

WEST VIRGINIA SECRETARY OF STATE

Betty Ireland

ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV DEP Office of Water Resources TITLE NUMBER: 47

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

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: _____

DATE OF PUBLIC HEARING: July 10, 2007 TIME: 6:00 p.m.

LOCATION OF PUBLIC HEARING: Department of Environmental Protection
Canaan Valley Room
601-57th Street
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL ☐ WRITTEN ☐ BOTH ☒

DATE WRITTEN COMMENT PERIOD ENDS: July 10, 2007 TIME: At close of hearing

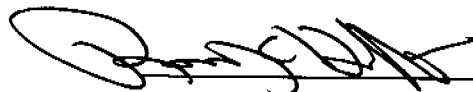
WRITTEN COMMENTS MAY BE MAILED TO:

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

WV Department of Environmental Protection
Charles Sturey
601 - 57th Street
Charleston, WV 25304

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



Authorized Signature

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

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

A. AUTHORITY: §§ 22-11-1 et. seq.

B. SUMMARY OF RULE:

The proposed amendments to this rule are being made to allow general clean-up of sections referencing outdated names of agencies and references to the EQB governing rule making.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

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

The proposed rule changes are needed to allow clean-up of the existing rule. The proposed changes will also allow the agency to operate more efficiently and effectively by allowing the coal related WV/NPDES permits to be reviewed and issued more closely to the corresponding Article 3 Permit.

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

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

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

During a May 22, 2007 and May 30, 2007 meetings, the Environmental Protection Advisory Council reviewed and discussed this rule. Their comments are contained in the attached minutes.

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Monday – May 21, 2007

1:00 p.m. – 3:00 p.m.

601 57th Street, SE, Charleston, WV

West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

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

DEP:

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

VISITORS:

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

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

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

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

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

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

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

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

COMMENT

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

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

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

DEP Response: Yes

45CSR8 – Ambient Air Quality Standards

SUMMARY

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

COMMENT

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

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

45CSR16 – Standards of Performance for New Stationary Sources

SUMMARY

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

COMMENT

No questions.

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

SUMMARY

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

COMMENT

No questions.

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

SUMMARY

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

COMMENT

No questions.

45CSR34 – Emission Standards for Hazardous Air Pollutants

SUMMARY

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

COMMENT

No questions.

45CSR39 – Control of Annual Nitrogen Oxides Emissions

SUMMARY

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

COMMENT

No questions.

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

SUMMARY

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

COMMENT

No questions.

45CSR41 – Control of Annual Sulfur Dioxide Emissions

SUMMARY

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

COMMENT

No questions.

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

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

COMMENT

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

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

Mr. Raney: How do we quantify sequestration?

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

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

Division of Water and Waste Management

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

SUMMARY

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

COMMENT

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

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

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

33CSR20 – Hazardous Waste Management System

SUMMARY

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

COMMENT

No questions.

33CSR30 – Underground Storage Tanks

SUMMARY

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

COMMENT

No questions.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

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

COMMENT

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

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

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

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

47CSR10 – National Pollutant Discharge Elimination System (NPDES)

SUMMARY

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

COMMENT

No questions.

47CSR34 – Dam Safety

SUMMARY

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

COMMENT

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

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

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

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

COMMENT

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

Mr. Raney: Suggested we start with 39.

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

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

Division of Mining and Reclamation

38CSR2 – Surface Mining Reclamation Rule

SUMMARY

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

COMMENT

No questions.

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

SUMMARY

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

COMMENT

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

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

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

DEP Response: Rule has to be consistent with statute.

47CSR30 – WV/NPDES Rules for Coal Mining Facilities

SUMMARY

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

COMMENT

No questions.

199CSR1 - Surface Mining Blasting Rule

SUMMARY

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

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

COMMENT

No questions.

Office of Oil and Gas

35CSR3 – Coalbed Methane Wells Rule

SUMMARY

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

COMMENT

Is this the same rule that went through last year?

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

16.2.e – advertisement “15 days”

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

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

DEP Response: Yes.

Ms. Hallinan: What is a field rule?

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

Division of Land Restoration

33CSR10 – Recycling Assistance Grant Program

SUMMARY

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

COMMENT

No questions.

60CSR3 – Voluntary Remediation and Redevelopment Rule

SUMMARY

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

COMMENT

Ms. Dooley: Are there grant dollars for brownfields?

DEP Response: Yes

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

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Wednesday – May 30, 2007

10:00 a.m. – 12:00 p.m.

601 57th Street, SE, Charleston, WV

West Virginia Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

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

DEP:

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

VISITORS:

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

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

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

Air Quality

45CSR6 – Control of Air Pollution from Combustion of Refuse

SUMMARY

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

COMMENT

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

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

45CSR8 – Ambient Air Quality Standards

SUMMARY

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

COMMENT

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

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

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

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

45CSR39 – Control of Annual Nitrogen Oxides Emissions

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

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

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

45CSR41 – Control of Annual Sulfur Dioxide Emissions

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

COMMENT

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

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

45CSR42 – Greenhouse Gas Emissions Inventory Program

SUMMARY

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

COMMENT

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

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

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

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

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

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

DEP Response: The agency will consider the issue.

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

DEP Response: It is authorized by the statute.

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

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

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

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

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

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

Division of Water and Waste Management

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

SUMMARY

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

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

COMMENT

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

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

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

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

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

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

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

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

33CSR30 – Underground Storage Tanks

SUMMARY

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

COMMENT

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

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

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

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

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

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

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

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

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

DEP Response: The agency will consider.

47CSR2 – Requirements Governing Water Quality Standards

SUMMARY

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

COMMENT

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

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

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

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

DEP Response: Agency will consider.

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

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

60CSR5 – Antidegradation Implementation Procedures

SUMMARY

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

COMMENT

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

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

DEP Response: Agency will take this under advisement.

Larry Harris: Is the nomination process adequate?

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

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

60CSR8 - Environmental Excellence Program

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

SUMMARY

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

COMMENT

Rick Roberts: Why is section 6.2 completely deleted?

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

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

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

Jackie Hallinan: The program is a good idea.

Meeting was adjourned by Deputy Cabinet Secretary Randy Huffman.

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

Bill...

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

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

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

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

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

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

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

Mining & Reclamation Rule (38 CSR 2)

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

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

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

401 Water Quality Certification Rule (47 CSR 5A)

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

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



West Virginia Coal Association

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

July 18, 2006

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

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

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

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

General Comments

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

History of State § 401 Mitigation Requirements.

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

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

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

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

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

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

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

¹ Programmatic Environmental Impact Statement. Corps, EPA et al. 2005. page II.C-42.

² Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec 13, 1996. 61 Fed. Reg. 241.

³ Programmatic Environmental Impact Statement. Corps, EPA et al. 2005. Page II.C-52

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

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

Federal Mitigation Requirements are Comprehensive.

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

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

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

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

This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.

Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.

...Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating... features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.⁶

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

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

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

In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.⁷

Mitigation should be required, when practicable, in areas adjacent or contiguous to the discharge site. On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat.⁸

Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.⁹

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

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

⁷ Regulatory Guidance Letter No 01-1. U.S. Army Corps of Engineers, October 31, 2001.

⁸ Regulatory Guidance Letter No 02-2. U.S. Army Corps of Engineers, December 24, 2002.

⁹ Compensatory Mitigation Guidelines- Huntington District U.S. Army Corps of Engineers, Huntington, WV District. January 30, 2004.

¹⁰ See attached power point presentation---Central Appalachian Protocol.

and beyond that which is required by the Corps despite the mandate of W. Va.

Code § 22-11-7a(a)(2)(C):

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

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

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

Specific Comments

Page 4 4.2.f.2.A. Economic Information about the coal mining operations, including, without limitation, the estimated number of jobs created, the estimated proportion of employees who will be residents of West Virginia, the estimated annual payroll, the

estimated annual coal production (if applicable), the estimated life of the operation, the estimated severance tax for the operation, the estimated annual property tax, and such other economic information as may be requested by the agency.

WVCA questions why this level of information is needed for the § 401 certification process. Similar information is provided to the Corps under the § 404 permitting program and to the state through the Community Impact Statement. The justification for requiring duplicative information as part of the § 401 certification process is lacking. Further, we are puzzled as to why this information is required only for mining operations. Sections 404 and 401 of the CWA apply to all manner of filling activities, not just coal mining operations. If this information is needed by the WVDEP to properly implement the § 401 certification process, then it should be required for all dredge and fill activities. If it is not, then it should be removed from the proposed revisions. Without further explanation and justification, the WVCA does not support this proposed revision.

4.2.f.4. A Delineation of the Stream to be Impacted. The length, width and depth of the stream segment impacted shall be measured. Width and depth measurements shall be made at one hundred (100) foot intervals. The stream delineation shall indicate the ephemeral and intermittent/perennial segments to be impacted. The stream shall be measured from the farthest downstream disturbance, excluding stream crossings associated with haul roads for surface mining operations, upstream to the beginning of an intermittent stream, as defined in 46 CSR 1-2.9 and/or 38 CSR 2-2.71, the ordinary high water mark. The applicant shall provide a table listing the station number with the corresponding acreage, including the drainage area from the toe of the pond and the toe of the fill.

As proposed, this revision appears to extend the reach of the state's jurisdiction and expand the WVDEP's mitigation requirements under the § 401 certification program. While this change may be motivated by a desire to more closely align the state's mitigation requirements with those of the Corps, the

WVDEP's first and most needed step in that direction is compliance with W. Va. Code § 22-11-7a(a)(2)(C). Until the WVDEP revises its mitigation rules and policies to accept Corps-required mitigation, this proposed change will serve only to increase the amount of in-lieu fee mitigation provided to the state, with no resulting environmental benefit. Further, the proposed change appears to be counter to the authorizing statute which bears no mention of the "ordinary high water mark." The WVCA does not support this proposed revision.

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

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

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

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

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

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

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

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

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

each year the impact occurs.

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

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

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

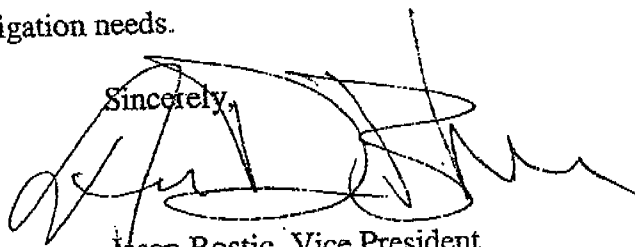
Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Bostic", written over a horizontal line.

Jason Bostic, Vice President
Regulatory & Technical Affairs



West Virginia Coal Association

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

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

Via Electronic Mail: Gjshaffer@wvdep.org

Re: Comments on 2007 Triennial Review of Water Quality Standards

Dear Ms. Shaffer:

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

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

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

Trout Streams

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

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

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

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

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

We appreciate the agency's consideration of these comments.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', is written over a horizontal line. The signature is stylized with a large initial 'J' and 'B'.

Jason D. Bostic
West Virginia Coal Association



West Virginia Coal Association

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

July 17, 2006

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

Re: Comments on Proposed Revisions to 38 CSR 2

Dear Mr. Sturey:

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

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

WVCA appreciates the opportunity to provide comments to the West Virginia

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

Specific Comments

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

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

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

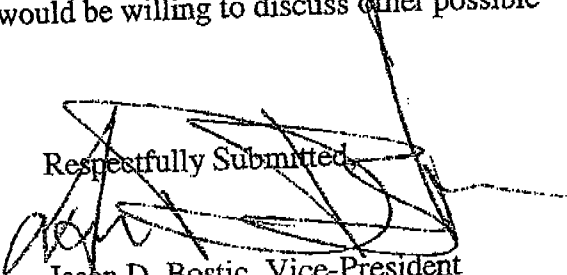
As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect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

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

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

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

Respectfully Submitted,


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

Surface Mining 38 CSR 2 (Agreement)
401 Certification 47 CSR 5A 45CSR42
TROUT LISTING

TITLE 45

LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

§45-42-1. General.

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

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

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

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

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

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

12 Authority -- W Va. Code §22-5-19

13. Filing Date --

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

§45-42-2. Definitions.

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

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

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

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

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

2.5
"Biogenic Sources"
include
COAL

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

Biogenic
Sources
include
COAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-42-3. Applicability.

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

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

Any facility, etc.

45CSR42

hydrofluorocarbons	0.855
perfluorocarbons	1.09

sulfur hexafluoride	0.42
---------------------	------

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

§45-42-4. Reporting Requirements.

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

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

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

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

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

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

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

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

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

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

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

entire Surface Area /
underground Area is a AREA SOURCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-42-7.Economic Development Potential.

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

§45-42-8.Inconsistency Between Rules.

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

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Biogenic substance

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

Examples

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

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

Cotton and wood is are biogenic constituents of contemporary origin.

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

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

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

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

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

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

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

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

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

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

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

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

Comments on DEP Rules for 2007

Communicated by Larry Harris, Public Advisory Council Member

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

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

47CSR2 Water Quality

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

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

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

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

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

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

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

47CSR2 (Appendix E):

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

47CSR5A

47 CSR 5A (State Certification)

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

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

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

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

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

60 CSR5 Antidegradation

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

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

Other issues:

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

3.9 Which advisory committee is this phrase referring to:

5.5b is removed. Why?

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

Comments from Adam Webster (WVRC)

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

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

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

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

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

45CSR42 Greenhouse Gases

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

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

Air Quality and Emission Rules (see below)

45CSR8 Ambient Air Quality Standards

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

Here is what should be reinstated:

§45-8-2. Anti-Degradation Policy.

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

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

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

45CSR41 Control of Annual SO₂ emissions

45CSR6 Control of Air Pollution from Refuse Combustion

45CSR39 Nitrogen Oxides

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

Dr. Kotcon has raised the following issues:

45-CSR-8 Ambient Air Quality Standards

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

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

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

Questions/Comments on DEP's 2007 Proposed Rules

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

- 45 CSR 8 Ambient Air Quality Standards

Section 4 2.c – PM_{2.5} Maximum 24-Hour Average Concentration. The level for the 24-hour primary and secondary standard states 35 ug/m³. This should be 65 ug/m³, pursuant to 40 CFR 50.7.

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

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

- 33 CSR 30, Underground Storage Tank Rules

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

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

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

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

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

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

INDUSTRY'S REVISIONS

45CSR42

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

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

§45-42-1. General.

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

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

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

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

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

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

1.2 Authority -- W Va Code §22-5-19.

1.3. Filing Date --

1.4. Effective Date -- June 1, 2008.

§45-42-2. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-42-3. Applicability.

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

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

nitrous oxide	32.6
perfluorocarbons	1.09
sulfur hexafluoride	0.42

hydrofluorocarbons	0.855
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3.2. Stationary sources which are regulated by the Secretary under W.Va. Code §22-3-1 et seq. and do not report emissions of regulated air pollutants pursuant to the emissions inventory requirements under W.Va. Code §22-5-4(a)(14) are not required to, but may voluntarily report their greenhouse gas emissions under section 4.

§45-42-4. Reporting Requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§45-42-7.Economic Development Potential.

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

§45-42-8.Inconsistency Between Rules.

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

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

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

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

MEMORANDUM

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

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

No comment.

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

We would urge the DEP to update the rule. It still contains references to the Chief, rather than the Director (See, for example, Sections 5 13.d 1, 6 2 and 9 1 a.)

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

C. Antidegradation Implementation Procedures.
Title 60, Series 5

We agree that the State should do away with Section 6 2. There is no need for an initial presumptive listing procedure at this point. As for the 156 (I counted 157, but I may have miscounted) streams in Appendix A, we will disagree with all those listed except the 39 to which no objections were ever lodged.

D. Requirements Governing Water Quality Standards.

Title 57, Series 2.

There are a couple of minor errors – Section 2 2 has a “then” that should be “than” and Section 6 1 is missing text

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

Memorandum
May 29, 2007
Page 2

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

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

DLY:shb

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: Department of Environmental Protection

Address: 601 - 57th Street
Charleston, WV 25304

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

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure
will have on costs and revenues of state government.

These changes are mainly for clarification and may have slight fiscal impact on state government due to reduction in application fee.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of
Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "--")	Next Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	-- 50,000.00	-- 50,000.00

Rule Title: _____

Rule Title:

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

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

These changes are mainly for clarification and may have slight fiscal impact on state government due to reduction in application fee. There will be no long-range effect in the reduction of revenue. The reduction of revenue should be offset by savings in man hours in reviewing these types of applications. This should increase the overall efficiency of the processing of applications.

MEMORANDUM

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

These changes are mainly for clarification and may have slight fiscal impact on state government due to reduction in application fee. There will be no long-range effect in the reduction of revenue. The reduction of revenue should be offset by savings in man hours in reviewing these types of applications. This should increase the overall efficiency of the processing of applications.

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

§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. -- ~~April 19, 2004.~~

1.4. Effective Date. -- ~~June 1, 2004.~~

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~~ Secretary 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~~ Secretary'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~~ Secretary 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 at a site on which coal mining was previously conducted and where the site has been abandoned or the performance bond has been forfeited, ~~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.~~

2.1546. "Discharge" when used without qualification means the discharge of a pollutant.

2.1647. "Discharge of a Pollutant" means:

2.1647.a. Any addition of any pollutant or combination of pollutants to waters of the State from any point source; and

2.1647.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.

2.1748. "Discharge Monitoring Report" or "DMR" means the form(s) prescribed by the ~~Director~~ Secretary and approved by EPA for the reporting of self-monitoring results by permittees under WV/NPDES.

2.1849. "Draft Permit" means a document prepared under Section 10.1 of these rules indicating the ~~Director's~~ Secretary's tentative decision to issue, modify, reissue, suspend or revoke a permit.

2.1920. "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.

2.2021. "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.

2.2122. "Environmental Protection Agency" or "EPA" means the United States Environmental Protection Agency.

2.2223. "Existing Source" means any coal mine, preparation plant and all refuse or waste therefrom:

2.2223.a. From which there is or may be a discharge of pollutants which commenced prior to September 19, 1977; and

2.2223.b. Which is not a new source.

2.2324. "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.

2.2425. "General Permit" means a WV/NPDES permit authorizing a category of discharges within a geographical area.

2.2526. "Hazardous Substance" means any substance designated under 40 C.F.R. Part 116 pursuant to CWA Section 311.

2.2627. "Indirect Discharger" means a nondomestic discharger introducing pollutants to publicly owned treatment works.

2.2728. "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.

2.2829. "Major Facility" means any WV/NPDES facility or activity classified as such by the ~~Director~~ Secretary or by the Regional Administrator in conjunction with the ~~Director~~ Secretary.

2.2930. "Maximum Daily Discharge Limitation" means the highest allowable daily discharge.

2.3034. "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.

2.3132. "New Source" means any coal mining facility covered under 40 C.F.R. Part 434, including an abandoned mine which is being remined, 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.

2.3132.a. In making the determination of major alteration, the ~~Director~~ Secretary 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:

2.3132.a.1. Extraction of a coal seam not previously extracted by that mine;

2.3132.a.2. Discharge into a drainage area not previously affected by

wastewater discharge from the facility covered under 40 C.F.R. Part 434;

2.3132.a.3. Extensive new surface disruption at the mining operation; or

2.3132.a.4. A construction of a new shaft, slope, or drift.

2.3132.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.

2.3132.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.

2.3233. "Operator" means any person, firm, or company who is granted or who should obtain a WV/NPDES permit.

2.3334. "Owner" means the owner of the facility subject to regulation.

2.34. "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 remining operation or from outside the coal remining operation provided there is a demonstrated hydrological connection between the coal~~

~~remining operation and the pre-existing discharge.~~

~~2.3735.~~ "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.

2.3836. "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.

2.3937. "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~~ Secretary.

2.4038. "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.

2.4139. "Recommencing Discharger" means a source, which recommences discharge after terminating operations.

2.4240. "Regional Administrator" means the Regional Administrator of Region III of the Environmental Protection Agency, or an authorized representative.

2.4341. "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.~~

2.4542. "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.

2.4643. "Secretary" means the Secretary of the West Virginia Department of Environmental Protection and his or her authorized agent.

2.4744. "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.

2.4845. "State" means the State of West Virginia.

2.4946. "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.

2.5047. "Toxic Pollutant" means any pollutant listed as a toxic under CWA Section 307(a)(1) (see Appendix A of these rules).

2.5148. "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.

2.5249. "West Virginia Surface Coal Mining and Reclamation Act" or WVSCMRA" means W. Va. Code §22-3-1 et seq..

2.5350. "WV/NPDES Application" or "Application" means the forms prescribed by the ~~Director~~ Secretary and approved by the EPA for applying for a permit or permit modification,

including any additions, revisions or modifications to the WV/NPDES forms.

2.5451. "WV/NPDES Permit" or "Permit" means an authorization issued by the ~~Director~~ Secretary to implement the requirements of Article 11 including modifications to permits.

2.5552. "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;

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 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.1.F. Activities consisting of discharges of storm water runoff or snow melt composed entirely of flows, which are from conveyances used for collecting and conveying precipitation runoff, may be authorized by this rule under the following requirements.

3.1.a.1.F.a.

Must have a valid WVNPDES Permit in effect and issued to implement the requirements of Article 11 and these legislative rules.

3.1.a.1.F.b.

The storm water activity shall not involve any mineral removal, pumping of storm water, or storm water commingled with mine drainage or refuse drainage.

3.1.a.1.F.c. The storm water activity shall be constructed and maintained in accordance with the issued Article 3 Permit Revision including incidental boundaries revisions and with the best management practices and performance standards contained in 38 CSR 2 and Chapter 22, Article 3.

3.1.a.1.F.1.

Request to provide coverage under this rule shall be submitted on forms prescribed by the Secretary, for a Article 3 Permit Revision.

3.1.a.1.F.2.

Authorization to discharge storm water is effective upon the issuance of the corresponding Article 3 Permit Revision.

3.1.a.1.F.3. Application for reissuance of the NPDES Permit shall include application information on all storm water discharges authorized under this rule.

3.1.a.1.F.4. The Secretary may require any storm water discharge authorized by this rule to submit a NPDES modification when the Secretary determines that the receiving stream may be better protected by an individual NPDES modification.

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 other rules including State Act or 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~~ Secretary 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~~ Secretary 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~~ Secretary. 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~~ Secretary 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~~ Secretary 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~~ Secretary determines additional time is necessary in order to process the application for reissuance.

3.5.b.2. Watershed Framework Extensions. The ~~Director~~ Secretary 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 West Virginia 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.c.1 The Secretary may grant advanced approval of the transfer of the WV/NPDES Permit to temporarily allow the new owner or operator to operate and discharge under the conditions of the WV/NPDES permit. Approval will be contingent upon the corresponding Article 3 approval granted under the terms and conditions specified in 38 CSR 2-3.25.a.4

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~~ Secretary 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~~ Secretary 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~~ Secretary.

3.6.a. The ~~Director~~ Secretary 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~~ Secretary prior to the original effective date of these rules (May 30, 1985) shall be administered and enforced by the ~~Director~~ Secretary: 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~~ Secretary 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~~ Secretary. 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary a WV/NPDES application. An application for a permit is complete when the ~~Director~~ Secretary

receives an application form and any supplemental information including maps, plans, designs, and other application materials, which are completed to the ~~Director's~~ Secretary'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~~ Secretary 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~~ Secretary with a complete application in the manner and on a form prescribed by the ~~Director~~ Secretary. 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 Non-complying 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~~ Secretary 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~~ Secretary 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~~ Secretary:

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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary, at his or her request, such other information as the ~~Director~~ Secretary 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~~ Secretary, 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~~ Secretary 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 Division~~ 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~~ Secretary, 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 Non-complying 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~~ Secretary pursuant to West Virginia Code of State Rules, ~~West Virginia Environmental Quality Board, Series 1, Section 8.~~ West Virginia Department of Environmental Protection, Title 47, Series 2.

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. Non-conventional Pollutants. A request for a variance from the BAT requirements for CWA Section 301(b)(2)(F) pollutants (commonly called "non-conventional" 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~~ Secretary, 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~~ Secretary 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~~ Secretary 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~~ Secretary. 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~~ Secretary 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~~ Secretary.

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~~ Secretary 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, Department of Environmental Protection, Title 47, Series 2. 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 non-compliance, 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~~ Secretary 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~~ Secretary, within a specified time, any information which the ~~Director~~ Secretary 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~~ Secretary, upon request, copies of records required to be kept by the permit.

5.10. Inspection and Entry. The permittee shall allow the ~~Director~~ Secretary, 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~~ Secretary 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~~ Secretary, 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~~ Secretary in the permit.

5.12. Signatory Requirement. All applications, reports, or information submitted to the ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary has required in the permit to be reported immediately.

5.13.d.3. The ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary, 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~~ Secretary 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~~ Secretary may approve an anticipated bypass exceeding limitations, after considering its adverse effects, if the ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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.d. Effluent Limitations for Coal Remining Operations.

6.2.d.1. An operator shall be eligible for the effluent limitations under this subdivision if the operator has not caused or contributed to the pollutional discharges associated with the coal remining operation.

6.2.d.2. Technology-based effluent limitations--In the case of coal remining operations, the Secretary shall include the provisions of 40 CFR Part 434, Subpart G in an NPDES permit to satisfy the requirements of subdivision 6.2.a.

6.2.d.3. Water quality-based effluent limitations--In the case of coal remining operations, where water quality standards under 47CSR2 require more stringent limitations than those established under paragraph 6.2.d.2 or address parameters not included in 40 CFR Part 434, Subpart G, the Secretary may grant a remining variance for any parameter of concern. A remining variance shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, and shall not be issued unless the applicant demonstrates that the remining operation will result in the potential for improved instream water quality as a result of the remining operation. The variance shall be issued in accordance with the Secretary's procedural rule at 47CSR6.

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~~ Secretary 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~~ Secretary, 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~~ Secretary'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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary'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~~ Secretary in

writing and shall contain facts or reasons supporting the request. The ~~Director~~ Secretary may require additional information, which may require submission of an updated permit application.

8.1.b. If the ~~Director~~ Secretary 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~~ Secretary citing facts or reasons supporting the request for modification and indicating under which section of these rules the request is made. The ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary determines that no other change in the permit is necessary: Provided, That any forms prescribed by the ~~Director~~ Secretary, 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~~ Secretary;

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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary:

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~~ Secretary 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~~ Secretary, 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~~ Secretary shall tentatively decide whether to prepare a draft permit or to deny the application.

10.1.b. If the ~~Director~~ Secretary 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~~ Secretary may reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted. The ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Division of Water and Waste Management and the ~~Office~~ Division of Air Quality of the West Virginia Department of Environmental Protection;

10.2.d.1.B.2. For UIC: The ~~Office~~ Division of Water Resources and Waste Management 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~~ Division 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~~ Secretary 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~~ Secretary.

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~~ Secretary finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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 non-construction 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~~ Secretary 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~~ Secretary 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~~ Secretary, are more appropriately controlled under a general permit than under individuals permits.

13.1.c. If the ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary.

14.1.a. The ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary.

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~~ Secretary 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~~ Secretary. If the Administrator (or his delegate) approves the variance, the ~~Director~~ Secretary 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~~ Secretary 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~~ Secretary 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~~ Secretary 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
2. Acrolein
3. Acrylonitrile
4. Aldrin and Dieldrin
5. Antimony and compounds
6. Arsenic and compounds
7. Asbestos
8. Benzene
9. Benzidine
10. Beryllium and compounds
11. Cadmium and compounds
12. Carbon tetrachloride
13. Chlorodane (technical mixture and metabolites)
14. Chlorinated benzenes except dichlorobenzenes
15. Chlorinated ethanes:
1,2-Dichloroethane
1,1,1-Trichloroethane
Hexachloroethane
16. Chloroalkyl ethers:
Chloromethyl ether
Chloroethyl ether
Mixed ethers
17. Chlorinated naphthalene
18. Chlorinated phenols:
Trichlorophenols
Chlorinated cresols
19. Chloroform
20. 2-Chlorophenol

21. Chromium and compounds
22. Copper and compounds
23. Cyanides
24. DDT and metabolites
25. Dichlorobenzenes:
 - 1,2-Dichlorobenzene
 - 1,3-Dichlorobenzene
 - 1,4-Dichlorobenzene
26. Dichlorobenzidine
27. Dichloroethylenes:
 - 1,1-Dichloroethylene
 - 1,2-Dichloroethylene
28. 2,4-Dichlorophenol
29. Dichloropropane and Dichloropropene
30. 2,4-Dimethylphenol
31. Dinitrotoluene
32. Diphenylhydrazine
33. Endosulfan and metabolites
34. Endrin and metabolites
35. Ethylbenzene
36. Fluoranthene
37. Haloethers:
 - Chlorophenylphenyl ethers
 - Bromophenylphenyl ether
 - Bis (chloroethoxy) methane
 - Polychlorinated dephenyl ethers
38. Halomethanes:
 - Methylene chloride
 - Methylchloride
 - Methylbromide
 - Bromoform
 - Dichlorobromomethane
 - Trichlorofluoromethane

Dichlorodifluoromethane

APPENDIX A (continued)
Toxic Pollutants under CWA Section 307(a)

- 39. Heptachlor and metabolites
- 40. Hexachlorobutadiene
- 41. Hexachlorocyclohexane
- 42. Hexachlorocyclopentadiene
- 43. Isophorone
- 44. Lead and compounds
- 45. Mercury and compounds
- 46. Naphthalene
- 47. Nickel and compounds
- 48. Nitrobenzene
- 49. Nitrophenols:
 - 2,4-Dinitrophenol
 - Dinitrocresol
- 50. Nitrosamines
- 51. Pentachlorophenol
- 52. Phenol
- 53. Phthalate ester
- 54. Polychlorinated biphenyls (PCBs)
- 55. Polynuclear aromatic hydrocarbons:
 - Benanthracenes
 - Benzopyrenes
 - Benzofluoranthene
 - Chrysenes
 - Dibenzathracenes
 - Indenopyrenes
- 56. Selenium and compounds
- 57. Silver and compounds
- 58. 2,3,7,8-Tetrachloro-dibenzo-p-dioxin (TCDD)
- 59. Tetrachloroethylene

- 60. Thallium and compounds
- 61. Toluene
- 62. Toxaphene
- 63. Trichloroethylene
- 64. Vinyl chloride
- 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
- 2V. Acrylonitrile
- 3V. Benzene
- 5V. Bromoform
- 6V. Carbon tetrachloride
- 7V. Chlorobenzene
- 8V. Chlorodibromomethane
- 9V. Chloroethane
- 10V. 2-Chloroethylvinyl ether
- 11V. Chloroform
- 12V. Dichlorobromomethane
- 14V. 1,1-Dichloroethane
- 15V. 1,2-Dichloroethane
- 16V. 1,1-Dichloroethylene
- 17V. 1,2-Dichloropropane
- 18V. 1,3-Dichloropropylene
- 19V. Ethylbenzene
- 20V. Methyl bromide
- 21V. Methyl chloride
- 22V. Methylene chloride
- 23V. 1,1,2-Tetrachloroethane
- 24V. Tetrachloroethylene
- 25V. Toluene

26V. 1,2-Trans-dichloroethylene

27V. 1,1,1-Trichloroethane

28V. 1,1,2-Trichloroethane

29V. Trichloroethylene

31V. Vinyl chloride

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
- 2P. alpha-BHC
- 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
- 24P. PCB-1016
- 25P. Toxaphene

APPENDIX C (continued)

Organic Toxic Pollutants

- Bases/Neutral -

- 1B. Acenaphthene
- 2B. Acenaphthythylene
- 3B. Anthracene
- 4B. Benzidine
- 5B. Benzo(a)anthracene
- 6B. Benzo(a)pyrene
- 7B. 3,4-Benzofluoranthene
- 8B. Benzo(ghi)perylene
- 9B. Benzo(k)fluoranthene
- 10B. Bis(2-chloroethoxy)methane
- 11B. Bis(2-chloroethyl)ether
- 12B. Bis(2-chloroisopropyl)ether
- 13B. Bis(2-ethylhexyl)phthalate
- 14B. 4-Bromophenyl phenyl ether
- 15B. Butylbenzyl phthalate
- 16B. 2-Chloronphthalene
- 17B. 4-Chlorophenyl phenyl ether
- 18B. Chrysene
- 19B. Dibenzo(a,h)anthracene
- 20B. 1,2-Dichlorobenzene
- 21B. 1,3-Dichlorobenzene
- 22B. 1,4-Dichlorobenzene
- 23B. 3,3'-Dichlorobenzidine
- 24B. Diethyl phthalate

- 25B. Dimethyl phthalate
- 26B. Di-n-butyl phthalate
- 27B. 2,4-Dinitrotoluene
- 28B. 2,6-Dinitrotoluene
- 29B. Di-n-octyl phthalate
- 30B. 1,2-Diphenylhydrazine (as azobenzene)
- 31B. Fluoranthene
- 32B. Fluorene
- 33B. Hexachlorobenzene
- 34B. Hexachlorobutadiene
- 35B. Hexachlorocyclopentadiene
- 36B. Hexachloroethane
- 37B. Indeno(1,2,3-**cd**)pyrene
- 38B. Isophorone
- 39B. Naphthalene
- 40B. Nitrobenzene
- 41B. N-nitrosodimethylamine
- 42B. N-nitrosid-n-propylamine
- 43B. N-nitrosodiphenylamine
- 44B. Phenanthrene
- 45B. Pyrene
- 46B. 1,2,4-Trichlorobenzene

APPENDIX D**Conventional and Nonconventional Pollutants Required
to be Tested by Existing Dischargers
if Expected to be Present**

Bromide

Total Residual Chlorine

Color

Fecal Coliform

Fluoride

Nitrate-Nitrite

Total Organic Nitrogen

Oil and Grease

Total Phosphorus

Radioactivity

Sulfate

Sulfide

Sulfite

Surfactants

Total Aluminum

Total Barium

Total Boron

Total Cobalt

Total Iron

Total magnesium

Total Molybdenum

Total Manganese

Total Tin

Total Titanium

APPENDIX E

**Toxic Pollutants and Hazardous Substances Required
to be Identified by Existing Dischargers
if Expected to be Present**

Acetaldehyde

Allyl alcohol

Allyl chloride

Amyl acetate

Aniline

Asbestos

Benzonitrile

Benzl chloride

Butyl acetate

Butylamine

Captan

Carbaryl

Carbofuran

Carbon disulfide

Chlorpyrifos

Coumaphos

Cresol

Crotonaldehyde

Cyclohexane

2,3-Dichlorophenoxyacetic acid (2,4-D)

Diazinon

Dicamba

Dichlobenil

Diclone

2,2-Dichloropropionic acid

Dichlorvos
Diethyl amine
Dimethyl amine
Dinitrobenzene
Diquat
Disulfoton
Diuron
Epichlorohydrin
Ethion
Ethylene Diamine
Ethylene dibromide
Formaldehyde
Furfural
Guthion
Isoprene
Isopropanolamine dodecylbenzenesulfonate
Kelthane
Kepone
Malthion
Mercaptodimethur
Methoxychlor
Methyl mercaptan
Methyl methacrylate
Methyl parathion
Mevinphos

APPENDIX E (continued)**Toxic Pollutants and Hazardous Substances Required
to be Identified by Existing Dischargers
if Expected to be Present**

Mexacarbate

Monoethyl amine

Monomethyl amine

Naled

Naththenic acid

Nitrotoluene

Parathion

Phenolsulfanate

Phosgene

Propargite

Propylene oxide

Pyrethrins

Quinoline

Resorcinol

Strontium

Strychnine

Styrene

2,4,5-Trichlorophenoxyacetic acid (2,4,5-T)

Tetrachlorodiphenylethane

2,4,5-Trichlorophenoxy propanoic acid (2,4,5-TP)

Trichlorogon

Triethanolamine dodecylbenzenesulfonate

Triethylamine

Trimethylamine

Uranium

Vanadium

Vinyl acetate

Xylene

Xylenol

Zirconium