WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: OFFICE OF WATER RESOURCES TITLE NUMBER: 47

CITE AUTHORITY: W. VA. CODE 22-28-9

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ___

TITLE OF RULE BEING AMENDED: ___

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 61

TITLE OF RULE BEING PROPOSED: COMMUNITY INFRASTRUCTURE INVESTMENT PROGRAM

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

Stephanie R. Timmermeyer
Authorized Signature

$10.40

QUESTIONNAIRE

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

DATE: October 26, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (*Agency Name, Address & Phone No.*) Department of Environmental Protection
Office of Water Resources
601 57th Street, Charleston, WV 25304
926-0495

LEGISLATIVE RULE TITLE: Community Infrastructure Investment Program

1. Authorizing statute(s) citation W. VA. CODE 22-28-9

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

   August 10, 2005

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

   Press releases, online mailing list and placed on web page. Also mailed to those persons who submitted informal comments earlier.

   c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

   September 27, 2005

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

   Attached X No comments received _____

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

October 26, 2005

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

Mike Johnson, Assistant Director
WVDEP - Office of Water Resources
601 57th Street, SE Charleston, WV 25304
926-0499 ext. 1611
926-0496 (fax)
mjohnson@wvdep.org

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

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

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

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: Community Infrastructure Investment Program

A. AUTHORITY: W. Va. Code §22-28-9

B. SUMMARY OF RULE:

This rule establishes requirements governing the Community Infrastructure Investment Program established pursuant to W. Va. Code §22-28-1 et seq. The purpose of this program is to facilitate the construction or expansion of water and sewer facilities for the promotion of economic development and the protection of public health and the environment. Facilities costing less than $10 million that are initially built using private funds may be transferred to a public utility, at no cost, pursuant to an investment agreement required by Section 4 of the rule.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

As per §22-28-9 the agency is required to file this legislative rule.

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

There is no federal counterpart regulation, thus no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

The agency presented the proposed rule to the Environmental Protection Advisory Council at its meeting held on September 15, 2005. Minutes of the Council's meeting are attached.

West Virginia Department of Environmental Protection

ADVISORY COUNCIL TELECONFERENCE MINUTES

Thursday - September 15, 2005
601 57th Street, SE, Charleston, WV
West Virginia Conference Room – 3rd Floor

ATTENDEES:

Advisory Council Members:
Larry Harris
Rick Roberts
Jason Bostic for Bill Raney

***NOTE**: Lisa Dooley did not participate in the teleconference – she did offer suggestions regarding 47CSR61 by e-mail. (see attached)

DEP:
Stephanie R. Timmermeyer, Cabinet Secretary
Karen G. Watson, Assistant General Counsel
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
Mike Dorsey – WVDEP - DWWM
Mike Johnson – WVDEP – DWWM
Charlie Sturey - WVDEP – DMR
Pam Nixon – WVDEP - OA

Cabinet Secretary Stephanie R. Timmermeyer began with general information about legislation. She said that the agency is waiting on the Governor's office, and once finalized will send information to the Council for their information. She said the Council could discuss the subject in December or in a special meeting before that if they desire.

- **47CSR61 - Community Infrastructure Investment Program**

This legislative rule establishes requirements governing the Community Infrastructure Investment Program established pursuant to W.Va. Code §22-28-1 et seq. The program will facilitate the construction or expansion of project facilities for the promotion of economic development and the protection of public health and environment in the state.

Mike Johnson summarized the following:

- The 2005 Legislature passed Senate Bill 700 which created within DEP a "Community Infrastructure Investment Program", dedicated to facilitate the construction of new or expanded water and sewer facilities that promote economic development while protecting public health and the environment.

- The Legislature found that private businesses are in need of these services and are willing to initially pay for the construction of these facilities, then after construction is completed to transfer them to a Publicly Owned Treatment Works (POTW), at no cost to the POTW.

- Any municipality or public service district can enter into an "agreement" with a private business to undertake a project under this statute.

- Both the POTW and the private business entity can jointly submit an application (with the Agreement) to DEP for approval. If DEP approves the arrangement, it will issue a "Certificate of Appropriateness" signifying its approval.

- Under this new law, DEP is the sole agency approving these type projects up front. The Public Service Commission of WV is no longer involved until after the transfer of facilities takes place.

- DEP filed an emergency rule to implement this new law on August 1, 2005, as authorized in the law. On August 10, 2005, DEP also filed a Notice of a Public Hearing setting the hearing for September 27, 2005, at 6pm in Morgantown at WVU's Natural Resource Center for Coal and Energy.

The emergency rule basically gives the requirements for filing an application with DEP, including the Investment Agreement. This process takes place after a permit has been issued by DEP (and/or the Bureau for Public Health). DEP has 30 days after receipt of a complete application to render its decision. The application fee to accompany the application is $3,000.

Larry Harris asked could this be any type of business. Mike Johnson replied yes.

Jason Bostic asked if there is any other matter for the PSC to approve. Mike Johnson responded the PSC only reviews the project after construction – after the facility is transferred to the public utility. Then the PSC has oversight.

Larry Harris wanted to know if a mining company could participate in the program. Mike Johnson replied "yes."

- **38CSR2 - Conditions for Surety Bonds**

Charlie Sturey discussed the following proposed revision involving surety bonds to 38CSR2:

11.3 Bond Instruments.

11.3.a. Surety bonds shall be subject to the following conditions:

. . .

11.3.a.3. Surety received after July 1, 2001 must: (i) be recognized by the treasurer of the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds, or (ii) submit to the Secretary proof that the surety holds a valid license issued by the West Virginia Insurance Commissioner and agree to submit on at least a quarterly basis a certificate of good standing or other evidence demonstrating that the surety remains licensed or otherwise in good standing with the West Virginia Insurance Commissioner and the insurance regulator of its domiciliary state.

Charlie explained that the current rule prevents new surety companies that do not currently issue federal bonds, but are otherwise in good financial condition, from doing business as sureties on mining and reclamation bonds. The agency did not intend this result when it adopted the original language; it only used the federal requirement as a way to have someone with financial expertise outside the agency assess a surety's financial condition. To be T-Listed, a surety has to do business for at least 2 years, preventing new companies from meeting the requirement.

The proposed rule change will allow a company to issue mining bonds as long as they meet the federal T-Listing requirement within four (4) years. The agency will file the rule as an emergency rule next week and hold a public hearing the end of October.

Jason Bostic asked if the current language is unique to West Virginia, and Charlie responded that a few other states have a similar requirement.

At the conclusion of the discussion on 38CSR2, Secretary Timmermeyer asked the Council if they had any questions for the staff present for the teleconference call.

Larry Harris asked how the studies on unisex fish are coming along. Bill Brannon responded the agency is still working on the issue and is looking at other watersheds. Larry would like a copy of the unisex news release.

Jason Bostic said the Coal Association might have some suggested revisions to the portion of the mining rule involving forestry and the soil overburden issue. The Secretary suggested they submit any suggestions they have in writing to the agency for its consideration.

Karen Watson, Assistant General Counsel, let the Council know that Trish would be e-mailing them with the upcoming date of our next meeting. We are looking at the first week in December.

Karen adjourned the meeting.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 47CSR61

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: Office of Water Resources

Address: 601 57th Street, SE
Charleston, WV 25304

Phone Number: 926-0495 Email: mjohnson@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.

The agency does not anticipate any additional costs as a result of this program. Existing staff will be utilitzed to administer this new program.

This rule will assess a $3,000 fee per application. At this time the agency is unable to estimate the number of applications per year that may be submitted. We do not expect many applications, maybe twelve (12) per year.

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	27,000.00	36,000.00	36,000.00

Rule Title: 47CSR61

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

Each application must be submitted with a fee of $3,000. This is calculated assuming each application will be assigned to a project engineer and financial specialist to review. Each of these reviewers will spend an average of 24 hours reviewing each application. At an average hourly rate of pay of $28 and $20 respectively, the total cost of their review will be about $1,150. Two managers or supervisors will review their recommendations and will do a cursory review of the application package. Assuming 20 hours total for this phase of the review at $31/hours equals $620. Assuming clerical support and a final legal review of the investment agreement in each application by attorneys, this will add about $1,200 to the cost of review for a total rounded off number of $3,000. The above calculation allows room for travel costs associated with on-site meetings, inspection, etc., if necessary.

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.

See above

Date: October 26, 2005

Signature of Agency Head or Authorized Representative

47CSR61

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

SERIES 61
COMMUNITY INFRASTRUCTURE INVESTMENT PROGRAM

§47-61-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes requirements governing the Community Infrastructure Investment Program established pursuant to W. Va. Code §22-28-1 et seq. The program will facilitate the construction or expansion of project facilities for the promotion of economic development and the protection of public health and environment in the state.

1.2. Authority. -- W. Va. Code §22-28-9.

1.3. Filing Date. --

1.4. Effective Date. --

§47-61-2. Definitions.

The definitions set forth in W. Va. Code §22-28-2 apply to this rule along with the following definitions.

2.1. "Act" means the Community Infrastructure Investment Projects Act, W. Va. Code §22-28-1 et seq.

2.2. "Agreement" means the Community Infrastructure Investment Agreement as required by the Act and shall refer to a duly authorized written agreement between a public utility and a person that provides for the transfer of legal title to a project facility from the person to the public utility.

2.3. "Certificate" means a certificate of appropriateness issued by the Secretary evidencing approval of a project to be constructed under the provisions of the Act.

2.4. "Completion and activation" means the date on which operation of the project is initiated or is capable of being initiated, whichever is earlier.

2.5. "Department" means the Department of Environmental Protection.

2.6. "Governing body" means with respect to a municipality the mayor and council; with respect to a public service district the public service board; with respect to a sanitary district the board of trustees; and with respect to any other public utility the duly elected or appointed members having legal authority to make decisions at public meetings for the public utility.

2.7. "Person" means any individual, partnership, firm, society, association, trust, corporation or other business entity.

2.8. "Project" means any newly constructed or enlarged and improved project facilities of $10 million or less that may be transferred to a public utility without cost to the public utility pursuant to the Act.

2.9. "Project cost" means the capital cost of the project to be constructed under the Act and shall not refer to any of the costs or expenses of ordinary operation and maintenance of the project once it becomes operational.

2.10. "Project facilities" means wastewater treatment plants or water treatment plants constructed pursuant to the Act and include, but are not limited to, related storage buildings or structures, meters, hydrants, pump stations, force and gravity main, transmission lines and other such fixtures related to the construction of water and sewer facilities. Project facilities do not refer to the ordinary extension of collection and distribution lines or facilities from or to the project to the property of any user of project facilities.

2.11. "Public utility" means an existing water or sewer utility operated by a municipality, public service district or any other political subdivision that is certificated by the Public Service Commission of West Virginia.

2.12. "Rights of way" means the acquisition of all real property or property rights (easements, etc.) needed for project facility construction.

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.

§47-61-3. Community Infrastructure Investment Program.

3.1. Prior to filing a formal application for a certificate, the public utility or the person intending to construct a community infrastructure project must file a "notice of intent" with the Secretary. This notice of intent must demonstrate a desire to construct the project under the provisions of this rule and must state the date the utility expects to file the application. The notice of intent must be filed as soon as possible, but no later than the date of filing of an

application for any applicable Department permit or permit modification, whichever is earlier, or the filing of any applicable permit application with the Bureau for Public Health by the person responsible for the construction of the project facilities. If a permit has already been issued or an application for a permit has already been submitted as of the effective date of this rule, the requirement of this section will be waived.

3.2. Application requirements.

3.2.a. A joint application from a person intending to construct a community infrastructure project and the public utility to which the project will be transferred must be filed with the Secretary on a prescribed form and must include all of the following:

3.2.a.1. Completed Form #CIIP-1;

3.2.a.2. Utility's current rate tariff, proposed new tariff for the project, if applicable and annual budget;

3.2.a.3. Utility's most recent two annual independent audited financial statements;

3.2.a.4. Opinion of bond counsel with respect to existing bond covenants being satisfied as a result of transfer of the project;

3.2.a.5. Attorney's preliminary opinion of title transfer that upon completion of the project the transfer will take place;

3.2.a.6. Any applicable permits issued by the Department and/or Bureau for Public Health;

3.2.a.7. An independent certified public accountant's cash flow analysis for the public utility's current operations and projected operations after the transfer of the project;

3.2.a.8. A certified copy of the resolution of the governing body of the public utility authorizing the filing of an application.

3.2.a.9. Evidence and documentation of public participation efforts conducted by the public utility, prior to the filing of this application;

3.2.a.10. Proposed Agreement; and

3.2.a.11. The application fee.

3.3. An application for a certificate will not be deemed administratively complete unless all items are contained therein as described in Subdivision 3.2.a..

3.4. A certified copy of the minutes of the meeting where the application resolution was adopted by the governing body of the public utility shall be filed with the Secretary within thirty (30) days from the date of filing of the application, unless, by mutual agreement among all the parties such time period is extended.

3.5. Upon completion of his or her review of the application and attachments, the Secretary may require additional information as deemed appropriate in order to take final action on the application.

§47-61-4. Community Infrastructure Investment Agreements.

4.1. Each proposed Agreement must be submitted to the Secretary for review and approval as part of the application for a certificate, using a standard form of agreement as prescribed by the Secretary. The public utility and the person intending to construct a community infrastructure project may agree to terms which are different from or additional to those contained in the standard form of agreement provided such terms are set forth in an appendix to the standard form of agreement. The Secretary may approve, reject, or modify such additional or different terms. In the event the Secretary rejects or modifies such additional different terms, construction on the project will not be initiated until the certificate has been issued and a copy of the executed Agreement, as modified by the Secretary, has been returned to the Secretary.

4.2. Each proposed Agreement must contain the following information:

4.2.a. The project facilities must be engineered and constructed in accordance with the requirements for new construction established by the public utility;

4.2.b. Proof or certification of the financial ability of the public utility to maintain and operate the public facilities;

4.2.c. Certification that upon completion and activation of the project facility or improvements to the project facility, the title to the public facility must be transferred without cost to the public utility;

4.2.d. A finding that the construction of the new public facility, or the substantial improvement or expansion of an existing public facility, either: (I) fosters economic growth by promoting commercial, industrial or residential development; and (ii) improves water quality or otherwise enables the affected territory to achieve compliance with any applicable state or federal health or environmental law;

4.2.e. The public utility will receive or otherwise obtain without cost to the

public all necessary rights-of-way for the operation of the public facility;

4.2.f. The rates charged by a public utility to new customers to be served by the project facility must be the rates in effect at the time of transfer of the project facility to the utility, unless the revenues to be generated from new customers at the utility's rates in effect at the time of transfer are less than the utility's cost of service of the project facility, in which case the utility shall charge rates to the new customers to be served by the project facility which are expected to equal or exceed by no more than 15% the utility's expected cost of service of the project facility, until such time as new rates may be finally enacted by the public utility and approved by the Public Service Commission of West Virginia. The rates charged by the public utility to existing customers must not be adversely impacted as a result of the obligation of the public utility pursuant to the community infrastructure investment agreement;

4.2.g. Confirmation that the agreement does not violate any of the bond covenants imposed on the public utility;

4.2.h. Proof that necessary permits, where applicable, have been obtained from the Bureau for Public Health and the Department of Environmental Protection;

4.2.i. Evidence that the person responsible for the construction of or improvements to the public facility has provided funding to the public utility for the engagement of an engineer qualified to inspect and certify that the project has been constructed in accordance with plans approved by the Bureau for Public Health and the Department, and that said project has been constructed in a good and workmanlike manner; and

4.2.j. Proof that the person responsible for construction of or improvements to the public facility has obtained a performance bond securing performance for the benefit of the public utility equal to the estimated cost of construction: Provided, that the form of the bond required by this section shall be approved by the Secretary and may include, at the option of the Secretary, surety bonding, collateral bonding (including cash and securities), bonding fund participation as established by the Secretary, self-bonding or a combination of these methods.

4.3. In addition to the requirements contained in section 4.2., each Agreement must contain or require the following items:

4.3.a. A one year warranty bond equal to the cost of construction from the person responsible for the construction of the project facilities;

4.3.b. A payment bond equal to the cost of construction from the person responsible for the construction of the project facilities, or a release of liens regarding the system as specified in the Agreement;

4.3.c. The required performance bond will remain in effect until the project

facility has been accepted by the public utility; and

4.3.d. The public utility must monitor the construction of the project facilities for quality control.

4.4. In the absence of enough new customers to reasonably shoulder the initial burden of additional operation and maintenance expenses imposed upon the public utility as a result of completion and transfer of the project, the person responsible for the construction may be required to post a bond in a form approved by the Secretary in an amount necessary to cover any monthly revenue shortfalls for a reasonable period of time.

§47-61-5. Permitting Requirements.

Prior to the issuance of a certificate by the Secretary, all necessary permits, where applicable, must have been obtained from the Department and the Bureau for Public Health. Facilities discharging into the Potomac River watershed and its tributaries must be designed to achieve nutrient reductions, for both nitrogen and phosphorus, consistent with West Virginia's participation in the Chesapeake Bay program upon implementation of the Chesapeake Bay standards by the Secretary.

§47-61-6. Time for approval.

The Secretary will approve or reject all applications for a project within thirty (30) days from the date the application is deemed administratively complete. By mutual agreement among all the parties such time period may be extended but in no case will the time period extend beyond ninety (90) days from the date the application is deemed administratively complete. Construction on the project will not be initiated until the certificate has been issued and a copy of the executed Agreement has been returned to the Secretary.

§47-61-7. Fees.

Each application for a certificate must be submitted with a check or money order made payable to the Department of Environmental Protection, Office of Water Resources in the amount of $3,000.00.

TRANSCRIPT

Public Hearing for Community Infrastructure Investment Program
6 to 8 p.m., Tuesday, September 27, 2005
West Virginia University Evansdale Campus NRCCE
Morgantown, WV

Rich Carter: ... front so that you can get your comments on tape. I'll open the public comment portion of the hearing now. First person I have to speak is James Kelsh. Mr. Kelsh.

James Kelsh: Yes.

Rich Carter: Just come up here and make sure that you ...

James Kelsh: Thank you Mr. Carter. My name is James V. Kelsh and I'm an attorney with the Jefferson County Public Service District. I've prepared some written comments I'd like to go over briefly and orally as well.

Rich Carter: Ok.

James Kelsh: I'll hand those over to you as well. My understanding is that we're here today on the, what I'm going to call the regular rules. That the emergency rules have been adopted and in effect and the DEP today is receiving comments on the regular

rule. And my understanding also is that the proposed regular rule is identical to the current emergency rule. Is that the case Mike?

Mike Johnson: Sure.

James Kelsh: Ok. The Jefferson County Public Service District believes that the proposed rules are a very good start. We do have some comments on a couple of the rules. Mr. Johnson, I'll go ahead and hand you an extra copy of my written comments. We're concerned about proposed rule 3.2A8 which requires the, in order for an application to be complete that it include both the resolution of the utility adopting the filing of the application and the minutes of the meeting where that resolution was passed. Many of the utilities who will be filing this meet only once a month and if they're required to file the minutes along with the resolution itself that will needlessly delay the filing of the application. So instead the District proposes that the resolution be included with the application, but the minutes wherein the, you know demonstrating that the resolution was in fact adopted by the Board be filed subsequent to the filing of the application. Second, proposed rule 4.1 requires the filing of a standard form of agreement. The District has refused, reviewed the standard form of agreement which the DEP has circulated and we believe that it's good and helpful to have a standard form of agreement in, and it's a good agreement in that it covers you know many of the checklist items that have to be included by statute or by

rule. We do have some particular comments on that agreement as well. However, we want to make sure that the rules clearly indicate that the parties are free to depart from the terms of the agreement based upon individual circumstances which may come up with situations involving different utilities. And we have in my comments there included language which would clarify that the parties are in fact free to adopt additional or different terms from those contained in the standard form of agreement. Of course, the Secretary would be free to review, approve, reject, or modify those terms as it sees appropriate. Next, the, we're concerned about a proposed Rule 4.2.f which is pulled straight from the statute. However, the statute is ambiguous and the rule's ambiguous too. I think the language could be interpreted to say that the rates have to be the utility's current rates plus the increment needed to cover the cost of operation of the facility. Whereas I think the intention was that if the utility's existing rates are sufficient for it to break even in operating the community infrastructure improvement project that those rates should be placed in effect and you only go above those if there are extraordinary operating costs. So we have a proposal to clarify that issue. There's a typo in proposed Rule 4.2.j which my comments correct. The, we also have some comments on the application form which has been circulated. That application form asks for the utility to include, you know, the section on, for the utility to indicate whether it's been delinquent on any debt, when the utility had its last rate increase, and what the medium household income is in the area. Yet if these

are essentially 100 percent private grant funded projects, we don't see the relevance of this information and just to streamline the application process and not make it any more burdensome that need be, we'd recommend that DEP strike those items from the application form. With respect to the standard form of agreement circulated by DEP, that standard form includes Section 5.5 which essentially provides that nothing in these rules allows the utility to take ownership of the system one section at a time. It is common place with many of the utilities which I represent that they enter alternative mainline extension agreements with developers which provide for acceptance of wastewater collection systems or water distribution systems a section at a time. It hasn't been particularly problematic. We believe that at a minimum DEP should have, should review these on a case by case basis and we think it would be a better practice to strike this Section 5.5 altogether. Next, Section 9.2 requires the developer to provide the utility with connection and user agreements for current and future customers. It's logistically impossible for the developer to deliver user agreements for future customers so we just ask that that modification be made. The, and then in Section 10.7, it talks about the term of the agreement being set forth in the appendix. I think that it's just simpler to add the terms of the agreement set forth in the agreement itself rather than having a separate appendix to address that item. And we also provide comments on Appendix E. One, there's a mislabeling at the sections on, in Appendix E. They're referred to as F and it should be E.

There's a cross reference in F.1 to Section 6.5 in the standard form of agreement. There is no Section 6.5 in the standard form of the agreement. And in Appendix E has some tests on when the developer is released from his obligation to secure the operational costs of the facilities. There's no period for indicating when that test occurs, whether it's a monthly, a quarterly, or an annual test. The District would suggest that that should be a, that the developer should be released from his financial obligation when the facility has broken even or better for two consecutive quarters. Those are the comments of the Jefferson County Public Service District on the proposed rule. The Jefferson County Public Service District is active in lobbying for the community infrastructure investment program and we are pleased that DEP's prompt rulemaking and a thorough rulemaking that addresses many topics and we are willing to be available to DEP as a resource to discuss these issues further. Thank you.

Rich Carter: Next on the list is Mr. Green, is that correct? James. I'm ready.

Mr. Green: I don't think I have a full copy of this...

Rich Carter: There's a copy back there.

Jim Green: Ok, I'm Jim Green. I'm the general manager of the Morgantown Utility Board. We've been successful over the years in trying to pull developers and utilities together to try improve infrastructure, expand infrastructure, and do the types of things that this bill is aimed at. We've got some questions about you know, how this thing is really going to work and specifically in Section 2.9 where they talk about project facilities do not refer to the ordinary extension of collection distribution lines of facilities from or to the project to the property of any user of project facilities. And we're curious as whether or not this can be a combination type project where the developer under normal extension rules extends facilities to the property line and then under an agreement the developer goes ahead and develops this property in conjunction with that normal extension. I don't know whether the intent there is to do that or these are all standard in type projects. I think that it's going to be important to make a clarification on that simply because the way we do things in Morgantown most everything is under an extension agreement and that includes the facilities within a development or subdivision etc. Another question that we've got and I think it's an interesting question concerning Section 4.2.f. The rates charged by a public utility to a new customer will be served by the private facility must be the rates in effect at the time of the transfer plus any additional costs or service. I think that it's important that we identify the parameters of that cost of service. It's very easy to look at just operations and maintenance costs but we certainly have to look at

planning and repair, or a renewal and replacement fund for these new facilities because if that's not the case then we'll end up absorbing that into the utility's budget and I think there, if we're going to have, that's all part of the operating, or a part of the cost of service for this particular development. I think that needs to be clarified. In addition, we're very concerned about the fact that you know initially under the rule a, a, the existing tariff for the utility to be used plus the cost of service. We feel that the Public Service Commission, unless they're read into this, based upon our recent experience is that they'll try to level the rates in a short period of time after this development has occurred. And in Morgantown that would mean we've got a system that's located close by that has a much higher rate than Morgantown has and the Public Service Commission has pushed very hard to try to make them all have the same rate. And I read this to say that the rates charged by the public utility to existing customers must not be impacted as a result of the obligation of the public utility pursuant to the community infrastructure and investment agreement. I think we need the Public Service Commission to jump in here and say we'll not mess with this because it could do real damage to a utility if that cost and service were eliminated and rates were flattened out for the whole utility to cover the cost of service for that particular development. In 4.2.i it talks about evidence that the person responsible for the construction and improvements has provided funding for the public utility for engagement of engineer qualified to inspect, certify, etc. etc. I think

it needs to be spelled out that this engineer that qualifies this project must provide as built drawings, must provide operation and maintenance manuals to cover any equipment that's installed etc within this development and it must be done to the satisfaction of the utility because I've seen too many projects where inadequate documentation has been presented and it's caused utilities a tremendous amount of difficulty to get up to speed on how to operate and maintain that system. And other than that, that's basically all I have to say. Thank you.

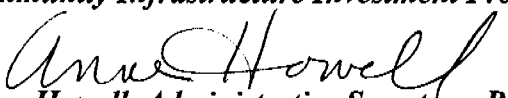
Rich Carter: Thank you. Well that would be all the people that I have signed up that wish, that have indicated they wish to speak. Now's the opportunity for anybody that hasn't spoken and wishes to speak on the record could speak. Well the comment period ends at the conclusion of this hearing which is just about now I guess. So of course as I said give me any written documentation if you want to. If not, let me just look out here quickly. I'd like to thank you all for coming and this concludes the public hearing and thank you.

DEP personnel present at meeting:

Division of Water Resources – Mike Johnson

Public Information Office – Richard Carter

I submit this transcript and swear that this is a true and accurate copy, to the best of my ability, of the public hearing held on Tuesday, September 27, 2005 for the Community Infrastructure Investment Program.



Anne Howell, Administrative Secretary, Public Information Office

Tuesday, October 4, 2005

September 27, 2005 Public Hearing - Community Infrastructure Investment Program.
West Virginia University Evansdale Campus NRCCE building assembly rooms 101 A and B.

	Do you wish to speak?	NAME	ADDRESS	PHONE #
1	Yes	James V. Kelsh	300 Summers St. Ste 1230 Charleston, WV 25301	343 1654
2	Yes	James L. Green	Morgantown Utility Board P.O. Box 852 Morgantown WV. 26507	304-292-8443
	NO	Sam Conly	211 Church St Lewisburg WV 24901	304 645-3905

September 27, 2005 Public Hearing - Community Infrastructure Investment Program. 6 to 8p
West Virginia University Evansdale Campus NRCCE building assembly rooms 101 A and B.

Do you wish to speak?	NAME	ADDRESS	PHONE #
NO	MIKE LUTMAN	C/O POTESTA & ASSOCIATES, INC 125 LAKEVIEW DR, MORG. WV 26508	304-225-2245
NO	TIM BALL	MGTN UTILITY BOARD PO BOX 852 MGTN	304 292-8143

RESPONSE TO COMMENTS – 47 CSR 61

The comment period for the Community Infrastructure Investment Program rule, 47 CSR 61, closed September 27, 2005. Comments were received from the following individuals.

James V. Kelsh, Counsel for Jefferson County Public Service District

COMMENT A:

Mr. Kelsh commented that the requirement to submit a certified copy of the resolution of the governing body authorizing the filing of an application and a certified copy of the minutes of the meeting where the application was adopted would result in a delay of the application being deemed administratively complete. Mr Kelsh suggested the certified copy of the minutes of the meeting be submitted within 30 days of the filing of an application and the administrative completeness determination of the application should not be held up waiting for the minutes of the meeting.

RESPONSE A:

The DEP agrees and will change the rule accordingly.

COMMENT B:

Concerning Section 4.1 of the rule, Mr. Kelsh commented that the parties to the investment agreement need the flexibility to enter into terms which differ from or augment those provided in the standard form of agreement as drafted by DEP in order to fit particular circumstances which may confront a community infrastructure project.

RESPONSE B:

The DEP agrees and will clarify the rule accordingly. It was never the intent of DEP to mandate the standard form of agreement be used word for word as it is currently written. The minimum conditions of the agreement as specified in the statute must be included in every agreement; however the remaining terms of the agreement are negotiable between the public utility and the private business entity. DEP does believe the proposed form of agreement provides a good template for these investment projects. The DEP shall retain the authority to approve or reject additional or different terms of the agreement.

COMMENT C:

Concerning Section 4.2.f. of the rule, Mr. Kelsh believes the proposed rule is ambiguous. He admittedly states this section of the rule is based upon statutory language. He believes that what was intended was for the utility to operate the facilities at the

utility's existing rates so long as the utility could do so on a breaking even or better basis. If the utility could not break even, it should then charge a higher rate to the new customers of the facilities. He believes a corresponding change to Section 6.4 of the standard form of agreement should also be changed.

RESPONSE C:

The DEP agrees with the ambiguity of the statutory language. The DEP will change the rule to address these concerns.

COMMENT D:

Concerning Section 4.2.j. of the rule, Mr. Kelsh points out a grammatical error in the first sentence.

RESPONSE D:

The DEP will correct the error.

COMMENT E:

Concerning the proposed application form, Mr. Kelsh believes some of the requested information is irrelevant since these projects are 100% privately funded at the beginning.

RESPONSE E:

Since each project is a joint effort between a private business entity and a public utility, the information in question is pertinent to assessing the utility's current financial status and past and future ability to deal with important financial issues. The application form requests information that is readily available at the utility level and therefore should be provided. The application form is much like the present one used by the West Virginia Infrastructure and Jobs Development Council, therefore utilities should be used to supplying this information.

COMMENT F:

Mr. Kelsh questioned some parts of the standard form of investment agreement and suggested that some of the items be eliminated, changed or clarified.

RESPONSE F:

As indicated in RESPONSE B above, the DEP will revise the standard form of agreement accordingly in order to clarify its content. Each agreement will be reviewed and approved or rejected on a case by case basis.

James Green, Manager, Morgantown Utility Board

COMMENT A:

Mr. Green questioned how this law was really going to work. He questioned Section 2.9 of the rule and felt the definition of what constitutes a normal line extension should be clarified.

RESPONSE A:

The DEP shares Mr. Green's concerns about the definition of "project facilities" in this section of the rule excluding ordinary extensions from or to the project (built under this program) to the property of any user of the project facilities. The statute contains the same language. Obviously, in order to have a completely functional project facility, users have to be connected to generate revenue. DEP believes this definition in the law and the proposed rule is intended exclude the further extension of lines outside the original scope of the project facility to any additional or potential future user of the project facility. When reviewing applications submitted for a project facility under this rule, DEP will rely upon a well defined original project scope.

COMMENT B:

Mr. Green commented upon Section 4.2.f of the rule. He felt the normal renewal and replacement cost components in any user rate structure should also be considered in determining any additional cost of service to be borne by the public utility. He was also concerned with the part of this section that allows the Public Service Commission (PSC) to come in after the fact and revise the rate structure after the facilities have been transferred to the public utility.

RESPONSE B:

The DEP agrees with the rate component part of the question. As written, the rule would not exclude a public utility from considering this additional rate structure component if they choose to do so. A change in the rule is not needed. The PSC concern is also valid. However, Section 8 of the statute specifically exempts the PSC from participating in the approval process only until the title of the facilities has been transferred to the utility. After that, the PSC authority under Chapter 24 of the Code is once again in effect.

COMMENT C:

Mr. Green commented on Section 4.2.i that as-built drawings and operation and maintenance manuals should be required.

RESPONSE C:

Section 4.2.i. of the rule follows the statutory language. However, in Article IV of the DEP suggested standard form of agreement, the person responsible for the

construction of the facilities will deliver to the public utility "all shop drawings, operating manuals and written warranties....", in addition to as-built drawings of the completed system. Therefore, a change in the rule is not needed.

Don Owen, resident of Jefferson County

COMMENT A:

Mr. Owen commented that Senate Bill 700 gives developers every possible advantage and communities virtually none. Concerning Section 6 of the rule, he commented that developers will use 30 to 90-day time for approval of applications to force the state, local government and citizens of the area to accept substandard infrastructure development. He suggested a clause be added that states the time period (for approval) not begin until such time as a fully complete application has been submitted, as determined by the Secretary.

RESPONSE A:

This section of the rule follows statutory language. DEP has defined an administratively complete application in the rule and the review time will not commence until a complete application is received. DEP does not believe a further change in the rule is necessary.

Lisa Dooley, West Virginia Municipal League

COMMENT A:

Ms. Dooley commented that a definition of a "governing body" be included in the rule because while the public utility may have a governing body, the final authority for municipal utilities rests with the city council.

RESPONSE A:

The DEP agrees and will add to the rule a definition of a "governing body". For municipalities the ultimate governing body is the city council and for public service districts it is the public service board.

LAW OFFICE OF
JAMES V. KELSH

300 Summers St., Ste. 1230
P.O. Box 3713
Charleston, WV 25337-3713
kelshlaw@yahoo.com
WV State Bar #6617

Telephone
(304) 343-1654

Facsimile
(304) 343-1657

September 27, 2005

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mike Johnson, Assistant Director
WV DEP - Division of Water and Waste Management
601 57th Street
Charleston, West Virginia 25304

Re: Proposed Rule 47 CSR 61,
Community Infrastructure Investment Program

Dear Mr. Johnson:

On behalf of the Jefferson County Public Service District ("District"), I file these comments to the above referenced proposed legislative rule, and the application and guidance documents prepared by DEP, including the standard form of application.

The District believes that the proposed rule should be adopted and approved with four modifications, only two of which are substantive. The application form should delete requests for information which are irrelevant. The standard form of agreement should delete Section 5.5, and make other clarifying changes.

A. Modification to Proposed Rule 3.2.a.8.

Proposed Rule 3.2.a.8. requires an application to include:

> "A certified copy of the resolution of the governing body of the public utility authorizing the filing of an application and a certified copy of the minutes of the meeting where the application resolution was adopted;"

Rule 3.3 provides:

> "An application for a certificate will not be deemed administratively complete unless all items are contained therein as described in Subdivision 3.2.a."

The combination of these two rules could result in excessive and needless delay in an application being deemed administratively complete. The problem is that the minutes of the meeting where the application or resolution was adopted typically occurs at the next meeting of the governing body of the public utility, which oftentimes is held only once a month. The District believes that the application should be deemed administratively complete upon the public utility filing a certified copy of the resolution of the governing body authorizing the filing of the application. The certified copy of the minutes of the meeting where the application resolution was adopted should be required to be filed prior to the Secretary's approval of the application. The District suggests that Rule 3.2.a.8 be modified to read:

> A certified copy of the resolution of the governing body of the public utility authorizing the filing of an application.

A new Section 3.4 should be added, resulting in the renumbering of the currently proposed Section 3.4 to 3.5 without any change in language. The new Section 3.4 should read:

> A certified copy of the minutes of the meeting where the application resolution was adopted by the governing body of the public utility shall be filed with the Secretary within thirty (30) days from the date of filing of the application, unless, by mutual agreement among all the parties such time period is extended.

B. Modification to Proposed Rule 4.1.

Section 4.1 of the proposed rule requires that the parties enter into a DEP approved standard form agreement. While nothing in the authorizing legislation would suggest that the Legislature expected that the legislative rules would include a standard form agreement, the District has reviewed DEP's proposed standard form agreement, and believes that it is a good template for community infrastructure investment projects in that it ensures that the parties have covered the items required by the authorizing legislation and the proposed rule, subject to the District's suggested changes contained herein at F. The District also appreciates that the use of a standard form of agreement will expedite the ability of Department staff members to review such agreements compared to receiving and reviewing customized agreements. The District believes, however, that the parties to a community infrastructure improvement agreement need the flexibility to enter into terms which differ from or augment those provided in the standard form of agreement to fit particular circumstances which may confront the public utility and the person intending to construct a community infrastructure project. In order to clarify that the

parties remain free to enter into such additional or different terms and to also present to the Department in a simple and clear manner what those additional or different terms are, the District suggests that Rule 4.1 should be modified to read:

> Each proposed Agreement must be submitted to the Secretary for review and approval as part of the application for a certificate, using a standard form of agreement as prescribed by the Secretary.
>
> The public utility and the person intending to construct a community infrastructure project may agree to terms which are different from or additional to those contained in the standard form of agreement provided such terms are set forth in an appendix to the standard form of agreement. The Secretary may approve, reject, or modify such additional or different terms. In the event the Secretary rejects or modifies such additional different terms, construction on the project will not be initiated until the certificate has been issued and a copy of the executed Agreement, as modified by the Secretary, has been returned to the Secretary.

The additional or different terms will be clearly presented to Department staff members in an appendix which, by benefit of being a separate document, clearly and concisely presents the new or different terms from that contained in the standard form of agreement. The District's proposed language also clarifies that the Secretary retains the authority to approve, reject or modify such additional or different terms, and sets forth the procedure for dealing with the modification or rejection of those terms by the Secretary. In this regard, the proposed modification language is consistent with the language contained in proposed Rule 6.

C. Modification to Proposed Rule 4.2.f.

Proposed Rule 4.2.f. provides:

> "The rates charged by public utility to new customers to be served by the project facility must be the rates in effect at the time of transfer of the project facility to the utility plus any additional cost of service borne by the public utility as a result of the project facility until such time as new rates may be finally enacted by the public utility and approved by the Public Service Commission

> and the rates charged by the public utility to existing customers must not be impacted as a result of the obligation of the public utility pursuant to the community infrastructure investment agreement;"

The District believes that the proposed rule is ambiguous. The District believes that what was intended was for the utility to operate the facilities at the utility's existing rates so long as the utility could do so on a breaking even or better basis. If the utility could not break even in operating the facilities at existing rates, it should then charge a higher rate. The proposed rule, which admittedly is based upon statutory language, could be read to suggest that the utility should charge its existing rates plus the cost of operating the facilities, as distinguished from recovering the cost of operating the facilities from the revenues generated by charging existing rates to the users to be served by the facilities. The District suggests that the proposed Rule 4.2 should instead read:

> The rates charged by public utility to new customers to be served by the project facility must be the rates in effect at the time of transfer of the project facility to the utility, unless the revenues to be generated from new customers at the utility's rates in effect at the time of transfer are less than the utility's cost of service of the project facility, in which case the utility shall charge rates to the new customers to be served by the project facility which are expected to equal or exceed by no more than 15% the utility's expected cost of service of the project facility. The rates charged by the public utility to existing customers must not be adversely impacted as a result of the obligation of the public utility pursuant to the community infrastructure investment agreement.

A corresponding change should also be made to §6.4 of the standard form of agreement.

D. Modification To Proposed Rule 4.2.j.

Proposed Rule 4.2.j. refers to the "estimated cost construction." This should be changed to the "estimated cost of construction."

E. Modifications to Application Form

The application form included in DEP's August, 2005 Application and Guidance Documents for the Community Infrastructure Investment Program requests information from utilities regarding debt delinquencies, most recent rate increase, and the median household income for the area served. Given that CIIP projects are essentially 100% private grant financed projects, the District questions the need to furnish this information.

F. Modifications to Standard Form of Agreement

Section 5.5 of the standard form of agreement provides:

> "Nothing in this Article shall be construed to allow the UTILITY to take ownership of the System a section at a time or any portion less than the completion of the entire System."

This item is not suggested or supported by the authorizing legislation, and should be struck as an unwarranted limitation upon the freedom of contract of parties to a CIIP agreement. With residential real estate developments, it is commonplace for developers to construct developments in phases. Utilities have frequently entered into alternate main line extension agreements which contemplate phasing for the construction of wastewater collection or water distribution systems, and these agreements have routinely been approved by the Public Service Commission. Phasing has not proven difficult for utilities to implement. A prohibition upon phasing will result in needlessly redundant administrative processes for utilities, developers, and DEP. To the extent DEP has concerns about phasing, these should be addressed on a case by case basis.

Section 9.2 provides:

> "The DEVELOPER shall provide to the UTILITY connection and user agreements for each structure that is connected to the collection system, both existing and future customers."

It is logistically impossible for the Developer to provide connection and user agreements for future customers; consequently the requirement with respect to future customers should be removed.

Appendix A appears to be tasked with multiple responsibilities. Under §2.6, it is to contain an agreement for the Developer to post funds to pay for the cost of review and inspection by the Utility's engineer, and under §10.8, for the cost of the certification of compliance by the Utility's bond counsel. The suggested title for Appendix A, "Bonds", suggests that the Developer will issue bonds for these items, an unlikely event given the costs associated with such an undertaking. The District suggests that Appendix B be re-titled "Securitization of Professional Expenses."

Appendix B should also be re-titled to indicate that it will cover not only testing but also the procedure for startup and training upon equipment, as indicated by §4.9.

Appendix E to the standard form of agreement contains several errors. The sections in Appendix E are "Section F.1, F.2" and so on, when presumably they were intended to be "E.1, E.2" etc. Section F.1 contains a cross reference to Section 6.5, when there is no Section 6.5 in the standard form of agreement.

Sections F.1 and F.4 of Appendix E both essentially propose a release of a developer's obligation to make or secure payments to cover operational costs until revenues become sufficient to meet these costs. Neither section identifies the time frame within which such a determination would be made, whether monthly, quarterly or annually. The District suggests that the CIIP System should meet the financial criteria set forth for two consecutive quarters before the developer is released from its financial commitments.

The Jefferson County Public Service District recommends that the Secretary make these modifications to the proposed rules application, and standard form of agreement and approve the rules with these modifications.

Thank you for your time and consideration.

JEFFERSON COUNTY PUBLIC SERVICE DISTRICT

By Counsel

James V. Kelsh

JVK/nal
cc: Sue Lawton
(jefferson\rules\wv dep ltr)

Patricia White - Re: Rule

From: <wvml@wvml.org>
To: "Patricia White" <pwhite@wvdep.org>
Date: 9/15/2005 11:39 AM
Subject: Re: Rule

Trish,
I have been called out this afternoon and probably will not make the conference call.

I have reviewed the rules. The only thing I would offer is a suggestion for the definition of governing body be added to 47CSR61.

The public utility may have a governing body, but city council is usually the final authority for municipal utilities.

Lisa Dooley

WV Municipal League
2020 Kanawha Blvd E
Charleston, WV 25311

----- Original Message -----
From: "Patricia White" <pwhite@wvdep.org>
To: <jhallinan@hallinanlaw.com>; <clharris@hsc.wvu.edu>; <rick@lcpsd.com>; <braney@wvcoal.com>; <karen@wvma.com>; <wvml@wvml.org>
Cc: "Karen Watson" <KWATSON@wvdep.org>
Sent: Monday, September 12, 2005 3:05 PM
Subject: Rule

I have attached the rule that will be discussed in the conference call on Thursday. If you are unable to open/read, please e-mail me and I can fax it to you.... Thanks, Trish

Trish White
WVDEP - Executive Office
601 57th Street, SE
Charleston, WV 25304

Mike Johnson - Re: SB 700

From: Owen Home <owenhome@citlink.net>
To: Mike Johnson <MJOHNSON@wvdep.org>
Date: 9/7/2005 8:25 PM
Subject: Re: SB 700

Mike -

Please take our initial concerns into account. It doesn't seem like much has changed in the current version of the proposed legislation. Senate Bill 700 gives developers every possible advantage and communities virtually none, and - when the rubber finally meets the road - places the burden on current residents to the financial benefit of developers (including out-of-state developers). I would hope that our legislators would be more conscious of the concerns of the people who voted them into office. Please see our comments below, and please ask our legislators to include this provision in the final bill, and please review the final legislation to ensure that it places the burden of proof on the developer, not the taxpayers and citizens of West Virginia.

Thank you.

Don and Amy Owen

P.O. Box 314
Harpers Ferry, W.Va. 25425

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From: "Mike Johnson" <MJOHNSON@wvdep.org>
Date: Fri, 02 Sep 2005 12:42:36 -0400
To: <owenhome@citlink.net>
Subject: Re: SB 700

Your comments on our proposed emergency regulations were considered prior to filing with the Secretary of State. This is to inform you of our official public hearing on the rule. The hearing will be held on September 27, 2005 at 6:00 pm at the West Virginia University's Natural Resource Center for Coal and Energy, Room 101-A, Evansdale Campus. Any additional comments, written or verbal, will be taken at that time.

Mike Johnson, P. E.
Assistant Director
Permitting and Engineering Branch
Division of Water and Waste Management
Department of Environmental Protection
601 57th Street, S. E.

Charleston, WV 25304
Room #2167
(304) 926-0499 ext. 1611
(304) 926-0496 (fax)
mjohnson@wvdep.org

>>> Owen Home <owenhome@citlink.net> 07/21/05 10:14 PM >>>
Dear Mr. Johnson -

We are neither pro-growth or anti-growth. However, Senate Bill 700 and its draft regulations - as currently written - are a mistake. Senate Bill 700 gives developers every possible advantage and communities virtually none. To wit:

47-61-6. Time for approval.

The Secretary will approve or reject all applications for a project within thirty (30) days from the date the application is deemed administratively complete. By mutual agreement such time period may be extended but in no case will the time period extend beyond ninety (90) days from the date the application is deemed administratively complete. Construction on the project will not be initiated until the certificate has been issued and a copy of the executed Agreement has been returned to the Secretary.

If this language is left as is, you can guarantee that every developer in West Virginia will use the 90-day provision as a club to force the state, the local government, and the citizens of the area to accept substandard infrastructure development. As has happened on several occasions in our county already, developers will submit substandard or incomplete applications and then demand action. A provision should be added to this clause that states:

"Said time period shall not begin until such time as a fully complete application, as determined by the Secretary, has been submitted."

Thank you.

Sincerely,

Don Owen
Amy Owen
P.O. Box 314
Harpers Ferry, W.Va. 25425

--

west virginia department of environmental protection

Executive Office
601 57th Street
Charleston, WV 25304
Phone: (304) 926-0440
Fax: (304) 926-0447

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

October 26, 2005

The Honorable Joseph M. Minard
West Virginia Senate
Legislative Rule-Making Review Committee – Chair
510 Haymond Highway
Clarksburg, West Virginia 26301

The Honorable Virginia Mahan
West Virginia House of Delegates
Legislative Rule-Making Review Committee – Chair
Post Office Box 1114
Green Sulphur Springs, West Virginia 25966

RE: 47CSR61 - Community Infrastructure Investment Program

Dear Honorable Minard and Mahan:

The Department of Environmental Protection (DEP) respectfully requests your Committee's permission to file the attached agency-approved legislative rule, 47CSR61, "Community Infrastructure Investment Program," after the deadline established by the State Administrative Procedures Act.

The reason for this late filing is that legislation passed by the 2005 Legislature, Senate Bill No. 700, required the DEP to adopt an emergency rule by August 1, 2005, and although the agency met this time frame, it was unable to put the counterpart legislative rule out to public notice until after that date.

The legislation establishes the Community Infrastructure Investment Program, a program that will facilitate the construction and expansion of water and sewer facilities for the promotion of economic development in the State. In passing the legislation, the Legislature found that private businesses are in need of water and sewer services and are willing to initially pay for the

construction of these facilities and then, after construction, to transfer them to publicly-owned facilities at no cost.

Under the statute, any municipality or public service district can enter into an agreement with a private business to undertake a project. If the DEP approves the arrangement, it will issue a "Certificate of Appropriateness" signifying its approval.

The DEP filed an emergency rule to implement this new law on August 1, 2005. The rule was put out to public notice on August 10, 2005, and a public hearing held on September 27, 2005. The emergency rule became effective September 12, 2005, and will expire in December of 2006. The agency therefore respectfully requests the Legislative Rule-Making Review Committee consider this rule for the upcoming legislative session.

If you have any questions, please contact Karen Watson at (304) 926-0499, ext. 1547, or Mike Johnson at (304) 926-0499, ext. 1611.

Sincerely,

Stephanie R. Timmermeyer by Karen G. Watson

Stephanie R. Timmermeyer
Cabinet Secretary

C: Joe Altizer, Chief Counsel
Felisha Sutherland