

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN RE:

LEGISLATIVE RULE 33CSR20,
HAZARDOUS WASTE MANAGEMENT SYSTEM

And

LEGISLATIVE RULE 47CSR30,
WV/NPDES RULE FOR COAL MINING FACILITIES

HELD JULY 24, 2014

6:00 P.M.

Donna H. Miller
Certified Court Reporter

CAPITOL CITY REPORTING
"PROFESSIONAL STENOMASK FOR THE RECORD"

A P P E A R A N C E S

ON BEHALF OF THE DEP:

THOMAS J. ALUISE
Public Information Specialist

CHARLES S. STUREY

JOE M. SIZEMORE

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P R O C E E D I N G S

MR. ALUISE: Good evening. I am Tom Aluise with the Department of Environmental Protection's Public Information Office, and I am the facilitator for tonight's public hearings on proposals to review two legislative rules. The DEP will be accepting comments this evening first on Legislative Rule 33CSR20, "Hazardous Waste Management System," and second on Legislative Rule 47CSR30, "WV/NPDES Rule for Coal Mining Facilities."

The purpose of tonight's hearings is to give you the opportunity to share your comments or information with the DEP about the proposed revisions to these rules.

Tonight's hearings are being recorded by a court reporter so that the comments shared can be taken into consideration and entered into the public record. An agency response will be provided for all submitted comments (both written and verbal).

To those wishing to speak, when you're called to the front, please state your name and if you are with any groups or organizations.

If you have written comments that you would like to submit in addition to your spoken comments, please hand them to me after you speak or at the conclusion of the hearing.

1 If no one has any questions about the
2 hearing format, we will begin accepting comments on
3 Legislative Rule 33CSR20, "Hazardous Waste Management
4 System." The proposed revision will incorporate current
5 Federal Hazardous Waste Regulations, including the
6 authorization of the use of electronic manifests in the
7 State of West Virginia when the system becomes available at
8 the federal level and the newly effective regulations
9 regarding solvent-contaminated industrial wipes.

10 On Rule 33CSR20, we have no one signed up to
11 speak. So this will conclude our public hearing on the
12 proposed revision to Legislative Rule 33CSR20, "Hazardous
13 Waste Management System." The public comment period on
14 this rule ends July 28th. The agency will review all
15 comments and take them into consideration as it moves
16 forward with finalizing the Agency Approved Rule.

17 We will now begin accepting comments on
18 Legislative Rule 47CSR30, "WV/NPDES Rule for Coal Mining
19 Facilities." This revision is being proposed as a result
20 of the passage of Senate Bill 615 by the West Virginia
21 Legislature on March 10, 2012 and to be consistent with
22 Section 402(k) of the Federal Clean Water Act.

23 We do have two speakers who signed up to
24 speak. The first is Michael Becher.

1 MR. BECHER: Thank you. My name is Mike Becher.
2 I'm here to address the proposed rule changes to 47CSR30,
3 particularly the change to 47CSR30-5.1(f). I submitted
4 written comments on behalf of Appalachian Mountain
5 Advocates, the Ohio Valley Environmental Coalition, West
6 Virginia Highlands Conservancy, West Virginia Rivers
7 Coalition and the Sierra Club, but I would like to expand
8 upon those comments a little bit.

9 The proposed changes to 47CSR30 eliminate
10 important protections to West Virginia streams by
11 preventing agency actions against polluters causing
12 violations of West Virginia Water Quality Standards.

13 The motivation behind this rule change is
14 clear. This past June, just one month ago, the citizens of
15 West Virginia won a court decision in Federal Court against
16 certain coal mines showing that alkaline mine drainage is
17 causing streams in the state to become biologically
18 impaired.

19 The court case showed valley fills have a
20 profound negative effect on West Virginia streams through
21 discharges of alkaline mine drainage basically salty water.
22 This causes stream conditions to become unhealthy for
23 aquatic life, including fish and macro invertebrates.

24 The science as established by that trial and

1 by the literature is clear and uncontroverted. Alkaline
2 mine drainages from valley fills leads to biological
3 degradation of the streams.

4 Let's be clear there is no controversy
5 surrounding the science. Every publication out there
6 agrees that this is occurring.

7 Two recent studies, in fact, since that
8 trial have expanded upon this body of literature and make
9 it more clear. A recent EPA study by Greg Pond showed that
10 this impairment can last for decades. Doctor Pond studied
11 valley fills and streams below them that had been reclaimed
12 for 11 to 33 years, and found that 90 percent of the
13 streams examined were still biologically impaired as a
14 result of conductivity and alkaline mine drainage.

15 A study released just two weeks ago by USGS
16 Scientists showed that not only macro invertebrates but
17 fish species in these streams are being impacted.

18 Because the science is clear and because the
19 industry is losing in court, it now is resorting to coming
20 to the DEP to pursue this rule change. It appears through
21 this rule change that the agency is willing to agree with
22 the industry and discount the science in proposing this
23 rule. There is no justification for that.

24 Not only is the science clear, but the

1 impact is profound. I have here a map. This was also
2 submitted in written form. A stream in West Virginia
3 that's failed to meet biological metrics for healthy stream
4 conditions, basically streams that are failing to meet the
5 water quality standards and it could be impacted by this
6 rule change.

7 As you can see, the coal fields are rife
8 with this kind of problem. I would say as a sort of aside,
9 I'd like to be able to show which specific mining
10 operations are causing these impairments, but we've had
11 trouble getting BMR's from the agency to be able to check
12 that, and that's limited our ability to gather facts that
13 would help illustrate this problem.

14 I also want to be clear that this is not a
15 situation where the coal industry is being singled out with
16 this kind of permit condition. The rule change here
17 eliminates a requirement in the rule that every permit have
18 a prohibition on discharges which cause or contribute to
19 violations of the water quality standards.

20 If you look carefully, that condition occurs
21 in every single permit issued by DEP, both on the coal side
22 and the industry side. This is not unique to the coal
23 industry, nor is it unique in this state. My organization
24 works in four Appalachian states, West Virginia, Virginia,

1 Tennessee and Kentucky, and we've found similar provisions
2 in every single one of those states except Kentucky. West
3 Virginia is not alone in having this condition.

4 In conclusion, this change is contrary to
5 science. It's going to eliminate an important tool for
6 challenging a widespread pervasive problem in West
7 Virginia. It's nothing but a gift to the coal industry to
8 allow them to discharge alkaline mine drainage and other
9 toxic pollutants with impunity into West Virginia streams.

10 Thank you.

11 MR. ALUISE: Our next speaker is Jason Bostic.

12 MR. BOSTIC: Thank you, Tom. Good evening. My
13 name is Jason Bostic. I'm the Vice President of the West
14 Virginia Coal Association. I'm here this evening to speak
15 in favor of the proposed revision to the Coal Mining NPDES
16 rule that's the subject of the hearing tonight.

17 The revision proposed in the current rule
18 package fixes what's best characterized as a mistake in the
19 coal mining NPDES rule that has turned state's NPDES
20 program on its head.

21 The case referenced by the earlier speaker
22 is an example of exactly the problem that we need to
23 address. An interpretation of West Virginia's water
24 quality standard is the job of the West Virginia

1 Legislature and the West Virginia Department of
2 Environmental Protection, not the Federal Environmental
3 Protection Agency or in that specific case a Federal Judge.

4 The defect that is proposed to be corrected
5 tonight has provided the opportunity for those outside
6 forces beyond the State's purview to hijack the
7 interpretation of that standard, and how DEP implements its
8 NPDES program and completely bypass our Legislature -- our
9 elected leaders, our Legislature, our Governor and the
10 professionals at DEP.

11 As we detail in our written comments, the
12 language that would be modified by this change does not
13 exist in either the non coal rules for West Virginia or the
14 corresponding federal requirements, and as far as we can
15 tell it's not found in any other surrounding states.

16 If the current language was read and
17 implemented, as some would have it, DEP would not need a
18 NPDES permitting section for the coal industry at all. It
19 would simply hand the mine operator a copy of the state's
20 modified water quality standards and say good luck. Go on
21 your way. Mine your coal. Be in compliance with the
22 state's water quality standards.

23 The problem with that from a practical
24 environmental standpoint is there would be no permit

1 specific calculation of individual effluent which also by
2 extension means there would be no application of the
3 complicated things like anti-degradation or wasteland
4 allegations, but a literal read of the language, the defect
5 of the language in our opinion, would likely lead to better
6 limits for many coal industry operations or coal mining
7 operations, since those limits would simply be the state
8 water quality standards. They wouldn't be remarkably
9 reduced in some cases by the application of anti-
10 degradation, settlement capacity and TND applications.

11 As we also detail in our written comments,
12 the offending language that's the subject of the correction
13 was improperly enacted. Even though it was very difficult
14 for us to do this on a rule that's very old, we went back
15 through the administrative record of the agency when the
16 rule was originally proposed, when DNR at the time, split
17 the coal mining NPDES function for the other industrial
18 facilities, and it appears as best we can tell, and there's
19 nothing in the record to contradict this, that this
20 language was not public noticed for comment. The
21 Legislature's rulemaking review committee was not advised
22 that this language was included in the rule, and because of
23 that, the offending language, the mistake, violates the
24 state's rulemaking process.

1 So, the proposed change that we support
2 would effectively correct this rulemaking mistake and
3 return to that rule to the intent that was envisioned by
4 the Legislature when it was enacted in 1984.

5 Thank you.

6 MR. ALUISE: Thank you to our speakers. This
7 concludes the public hearing on the proposed revision to
8 Rule 47CSR30, "WV/NPDES Rule for Coal Mining Facilities."
9 The public comment period on this rule ends at the
10 conclusion of this hearing. The agency will review all
11 comments and take them into consideration as it moves
12 forward with finalizing the Agency Approved Rule.

13 Thank you very much.

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16 CONCLUDED AT 6:15 P.M.

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REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, Donna H. Miller, Notary Public in and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing was duly taken by and before me, under the West Virginia Rules of Civil Procedure, at the time and place and for the purpose specified in the caption thereof.

I do certify that the said hearing was correctly taken by me by means of the Stenomask; that the same was transcribed by me, and that the said transcript is a true record of proceedings had.

I further certify that I am not connected by blood or marriage with any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially interested in the action, or interested, directly or indirectly, in the matter in controversy.

Given under my hand this _____ day of
July, 2014.

Donna H. Miller
Notary Public

My commission expires October 1, 2023.