginia 25321

Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

Comments RE: proposed regulations 38CSR 2 WV Surface Mine Reclamation Rules
and 47CSR 30 NPDES Rules for Coal Mining Facilities

Submitted to:

DEP Mining and Reclamation on July 21, 2003

Submitted by:

Cindy Rank, Mining Committee Chair

HC 78 Box 227, Rock Cave WV 26234

Phone and fax: 304 924-5802

SURFACE MINE RECLAMATION RULES 38CSR 2-7.6 and 7.7

WVHC objects to proposed sections 7.6 Forestland and 7.7 Wildlife of 38CSR 2.

In its attempt to establish specific requirements for the post mining land use of forestland DEP has failed to set forth standards sufficient to return mined land to the diverse and productive Appalachian forest habitat that exists throughout the coalfields of WV. In so doing the DEP has weakened current regulations. This section is unacceptable.

Having been party to the *Bragg* Consent Decree that resulted in the postmining land use of "commercial forestry and forestry" as an alternative at sites where an AOC variance has been granted, we recognize the difficulties involved in the negotiations that resulted in those improved standards. However the DEP, the WV Legislature and the Federal OSM approved those regulations which, if enforced, could make a positive difference at sites where those standards are applied.

It is now painful to see DEP propose standards that would backslide on current forestry requirements on mined lands where there is not an AOC variance. Implementation of these regs will be harmful to the future reforestation of the Appalachian forest habitat that is the premining land use of many thousands of acres of lands in the coalfields.

The native forest habitat throughout WV coalfields provides for a diverse wildlife population that will also be degraded if the proposed postmining land uses of forestland and wildlife as described in Sections 7.6 and 7.7 are enacted into regulation.

WVHC concurs with, supports and incorporates by reference the comments submitted by the Appalachian Center for the Economy and the Environment (ACEE) Re: these two sections (CSR 38-2-7.6 and 7.7).

WV NPDES RULES FOR COAL MINING 47CSR 30-10.2d.2

WVHC has long been involved and interested in the fair accurate and equitable application of water quality standards at mine sites across WV. One of the problems with the public notice requirements in the water discharge (NPDES) program for Coal Mining in WV has been the inaccessibility of timely notice of draft permits to interested members of the public. This is especially problematic given the short 30 day comment period.

We recognize that DEP does not even require a company to inform the agency when it submits public notice of its draft permit for publication, but rather only requires confirmation sometime before the close of the comment period (e.g. the last day). And for that reason all previous attempts by DEP to inform the general public have been half-assed, half-hearted and certainly not timely.

For the DEP to now require the applicant to send public notice to persons on a mailing list is equally worthless unless some useful timeframe is inserted into the notification process. Simply requiring an applicant to send a copy of the advertisement to the names on the DEP maintained list at the same time the applicant submits it to the newspaper wouldn't be ideal, but it would be a far cry better than what is happening now (i.e. nothing). And it would add a minimum level of usefulness to what is being proposed in 47CSR30-10.2.d.2.

Thank you for the opportunity to comment.



Pages 6 & 7

3.1. Permit Requirements; Exemptions; ~~Prohibitions.~~

3.1.a. Permit Requirements. ~~Except as authorized by a WV/NPDES permit no person shall:~~

3.1.a.1. Except as authorized by a WV/NPDES permit no person shall:

3.1.a.1.A. Discharge pollutants from a point source associated with any coal mine, preparation plant, and all refuse and waste there from;

3.1.a.1.B.2. Make, cause, or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet from a facility for the discharge of pollutants or the effluent there from into the waters of the State;

3.1.a.1.C.3. Acquire, construct, install, modify, or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated waste or effluent from any facility into the waters of the State, or any extension to or addition to such disposal system;

3.1.a.1.D.4. Extend, modify, add to or increase in volume or concentration any pollutants or effluent from any point source associated with any facility in excess of the discharges or disposition specified or permitted under any existing permit; or

3.1.a.1.E.5. Construct, install, modify, open, reopen, operate, or abandon any coal mine, coal preparation plant, or coal preparation plant associated areas whenever such facilities have associated with them or might reasonably be expected to have associated with them a discharge into or pollution of waters of the State except that a WV/NPDES permit shall be required for any coal preparation plant regardless of whether it has, may have or might reasonably be expected to have a discharge.

3.1.a.2.b. A WV/NPDES permit issued pursuant to Section 3 of these rules shall be deemed to be a permit issued in accordance with Article 11 and CWA.

3.1.a.3e. No facility may be an indirect discharger.

3.1.b. Exemptions

3.1.b.1 Discharges of dredged or fill material into waters of the State which are regulated under Section 404 of CWA. Do not require a NPDES permit for the activities regulated under section 404 of the CWA. This exemption shall not relieve any person of any requirement imposed by the State Act or regulations including State Act permit requirements.

**BUREAU OF ENVIRONMENT
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF MINING & RECLAMATION**

BRIEFING DOCUMENT

Rule Title: WV/NPDES RULES FOR COAL MINING FACILITIES. Title 47Series 30

A. AUTHORITY: §22-11-1 et. seq.

B. SUMMARY

The proposed amendments to this rule are being made to recognize that the Federal NPDES program excludes certain discharges from needing a NPDES permit

C. STATEMENT OF CIRCUMSTANCES

The proposed amendments to this rule are being made to recognize that the Federal NPDES program excludes certain discharges from needing a NPDES permit

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

Because those proposed rule complies with federal requirements, the Secretary has determined them no more or less stringent than the applicable federal regulations.

F. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with West Virginia Code §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 the United States of America and West Virginia.

**G. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY
COUNCIL:**

During a June 3, 2003 meeting, the Environmental Protection Advisory Council reviewed and discussed this rule. Their comments are contained in the attached minutes.

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: WV/NPDES RULES FOR COAL MINING FACILITIES

Type of Rule: Legislative Interpretive Procedural

Agency: Department of Environmental Protection

Address: #10 McJunkin Road
Nitro, WV 25143-2506

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	-0-	-0-	-0-	-0-	-0-
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-
CURRENT EXPENSE	-0-	-0-	-0-	-0-	-0-
REPAIRS & ALTERATIONS	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-
OTHER	0	0	0	-0-	-0-

2. Explanation of Above Estimates:

NA

3. Objectives of These Rules:

The objective of the rule change is to recognize that the Federal NPDES program excludes certain discharges from needing a NPDES permit.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

There will be no a increase cost associated with the change.

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

There will be no a increase cost associated with the change.

C. Economic Impact on Citizens/Public at Large.

The proposed rule should not adversely affect in a material manner the citizens or public at large.

Date: _____

Signature of Agency Head or Authorized Representative:

TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES

SERIES 30
WV/NPDES RULES FOR COAL MINING FACILITIES

FILED

700 JUL 31 P 3:18

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§47-30-1. General.

1.1. Scope. -- This rule establishes requirements implementing the powers, duties, and responsibilities of W. Va. Code §22-11-1 with respect to all coal mines, preparation plants and all refuse and waste therefrom in the State.

1.2. Authority. -- W. Va. Code §22-11-1 et. seq.

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

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

1.5. Applicability. -- These rules shall apply to all facilities covered under the "West Virginia Surface Coal Mining and Reclamation Act" and waste therefrom as defined herein.

1.6. Invalidity. -- If any provision of these rules or the application thereof to any person or circumstance is held invalid, then such invalidity shall not affect other provisions or applications of these rules.

1.7. Incorporation by Reference. -- Whenever federal statutes or regulations are incorporated into these rules, the reference is to the statute or regulation in effect on May 15, 1997.

1.8. Promulgation History. -- These rules originally became effective on the 30th day of May, 1985. Amendments to these rules were made effective on April 24, 1986, May 29, 1987 and on May 15, 1997.

1.9. Conflict of Interest. -- The director or his or her authorized representative who has or shares authority to approve all or portions of

permits, either in the first instance or as modified and reissued, 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.

1.9.a. For the purposes of this paragraph:

1.9.a.1. "Significant portion of income" means five thousand dollars (\$5,000) or ten percent (10%) or more of gross personal income for a calendar year, whichever is less, 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.

1.9.a.2. "Permit holders or applicants for a permit" does not include any department or agency of the State.

1.9.a.3. "Income" includes retirement benefits, consultant fees, and stock dividends.

1.9.a.4. 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.

§47-30-2. Definitions.

The definitions set forth in W. Va. Code §22-11-3 apply to these rules 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 of the administrator.

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) Sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 and Article 11, including effluent limitations, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, and pretreatment standards.

2.3. "Article 11" means the West Virginia Water Pollution Control Act, W. Va. Code §22-11-1 et seq.

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" or "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 may 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. "Best Professional Judgement" or "BPJ" means the Director's highest quality technical opinion forming the basis for the terms and conditions of the treatment level required after consideration of all reasonably available and pertinent data, including background water quality data. The treatment levels shall be established by the Director under the Clean Water Act (CWA) Sections 301 and 402.

2.7. "Clean Water Act" or "CWA" means Public Law 92-500, as amended by Public Law 95-217 Public Law 95-576; 33 U.S.C. §1251 et seq. (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution

Control Act Amendments of 1972).

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

2.9. "Coal Mines, Preparation Plants and All Refuse and Waste Therefrom" means any point source covered under 40 C.F.R. Part 434 and any coal mine, coal preparation plant, coal preparation plant associated areas, refuse pile, coal waste pile, or other related activity including any related sewage treatment facilities and bath houses required to have a permit under CWA or Article 11, but excluding dredging operations or the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen (16) and two-thirds percent (2/3%) of the tonnage of minerals removed for purposes of commercial use or sale.

2.10. "Coal Mine" or "Mine" means the area, and any related structures, on and beneath land, used or disturbed in activity related to the extraction, removal or recovery of coal.

2.11. "Coal Preparation Plant" means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and is loaded for transit to a consuming facility.

2.12. "Coal Preparation Plant Associated Areas" means the coal preparation plant yards, immediate access roads, coal refuse piles, tipples, loadouts, and coal storage piles and facilities.

2.13. "Coal Remining Operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before the effective date of the federal Surface Mining Control and Reclamation Act of 1977.

2.14. "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.

2.15. "Director" means the director of the Division of Water Resources.

2.16. "Discharge" when used without qualification means the discharge of a pollutant.

2.17. "Discharge of a Pollutant" means:

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

2.17.b. This definition includes additions of pollutants into waters of the State from: surface runoff which is collected or channeled by man; discharges through pipes, other conveyances owned by a person which do not lead to a treatment works; 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.

2.18. "Discharge Monitoring Report" or "DMR" means the form(s) prescribed by the director and approved by EPA for the reporting of self-monitoring results by permittees under WV/NPDES.

2.19. "Draft Permit" means a document prepared under Section 10.1 of these rules indicating the director's tentative decision to issue, modify, reissue, suspend or revoke a permit.

2.20. "Effluent Limitation" means any restriction established under State or federal law on quantities, discharge rates and concentrations of pollutants which are discharged from point sources into waters of the State.

2.21. "Effluent Limitations Guidelines"

means a regulation published by the Administrator to adopt or revise effluent limitations under CWA Section 304(b) or to adopt or revise levels of effluent quality attainable through the application of secondary or equivalent treatment under CWA Section 301(b)(1)(B). For the coal industry, such regulations are published at 40 C.F.R. Part 434. Sewage facilities governed by these rules are covered under 40 C.F.R. Part 133.

2.22. "Environmental Protection Agency" or "EPA" means the United States Environmental Protection Agency.

2.23. "Existing Source" means any coal mine, preparation plant and all refuse or waste therefrom:

2.23.a. From which there is or may be a discharge of pollutants which commenced prior to September 19, 1977; and

2.23.b. Which is not a new source.

2.24. "Facility" or "Activity" means any coal mine, preparation plant and all refuse and waste therefrom or any other facility or activity (including land or appurtenances thereto) that is subject to the provisions of these rules.

2.25. "General Permit" means a WV/NPDES permit authorizing a category of discharges within a geographical area.

2.26. "Hazardous Substance" means any substance designated under 40 C.F.R. Part 116 pursuant to CWA Section 311.

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

2.28. "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 CWA and

rules promulgated thereunder.

2.29. "Major Facility" means any WV/NPDES facility or activity classified as such by the director or by the Regional Administrator in conjunction with the director.

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

2.31. "National Pollutant Discharge Elimination System" or "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 CWA Sections 307, 318, 402, and 405, including any approved State program.

2.32. "New Source" means any coal mining facility covered under 40 C.F.R. Part 434, including an abandoned mine which is being mined, the construction of which is commenced after the date of promulgation of a new source performance standard (NSPS) or of the proposal of a NSPS which is subsequently promulgated in accordance with Section 306 of CWA.

2.32.a. In making the determination of major alteration, the director shall take into account whether one or more of the following events resulted in a new, altered or increased discharge of pollutants after the date of a new source performance standard or of the proposal of a new source performance standard subsequently promulgated in accordance with Section 306 of CWA:

2.32.a.1. Extraction of a coal seam not previously extracted by that mine;

2.32.a.2. Discharge into a drainage area not previously affected by wastewater discharge from the facility covered under 40 C.F.R. Part 434;

2.32.a.3. Extensive new surface disruption at the mining operation; or

2.32.a.4. A construction of a new shaft, slope, or drift.

2.32.b. For a preparation plant or associated areas under 40 C.F.R. Part 434, a new source shall be a preparation plant or associated area, the construction of which is commenced after the date of promulgation of a new source performance standard (NSPS) or of the proposal of a NSPS which is subsequently promulgated in accordance with Section 306 of CWA, and which meets the criteria of Section 12.3 of these rules.

2.32.c. No provision in this definition shall be deemed to affect the classification of a facility as a new source which was so classified under previous EPA regulations, but would not be classified as a new source under this definition. Nor shall any provision in this definition be deemed to affect the standards applicable to such facilities, except as provided in Section 12.3 of these rules.

2.33. "Operator" means any person, firm, or company who is granted or who should obtain a WV/NPDES permit.

2.34. "Owner" means the owner of the facility subject to regulation.

2.35. "Point Source" means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

2.36. "Pre-Existing Discharge" means any discharge at the time of permit application under this subsection 301(p) of the Federal Clean Water Act. A pre-existing discharge may originate from within the coal mining operation or from outside the coal mining operation provided there is a demonstrated hydrological connection between the coal mining operation and the pre-existing discharge.

2.37. "Privately Owned Treatment Works" means any device or system which is used to treat wastes other than the owner's wastes and is not a

POTW.

2.38. "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, byproduct, or waste product.

2.39. "Proposed Permit" means a WV/NPDES permit prepared after the close of the comment period (and, when applicable, any public hearing) and which is sent to EPA (pursuant to the Memorandum of Agreement) for review before final issuance by the director.

2.40. "Publicly Owned Treatment Works" or "POTW" means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality, public service district, sanitary district, or other public body. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

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

2.42. "Regional Administrator" means the Regional Administrator of Region III of the Environmental Protection Agency, or an authorized representative.

2.43. "Reissuance" means the issuance of a permit to a facility which has a previously issued effective permit and includes automatic revocation of the previously issued permit.

2.44. "Remined Area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the federal Surface Mining Control and Reclamation Act of 1977.

2.45. "Schedule of Compliance" means a schedule of remedial measures in a WV/NPDES permit, including an enforceable sequence of interim requirements (for example, actions,

operations, or milestone events) leading to compliance with CWA, Article 11, and rules promulgated thereunder.

2.46. "Secretary" means the Secretary of the West Virginia Department of Environmental Protection.

2.47. "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.

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

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

2.50. "Toxic Pollutant" means any pollutant listed as a toxic under CWA Section 307(a)(1) (see Appendix A of these rules).

2.51. "Variance" means any mechanism or provision under CWA Sections 301 or 316 or under 40 C.F.R. 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 CWA Sections 301(c), 301(g), 301(i), 302(b)(2), and 316(a) where appropriate.

2.52. "West Virginia Surface Coal Mining and Reclamation Act" or WVSCMRA" means W. Va. Code §22-3-1 et seq..

2.53. "WV/NPDES Application" or "Application" means the forms prescribed by the director and approved by the EPA for applying for a permit or permit modification, including any additions, revisions or modifications to the WV/NPDES forms.

2.54. "WV/NPDES Permit" or "Permit" means an authorization issued by the director to implement the requirements of Article 11 including modifications to permits.

2.55. "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§47-30-3. Permits.

3.1. Permit Requirements; Exemptions; ~~Prohibitions~~

3.1.a. Permit Requirements.

3.1.a.1. Except as authorized by a WV/NPDES permit no person shall:

3.1.a.1.A. Discharge pollutants from a point source associated with any coal mine, preparation plant, and all refuse and waste therefrom;

3.1.a.1.B.. Make, cause, or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet from a facility for the discharge of pollutants or the effluent therefrom into the waters of the State;

3.1.a.1.C. Acquire, construct, install, modify, or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated waste or effluent from any facility into the waters of the State, or any extension to or addition to such disposal system;

3.1.a.1.D. Extend, modify, add to or increase in volume or concentration any pollutants or effluent from any point source associated with

any facility in excess of the discharges or disposition specified or permitted under any existing permit; or

3.1.a.1.E. Construct, install, modify, open, reopen, operate, or abandon any coal mine, coal preparation plant, or coal preparation plant associated areas whenever such facilities have associated with them or might reasonably be expected to have associated with them a discharge into or pollution of waters of the State except that a WV/NPDES permit shall be required for any coal preparation plant regardless of whether it has, may have or might reasonably be expected to have a discharge. 3.1.a.2. A WV/NPDES permit issued pursuant to Section 3 of these rules shall be deemed to be a permit issued in accordance with Article 11 and CWA.

3.1.a.3. No facility may be an indirect discharger.

3.1.b. Exemptions

3.1.b.1. Discharges of dredged or fill material into waters of the State which are regulated under Section 404 of CWA. Do not require a NPDES permit for the activities regulated under section 404 of the CWA. This exemption shall not relieve any person of any requirement imposed by the State Act or regulations including State Act permit requirements.

3.2. Prohibition Against Issuing a WV/NPDES Permit.

3.2.a. A WV/NPDES permit may not be issued:

3.2.a.1. When the conditions of the permit do not provide for compliance with the applicable requirements of CWA and Article 11;

3.2.a.2.. By the director where the Regional Administrator has objected to issuance of the WV/NPDES permit;

3.2.a.3. When, in the judgment of the

Secretary of the Army, anchorage and navigation in or on any waters of the State would be substantially impaired by the discharge;

3.2.a.4. For the discharge of any radiological, chemical, or biological warfare agent or high level radioactive waste;

3.2.a.5. For any discharge inconsistent with a plan or plan amendment approved under CWA Section 208(b);

3.2.a.6. 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 unless the applicant has met the requirements of Section 4.5.e. of these rules or has met the requirements for a variance under Section 4.5.f. of these rules;

3.2.a.7. When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or

3.2.a.8. To any facility which is an indirect discharger.

3.3. Denial of Permits. WV/NPDES permits may be denied for noncompliance with Article 11 or these rules including the reasons specified in Section 8.4 of these rules or when a surface mining permit under WVSCMRA has been denied. In the case of an application for reissuance, an outstanding violation of any existing environmental permit is grounds for denial. Any denial of the WV/NPDES permit is appealable to the West Virginia Environmental Quality Board in accordance with the procedures and authority of W. Va. Code §22-11-21.

3.4. Effect of a Permit.

3.4.a. Except for any toxic effluent standards and prohibitions imposed under CWA Section 307, compliance with a permit during its term constitutes compliance, for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11. However, a permit may be modified, reissued or revoked

during its term for cause as set forth in Section 8 of these rules.

3.4.b. Issuance of a WV/NPDES permit does not convey any property rights of any sort, or any exclusive privilege.

3.5. Duration and Transferability of Permits.

3.5.a. Duration. WV/NPDES permits shall be effective for a fixed term not to exceed five (5) years. The director may shorten the term of a WV/NPDES permit to ensure that expiration dates of WV/NPDES permits in the same watershed coincide, but a WV/NPDES permit may not be shortened to less than three years for the sole purpose of reconciling expiration dates of WV/NPDES permits unless the permittee agrees.

3.5.b.

Extension. An extension for a WV/NPDES permit may be initiated by either the permittee or the Director. Permits extended under Section 3.5.b. of these rules remain fully effective and enforceable. When a WV/NPDES permit is reissued the existing permit is automatically void.

3.5.b.1 Reissuance Extensions. Prior to the expiration date of the permit, the permittee may request an extension of their WV/NPDES permit for the purpose of compiling or processing a reissuance application. Such requests must be in writing to the Director and shall not be granted for more than twelve (12) months beyond the expiration date. The request for extension shall be signed as required under Section 4.7 of these rules. After receiving the reissuance application the Director may extend any WV/NPDES permit for the purpose of ensuring coverage of a facility during processing of the reissuance. Successive extensions may be granted for periods not to exceed twelve months if the Director determines additional time is necessary in order to process the application for reissuance.

3.5.b.2 Watershed Framework Extensions. The Director may grant a one time extension of a WV/NPDES permit for up to twenty-four (24) months for the purpose of adjusting expiration dates to coincide with the W

V Watershed Management Framework initiative cycle dates of the watershed groups.

3.5.c. Transfer of Permits. Permits may be transferred from a permittee to a new operator by either modifying an existing permit pursuant to Section 8.2.c.1.D. of these rules, reissuing the permit under Section 8.3.c.3. of these rules or by an automatic transfer under Section 3.5.d. of these rules. The proposed permittee shall demonstrate that he or she has accepted all necessary permit responsibilities.

3.5.d. Automatic Transfer of Permits. Any permit may be automatically transferred to a new permittee if:

3.5.d.1. The current permittee notifies the director on the forms prescribed, at least thirty (30) days in advance of the proposed transfer date;

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

3.5.d.3. The director does not notify the existing permittee and the proposed new permittee of his intent:

3.5.d.3.A. To deny the transfer request;

3.5.d.3.B. To require the transfer through permit modification;

3.5.d.3.C. To require the transfer through reissuance and require a new application be filed rather than approving the transfer; or

3.5.d.3.D. Notification under Section 3.5.d.3. of these rules is not received by the permittee and proposed new permittee within forty-five (45) days after receipt of the current permittee's notification under Section 3.5.d.1. of these rules.

3.5.e. Permits Issued After July 1, 1984. A permit may be issued to expire on or after the statutory deadline set forth in CWA Sections 301(b)(2)(A), 301(b)(2)(C), and 301(b)(2)(E) (July 1, 1984) if the permit includes effluent limitations to meet the requirements of CWA Sections 301(b)(2)(A), 301(b)(2)(C), 301(b)(2)(D), 301(b)(2)(E), and 301(b)(2)(F), whether or not the applicable effluent limitations guidelines have been promulgated or approved. A determination that a particular discharger falls within a given industrial category for purposes of setting a permit expiration date under this paragraph is not conclusive as to the discharger's inclusion in the industrial category for any other purposes, and does not prejudice any rights to challenge or change that inclusion at the time that a permit based on that determination is formulated.

3.6. NPDES Permits Issued by EPA and the Director of the Office of Water Resources.

3.6.a. The director shall issue, administer and enforce all WV/NPDES or Article 11 permits relating to coal mines, preparation plants and all refuse and waste therefrom.

3.6.b. All NPDES permits relating to coal mines, preparation plants and all refuse and waste therefrom that have been adopted by the director prior to the original effective date of these rules (May 30, 1985) shall be administered and enforced by the director: Provided, That in the event of a conflict between an adopted NPDES permit and a WV/NPDES permit or Article 11 permit the more stringent provisions shall apply.

3.6.c. The director may adopt as WV/NPDES permits all NPDES permits relating to coal mines, preparation plants and all refuse and waste therefrom issued by the Regional Administrator which are transferred by the Regional Administrator and accepted by the director. Acceptance of a NPDES permit from the Regional Administrator shall not supersede any permit previously issued under Article 11. All provisions of both permits shall be in force, except that, in the event of a conflict, the more stringent provisions shall apply. All permits

relating to the same facility shall be deemed consolidated and considered as a single permit for the purposes of reporting, administration and enforcement.

3.6.d. Unexpired permits previously issued under Article 11 shall be void whenever a new WV/NPDES permit is issued for the same facility. Any unexpired NPDES permit issued by the EPA shall not be enforceable by the director upon the issuance of a new WV/NPDES permit for the same facility.

§47-30-4. Application For Permits.

4.1. Duty to Apply. Unless covered under a general permit issued in accordance with Section 13 of these rules, any person discharging pollutants, proposing to discharge pollutants, or proposing to undertake any activity listed in Section 3.1.a. of these rules who does not have an effective permit for such discharge or activity shall submit a complete application in the manner and form prescribed by the director and in accordance with the provisions of Section 4 of these rules.

4.2. Responsible Party Applies. When a facility or activity is owned by one person but is operated by another, the operator shall be the applicant. The director may require documentation of the WV/NPDES permit responsibility and liability of the owner and operator and may propose and issue the WV/NPDES permit to the responsible person(s), but only after notice to the responsible person(s), or the director may refuse to issue the WV/NPDES permit until the responsible person applies for the WV/NPDES permit.

4.3. Completeness. Any person who requires a WV/NPDES permit shall complete, sign, and submit to the director a WV/NPDES application. An application for a permit is complete when the director receives an application form and any supplemental information including maps, plans, designs, and other application materials which are completed to the director's satisfaction. The completeness of any application for a WV/NPDES permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. The director shall not begin the processing of a permit until the applicant has fully complied with the application requirements.

4.4. Time to Apply.

4.4.a. Reissuance. Any person with an existing WV/NPDES permit shall submit an application for reissuance of such permit at least one hundred and twenty (120) days before the expiration date of the existing WV/NPDES,

NPDES, or Article 11 permit.

4.4.b. Permit to Abandon. Any person proposing to abandon a deep mine facility under W. Va. Code §22-11-8(b)(6) and Section 3.1.a.5. of these rules shall apply for an abandonment permit at least one hundred and eighty (180) days prior to sealing of the deep mine. A Phase II bond release request under WVSCMRA shall be considered an application to abandon a surface mine facility under W. Va. Code §22-11-8(b)(6) and Section 3.1.a.5. of these rules.

4.5. Information Required From Applicants.

4.5.a. Information Required From All Applicants. All applicants for WV/NPDES permits shall provide the director with a complete application in the manner and on a form prescribed by the director. The form may require information in addition to that specified in Section 4.5 of these rules. Additionally all applicants for WV/NPDES permits must submit a complete application for a surface mining permit under WVSCMRA. Incorporation by reference of material supplied in the WVSCMRA application is permissible in consolidated applications.

4.5.a.1. The activities conducted by the applicant which require it to obtain a permit.

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

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

4.5.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.

4.5.a.5. All relevant environmental permits necessary for the construction or operation or both of this facility such as dredge and fill permits under CWA Section 404, and

permits issued under WVSCMRA.

4.5.a.6. A topographic map drawn to a reasonable scale including, but not limited to, the following:

4.5.a.6.A. The facility boundary and extending at least one thousand (1000) feet beyond, to include the boundary of each WVSCMRA permit (appropriately labeled) being covered by the application.

4.5.a.6.B. Any adjacent deep and strip mines and auger holes and the thickness of barriers between the proposed mine and adjacent mine or auger holes;

4.5.a.6.C. Water level and its elevation in any adjacent deep mines;

4.5.a.6.D. Proposed location of all mine seals and sectional dams if any;

4.5.a.6.E. All proposed mine portals and boreholes;

4.5.a.6.F. Surface and seam elevations of all mine openings;

4.5.a.6.G. The north line;

4.5.a.6.H. General strike and dip direction of the mineral bed and the average dip;

4.5.a.6.I. Each of its appropriately labeled monitoring, intake and discharge points;

4.5.a.6.J. Each of its hazardous waste treatment, storage or disposal facilities;

4.5.a.6.K. 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.

4.5.a.6.L. The map must be notarized and certified by a Registered

Professional Engineer or Licensed Land Surveyor in accordance with Section 4.7.d. of these rules, and notarized;

4.5.a.7. Outlet and Monitoring Point Location. For each point source and monitoring point, the latitude and longitude to the nearest second, elevation and the name of the immediate receiving/sampling water and river mile point.

4.5.a.8. Line Drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing influent to the treatment units and effluent. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under Section 4.5.a.9. of these rules. 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 through historic record, the applicant may instead provide the flows used to design the treatment unit.

4.5.a.9. Average Flows and Treatment. On the Line Drawing or in a narrative identify each type of process, operation, or production area which contributes wastewater to the effluent for each outlet, including process wastewater and storm water runoff (including material storage area runoff), the average flow each process contributes and a description of the treatment, if any, the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations, or production areas may be described in general terms.

4.5.a.10. Intermittent Flows. If any of the discharges described in Section 4.5.a.9. of these rules 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).

4.5.a.11. 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.

4.5.a.12. Biological Information. An identification of any biological monitoring data 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.

4.5.a.13. Contract Analyses. If a contract laboratory or consulting firm performed any of the analyses required by Section 4.5.b.1. of these rules, the identity of each laboratory or firm and the analyses performed.

4.5.a.14. Plan for Abandonment. The information required in a plan for abandonment pursuant to Section 4.5.d. of these rules.

4.5.a.15. Discharges into Noncomplying Waters. Compliance with Section 4.5.e. of these rules.

4.5.a.16. Existing Source Variances. Compliance with Sections 4.5.f. and 4.5.g. of these rules if applicable and meets the definition of Existing Source.

4.5.a.17. Used or Manufactured Toxics. A listing of any toxic pollutant which the applicant does or expects to use or manufacture as an intermediate or final product or by-product. The director may waive or modify this requirement for any applicant if the applicant demonstrates that it would be unduly burdensome to identify each toxic pollutant and the director has adequate information to issue the permit.

4.5.b. Information Required For Pre-Existing Discharges and Reissuance Applications. All applicants (including all applicants for reissuance) for WV/NPDES permits whose facilities have pre-existing discharges shall also provide the following information to the director:

4.5.b.1. Effluent Characteristics. Information on the discharge of pollutants specified in Sections 4.5.b.1.A. through 4.5.b.1.F.

of these rules. When "quantitative data" (concentration and mass) for a pollutant is required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 C.F.R. Part 136. When no analytical method is approved, the applicant may use any suitable method but must provide a description of the method. Grab samples must be used for pH, temperature, cyanide, total phenols, total residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. However, a minimum of one (1) grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than twenty-four (24) hours, and a minimum of one (1) to four (4) grab samples may be taken for storm water discharges depending on the duration of the discharge. One grab sample shall be taken in the first hour (or less) of discharge with one additional grab sample taken in each succeeding hour of discharge up to a minimum of four (4) grab samples for discharges lasting four or more hours. In addition, the director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged. When an applicant has two (2) or more outlets with substantially identical effluents, the director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outlet.

4.5.b.1.A. Mandatory Testing:

4.5.b.1.A.1. Every applicant must report quantitative data for every outlet for the following pollutants. All levels must be reported as concentration and as total mass except for temperature, pH, and flow:

4.5.b.1.A.1.(a)
Biochemical Oxygen Demand (BOD-5day);

4.5.b.1.A.1.(b) Chemical
Oxygen Demand (COD);

4.5.b.1.A.1.(c) Total
Organic Carbon (TOC);

4.5.b.1.A.1.(d) Total
Suspended Solids (TSS);

4.5.b.1.A.1.(e) Ammonia
(as N);

4.5.b.1.A.1.(f)
Temperature (both winter and summer);

4.5.b.1.A.1.(g) pH;

4.5.b.1.A.1.(h) Discharge
Flow;

4.5.b.1.A.1.(i) Fecal
Coliform (if believed present or if sanitary waste
is or will be discharged);

4.5.b.1.A.1.(j) Total
Residual Chlorine (if chlorine is used); and

4.5.b.1.A.1.(k) Oil and
grease.

4.5.b.1.A.2. The director may waive the testing and reporting requirements for any of the pollutants or flow listed in Section 4.5.b.1.A.1. of these rules if the applicant submits a request for a waiver before or with his application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements.

4.5.b.1.B. Each applicant contributing to a discharge must report quantitative data for the pollutants listed in Appendix B of these rules in each outlet.

4.5.b.1.C. Potentially Required Testing. Each applicant must indicate whether the applicant knows or has reason to believe that the pollutant is discharged from the outlet (see Section 4.5.b.1.F. of these rules) and must report for each outlet quantitative data for the following pollutants:

4.5.b.1.C.1. All pollutants

listed in Appendix B or Appendix C of these rules for which quantitative data is not otherwise required under Section 4.5.b.1.B. of these rules. For every pollutant listed in Appendix B or Appendix C expected to be discharged in concentrations of ten (10) ppb or greater, the applicant must report quantitative data. Where acrolein, acrylonitrile, 2, 4-dinitrophenol, or 2-methyl-4,6-dinitrophenol is expected to be discharged in concentrations of one hundred (100) ppb or greater, the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than ten (10) ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. Where acrolein, acrylonitrile, 2,4-dinitrophenol, or 2-methyl-4,6-dinitrophenol is expected to be discharged in concentrations less than one hundred (100) ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying for a small business exemption under Section 4.5.b.2. of these rules is not required to analyze for pollutants listed in Appendix C of these rules.

4.5.b.1.C.2. All pollutants in Appendix D of these rules. If an applicable effluent limitations guideline either directly limits the pollutant listed in Appendix D or, by its express terms, indirectly limits the pollutant listed in Appendix D through limitations of an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

4.5.b.1.D. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Appendix E of these rules are discharged from each outlet (see Section 4.5.b.1.E. of these rules). For every pollutant listed in Appendix E that is expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

4.5.b.1.E. Each applicant must report quantitative data generated using a screening procedure not calibrated with analytical standards, for TCDD (2,3,7,8-tetrachlorodibenzo-p-dioxin) if:

4.5.b.1.E.1. The applicant uses or manufactures 2, 4, 5,-trichlorophenoxyacetic acid (2,3,5-T); 2-(2,4,5,-trichlorophenoxy) propanoic acid (Silvex or 2,4,5-TP); 2-(2,4,5,-trichlorophenoxy)ethyl 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

4.5.b.1.E.2. The applicant knows or has reason to believe that TCDD is or may be present in an effluent.

4.5.b.1.F The requirements in Sections 4.5.b.1.C. and 4.5.b.1.D. of these rules that an applicant must provide quantitative data for certain pollutants known or believed 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. 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.

4.5.b.2. Small Business Exemption. Coal mines or preparation plants with a probable total annual production of less than one hundred thousand (100,000) tons per year per mine or plant are exempt from the requirements in Section 4.5.b.1.C.1. of these rules to submit quantitative data for the pollutants listed in Appendix C of these rules.

4.5.c. Additional Information.

4.5.c.1. In addition to the information reported on the application form, applicants shall provide to the director, at his or her request, such other information as the director may reasonably

require to assess the facility and discharges from the facility and to determine whether to issue a WV/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.

4.5.d. Plan for Abandonment and Application to Abandon a Mine.

4.5.d.1. Deep Mines. The plan for abandonment may incorporate information contained in the surface mining permit under WVSCMRA. Unless waived in writing in whole or in part by the director, an applicant for a deep mine under Section 4.5.b. of these rules shall provide a plan for abandonment which contains the following information:

4.5.d.1.A. A deep mine development map to scale showing among other things:

4.5.d.1.A.1. The proposed mine boundary for the initial five (5) years of the mine and the proposed final limits of mining (to be shown in different colors); thickness of barriers against outcrop;

4.5.d.1.A.2. Any adjacent deep and strip mines and auger holes and the thickness of barriers between the proposed mine and adjacent mines or auger holes;

4.5.d.1.A.3. Predicted final water elevation in the proposed mine;

4.5.d.1.A.4. Water level and its elevation in any adjacent mines;

4.5.d.1.A.5. Seam structural contours at ten (10) feet intervals and surface elevation contours at an interval not to exceed those available on the latest U.S.G.S. 7.5-minute quadrangle, fault plane or weak plane;

4.5.d.1.A.6. Proposed location of all mine seals and sectional dams if any;

4.5.d.1.A.7. All proposed mine portals and boreholes;

4.5.d.1.A.8. Surface and seam elevations of all mine openings;

4.5.d.1.A.9. The north line;

4.5.d.1.A.10. General strike and dip direction of the mineral bed and the average dip; and

4.5.d.1.A.11. The map must be notarized and certified by a Registered Professional Engineer or Licensed Land Surveyor in accordance with Section 4.7.d. of these rules, and notarized;

4.5.d.1.B. If there are mine workings either below or above the mine workings to be abandoned, information on whether they are active, inactive or abandoned; the final limits of mining (to be shown in different colors on the mine map in Section 4.5.d.1.A.1. of these rules); elevation of water pools in these mines; the thickness and nature of parting between the workings; whether water from the mine to be abandoned will flow through the adjacent mines or the mines above or below; and whether water from adjacent mines or mines below or above will flow through the mine to be abandoned and, if it will, the quality of the water.

4.5.d.1.C. The type and number of permanent seals proposed, their design details and drawings, and the materials to be used for construction.

4.5.d.1.D. Whether there will or might reasonably be expected to be a discharge from the mine after abandonment; the maximum rate of discharge expected; whether the discharge, if any, will need treatment; if treatment is required, the type of treatment proposed and its details; and, if treatment will not be required, the reasons for assuming so.

4.5.d.1.E. Provisions that shall be made for assuring acceptable water quality from any discharges after abandonment of the mine.

Should the mine become filled with water, the effect on groundwater quality and plans to eliminate or minimize the adverse effects if any on groundwater quality.

4.5.d.1.F. Any other information which the director may deem necessary to evaluate the water pollution potential of the facility.

4.5.d.1.G. The information required in West Virginia Code of State Rules, Office of Mining and Reclamation, Title 38, Series 2, Section 3.13.

4.5.d.2. Other facilities requiring plans for abandonment. For all coal mines other than deep mines, preparation plants, and preparation plant associated areas, the reclamation plan required under the WVSCMRA permit shall be the plan for abandonment.

4.5.d.3. Plan for Abandonment; Reissuance. Unless waived in writing in whole or in part by the director, in addition to the information required by Section 4.5.a. of this rule, an applicant for the reissuance of a WV/NPDES permit shall provide information to update or add to the information required in Sections 4.5.d.1. and 4.5.d.2. of these rules.

4.5.d.4. Application for Permit to Abandon.

4.5.d.4.A. For Deep Mines. An application for a permit to abandon shall contain the information requested under Sections 4.5.d.1. and 4.5.d.2. of these rules updated to show final determinations which reflects current knowledge on each item: Provided, That where the information submitted under Sections 4.5.d.1. and 4.5.d.2. of these rules has not significantly changed, further updating will not be required, and the following:

4.5.d.4.A.1. A statement from the applicant which predicts the likelihood of a discharge from the abandoned mine;

4.5.d.4.A.2. At least one

representative cross section map across the coal seam and overburden along a line parallel to the dip of the mineral bed showing the name and thickness of each strata above and the strata ten (10) feet below the lowest mineral bed being mined, the position of the water table and the direction of the flow of water, the final likely level of water in the mineral bed on abandonment, and the likely extent of fracturing in the overburden due to mining. The line of cross section shall be shown on the mine map submitted under Section 4.5.a.6 or 4.5.d.1. of these rules; and

4.5.d.4.A.3. A report on the quality of water being discharged from the mine during the past two (2) years or, if the data is unavailable, an analysis of current discharge quality and a prediction of expected discharge quality should a discharge occur.

4.5.d.4.B. For facilities other than deep mines, the application for a permit to abandon shall be the application for a Phase II bond release under WVSCMRA.

4.5.e. Discharges into Noncomplying Waters. The owner or operator of a facility proposing to discharge into a water segment which does not meet applicable water quality standards for the pollutants to be discharged or is not expected to meet those standards even after the application of effluent limitations required by CWA Sections 301(b)(2)(A)2, 301(b)(2)(E), or 306, and for which the State has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate before the close of the comment period that either:

4.5.e.1. There are sufficient remaining pollutant load allocations to allow for the discharge;

4.5.e.2. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards; or

4.5.e.3. That the applicant qualifies for an alternate water quality based effluent

limitation by making an adequate demonstration to the director pursuant to West Virginia Code of State Rules, West Virginia Environmental Quality Board, Series 1, Section 8.

4.5.f. Variance Requests. A facility may request a variance from effluent limitations under any of the following statutory or regulatory provisions within the times specified. Requests must explain how the requirements of EPA variance regulations have been met. EPA regulations governing the variances under Sections 4.5.f.1. through 4.5.f.4. of these rules are promulgated at 40 C.F.R. Part 125.

4.5.f.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 Section 10.2 of these rules. The request shall explain how the requirements of 40 C.F.R. Part 125, Subpart D have been met.

4.5.f.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 CWA Section 301(c) because of the economic capability of the owner or operator, or pursuant to CWA Section 301(g) because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:

4.5.f.2.A. Submitting an initial request to the Environmental Protection Agency Region III Administrator, as well as to the director, stating the name of discharger, the permit number, the outlet number(s), the applicable effluent guideline, and whether the discharger is requesting a CWA Section 301(c) modification or a CWA Section 301(g) modification or both. This request must have been filed not later than two hundred and seventy (270) days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; or

4.5.f.2.B. Submitting a completed request no later than the close of the public comment period under Section 10.2 of these rules demonstrating that the applicable requirements of 40 C.F.R. Part 125 have been met, unless an extension is granted under Section 4.5.g.2. of these rules.

4.5.f.2.C. Requests for variance from effluent limitations not based on effluent limitation guidelines need only comply with Section 4.5.f.2.B. of these rules and need not be preceded by an initial request under Section 4.5.f.2.A. of these rules.

4.5.f.3. Innovative Technology. An extension under CWA Section 301(k) from the statutory deadline of July 1, 1984 under CWA 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 Section 10.2 of these rules for the discharger's initial permit requiring compliance with CWA Section 301(b)(2)(A). The request shall demonstrate that the requirements of 40 C.F.R. §124.13 and Part 125, Subpart C have been met.

4.5.f.4. Water Quality Related Effluent Limitations. A modification to any water quality related effluent limitation under CWA Section 302(b)(2) of requirements under CWA Section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under Section 10.2 of these rules on the permit from which the modification is sought.

4.5.g. Expedited Variance Procedures and Time Extensions.

4.5.g.1. Notwithstanding the time requirements in Section 4.5.f. of these rules, the director 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 director may require the applicant as a condition of consideration of any potential variance request to submit information explaining how the requirements 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.

4.5.g.2. A discharger who cannot file a complete request required under Section 4.5.f.2.B. of these rules may request an extension. The extension may be granted or denied at the discretion of the director. Extensions shall be no more than six (6) months in duration.

4.6. Record Keeping by Applicant. Applicants 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.

4.7. Signatories to Permit Applications and Reports.

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

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

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

4.7.a.1.B. The manager of one or more manufacturing, production, or operating facilities employing more than two hundred and fifty (250) 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.

4.7.a.2. For a partnership or sole

proprietorship: by a general partner or the proprietor.

4.7.b. Reports. All reports required by WV/NPDES permits, and other information requested by the director for compliance with Article 11, shall be signed by a person described in Section 4.7.a. of these rules, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

4.7.b.1. The authorization is made in writing by a person described in Section 4.7.a. of these rules;

4.7.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, superintendent, an individual or position having overall responsibility for environmental matters for the company, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

4.7.b.3. The written authorization is submitted to the director.

4.7.c. Changes to Authorization. If an authorization under Section 4.7.b. of these rules 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 Section 4.7.b. of these rules must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.

4.7.d. Certification. Any person signing a document under Section 4.5.a.6.L., 4.5.d.1.A.11., 4.7.a. or 4.7.b. of these rules shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under the 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."

§47-30-5. Conditions Applicable To All Permits.

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES 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; Penalties.

5.1.a. The permittee must comply with all conditions of a WV/NPDES permit. Permit noncompliance constitutes a violation of CWA and Article 11 and is grounds for enforcement action; for WV/NPDES permit modification, suspension or revocation; or for denial of a WV/NPDES permit reissuance application.

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

5.1.c. The Clean Water Act and Article 11 provide that any person who violates a permit condition implementing CWA Sections 301, 302, 306, 307, 308, 318 or 405, or any provision of a WV/NPDES permit, or any rule or regulation promulgated under Article 11, is subject to a civil penalty not to exceed twenty-five thousand dollars (\$25,000) per day of such violation. Any person who willfully or negligently violates permit conditions implementing CWA Sections 301, 302, 306, 307, or 308, or any provision of Article 11,

or a WV/NPDES permit, is subject to a fine of not less than two thousand and five hundred dollars (\$2,500) per day of violation nor more than twenty-five thousand dollars (\$25,000) per day of violation, or by imprisonment for not more than one (1) year, or both.

5.1.d. Any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under a WV/NPDES permit shall, upon conviction, be punished by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000) per violation, or by imprisonment for not more than six (6) months per violation, or both.

5.1.e. The Clean Water Act and Article 11 provide that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000) per violation, or by imprisonment for not more than six (6) months per violation, or by both.

5.1.f. The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the West Virginia Environmental Quality Board. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein.

5.1.g. Nothing in Section 5.1 of these rules shall be construed to limit or prohibit any other authority the secretary or director may have under Article 3 or Article 11 of the West Virginia Code, or to relieve the permittee from any responsibilities, liabilities or penalties for not complying with West Virginia Code of State Rules, West Virginia Environmental Quality Board, Title 60, Series 1 and 3.

5.2. Duty to Reapply. If the permittee wishes to continue an activity regulated by the WV/NPDES permit after the expiration date of the permit, the permittee must apply for reissuance of the permit at least one hundred and twenty (120) days prior to expiration of the permit.

5.3. Duty to Halt or Reduce Activity Not a Defense. Upon reduction, loss, or failure of the treatment facility the permittee shall, to the extent necessary to maintain compliance with the WV/NPDES permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power to the treatment facility fails or is reduced or lost. 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 the permit.

5.4. Duty to Mitigate. The permittee shall take all reasonable steps to minimize, correct, or prevent any discharge in violation of the WV/NPDES 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 the WV/NPDES permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of backup auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

5.6. Permit Actions. The WV/NPDES permit may be modified, reissued, suspended, or revoked for cause (see Section 8 of these rules). The filing of a request by the permittee for a permit

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

5.7. Transfer. The WV/NPDES permit is not transferable to any person except after notice to the director and by following one of the procedures listed in Section 3.5.c. of these rules.

5.8. Property Rights. The WV/NPDES permit does not convey any property rights of any sort nor any exclusive privilege.

5.9. Duty to Provide Information. The permittee shall furnish to the director, within a specified time, any information which the director may request to determine whether cause exists for modifying, reissuing, suspending, or revoking the WV/NPDES permit, or to determine compliance with the permit. The permittee shall also furnish to the director, upon request, copies of records required to be kept by the permit.

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

5.10.a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the WV/NPDES permit;

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

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

5.10.d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by Article 11, any substances or parameters at any location.

5.11. Monitoring and Records.

5.11.a. Monitoring must be conducted according to test procedures approved under 40 C.F.R. Part 136, unless other test procedures have been specified in the WV/NPDES permit.

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

5.11.c. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original chart recording for continuous monitoring instrumentation, copies of all reports required by the WV/NPDES permit, and records of all data used to complete the application for the 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 director at any time.

5.11.d. Records of monitoring information shall include:

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

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

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

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

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

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

5.11.d.7. This information need not be submitted to the director, unless requested, but should be retained in accordance with Section

5.11.c. of these rules.

5.11.e. Monitoring results shall be reported on DMRs and at the intervals specified in the permit. DMR's should be sent to the person designated in the permit so that they are received no later than twenty (20) days following the end of the reporting period.

5.11.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 under 40 C.F.R. Part 136 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. Such increased frequency shall also be indicated.

5.11.g. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the director in the permit.

5.12. Signatory Requirement. All applications, reports, or information submitted to the director shall be signed and certified as required in Section 4.7 of these rules.

5.13. Reporting Requirements.

5.13.a. Planned Changes. The permittee shall give notice to the director as soon as possible but not later than thirty (30) days prior to any planned physical alterations or additions to the permitted facility and of any planned changes in the method of operating the facility which may affect the nature or quantity of the discharge, or qualify that facility for designation as a new source under Section 2.30 of these rules.

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

5.13.c. Compliance Schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final

requirements contained in any compliance schedule of the permit shall be submitted no later than fourteen (14) days following each schedule date.

5.13.d. Immediate Reporting.

5.13.d.1. The permittee shall report any noncompliance with the WV/NPDES permit or Article 11 which may endanger health or the environment immediately but not later than twenty-four (24) hours after becoming aware of the circumstances by using the Department of Environmental Protection's Emergency Notification Number 1-800-654-3312. A written submission shall be provided to the person designated in the permit 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 the noncompliance is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

5.13.d.2. The following shall also be reported immediately but not later than twenty-four (24) hours after:

5.13.d.2.A. Any unanticipated bypass (see Section 5.14.a. of these rules) which exceeds any effluent limitation in the permit;

5.13.d.2.B. Any spill or accidental discharge (upset), as defined in Section 5.15 of these rules, shall be reported to the director via the Department of Environmental Protection's Emergency Notification Number 1-800-654-3312. Such notification shall set forth the time and place of such spill or discharge, type and quantities of pollutants, any actions taken to stop or mitigate the spill or accidental discharge, and any other information as may be requested. A written verification of such notification shall be submitted upon request of the person designated in the permit; and

5.13.d.2.C. Violation of a

maximum daily discharge limitation for any of the pollutants which the director has required in the permit to be reported immediately.

5.13.d.3. The director may waive the written report required under Section 5.13.d.2. of these rules on a case-by-case basis if the oral report has been received in accordance with the above.

5.13.d.4. Notification Levels. The permittee must notify the director in writing as soon as they know or have reason to believe:

5.13.d.4.A. 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":

5.13.d.4.A.1. One hundred micrograms per liter (100 ug/l);

5.13.d.4.A.2. Two hundred (200) micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred (500) 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;

5.13.d.4.A.3. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with Section 4.5.b.1. of these rules; and

5.13.d.4.A.4. The level established by the director in accordance with Section 6.2.h. of these rules.

5.13.d.4.B. That any activity has occurred or will occur which would result in any discharge, on a nonroutine 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":

5.13.d.4.B.1. Five hundred (500) micrograms per liter (500 ug/l);

5.13.d.4.B.2. One milligram per liter (1 mg/l) for antimony;

5.13.d.4.B.3. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with Section 4.5.b.1. of these rules; or

5.13.d.4.B.4. The level established by the director in accordance with Section 6.2.h. of these rules.

5.13.d.4.C. That they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under Section 4.5.a.17. of these rules.

5.13.e. Other Noncompliance. The permittee shall report all instances of noncompliance not reported under Sections 5.11.e., 5.11.f., 5.11.g., 5.13.c., and 5.13.d. of these rules at the time monitoring reports are submitted. The reports shall contain the information listed in Section 5.13.d.1. of these rules.

5.13.f. Net Limitations. If net limitations are established, then the permittee shall notify the director if eligibility for such limitations has been altered or no longer exists.

5.13.g. 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 director, it shall promptly submit such facts or information.

5.14. Bypass.

5.14.a. Definitions.

5.14.a.1. "Bypass" means the intentional temporary diversion of waste streams from any portion of a treatment facility.

5.14.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.

5.14.b. Bypass Not Exceeding Limitations. The permittee may allow any bypass to occur, for reasons other than sediment control, which does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Sections 5.14.c. and 5.14.d. of these rules.

5.14.c. Notice.

5.14.c.1. Anticipated Bypass. If the permittee knows in advance of the need for a bypass, he or she shall submit prior written notice, if possible, at least ten (10) days before the date of the bypass.

5.14.c.2. Unanticipated Bypass. If the permittee does not know in advance of the need for a bypass, notice shall be submitted as required in Section 5.13.d. of these rules.

5.14.d. Prohibition of Bypass Exceeding Limitations.

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

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

5.14.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 judgment to prevent a bypass which occurred during normal periods of

equipment downtime or preventive maintenance;
and

5.14.d.1.C. The permittee submitted notices as required under Section 5.14.c. of these rules.

5.14.e. Approval of Bypass Exceeding Limitations. The director may approve an anticipated bypass exceeding limitations, after considering its adverse effects, if the director determines that it will meet the three conditions listed in Section 5.14.d.1. of these rules.

5.15. Upset.

5.15.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.

5.15.b. Effect of an Upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of Section 5.15.c. of these rules 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.

5.15.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:

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

5.15.c.2. The permitted facility was

at the time being properly operated;

5.15.c.3. The permittee submitted notice of the upset as required in Section 5.13.d.2.B. of these rules; and

5.15.c.4. The permittee complied with any remedial measures required under Section 5.4 of these rules.

5.15.d. Burden of Proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5.16. Reopener Clause. In accordance with W. Va. Code §22-11-20, the director may reopen the WV/NPDES permit through modification or by reissuance to incorporate an applicable effluent standard or limitation under CWA Sections 301(b)(2)(C) and W. Va. Code §22-11-11(b) (Water Quality Based Effluent Limitations and Standards), CWA Section 301(b)(2)(D) (Toxics), CWA Section 304(b)(2) (Best Available Treatment) and CWA Section 307(a)(2) (Toxics), which is promulgated or approved after the WV/NPDES permit is issued if that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit.

5.17. Removed Substances. Where removed substances are not otherwise covered by the terms and conditions of the WV/NPDES permit or other existing permit issued by the Department, any solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters 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 Department. If such substances are intended for disposal outside the State or for reuse (that is, as a material used for making another product, which in turn has another use), the permittee shall notify the Department in writing of the proposed disposal or use of such substances, the identity of the prospective disposer or users, the intended place of disposal or use, as appropriate, and shall take reasonable measures to ensure that the use does not cause pollution of the

waters of the State.

5.18. New Sources.

5.18.a. The owner or operator of a new source 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 the WV/NPDES permit before beginning to discharge.

5.18.b. 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.

5.18.c. Any new source classified as such under previous EPA regulations may, notwithstanding Section 8 of these rules, apply to have the WV/NPDES permit modified to incorporate the revised new source performance standards.

5.18.d. When a WV/NPDES permit is issued to a new source, the protection period of Section 12.2.a. of these rules shall apply. After expiration of such protection period, the permittee must immediately comply with any more stringent technology-based limitations promulgated under CWA Section 301. If, however, the more stringent technology-based limitations are promulgated less than three (3) years before the expiration of the WV/NPDES permit, the permittee has three (3) years from the date of their promulgation to comply with such stricter limits.

5.19. Definitions. When used in WV/NPDES permits, the definitions of Section 2 of these rules shall apply and the following terms shall mean:

5.19.a. "Daily Average Fecal Coliform Bacteria" means the geometric average of all samples collected during the month.

5.19.b. "Measured Flow" means any method of liquid volume measurement, the accuracy of which has been previously demonstrated in engineering practice, or for which a relationship to absolute volume has been

obtained.

5.19.c. "Composite Sample" means a combination of individual samples obtained at regular intervals over a time period. Either the volume of each individual sample is proportional to discharge flow rates or the sampling interval (for constant volume samples) is proportional to the flow rates over the time period used to produce the composite. The maximum time period between individual samples shall be two (2) hours.

5.19.d. "Grab Sample" means an individual sample collected in less than fifteen (15) minutes.

§47-30-6. Establishing WV/NPDES Permit Conditions.

6.1. General. In addition to conditions required in all WV/NPDES permits, the director shall establish conditions in WV/NPDES permits, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of CWA, Article 11, and Section 6 of these rules.

6.1.a. 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, or is any requirement which takes effect prior to final administrative disposition and is also any requirement which takes effect prior to the modification or reissuance of a permit. Section 10.2.b. of these rules provides a means for reopening a WV/NPDES permit proceeding at the discretion of the director where new requirements become effective during the permitting process. An applicable requirement is also any requirement which takes effect prior to a modification or reissuance of a permit.

6.2. Effluent Limitations. Each WV/NPDES permit shall include conditions meeting the following requirements when applicable:

6.2.a. Technology based effluent limitations and standards for existing sources

based on effluent limitation guidelines and standards under CWA Section 301 or new source performance standards promulgated under CWA Section 306, or case-by-case effluent limitations determined under CWA Section 402(a)(1) (Best Professional Judgment or BPJ), or a combination of the two (2) in accordance with 40 C.F.R. Part 125. For new sources or new discharges, these technology-based limitations and standards are subject to the provisions of Section 12 of these rules (Protection Period).

6.2.b. Other Effluent Limitations and Standards Under CWA Sections 301, 302, 303, 307, and 318. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under CWA Section 307(a) for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the director shall institute proceedings under these rules to modify or reissue the permit to conform to the toxic effluent standard or prohibition.

6.2.c. Water Quality Standards. Any more stringent requirements necessary to achieve water quality standards established pursuant to CWA or Article 11 or rules promulgated thereunder, including requirements of other affected states; or to attain or maintain a specified water quality related effluent limit established under CWA Section 302.

6.2.d. Modified Effluent Limitations for Coal Remining Operations. The Director may issue a NPDES Permit which modifies the effluent limitations for iron, manganese, or pH of any pre-existing discharge from the remined area of any coal remining operation or of any pre-existing discharge affected by the coal remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment. Total Hot Acidity will be used in lieu of pH in the establishment of the effluent limitation (loading).

6.2.e. Reopener Clause. Any WV/NPDES permit issued shall include effluent

limitations to meet the requirements of CWA Sections 301(b)(2)(A), 301(b)(2)(C), 301(b)(2)(D), 301(b)(2)(E), and 301(b)(2)(F), whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits shall also include a reopener condition (see Section 5.16 of these rules) stating that, if an applicable standard or limitation is promulgated under CWA Sections 301(b)(2)(C), 301(b)(2)(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 limited in the permit, the permit may be modified or revoked and reissued to conform to that effluent standard or limitation.

6.2.f. Water Quality Management Plans. Any requirements necessary to ensure consistency with the requirements of a water quality management plan approved by EPA under CWA Section 208(b).

6.2.g. Alternate Limits that incorporate alternate effluent limitations or standards where warranted by "fundamentally different factors" under 40 C.F.R. Part 125, Subpart D (see Section 4.5.f. of these rules).

6.2.h. Toxic pollutants limitations established under Sections 6.2.a., 6.2.b., or 6.2.c. of these rules, to control pollutants meeting the criteria listed in Section 6.2.h.1. of these rules. Limitations will be established in accordance with Section 6.2.h.2. of these rules. An explanation of the development of these limitations shall be included in the fact sheet.

6.2.h.1. Limitations must control all toxic pollutants which:

6.2.h.1.A. The director determines, based on information reported in a permit application under Sections 4.5.b.1. and 4.5.a.17. of these rules or in a notification under Section 5.13.d.4. of these rules or on other information, 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

6.2.h.1.B. The discharger does or may use or manufacture as an intermediate, final product, or by-product.

6.2.h.2. The requirement that the limitations control the pollutants meeting the criteria of Section 6.2.h.1. of these rules will be satisfied by:

6.2.h.2.A. Limitations on those pollutants; or

6.2.h.2.B. Limitations on other pollutants which, in the judgment of the director, will provide the necessary treatment of the pollutants.

6.2.i. Notification Level. A "notification level" which exceeds the notification level of Section 5.13.d.4. of these rules, upon a petition from the permittee or on the director'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.

6.2.j. Immediate Reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under Section 5.13.d.2.C. of these rules shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or a pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

6.2.k. Monitoring Requirements. In addition to the requirements of Section 5.11 of these rules, all WV/NPDES permits shall specify:

6.2.k.1. Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods);

6.2.k.2. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

6.2.k.3. Applicable reporting requirements based upon the impact of the regulated activity and as specified in Section 6.2.k.4. of these rules. Reporting shall be no less frequent than specified in the Section 6.2.k.5. of these rules; and

6.2.k.4. To assure compliance with permit limitations, requirements to monitor:

6.2.k.4.A. The volume of effluent discharged from each outlet; and

6.2.k.4.B. Other measurements as appropriate, including pollutants in internal waste streams under Section 7.8 of these rules; pollutants in intake water for net limitations under Section 7.7 of these rules; frequency rate of discharge for noncontinuous dischargers under Section 7.4 of these rules; and pollutants subject to notification requirements under Section 5.13.d.4. of these rules.

6.2.k.5. 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.

6.2.l. Best Management Practices to control or abate the discharge of pollutants when:

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

6.2.l.2. Numeric effluent limitations are infeasible; or

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

6.2.m. Reissued Permits.

6.2.m.1. Except as provided in Section 6.2.m.2. of these rules, when a permit is reissued, interim limitations, standards, or conditions shall be set which are 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.

6.2.m.2. When effluent limitations were imposed under CWA Section 402 (a)(1) in a previously issued permit, and these limitations are more stringent than the subsequently promulgated effluent guidelines, the provisions of Section 6.2.m.1. of these rules shall apply unless:

6.2.m.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 effluent limitation guidelines);

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

6.2.m.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

6.2.m.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 production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

6.2.n. Navigation. Any conditions that the Secretary of the Army considers necessary to

ensure that navigation and anchorage will not be substantially impaired.

6.2.o. Schedules of Compliance. The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA, Article 11, and rules promulgated thereunder.

6.2.o.1. Any schedules of compliance for existing sources shall require compliance as soon as possible, but in no case later than the applicable statutory deadline: July 1, 1984 for technology-based limits under CWA Section 301(b)(1)(B); July 1, 1977 for water quality based effluent limits under CWA Section 301 (b)(1)(C); or July 1, 1987 or three (3) years after promulgation for control of a toxic pollutant under CWA Section 307(a).

6.2.o.2. The first WV/NPDES permit issued to a new source or a recommencing discharger may contain a schedule of compliance under the provisions of Section 6.2.o. of these rules. Any first time WV/NPDES permit issued to a new source or recommencing discharge 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.

6.2.o.3. Interim Dates. Any permit may contain a schedule of compliance for completion of interim requirements and require submission of reports detailing progress toward completion of such interim requirements. 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 (for example, actions, operations, or milestone events) and the dates for their achievement, but the time between interim dates shall not exceed one (1) year.

6.2.o.4. 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.

6.2.o.5. Reporting. The permit shall be written to require that no later than fourteen (14) days following each interim date and the final compliance date, the permittee shall notify the director in writing of its compliance or noncompliance with the interim or final requirements or submit progress reports if the provisions of Section 6.2.e. of this rule is applicable.

§47-30-7. Calculating WV/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 Section 6.3.k.2. and Section 7.8 of these rules. Where a person has a number of outlets emerging into the waters of this State in close proximity to one another, such outlets may be treated as a unit for the purposes of Section 7 of these rules.

7.2. Metals. All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of the "total recoverable metal" as defined in 40 C.F.R. Part 136 unless:

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

7.2.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 form in order to carry out the provisions of CWA; or

7.2.c. All approved analytical methods for the metal inherently measures its dissolved

form.

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

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

7.4.a. Frequency;

7.4.b. Total mass;

7.4.c. Maximum rate of discharge of pollutants during the discharge; and

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

7.5. Mass Limitations. Any 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.

7.6. Pollutants in Intake Water. Except as provided in Section 7.7 of these rules, effluent limitations imposed in permits shall not be adjusted for pollutants in the intake water.

7.7. Net Limitations.

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

7.7.a.1. The applicable effluent limitations and standards contained in 40 C.F.R. Subchapter N specifically provide that they shall be applied on a net basis; or

7.7.a.2. The discharger demonstrates that the control system it proposes or uses 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 or total suspended solids 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 outfall or elsewhere.

7.7.c. 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.d. Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The director may waive this requirement if he finds that no environmental degradation will result.

7.7.e. The provisions of Section 7.7 of these rules do not apply to the discharge of raw water clarifier sludge generated from the treatment of intake water.

7.8. Internal Waste Streams.

7.8.a. 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 Section 5.11 of these rules shall also be applied to the internal waste streams.

7.8.b. Limits on internal waste streams will be imposed only when the fact sheet under Section 11 of these rules sets forth the exceptional circumstances which make such limitations

necessary, such as when the final discharge point is inaccessible (for example, a point that is beneath ten (10) meters of water), the wastes at the point of discharge are so diluted as to make monitoring impractical, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

7.9. Disposal of Pollutants into Wells, Underground Mines, or by Land Application.

7.9.a. Calculations of Effluent Limitations (General). When part of a discharger's process wastewater is not being discharged into surface waters of the State because it is disposed into a well, underground mine or by land application thereby reducing the flow or level of pollutants being discharged into surface waters of the State, the director may establish limits on the concentration and quantity of such discharge and applicable effluent standards and the limitations for the surface discharge in a WV/NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal.

7.9.b. Calculations of Effluent Limitations (Specified). The provisions of Section 7.9.a. of these rules shall not apply to the extent that promulgated effluent limitations guidelines specify a different specific technique for adjusting effluent limitations to account for well injection underground, mine disposal, or land application.

7.9.c. The provisions of Section 7.9.a. of these rules do not alter a discharger's obligation to meet any more stringent requirements established under Section 5 or 6 of these rules.

§47-30-8. Modification, Reissuance, Suspension, Release, And Revocation Of Permits.

8.1. General.

8.1.a. WV/NPDES permits may be modified, reissued, suspended, released, or revoked either at the request of any interested person (including the permittee) or upon the

director's initiative. However, permits may be modified, reissued, suspended, released, or revoked only for the reasons specified in Section 8 of these rules. All requests shall be submitted to the director in writing and shall contain facts or reasons supporting the request. The director may require additional information which may require submission of an updated permit application.

8.1.b. If the director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, suspension, release or revocation are not subject to public notice, comment, or hearings.

8.2. Modifications.

8.2.a. General. All requests for modification shall be submitted in writing to the director citing facts or reasons supporting the request for modification and indicating under which section of these rules the request is made. The director may request additional information and may require the submission of an updated permit application. When a permit modification is requested, only the conditions subject to modification are reopened. All other conditions of the permit shall remain in effect for the duration of the permit.

8.2.b. If the director tentatively decides to modify a permit and the modification is made under Section 8.2.c.2. of these rules, he or she shall prepare a draft permit under Section 10.1 of these rules, follow the public notice procedures in Section 10.2 of these rules, and shall follow the procedural requirements in Section 12 of Article 11. The draft permit shall fulfill the requirement of notice under Section 12 of Article 11. When a draft permit is prepared for the modification, only those conditions to be modified shall be reopened when a new draft permit is prepared.

8.2.c. Causes for Modification.

8.2.c.1. Minor Modifications. Upon the consent of the permittee, the director may modify a permit to make the corrections or allowances for changes in the permitted activity

listed in Sections 8.2.c.1.A. through 8.2.c.1.J. of these rules without preparing a draft permit under Section 10.1 of these rules, or following the procedures of Section 10 or 11 of these rules or the procedures in Section 12 of Article 11. Minor modifications may:

8.2.c.1.A. Correct typographical errors;

8.2.c.1.B. Require more or less frequent monitoring or reporting by the permittee;

8.2.c.1.C. Change an interim compliance date in a schedule of compliance: Provided, That the new date is not more than one hundred and twenty (120) days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement;

8.2.c.1.D. Allow for a change in ownership or operational control of a facility where the director determines that no other change in the permit is necessary: Provided, That any forms prescribed by the director, 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 director;

8.2.c.1.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;

8.2.c.1.F. Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits;

8.2.c.1.G. Allow disposal system equipment substitution when the substituted equipment would not alter the degree of treatment required by the permit;

8.2.c.1.H. Allow rerouting of

discharging lines when the rerouted line would not discharge to a different receiving stream and would not require new or different permit conditions;

8.2.c.1.I. Allow relocation of elements of treatment facilities or disposal systems, due to topography or equipment failures; or

8.2.c.1.J. When the WV/NPDES or NPDES permit becomes final and effective after March 9, 1982, conform to Sections 5.5, 5.13.a., 5.13.d.2., 5.13.d.4. 5.14, and 5.15.c.1. of these rules.

8.2.c.2. Major Modifications. The following are causes for major modification, but not reissuance of a permit unless the permittee requests or agrees, and require the preparation of a draft permit under Section 10.1 of these rules and the public notice procedures of Section 10.2 of these rules. If the permittee requests or agrees, then the following causes can be reason for a permit reissuance which will open the entire permit for comment and change:

8.2.c.2.A. Alterations. There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

Note: Certain reconstruction activities may cause the new source provisions of 40 C.F.R. §122.29 and Part 434 to be applicable. See also Sections 2.31 and Section 12 of these rules.

8.2.c.2.B. Information. The director has received new information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. This cause shall include any information indicating that cumulative effects on the environment are unacceptable.

8.2.c.2.C. New Rules or Judicial Decision. 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:

8.2.c.2.C.1. For promulgation of amended standards or rules, when:

8.2.c.2.C.1.(a) The permit condition to be modified was based on a promulgated effluent limitation guideline or water quality standards;

8.2.c.2.C.1.(b) The EPA or State has revised, withdrawn, or modified that portion of the effluent limitation guideline or water quality standard on which the permit condition was based; and

8.2.c.2.C.1.(c) If a modification request is made by the permittee, such request is within ninety (90) days of Federal Register or State Register notice of the action on which the request is based, unless the effluent limitations guidelines allow for a different time period.

8.2.c.2.C.2. For judicial decisions, when a court of competent jurisdiction has remanded and stayed State or federal promulgated rules or, if the remand and stay concern that portion of the rules on which the permit condition was based and if the permittee is requesting the change, the request is filed by the permittee within ninety (90) days of judicial remand.

8.2.c.2.D. Compliance Schedules. The Director determines good cause exists for modification of a compliance schedule such as an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case shall a compliance schedule be modified to extend beyond an applicable CWA statutory deadline: July 1, 1984 for technology-based effluent limits

under CWA Section 301(b)(1)(B) or July 1, 1977 for water quality based effluent limits under CWA Section 301(b)(1)(C).

8.2.c.2.E. Variances. When the permittee has filed a timely request for a variance under CWA Sections 301(c), 301(g), 301(h), 301(i), 301(k), 302(b)(2), or 316(a), or for "fundamentally different factors" under Section 4.5.f.1. of these rules.

8.2.c.2.F. Toxics. When required to incorporate an applicable CWA Section 307(a) toxic effluent standard or prohibition.

8.2.c.2.G. Reopener. When required by the "reopener" conditions in a permit, which are established in the permit under Section 6.2.d. of these rules.

8.2.c.2.H. Net Limitations. Upon request of a permittee who qualifies for effluent limitations on a net basis, or when a discharger is no longer eligible for net limitations, as provided in Section 7.7 of these rules.

8.2.c.2.I. Nonlimited Pollutants. 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.

8.2.c.2.J. Use or Manufacture of Toxics. When the permittee begins or expects to begin to use or manufacture as an intermediate, final product, or by-product any toxic pollutant which was not reported in the permit application.

8.2.c.2.K. Notification Levels. To establish a "notification level" as provided in Section 5.13.d.4. of these rules.

8.2.c.2.L. Failure to Notify Affected State. Upon failure of the director to notify another state as required by Section 10.2.d. of these rules whose waters may be affected by a discharge from this state and different permit conditions are required to comply with the other states water quality standards.

8.2.c.2.M. Correction of Mistakes. To correct technical mistakes, such as errors in calculation or mistaken interpretations of law made in determining permit conditions.

8.2.c.2.N. Unable to Meet BPJ Limits. When the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under CWA Section 402(a)(1) 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 pollutant control actually achieved but shall not be less stringent than required by a subsequently promulgated effluent guideline.

8.2.c.2.O. BPJ Limits too Costly. When the permittee's effluent limitations were imposed under CWA Section 402(a)(1) 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 limitation be less stringent than the subsequent guideline.

8.3. Reissuance.

8.3.a. General.

8.3.a.1. The director may reissue WV/NPDES permits prior to their expiration date for any cause specified in Section 8.3 of these rules. When a permit is to be reissued, the entire permit is reopened, and the director shall require submission of a permit reissuance application.

8.3.a.2. During any reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is issued. Reissuance requires a draft permit under Section 10.1 of these rules and the public notice procedures of Section 10.2 of these rules. Processing of a reissuance application does not exempt the permittee from compliance with any permit term or condition.

8.3.b. Reissuance Based on Permittee Request or Agreement. The following are causes for reissuance of a permit when the permittee requests or agrees:

8.3.b.1. All causes for modification listed under Section 8.2.c.2. of these rules.

8.3.b.2. The WV/NPDES permit will expire within eighteen (18) months and the permittee has submitted an application for reissuance which is approvable.

8.3.c. Reissuance Without Permittee Request or Agreement. The following are causes for reissuance of a permit:

8.3.c.1. Cause exists for suspension, release or revocation of the WV/NPDES permit under Section 8.4 of these rules and the director determines reissuance is appropriate;

8.3.c.2. The facility has an Article 11 permit which was issued prior to July 1, 1974 which does not have an expiration date;

8.3.c.3. Conditions exist which allow reopening and reissuance of the permit under Section 5.16 of these rules.

8.4. Suspension, Release and Revocation of Permits. Permits may be suspended, released or revoked in whole or in part. The following may be causes for revocation or suspension of a permit during its term, or for denying a permit reissuance application:

8.4.a. Noncompliance by the permittee with any condition of the WV/NPDES permit or Article 11;

8.4.b. 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;

8.4.c. 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;

8.4.d. A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW); or

8.4.e. Revocation of a permit issued under WVSMRCA.

§47-30-9. Permits For Major Facilities.

9.1. Designation of Major Facilities.

9.1.a. Because of their size of discharge, location in an environmentally sensitive area, or for other reasons, certain facilities have been classified as major facilities by the Environmental Protection Agency Region III Administrator. All such major facilities are facilities for which EPA has not waived the right to review, object to, or comment upon pursuant to the Memorandum of Agreement. In addition, the director may make additional designations of major facility status of facilities not already classified as such.

9.1.b. Facilities designated as major will be informed at the time of permit issuance.

9.1.c. Such facilities will be subject to special requirements as set forth in Section 9.2 of these rules.

9.2. Special Requirements for Major Facilities.

9.2.a. All facilities designated as major facilities by the Environmental Protection Agency Region III Administrator in conjunction with the director:

9.2.a.1. Will have a fact sheet prepared on them pursuant to Section 11 of these rules whenever a draft permit is issued for them;

9.2.a.2. Must submit all discharge monitoring reports and reports of noncompliance

required by their WV/NPDES or NPDES permit or under Section 5.11 of these rules to both the director and the Environmental Protection Agency Region III Administrator;

9.2.a.3. Will be annually subject to either a Compliance Sampling Inspection (CSI), Compliance Evaluation Inspection (CEI) or Performance Audit Inspection (PAI); and

9.2.a.4. Will have copies of compliance inspection reports and correspondence regarding noncompliance forwarded to EPA.

9.2.b. All facilities classified as major, solely by the director, will be subject to an annual inspection under Section 9.2.a.3. of these rules.

§47-30-10. Procedure For Permit Issuance.

10.1. General.

10.1.a. Once an application is complete, the director shall tentatively decide whether to prepare a draft permit or to deny the application.

10.1.b. If the director decides to prepare a draft permit, it shall contain the following information:

10.1.b.1. All applicable conditions under Sections 5 and 6 of these rules;

10.1.b.2. All monitoring requirements; and

10.1.b.3. Effluent limitations, standards, prohibitions and conditions and all variances under Section 14 of these rules that are to be included.

10.1.c. All draft permits shall be accompanied by a fact sheet if required under Section 11 of these rules and shall be publicly noticed and available for public comment in accordance with Section 10.2 of these rules.

10.2. Public Notice, Comment, and Hearings.

10.2.a. Public Notice.

10.2.a.1. Scope.

10.2.a.1.A. Public notice shall be given that a draft permit has been prepared.

10.2.a.1.B. Public notices may describe more than one permit or permit action.

10.2.a.1.C. Public notice shall be given of any hearing granted under Section 10.3 of these rules.

10.2.a.2. Timing.

10.2.a.2.A. Public notice of the preparation of a draft permit shall allow at least thirty (30) days for public comment. Extra time may be allowed if requested.

10.2.a.2.B. 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.

10.2.b. Reopening of the Public Comment Period. If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the director may reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted. The director may also extend the comment period for good cause.

10.2.c. Proof of Publication. The applicant shall be responsible for publication of a legal advertisement in a qualified newspaper of general circulation in the location of the proposed permit area. Before the expiration of the WV/NPDES notice period in 10.2.a.2.A. of these rules, the applicant shall send the director a copy of the advertisement and proof of publishing along with an affidavit certifying that the notice, and a fact sheet, if required, was sent to all persons listed in Sections 10.2.d.1.A. and 10.2.d.1.B. of these rules. A WV/NPDES permit may not be issued until such affidavit is received.

10.2.d. Methods. In addition to the requirements of Section 10.2.c. of these rules, public notice of the draft permit shall be given by the following methods:

10.2.d.1. By the applicant mailing a copy of a notice to the following persons:

10.2.d.1.A. Federal, State, and interstate agencies with jurisdiction over fish and wildlife resources including the United States Fish and Wildlife Service and the Wildlife Resources Section of the West Virginia Division of Natural Resources; United States Army Corps of Engineers; the Historic Preservation Unit of the West Virginia Department of Culture and History; the Advisory Council on Historic Preservation; and other appropriate government authorities, including any affected states.

10.2.d.1.B. Any other State or federal agency which the director knows has issued or is required to issue a permit for the same facility or activity under any of the following federal programs:

10.2.d.1.B.1. For RCRA: The Office of Waste Management and the Office of Air Quality of the West Virginia Department of Environmental Protection;

10.2.d.1.B.2. For UIC: The Office of Water Resources of the West Virginia Department of Environmental Protection;

10.2.d.1.B.3. For 404: The United States Army Corps of Engineers, Pittsburgh District or Huntington District; and

10.2.d.1.B.4. For PSD: The Office of Air Quality.

10.2.d.1.C. To any unit of local government having jurisdiction over the area where the facility is proposed to be located.

10.2.d.1.D. 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.

10.2.d.1.E. Any person otherwise entitled to receive notice under Section 10.2.d.1. of these rules may waive his rights to receive notice for any classes and categories of permits.

10.2.d.2. The director shall send the public notice to persons on a mailing list which is developed by:

10.2.d.2.A. Including those who request in writing to be on the list;

10.2.d.2.B. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

10.2.d.2.C. 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 list may be updated from time to time by requesting written indication of continued interest from those listed. Persons may be deleted from the list if they fail to respond to such a request.

10.2.d.3. In addition to the general public notice described in Section 10.2.e. of these rules, all persons identified in Sections 10.2.d.1.A. and 10.2.d.1.B. of these rules shall be mailed a copy of the fact sheet, if any, and the draft permit and application unless such person requests, in writing, that these documents not be sent.

10.2.e. Contents.

10.2.e.1. All Public Notices. All public notices issued under Section 10.2 of these rules shall contain the following minimum information:

10.2.e.1.A. Name and address of the office processing the permit action for which notice is being given;

10.2.e.1.B. Name and address of the permittee or permit applicant and a location

map of the proposed area, except in the case of general permits;

10.2.e.1.C. A brief description of the business conducted at the facility or activity described in the permit application or in the draft permit, except in the case of general permits;

10.2.e.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;

10.2.e.1.E. A brief description of the comment procedures required and the time and place of any hearing that will be held, including a statement of procedures to request a 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;

10.2.e.1.F. A general description and map of the location of the facility and the name of the receiving water(s). For draft general permits, this requirement will be satisfied by a map or description of the permit area; and

10.2.e.1.G. Any other information considered necessary or proper by the director.

10.2.e.2. Public Notices for Hearings. In addition to the general public notice requirements of Section 10.2.e.1. of these rules, a public notice of a public hearing shall contain the following information:

10.2.e.2.A. Reference to the date of previous public notices relating to the permit;

10.2.e.2.B. Date, time, and place of the hearing; and

10.2.e.2.C. A brief description of the nature and purpose of the hearing, including applicable rules and procedures.

10.2.f. Public Comments and Requests for Public Hearings. During the public comment period provided under Section 10.2.a. of these rules, any interested person may submit written comments on the draft permit and may request a public hearing, if a public hearing has not been already 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 Section 10.4 of these rules.

10.3. Public Hearings.

10.3.a. A public hearing shall be held whenever the director finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The director also may hold a public hearing at his discretion whenever such a hearing might clarify one or more issues involved in the permit decision.

10.3.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 may be required. The public comment period under Section 10.2.a.2.A. of these rules shall automatically be extended to the close of any public hearing held under the provisions of Section 10.3 of these rules.

10.3.c. A tape recording or written transcript of the hearing shall be made available to the public, upon request.

10.4. Response to Comments.

10.4.a. At the time that any final permit is issued, the director shall issue a response to comments. This response shall:

10.4.a.1. Specify which provisions of the draft permit have been changed in the final permit decision and the reasons for the change; and

10.4.a.2. Briefly describe and

respond to all significant comments on the draft permit raised during the public comment period or during any hearing.

10.4.b. The response to comments shall be available to the public.

10.5. Public Comment by Government Agencies.

10.5.a. If during the comment period for a draft permit, the District Engineer of the U.S. Army Corps of Engineers advises the director 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 director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the director shall include the specified conditions in the permit. Review or appeal of denial of a permit under Section 10 of these rules 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 WV/NPDES permit for the duration of that stay.

10.5.b. If during the comment period, any other State or federal agency with jurisdiction over fish, wildlife, or public health advises the director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial risk to public health or impairment of fish, shellfish, or wildlife resources, the director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of CWA and Article 11.

10.5.c. In appropriate cases the director may consult with one or more of the agencies referred to in Section 10 of these rules before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

10.6. Public Access to Information. Public access to information shall be governed by the Freedom of Information Act, Chapter 29B of the West Virginia Code.

§47-30-11. Fact Sheet.

11.1. Fact Sheet Preparation. A fact sheet shall be prepared for every draft permit for:

11.1.a. A major facility or activity;

11.1.b. Every general permit;

11.1.c. Every draft permit that incorporates a variance;

11.1.d. Every draft permit which the director finds is the subject of widespread public interest or raises major issues; and

11.1.e. 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 director shall send this fact sheet to the applicant, to the Office of Water Resources and, on request, to any other person.

11.2. Fact Sheet Contents. The fact sheet shall include, when applicable:

11.2.a. A brief description of the type of facility or activity which is the subject of the draft permit;

11.2.b. The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being discharged;

11.2.c. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

11.2.d. Reasons why any requested variances or alternatives to required standards do or do not appear justified;

11.2.e. A description of the procedures for reaching a final decision on the draft permit

including:

11.2.e.1. The beginning and ending dates of the comment period under Section 10.2 of these rules and the address where comments will be received;

11.2.e.2. Procedures for requesting a hearing and the nature of that hearing; and

11.2.e.3. Any other procedures by which the public may participate in the final decision.

11.2.f. Name and phone number of a person to contact for additional information;

11.2.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; and

11.2.h. When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:

11.2.h.1. Limitations to control toxic pollutants under Section 6.2.g. of these rules;

11.2.h.2. Limitations on internal waste streams under Section 7.8 of these rules;

11.2.h.3. Limitations on indicator pollutants under 40 C.F.R. §125.3(g);

11.2.h.4. Limitations set on a case-by-case basis under 40 C.F.R. §125.3(c)(2) or §125.3(c)(3); or

11.2.h.5. When appropriate, a sketch or detailed description of the location of the discharge described in the application.

§47-30-12. New Sources.

12.1. Definitions. For the purpose of Section

12 of these rules:

12.1.a. "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

12.1.b. "Facilities" or "Equipment" means buildings, structures, or 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 or water pollution treatment for the source.

12.2. Effect of Compliance with New Source Performance Standards.

12.2.a. Except as provided in Section 12.2.b. of these rules, any new source which meets the applicable new source performance standards promulgated 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 CWA Section 301(b)(2) for the shortest of the following periods:

12.2.a.1. Ten (10) years from the date that construction is completed;

12.2.a.2. Ten (10) years from the date the source begins to discharge process or other nonconstruction related wastewater; or

12.2.a.3. The period of depreciation or amortization of the facility for the purposes of Section 167 or Section 169 or both of the United States Internal Revenue Code of 1954.

12.2.b. The protection from more stringent standards of performance afforded by Section 12.2.c. of these rules does not apply to:

12.2.b.1. 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 CWA Section 307(a));

12.2.b.2. Additional permit conditions controlling pollutants listed as toxic under CWA Section 307(a) or as hazardous substances under CWA Section 311 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 to control the toxic pollutants or hazardous substances; or

12.2.b.3. Existing sources which modify their pollution control facilities and achieve performance standards but which are not new sources or otherwise do not meet the requirements of this paragraph.

12.2.c. When a WV/NPDES permit is issued to a source with a "protection period" under Section 12.2.a. of these rules which 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 CWA Section 301 and any other applicable CWA requirements 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.

12.2.d. The owner or operator of a new source 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 the WV/NPDES permit before beginning to discharge. Within the shortest feasible time, not to exceed thirty (30) days, the permittee must meet all permit conditions. These requirements do not apply if the owner or operator is issued a permit containing a compliance schedule under Section 6.2.n.2. of these rules.

12.2.e. 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.

12.3. Criteria for New Source Determination.

12.3.a. A preparation plant or associated area, except as otherwise provided, is a "new source" if it meets the definition of "new source" in Section 2.30 of these rules, and:

12.3.a.1. Is constructed at a site at which no other source is located;

12.3.a.2. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

12.3.a.3. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the director 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.

12.3.b. A source meeting the requirements of Section 12.3.a.3. of these rules is a new source only if a new source performance standard is independently applicable to it.

12.3.c. Construction on a site at which an existing source is located results in a modification subject to Section 8.2.c.2. of these rules rather than in a new source if the construction does not create a new building, structure, facility, or installation meeting the criteria of Section 12.3.a.2. or Section 12.3.a.3. of these rules but otherwise alters, replaces, or adds to existing process or production equipment.

12.3.d. Construction of a new source as defined under Section 2.30.c. of these rules has commenced if the owner or operator has:

12.3.d.1. Begun or caused to begin as part of continuous on-site construction program:

12.3.d.1.A. Any placement, assembly, or installation of facilities or equipment; or

12.3.d.1.B. 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 facilities or equipment; or

12.3.d.2. Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time. Options to purchase or contract which can be terminated or modified without a substantial loss, and contracts for feasibility engineering, and design studies do not constitute such a contractual obligation.

12.4. Modification of NPDES Permits for New Sources. Any new source classified as such under previous EPA regulations may, notwithstanding Section 8 of these rules, apply to have its WV/NPDES permit modified to incorporate the revised new source performance standards.

§47-30-13. General Permits.

13.1. Coverage. The director may issue a general permit in accordance with the following:

13.1.a. Area. The general permit may be written (10) to cover a category of discharges described in the permit under Section 13.1.b. of these rules, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:

13.1.a.1. Designated planning areas under CWA Sections 208 and 303;

13.1.a.2. City, county, or state political boundaries;

13.1.a.3. State highway systems;

13.1.a.4. Standard metropolitan

statistical area as defined by the U.S. Office of Management and Budget; or

13.1.a.5. Any other appropriate division or combination of boundaries.

13.1.b. Sources. The general permit may be written to regulate, within the area described in Section 13.1.a. of these rules, a category of point sources from coal mines, preparation plants, and refuse areas that:

13.1.b.1. Involve the same or substantially similar types of operations;

13.1.b.2. Discharge the same types of wastes;

13.1.b.3. Require the same effluent limitations or operation conditions;

13.1.b.4. Require the same or similar monitoring; and

13.1.b.5. In the opinion of the director, are more appropriately controlled under a general permit than under individuals permits.

13.1.c. If the director tentatively decides to issue a general permit, he or she shall prepare a draft general permit under Section 10.1.a. of these rules.

13.2. Administration.

13.2.a. General. General permits may be modified, reissued, suspended, or revoked in accordance with the applicable requirements of Section 8 of these rules for either individual dischargers or for a category of point sources.

13.2.b. Requiring an Individual Permit. The director may require any person authorized by a general permit to apply for and obtain an individual permit. Any interested person adversely affected or aggrieved may petition the director to take action under Section 13.2 of these rules. Cases where an individual permit may be required include the following:

13.2.b.1. The discharger is not in compliance with the conditions of the general permit;

13.2.b.2. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

13.2.b.3. Effluent limitation guidelines are promulgated for point sources covered by the general permit;

13.2.b.4. A water quality management plan containing requirements applicable to such point sources is approved; or

13.2.b.5. The requirements of Section 13.1 of these rules are not met.

§47-30-14. Decision On Variance.

14.1. Actions by Director.

14.1.a. The director may grant or deny requests for the following variances:

14.1.a.1. After consultation with the Regional Administrator, extensions under CWA Section 301(k) based on the use of innovative technology; or

14.1.a.2. Variances under CWA Section 316(a) for thermal pollution.

14.1.b. The director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

14.1.b.1. A variance based on the economic capability of the applicant under CWA Section 301(c); or

14.1.b.2. A variance based on water quality related effluent limitations under CWA Section 302(b)(2).

14.1.c. The director may deny or forward to the Administrator (or his delegate) with a

written concurrence, or submit to the Administrator (or his delegate) without recommendation, a completed request for:

14.1.c.1. A variance based on the presence of "fundamentally different factors" from those on which an effluent limitations guideline was based; or

14.1.c.2. A variance based upon certain water quality factors under CWA Section 301(g).

14.2. Actions by EPA.

14.2.a. 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 Section 14.2.b. of these rules that is forwarded by the director.

14.2.b. The EPA deputy assistant administrator for water enforcement may approve or deny any variance request submitted under Section 14.2.a. of these rules. If the Deputy Assistant Administrator approves the variance, the director may prepare a draft permit incorporating 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 C.F.R. §124.64.

14.2.c. The Administrator (or his delegate) may grant or deny a request for a variance listed in Section 14.1.c. of these rules that is forwarded by the director. If the Administrator (or his delegate) approves the variance, the director may prepare a draft permit incorporating 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 C.F.R. §124.64.

§47-30-15. Enforcement.

15.1. General. The provisions of this chapter may be enforced by all of the applicable

provisions in W. Va. Code §22-11-3, including:

15.1.a. Orders or notices issued by the director in accordance with W. Va. Code §§ 22-11-11, 12, 15 and 19;

15.1.b. Civil penalties appropriate to the violation and injunctive relief in accordance with W. Va. Code §22-11-22; and

15.1.c. Criminal penalties in accordance with W. Va. Code §22-11-24.

15.2. Citizen Participation. The director shall provide for public participation in enforcement by the following:

15.2.a. Investigating and providing a written response to all signed, written complaints from citizens;

15.2.b. Not opposing intervention by any citizen in an Article 11 proceeding when permissive intervention is authorized by statute or rule; and

15.2.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 under Article 11 or consent order issued by the West Virginia Environmental Quality 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 director shall consider all comments received during the thirty-day period.

NOTE: FORMS MAY BE OBTAINED FROM SECRETARY OF STATE'S OFFICE

APPENDIX A

Toxic Pollutants under CWA Section 307(a)

- | | |
|---|--|
| 1. Acenaphthene | 19. Chloroform |
| 2. Acrolein | 20. 2-Chlorophenol |
| 3. Acrylonitrile | 21. Chromium and compounds |
| 4. Aldrin and Dieldrin | 22. Copper and compounds |
| 5. Antimony and compounds | 23. Cyanides |
| 6. Arsenic and compounds | 24. DDT and metabolites |
| 7. Asbestos | 25. Dichlorobenzenes:
1,2-Dichlorobenzene
1,3-Dichlorobenzene
1,4-Dichlorobenzene |
| 8. Benzene | 26. Dichlorobenzidine |
| 9. Benzidine | 27. Dichloroethylenes:
1,1-Dichloroethylene
1,2-Dichloroethylene |
| 10. Beryllium and compounds | 28. 2,4-Dichlorophenol |
| 11. Cadmium and compounds | 29. Dichloropropane and Dichloropropene |
| 12. Carbon tetrachloride | 30. 2,4-Dimethylphenol |
| 13. Chlorodane (technical mixture and metabolites) | 31. Dinitrotoluene |
| 14. Chlorinated benzenes except dichlorobenzenes | 32. Diphenylhydrazine |
| 15. Chlorinated ethanes:
1,2-Dichloroethane
1,1,1-Trichloroethane
Hexachloroethane | 33. Endosulfan and metabolites |
| 16. Chloroalkyl ethers:
Chloromethyl ether
Chloroethyl ether
Mixed ethers | 34. Endrin and metabolites |
| 17. Chlorinated naphthalene | 35. Ethylbenzene |
| 18. Chlorinated phenols:
Trichlorophenols
Chlorinated cresols | 36. Fluoranthene |
| | 37. Haloethers:
Chlorophenylphenyl ethers
Bromophenylphenyl ether
Bis (chloroethoxy) methane
Polychlorinated dephenyl ethers |

APPENDIX A (continued)
Toxic Pollutants under CWA Section 307(a)

- | | |
|--|--|
| 38. Halomethanes:
Methylene chloride
Methylchloride
Methylbromide
Bromoform
Dichlorobromomethane
Trichlorofluoromethane
Dichlorodifluoromethane | 52. Phenol |
| 39. Heptachlor and metabolines | 53. Phthalate ester |
| 40. Hexachlorobutadiene | 54. Polychlorinated biphenyls (PCBs) |
| 41. Hexachlorocyclohexane | 55. Polynuclear aromatic hydrocarbons:
Benzanthracenes
Benzopyrenes
Benzofluoranthene
Chrysenes
Dibenzathracenes
Indenopyrenes |
| 42. Hexachlorocyclopentadiene | 56. Selenium and compounds |
| 43. Isophorone | 57. Silver and compounds |
| 44. Lead and compounds | 58. 2,3,7,8-Tetrachloro-dibenzo-p-dioxin (TCDD) |
| 45. Mercury and compounds | 59. Tetrachloroethylene |
| 46. Naphthalene | 60. Thallium and compounds |
| 47. Nickel and compounds | 61. Toluene |
| 48. Nitrobenzene | 62. Toxaphene |
| 49. Nitrophenols:
2,4-Dinitrophenol
Dinitrocresol | 63. Trichloroethylene |
| 50. Nitrosamines | 64. Vinyl chloride |
| 51. Pentachlorophenol | 65. Zinc and compounds |

APPENDIX B

**Other Toxic Pollutants
(Metals, Cyanide, and Total Phenols)**

1. Total Antimony
2. Total Arsenic
3. Total Beryllium
4. Total Cadmium
5. Total Chromium
6. Total Copper
7. Total Lead
8. Total Mercury
9. Total Nickel
10. Total Selenium
11. Total Silver
12. Total Thallium
13. Total Zinc
14. Total Cyanide
15. Total Phenols

APPENDIX C

Organic Toxic Pollutants

- Volatiles -

1V. Acrolein	17V. 1,2-Dichloropropane
2V. Acrylonitrile	18V. 1,3-Dichloropropylene
3V. Benzene	19V. Ethylbenzene
5V. Bromoform	20V. Methyl bromide
6V. Carbon tetrachloride	21V. Methyl chloride
7V. Chlorobenzene	22V. Methylene chloride
8V. Chlorodibromomethane	23V. 1,1,2-Tetrachloroethane
9V. Chloroethane	24V. Tetrachloroethylene
10V. 2-Chloroethylvinyl ether	25V. Toluene
11V. Chloroform	26V. 1,2-Trans-dichloroethylene
12V. Dichlorobromomethane	27V. 1,1,1-Trichloroethane
14V. 1,1-Dichloroethane	28V. 1,1,2-Trichloroethane
15V. 1,2-Dichloroethane	29V. Trichloroethylene
16V. 1,1-Dichloroethylene	31V. Vinyl chloride

APPENDIX C (continued)
Organic Toxic Pollutants

- Acids -

- 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

Organic Toxic Pollutants

- Pesticides -

- | | |
|-------------------------|----------------|
| 1P. Aldrin | 24P. PCB-1016 |
| 2P. alpha-BHC | 25P. Toxaphene |
| 3P. beta-BHC | |
| 4P. gamma-BHC | |
| 5P. delta-BHC | |
| 6P. Chlordane | |
| 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 | |

APPENDIX C (continued)

Organic Toxic Pollutants

- Bases/Neutral -

1B. Acenaphthene	24B. Diethyl phthalate
2B. Acenaphthylene	25B. Dimethyl phthalate
3B. Anthracene	26B. Di-n-butyl phthalate
4B. Benzidine	27B. 2,4-Dinitrotoluene
5B. Benzo(a)anthracene	28B. 2,6-Dinitrotoluene
6B. Benzo(a)pyrene	29B. Di-n-octyl phthalate
7B. 3,4-Benzofluoranthene	30B. 1,2-Diphenylhydrazine (as azobenzene)
8B. Benzo(ghi)perylene	31B. Fluoranthene
9B. Benzo(k)fluoranthene	32B. Fluorene
10B. Bis(2-chloroethoxy)methane	33B. Hexachlorobenzene
11B. Bis(2-chloroethyl)ether	34B. Hexachlorobutadiene
12B. Bis(2-chloroisopropyl)ether	35B. Hexachlorocyclopentadiene
13B. Bis(2-ethylhexyl)phthalate	36B. Hexachloroethane
14B. 4-Bromophenyl phenyl ether	37B. Indeno(1,2,3-cd)pyrene
15B. Butylbenzyl phthalate	38B. Isophorone
16B. 2-Chloronaphthalene	39B. Naphthalene
17B. 4-Chlorophenyl phenyl ether	40B. Nitrobenzene
18B. Chrysene	41B. N-nitrosodimethylamine
19B. Dibenzo(a,h)anthracene	42B. N-nitrosod-n-propylamine
20B. 1,2-Dichlorobenzene	43B. N-nitrosodiphenylamine
21B. 1,3-Dichlorobenzene	44B. Phenanthrene
22B. 1,4-Dichlorobenzene	45B. Pyrene
23B. 3,3'-Dichlorobenzidine	46B. 1,2,4-Trichlorobenzene

APPENDIX D

**Conventional and Nonconventional Pollutants Required
to be Tested by Existing Dischargers
if Expected to be Present**

Bromide	Surfactants
Total Residual Chlorine	Total Aluminum
Color	Total Barium
Fecal Coliform	Total Boron
Fluoride	Total Cobalt
Nitrate-Nitrite	Total Iron
Total Organic Nitrogen	Total magnesium
Oil and Grease	Total Molydenum
Total Phosphorus	Total Manganese
Radioactivity	Total Tin
Sulfate	Total Titanium
Sulfide	
Sulfite	

APPENDIX E

**Toxic Pollutants and Hazardous Substances Required
to be Identified by Existing Dischargers
if Expected to be Present**

Acetaldehyde	Diclonc
Allyl alcohol	2,2-Dichloropropionic acid
Allyl chloride	Dichlorvos
Amyl acetate	Diethyl amine
Aniline	Dimethyl amine
Asbestos	Dinitrobenzene
Benzonitrile	Diquat
Benzl chloride	Disulfoton
Butyl acetate	Diuron
Butylamine	Epichlorohydrin
Captan	Ethion
Carbaryl	Ethylene Diamine
Carbofuran	Ethylene dibromide
Carbon disulfide	Formaldehyde
Chlorpyrifos	Furfural
Coumaphos	Guthion
Cresol	Isoprene
Crotonaldehyde	Isopropanolamine dodecylbenzenesulfonate
Cyclohexane	Kelthane
2,3-Dichlorophenoxyacetic acid (2,4-D)	
Diazinon	
Dicamba	
Dichlobenil	

APPENDIX E (continued)

**Toxic Pollutants and Hazardous Substances Required
to be Identified by Existing Dischargers
if Expected to be Present**

Kepone	Styrene
Malthion	2,4,5-Trichlorophenoxyacetic acid (2,4,5-T)
Mercaptodimethur	Tetrachlorodiphenylethane
Methoxychlor	2,4,5-Trichlorophenoxy propanoic acid (2,4,5-TP)
Methyl mercaptan	Trichlorogon
Methyl methacrylate	Triethanolamine dodecylbenzenesulfonate
Methyl parathion	Triethylamine
Mevinphos	Trimethylamine
Mexacarbate	Uranium
Monoethyl amine	Vanadium
Monomethyl amine	Vinyl acetate
Naled	Xylene
Naththenic acid	Xylenol
Nitrotoluene	Zirconium
Parathion	
Phenolsulfanate	
Phosgene	
Propargite	
Propylene oxide	
Pyrethrins	
Quinoline	
Resorcinol	
Strontium	
Strychnine	