

**WEST VIRGINIA
SECRETARY OF STATE**

Betty Ireland

ADMINISTRATIVE LAW DIVISION

Form #1

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2007 MAY 30 PM 4: 22

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Department of Environmental Protection, Secretary's Office TITLE NUMBER: 60

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code § 22-11-7b(d)

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 5

Antidegradation Implementation Procedures

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: July 16, 2007 TIME: 7:00 p.m.

LOCATION OF PUBLIC HEARING: Coopers Rock Training Room
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL ☐ WRITTEN ☐ BOTH ☒

DATE WRITTEN COMMENT PERIOD ENDS: July 17, 2007 TIME: 5:00 p.m.

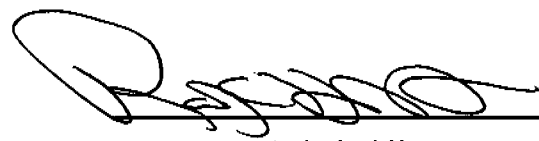
WRITTEN COMMENTS MAY BE MAILED TO:

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.

Lisa A. McClung, Director
Division of Water and Waste Management
WV Department of Environmental Protection
601 57th Street SE
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:

“Antidegradation Implementation Procedures,” 60CSR5

A. AUTHORITY:

W.Va. Code 22-11-7b(d)

B. SUMMARY OF RULE:

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.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

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, that is now subject to the legislative rulemaking review process. 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.

Section 6.2 of the current rule has been largely deleted because it related to the procedures the Department was required to follow in reviewing the list of 444 streams that had initially been placed on the presumptive list for Tier 2.5 waters and making a final decision prior to legislative review. These procedures have been completed and thus the rule language is no longer necessary. The proposed rule states that the Tier 2.5 list is now in Appendix A and refers to the applicable sections for making subsequent additions or deletions to the list. These particular sections have also been amended to clarify the applicable public notice procedures and that the subsequent listing or delisting of Tier 2.5 waters is subject to legislative review.

The process for including streams in Appendix A included two separate opportunities for public comment and hearing. The agency has prepared a Responsiveness Summary to all of the public

comments received, and a copy of this document is available at www.wvdep.org/antideg. Other changes that have been proposed are cross-references to the Water Quality Standards rule (formerly 46CSR1, now 47CSR2) and other clerical corrections to the rule consistent with Senate Bill No. 278 that transferred all water quality standards authority to the Secretary from the Environmental Quality Board. One additional change was made to incorporate the same approach for determining significant degradation in Tier 2 waters as is currently established for Tier 2.5 waters. This change relates only to pH, fecal coliform, temperature and dissolved oxygen and reflects the fact that due to their nature, application of a percentage change in assimilative capacity is not an appropriate measure of degradation for these pollutants.

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

Although the federal Clean Water Act requires the State to adopt implementation procedures related to the federal antidegradation policy, there is no direct federal counterpart regulation specifying the details of these procedures. Because there is no direct federal counterpart, 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 Constitutions of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its meeting on May 21st and May 30th, 2007, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

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 DWW'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 NO_x Rule - Incorporates revisions to 40 CFR Part 96.

COMMENT

No questions.

45CSR40 - Control of Ozone Season Nitrogen Oxides Emissions

SUMMARY

Ozone Season CAIR NO_x 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 deminimis 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:

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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.



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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

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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

Council Meeting - 5/30/07
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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 ½ 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.

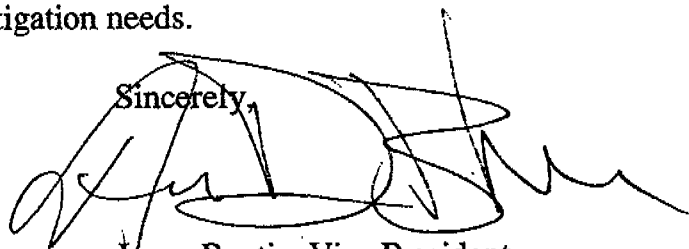
Again, as noted in our general comments, the state § 401 certification program has functioned for several years without the level of minutia and detail presented here, and there appears to be no justification for adding these new provisions to the rule at this time. In addition, § 404 permit mitigation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

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.

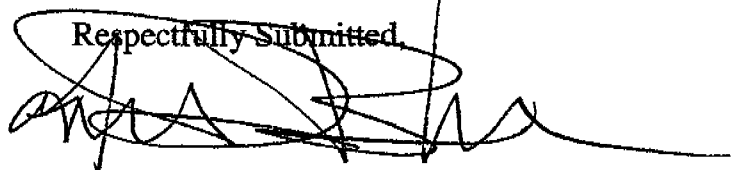
⁷ See Attachment "H", relevant pages from comments filed by the National Mining Association and WVCA regarding the programmatic Mountaintop Mining/ Valley Fill Environmental Impact Statement and *Fish Communities and Their Responses to Environmental Factors in the Kanawha River Basin, West Virginia,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

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.

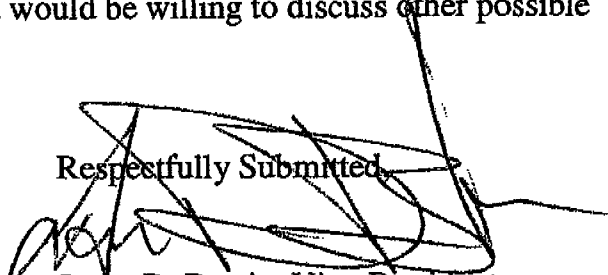
As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the goal of the proposed revision. The language of 38 CSR 2.3.e restricts the applicability of the provision to "a limited number of minor changes that do not significantly affect 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 CSR2 (agreement)
401 Certification 47 CSRSA 45CSR42
TRADUIT LISTING

2.5
"Biogenic Sources"
include
COAL

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

SERIES 42
GREENHOUSE GAS EMISSIONS INVENTORY PROGRAM

3.2 turned on
exemption into
on inclusion
5.3 "shall provide
information?"

§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 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.

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
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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 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 Sorban 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" <clharris@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.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Antidegradation Implementation Procedures, 60CSR5

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Department of Environmental Protection

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

Phone Number: (304) 926-0495 Email: lmccclung@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.

No fiscal impacts on state government are anticipated.

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	0.00	0.00

Rule Title: _____

Rule Title: Antidegradation Implementation Procedures, 60CSR5

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

None anticipated

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.

The proposed revisions carry forward the agency's implementation efforts, and costs of implementing the changes will be absorbed in the agency's current budget.

Date: _____

Signature of Agency Head or Authorized Representative

CERTIFICATION OF NON-APPLICATION OF EXECUTIVE ORDER 20-03

Name of Agency: Department of Environmental Protection

Description of Proposed Regulation: 60CSR5, "Antidegradation Implementation Procedures," establishing procedures for preserving existing quality of the State's waters and preventing future degradation, consistent with the federal Clean Water Act.

1. Purpose of the Proposed Regulation:

The proposed revisions to this rule reflect changes in the review process for Tier 2.5 waters pursuant to H.B. No. 4550 passed in the 2006 session. The rule also incorporates the results of the agency's determinations on which streams should be listed as Tier 2.5 waters.

2. Is the Regulation Exempt? Yes. The rule establishes State antidegradation implementation procedures in conformance with federal law and is no more or less stringent than federal regulations.

3. Cost of preparing this certification:

- a. Class of employee involved (state each class)—Attorney III
- b. Number of hours spent by class—Attorney III, .5 hr.
- c. Average wage for each class—Attorney III, \$30/hr
- d. Consultant costs—N/A
- e. Other costs—N/A
- f. Total--\$15.00

Date: June 1, 2007

Name of Agency Head: Stephanie R. Timmermeyer, Cabinet Secretary

TITLE 60
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE

SERIES 5
ANTIDegradation IMPLEMENTATION PROCEDURES

§60-5-1. General.

1.1. Scope. -- This rule establishes the procedures by which the Department of Environmental Protection shall implement the State's water quality anti-degradation policy found at ~~46 CSR 1-4~~; 47 CSR 2-4.

1.2. Authority. -- W. Va. Code §§~~22-11-7b(a)&(b)~~ §22-11-7b(d). ~~House Bills 3240 and 2663~~.

1.3. Filing Date. -- ~~July 19, 2002~~.

1.4. Effective Date. -- ~~July 19, 2002~~.

1.5. Applicability

1.5.a. Except as noted, the antidegradation implementation procedures herein apply to regulated activities that have the potential to affect water quality. The level of review required will depend upon the existing uses of the water segment that would be affected, the level of protection ("tier") assigned to the applicable water segment, the nature of the activity, and the extent to which existing water quality would be degraded.

1.5.b. Nonpoint source activities will be deemed to be in compliance with antidegradation requirements with the installation and maintenance of cost-effective and reasonable best management practices in accordance with ~~46 CSR 1-4.1.b.~~ 47 CSR 2-4.1.b. herein. These include, but are not limited to, best management practice programs for silviculture administered by the Division of Forestry, programs for oil and gas operations administered by the Office of Oil and Gas of the Department of Environmental Protection, nonpoint source construction activities, and reasonable land, soil and water conservation

measures and practices applied to agricultural nonpoint sources.

1.5.c. Where applicable and practical, the antidegradation procedure and review shall be integrated into and proceed concurrently with existing environmental processes and reviews pursuant to the National Environmental Policy Act.

1.5.d. Information contained within existing environmental processes and reviews, such as environmental assessments, environmental impact statements, facilities plans, and findings of no significant impact, may be used to provide part or all of the requirements of the antidegradation procedure and review.

§60-5-2. Definitions.

2.1. ~~For purposes of this rule the term "agency" "Agency" or "agencies" refers to means~~ the Department of Environmental Protection or other federal, state, or local governmental entities with regulatory authority over activities that may affect water quality.

2.2. "Ambient concentration" means that measured value or level of water quality downstream of the proposed or existing activity (discharge point for point source, runoff area for nonpoint source) for any parameter of concern determined through EPA-approved, collection and analytical methods in 40 CFR 136 or other methods accepted by the Secretary.

2.3. "Ambient water quality conditions" (AWQC) means those physical, chemical, biological and radiological conditions of the receiving waters of the state existing at the time of review of a regulated entity.

2.4. "Baseline water quality" means that ambient concentration established at the time of an

initial antidegradation review under rules effective May 17, 2001, for a stream or stream segment or any other water(s) of the state.

2.5. For purposes of this rule references to the "Board" or "EQB" mean means the West Virginia Environmental Quality Board.

~~2.3.~~ 2.6. For purposes of this rule the term "minimum uses" refers to "Minimum uses" means recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

2.7. "Parameter of concern" means any parameter for which numeric water quality criteria have been adopted in 47CSR2 and any other parameter for which numeric criteria are not established but where the discharge of such parameter has a reasonable potential to either cause or contribute to a violation of the narrative criteria outlined under 47CSR2, section 3.

2.8. "Reasonable less-degrading or non-degrading alternatives" shall be identified based on case specific information. In most cases, less-degrading or non-degrading pollution control alternatives shall be considered reasonable where the costs of such alternatives are less than 110% of the costs of the pollution control measures associated with the proposed activity.

~~2.2.~~ 2.9. For purposes of this rule the term "regulated entity" "Regulated entity" refers ~~generally to~~ means any regulated entity that affects or is proposing an activity that will affect water quality. For example, an applicant for a WV/NPDES permit, a WV/NPDES permit holder, or an owner or operator of an activity that discharges pollutants into a water of the state would be a regulated entity.

~~2.4.~~ 2.10. For purposes of this rule the term "Secretary" refers to means the Secretary of the Department of Environmental Protection or its successor.

2.11. "Trading" means establishing upstream controls for a parameter of concern to compensate for new or increased downstream sources for the same parameter resulting in

improved water quality for the parameter traded. More than one parameter of concern may be traded on a given stream. Trading may involve point sources, nonpoint sources or a combination of point and nonpoint sources. Unused permitted capacity cannot be traded.

2.12. "Trading assessment procedure" means methodologies to be used by the Secretary to document the basis for any trade and include Total Maximum Daily Load Procedures (40 CFR 130.2(i)), wasteload allocation procedures outlined in EPA's Technical Support Document for Water Quality-based Toxics Control (EPA/505/2-90-001 PB91-127415, March 1991), wasteload allocation methodologies outlined in EPA's Draft Framework for Watershed-Based Trading (EPA/800-R-96-001, May 1996) or other EPA approved wasteload allocation methodologies as long as these methodologies are consistent with the trading provisions of this rule.

~~2.6. For purposes of this rule the definitions contained in 46 CSR 1-2 effective May 17, 2001 are hereby incorporated herein.~~

§60-5-3. Antidegradation Review Process.

3.1. As set forth in ~~46 CSR 1-4.1~~ 47 CSR 2-4.1, the State's antidegradation policy requires that existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. This requirement applies to all waters of the state.

3.2. Except where a water segment is specifically listed as a Tier 2.5 or Tier 3 water, the following sections outline how the agency conducting the antidegradation review will determine the level of protection ("tier") assigned to the receiving water body associated with the activity subject to this rule.

3.3. Uses. The Secretary, in conducting an antidegradation review, must determine the existing uses of the receiving water body associated with the proposed activity. The Secretary shall determine the existing uses of the water body by identifying the uses set forth in ~~46 CSR 1 Section 6~~ 47 CSR 2-6 that the water body currently supports, or has supported since November 28, 1975. The regulated entity may be required to provide data sufficient for the

permitting agency to determine the existing uses of the water segment.

3.4. Baseline water quality. Where baseline water quality has not been established for the water segment the regulated entity proposes to impact or has not been established for a parameter of concern that is reasonably expected to be discharged into the water segment as a result of the proposed regulated activity, the Secretary must determine the baseline water quality for the receiving water body. The Secretary may consider data for establishing the baseline water quality from a federal or state agency, the regulated entity, the public, or any other source, as long as the data are recent and reliable. If adequate data are not available, the agency may, in conjunction with the regulated entity or on its own initiative, establish a plan for obtaining the necessary data. The regulated entity may be required to provide baseline water quality for those parameters of concern that are reasonably expected to be discharged as a result of the regulated activity into the affected water segment to help the permitting agency determine the baseline water quality, the existing uses, and the applicable tier. The regulated entity may contact the Secretary prior to initiating a baseline water quality evaluation to seek concurrence with its determination of the parameters of concern for its proposed activity and its proposed sampling protocol.

3.5. Determination of tier. If the tier has not already been determined for the water segment the regulated entity proposes to impact, then after determining the baseline water quality for parameters of concern and the existing uses for a water body, the agency will determine which level of protection (i.e. "tier") applies to the receiving water body associated with the activity, as follows:

3.5.a. Water segments listed in Appendix A of this rule shall receive Tier 2.5 protection.

3.5.b. Water segments within a federally designated Wilderness Area, as well as other water segments specifically listed ~~in this rule~~ as an outstanding national resource water pursuant to subsection 8.2 shall receive Tier 3

protection.

3.5.c. Water segments not within a federally designated Wilderness Area, not listed pursuant to subsection 8.2 and not listed in Appendix A of this rule shall receive Tier 1 protection, and shall receive Tier 2 protection if the water segment is determined, pursuant to subsections 5.1. through 5.3. of this rule, to be a high quality water for purposes of antidegradation review.

3.5.d. Water segments may be determined to receive only Tier 1 protection, pursuant to subsections 4.2. through 4.6. of this rule, for purposes of antidegradation review.

3.5.e. To the extent practicable, a list of water segments protected under Tier 2.5 or Tier 3 will be maintained on the West Virginia Department of Environmental Protection's website.

3.6. Level of review. Once the correct level of protection ("tier") and water segment use(s) are identified for the receiving water body, the agency shall document its findings and proceed with the appropriate level of antidegradation review.

3.7. On or after July 2, 2001, the effective date of these implementation procedures, new and reissued WV/NPDES general permits will be evaluated to consider the potential for significant degradation as a result of the permitted activity. Regulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier 2 antidegradation review as part of the permit registration process. Regulated activities that are granted coverage by a WV/NPDES permit that will degrade a Tier 2.5 or Tier 3 water segment must comply with the requirements of sections 6 and 7 herein.

3.8. Regulated activities that qualify for coverage under a Corps of Engineers regional or nationwide permit pursuant to section 404 of the Federal Act that has been certified by the state pursuant to section 401 of the Federal Act will not be required to undergo a Tier 2 antidegradation review, provided, however, that where an individual 401 certification is required, the Secretary may require an appropriate antidegradation review. Where an activity covered

by a regional or nationwide permit pursuant to section 404 of the Federal Act and certified pursuant to section 401 of the Federal Act allows for filling of a water, this exemption only applies to the site of the fill, and does not apply to activities downstream of the site of the fill. Regulated activities that are granted section 401 certification that will degrade a Tier 2.5 or Tier 3 water segment must comply with the requirements of sections 6 and 7 herein.

3.9. The Secretary shall develop guidance which addresses these implementation procedures and provides additional information to persons conducting regulated activities that are affected by these procedures. Such guidance shall include, but shall not be limited to, information regarding the following: (a) the determination of baseline water quality; (b) social and economic importance pursuant to subsection 5.8; and (c) the reasonable alternatives analysis required by subsection 5.7. The Secretary shall provide an opportunity for public review and comment before finalizing any guidance. ~~Within twelve months of the effective date of this rule, the Secretary shall report to the advisory committee established pursuant to W. Va. Code §22-1-9 regarding the status of its implementation.~~

§60-5-4. Tier 1 Protection.

4.1. Existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

4.2. Tier 1 protection applies to all waters of the state. A water segment shall be afforded Tier 1 protection where the level of water quality is not sufficient to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life, or where the water quality meets but does not exceed levels necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

4.3. In determining whether a water segment is afforded only Tier 1 protection, the agency will focus on whether the water segment is meeting or failing to meet minimum uses, except that, notwithstanding any other provision of this rule, the main stems of the Monongahela

River, and the Kanawha River from milepoint 72 to the confluence with the Ohio River shall be afforded Tier 1 protection only.

4.4. The Secretary will consider whether a water segment is listed on the state's 303(d) impaired waters list, but where the parameter(s) for which the water segment is listed does not result in that water segment's failure to attain minimum uses and where all other parameters exceed the quality necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life, the water segment will be afforded Tier 2 protection. Where the parameter(s) for which the water segment is listed does result in failure to attain minimum uses, such as an acid mine drainage-impacted water segment, that water segment will be afforded only Tier 1 protection.

4.5. All water segments listed on the state's 303(d) impaired waters list will be afforded only Tier 1 protection for the parameter(s) that resulted in the water segment being listed.

4.6. There also may be waters in the state where one or both of the fishable/swimmable uses are attained, but existing water quality is not "better than necessary" to support those uses (i.e., assimilative capacity does not exist for any of the parameters that would be affected by the proposed activity). Tier 1 protection is appropriate for such a water segment.

4.7. Where existing uses of the water body are impaired, there shall be no lowering of the water quality with respect to the parameters of concern that are causing the impairment. The agency shall consider nomination of such water body for the 303(d) list of water quality-impaired streams.

4.8. Where a proposed activity will result in a new or expanded discharge that would otherwise prevent attainment of an existing use in a water subject to Tier 1 protection, the applicant may be allowed to satisfy antidegradation review requirements by implementing or financing upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading

assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trade must be enforceable.

§60-5-5. Tier 2 Protection (High Quality Waters).

5.1. A water segment shall be considered a Tier 2 high quality water where the level of water quality exceeds levels necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

5.2. Tier 2 waters need not exceed the level of quality needed to meet or exceed numeric criteria for every parameter. ~~Water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection.~~ For example, a water segment listed on the state's 303(d) impaired waters list can qualify for Tier 2 protection, but where the impairment that caused the water segment to be listed results in failure to attain minimum uses, that water segment will be afforded only Tier 1 protection.

5.3. Where a water segment does not meet or exceed applicable water quality criteria for every parameter, the Secretary will determine whether the water segment will be afforded Tier 2 protection as part of the antidegradation review process using best professional judgment. In addition to data available for review, the Secretary may consider factors such as (1) existing aquatic life uses, (2) existing recreational or aesthetic uses, (3) existing water quality data for upstream segments or comparable segments, (4) biological score for the water segment, and (5) the overall value of the segment from an

ecological, health and public use perspective.

5.4. Where insufficient information is available to determine which tier should apply, a regulated entity may seek a determination that a water segment should be afforded only Tier 1 protection by submitting water quality data consistent with guidance developed pursuant to subsection 3.9. of this rule showing that there is no remaining assimilative capacity for any parameter to be affected by its activity. In seeking such a determination, the impacts of all of the regulated entity's activities on the water segment must be considered.

5.5. Where there is insufficient information to establish which tier should apply, it is the intent of these procedures to apply Tier 2 protection to such waters until such time as sufficient water quality data is obtained to determine the appropriate level of protection. No presumption shall be made with regard to the actual quality of any waters as a result of such initial application.

5.6. Tier 2 antidegradation review.

5.6.a. Any regulated activity in a Tier 2 water segment is required to go through the Tier 2 antidegradation review process where:

5.6.a.1. The regulated activity is a new or expanded activity that would significantly degrade water quality; or

5.6.a.2. The Secretary determines, upon renewal of a permit or certification, that other individual circumstances warrant a full review such as cumulative degradation resulting from multiple discharges within a watershed, degradation resulting from a single discharge over time, or degradation caused by a regulated facility's historic noncompliance with its permit.

5.6.b. In allowing any degradation, the agency shall assure water quality adequate to protect existing uses fully (i.e., Tier 1 protection).

~~5.6.c. The Secretary may determine that certain types or classes of activities should be exempt from Tier 2 review after balancing the relative impact of the activities on~~

~~water quality against the overall benefit of the activities to public health and welfare or the environment. The Secretary's discretion to exempt activities from review pursuant to this section shall be exercised and construed narrowly. Such types or classes of activities may include, for example, expansions or improvements to publicly owned wastewater treatment facilities or activities, public benefit activities by governmental entities, or discharges related to environmental remediation activities. Where the agency tentatively determines to grant an exemption under this provision, notice of this determination must be included in any required public notice, such as public notice required prior to issuance of an NPDES permit. The Secretary's final determination is a final decision and subject to appeal to the Environmental Quality Board. A proposed new or expanded discharge from a publicly owned or publicly owned and privately operated sanitary wastewater treatment plant constructed or operated to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage, is exempt from Tier 2 review. This exemption would include combined sewer overflow elimination or reduction projects affecting one or more water bodies and applies only where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters.~~

5.6.d. 5.6.c. Degradation for Tier 2 shall be deemed significant if the activity results in a reduction in the water segment's available assimilative capacity (the difference between the baseline water quality and the water quality criteria) of ten percent or more at the appropriate critical flow condition(s) for parameters of concern. Critical flow conditions for non-precipitation induced discharges are the 7Q10 flow of the receiving stream, plus either of the following: maximum permitted flow or maximum flow specified in the application, for industrial activities, or the average design flow, for wastewater treatment activities. Degradation will also be deemed significant if the proposed activity, together with all other activities allowed after the baseline water quality is established, results in a reduction in the water segment's available assimilative capacity of 20% or more at the appropriate

critical flow conditions for the parameters of concern: , except that discharges affecting dissolved oxygen, pH, fecal coliform or temperature will be deemed insignificant provided that:

5.6.c.1. For dissolved oxygen, the maximum DO sag will not be greater than 0.4 ppm based on an appropriate wasteload allocation model, unless that reduction is projected to cause a violation of 47 CSR 2-8.12 through 8.12.3, Appendix E, Table 1;

5.6.c.2. pH is maintained within the 6.0 to 9.0 range;

5.6.c.3. Thermal discharges will be consistent with 316(a) of the Federal Act or will not increase the temperature more than two degrees Fahrenheit at any time or cause other violations of applicable criteria in 47 CSR 2-8.28 through 8.28.4, Appendix E, Table 1.

5.6.c.4. For fecal coliform, necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

5.6.e. 5.6.d. Significant degradation will be determined on a parameter-by-parameter basis for each parameter of concern that might be affected by the regulated activity.

5.6.f. 5.6.e. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 2 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of

safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trades must be enforceable.

~~5.6.g.~~ 5.6.f. New or expanded activities determined to be significant by the agency shall be subject to the Tier 2 review requirements described in subsections 5.6. through 5.9. herein. If the agency determines that no further Tier 2 review requirements shall apply for an activity, the activity must still achieve the highest established statutory and regulatory requirements applicable to them, or conditions of the permit, or water quality certification, and that determination must be made a part of the public notification, as provided in subsections 9.1 through 9.5.

5.7. Review of alternatives.

5.7.a. If a determination is made that significant degradation will occur, the agency shall determine whether reasonable and cost effective less-degrading or non-degrading alternatives to the proposed activity exist. The agency will evaluate any alternatives analysis submitted by the regulated activity for consistency with the requirements set forth in Subdivision 5.7.b. herein.

5.7.b. A regulated entity proposing any new or expanded regulated activity that would significantly degrade water quality in a high quality water is required to prepare an evaluation of alternatives to the proposed activity. The evaluation must provide substantive information pertaining to the cost and environmental impacts associated with the following alternatives:

5.7.b.1. Pollution prevention measures;

5.7.b.2. Reduction in scale of project;

5.7.b.3. Water recycle or reuse;

5.7.b.4. Process changes;

5.7.b.5. Innovative treatment technology or technologies;

5.7.b.6. Advanced treatment technology or technologies;

5.7.b.7. Seasonal or controlled discharge options to avoid critical water quality periods;

5.7.b.8. Improved operation and maintenance of existing treatment systems; and

5.7.b.9. Alternative discharge locations.

5.7.c. After alternatives to allowing degradation have been adequately evaluated, a determination shall be made regarding whether cost-effective and reasonable non-degrading or less-degrading alternatives to the proposed activity shall be required. This determination will be based primarily on the alternatives analysis developed by the regulated entity, but may be supplemented with other information and data. As a rule of thumb, cost effective and reasonable non-degrading or less-degrading pollution control alternatives with costs that are less than 110% of the costs of the pollution control measures associated with the proposed activity shall be considered reasonable.

5.7.d. If it is determined that reasonable and cost effective less degrading or non-degrading alternatives to the proposed activity do exist, the project design may be revised accordingly. In general, if reasonable alternative(s) exist, the alternative or combination of alternatives that provide the least amount of degradation shall be implemented up to the determined reasonable and cost-effective threshold. If the regulated entity does not agree to adopt such reasonable and cost-effective alternatives, the alternatives analysis findings will be documented and the activity will not be allowed.

5.8. Review of social and economic importance.

5.8.a. If significant degradation would occur, even after application of reasonable

less-degrading or non-degrading alternatives, a determination shall be made as to whether the proposed activity is necessary to accommodate important economic or social development in the area in which the waters are located.

5.8.b. The regulated activity must document the social and economic importance of the proposed activity.

5.8.c. The factors to be addressed in such documentation may include, but are not limited to, the following:

5.8.c.1. Employment (e.g., increasing, maintaining or avoiding a reduction in employment);

5.8.c.2. Increased production;

5.8.c.3. Improved community tax base;

5.8.c.4. Housing;

5.8.c.5. Ancillary community economic benefit; and

5.8.c.6. Correction of an environmental or public health problem.

5.8.d. In addition to the above, a regulated entity may be required to submit the following:

5.8.d.1. Information pertaining to current aquatic life, recreational, or other water uses;

5.8.d.2. Information necessary to determine the environmental impacts that may result from the proposed activity;

5.8.d.3. Facts pertaining to the current state of economic development in the area (e.g., population, area employment, area income, major employers, types of businesses);

5.8.d.4. Government

fiscal base; and

5.8.d.5. Land use in the areas surrounding the proposed activity.

5.8.e. Once the available information pertaining to the socio-economic importance of the proposed activity has been reviewed by the agency, a preliminary determination regarding importance shall be made. In evaluating the regulated activity's demonstration of socio-economic importance, the agency may use EPA's Interim Economic Guidance for Water Quality Standards Workbook (EPA 823-B-95-002, March, 1995). Where there is a request for a variance from groundwater standards pursuant to 47 CSR 57 for existing sites where activities on those sites have the potential to impact surface water from contaminated groundwater and the activity is otherwise subject to this rule, the socio-economic justification process required under 47 CSR 57 subdivision 6.2.i will satisfy the requirements of this section. If the proposed activity is determined to have social or economic importance in the area in which the affected waters are located, the substance and basis for that preliminary determination shall be documented and the Tier 2 review shall continue.

5.9. Intergovernmental coordination for Tier 2 reviews.

5.9.a. The intergovernmental coordination requirements in ~~46 CSR 1-4.1.b.~~ 47 CSR 2-4.1.b. will be accomplished by providing notice to those agencies listed in Appendix B that the Secretary believes may have regulatory oversight of the regulated activity of the preliminary determination of the socio-economic review and requesting comments from those agencies regarding that review.

5.9.b. The public notice of the proposed activity will be provided as set forth in subsections 9.1 through 9.5 herein.

5.9.c. Once the intergovernmental coordination and public notice requirements are satisfied, the Secretary shall make a final determination concerning the social or economic importance of the proposed activity. All social and economic importance determinations, including determinations to prohibit the activity, shall be

documented and made a part of the public record.

§60-5-6. Tier 2.5 Protection Review Procedures (Waters of Special Concern). See ~~46 CSR 1-4.1.c~~ 47 CSR 2-4.1.c, and ~~46 CSR 1-2-29~~ 47 CSR 2-2.19 for a description and definition of Waters of Special Concern.

6.1. Any proposed activity that would degrade a water segment listed in Appendix A of this rule as waters of special concern will go through the Tier 2.5 antidegradation review process. Discharges from publicly-owned or publicly-owned and privately operated sanitary wastewater treatment plants that expand to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage, shall be permissible in a Tier 2.5 water segment where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters: Provided, That less degrading alternative treatment technologies are considered and used where costs for such technologies are within budgets and rates approved for such expansion project. This provision may extend to combined sewer overflow elimination or reduction projects. ~~Except as provided in subdivisions 6.2.a. and b. of this rule, the listing procedure for Tier 2.5 waters is set forth in section 8.1. herein. Currently listed Tier 2.5 waters are included in Appendix A to this rule.~~

6.2. Initial Presumptive Listing for Tier 2.5.

~~6.2.a. The stream or stream segments that appear on Appendix C shall be presumed to qualify as Tier 2.5 waters. Before any such stream or stream segment is protected as Tier 2.5 waters (and listed on Appendix A) the Secretary shall do the following:~~

~~6.1.a.1. Assure compliance with all provisions of article one-a of chapter twenty-two; and~~

~~6.1.a.2. No sooner than six months and no later than twelve months from the effective date of this rule, provide, where practicable, individual notice to property~~

~~owners along such stream or stream segment. In addition, notice by publication shall be provided to all property owners and others with a legal interest in the property. The notice shall include at a minimum, the information set forth in subparagraphs 8.1.a.1.A. through 8.1.a.1.D. of this rule. The notice shall indicate that a property owner or holder of legal interest in the property shall have thirty days to file an objection to the inclusion of the stream or stream segment as a Tier 2.5 water.~~

~~6.2.b. Should an objection be received from an owner or holder of a legal interest in property adjoining any stream on Appendix C, the Secretary shall provide written justification for the inclusion of the stream as a Tier 2.5 stream with reference to the criteria set out in paragraph 8.1.a.2. of this rule. The Secretary shall then provide a thirty-day comment period on the proposed action.~~

~~6.2.b.1. Where no objection is made to the inclusion of a stream or stream segment as a Tier 2.5 water, the stream shall be included by the Secretary on Appendix A without further justification.~~

~~6.2.b.2. Any final decision by the Secretary with regard to the inclusion of a stream in Tier 2.5 made following the procedure set forth in this paragraph, may be appealed to the EQB. For those streams for which the Secretary receives an objection to inclusion of the stream as a Tier 2.5 stream, the Secretary shall make a decision whether to include the stream on the initial listing on Appendix A and shall provide a written justification for the decision.~~

~~6.2.c. Following the initial listing for Tier 2.5 waters, as described in subdivisions 6.2.a. and b. above, subsequent additions or deletions from Appendix A shall be in accordance with section 8.1., herein.~~

6.2. Currently listed Tier 2.5 waters are included in Appendix A to this rule. Subsequent additions or deletions from Appendix A shall be in accordance with subsection 8.1.

6.3. Tier 2.5 antidegradation review.

6.3.a. No significant degradation

of Tier 2.5 waters will be allowed. For Tier 2.5 waters, degradation will be deemed significant if it exceeds the baseline water quality plus ten percent of available assimilative capacity (the difference between the baseline water quality and the water quality criteria), whether from a single activity or cumulatively, except that discharges affecting dissolved oxygen, pH, fecal coliform or temperature will be deemed insignificant provided that:

6.3.a.1. For dissolved oxygen, the maximum DO sag will not be greater than 0.4 ppm based on an appropriate wasteload allocation model, unless that reduction is projected to cause a violation of ~~46 CSR 1-8.12 through 8.12.3~~, 47 CSR 2-8.12 through 8.12.3, Appendix E, Table 1;

6.3.a.2. pH is maintained within the 6.0 to 9.0 range;

6.3.a.3. Thermal discharges will be consistent with 316(a) of the Federal Act or will not increase the temperature more than two degrees Fahrenheit at any time or cause other violations of applicable criteria in ~~46 CSR 1-8.28 through 8.28.4~~ 47 CSR 2-8.28 through 8.28.4, Appendix E, Table 1.

6.3.a.4. For fecal coliform, necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

6.3.b. Where a Tier 2.5 water has one or more parameters that fail to meet water quality criteria, the Secretary shall use best professional judgment in setting appropriate limitations for such parameters, with the goal of improving baseline water quality for such parameters over time.

6.3.c. Where baseline water quality has not been established for the Tier 2.5 water segment for a parameter of concern that is reasonably expected to be discharged into the water segment as a result of a new or expanded regulated activity, a determination of the baseline water quality for the receiving water segment must be established for that parameter

of concern prior to allowing any new or expanded discharge.

6.3.d. The Secretary may consider data for establishing the baseline water quality from a federal or state agency, the regulated entity, the public, or any other source, as long as the data are recent and reliable. The regulated entity may be required to provide baseline water quality for those parameters of concern that are reasonably expected to be discharged as a result of the regulated activity into the affected water segment.

6.3.e. After the baseline water quality has been established for the parameters of concern reasonably expected to be discharged by the proposed activity, the *de facto* criteria for those parameters of concern will equal the established baseline water quality plus ten percent of available assimilative capacity.

6.3.f. Regulated entities with discharges existing on or before July 2, 2001, the effective date of this rule, that discharge into a Tier 2.5 water may be required to submit an alternatives analysis upon renewal of its application or upon the written request of the Secretary to evaluate reasonable and cost-effective alternatives that would reduce the activity's impact to a Tier 2.5 water.

6.3.g. Discharges from activities in waters upstream of a water of special concern shall not result in the ambient water quality within the Tier 2.5 water exceeding the *de facto* criteria.

6.3.h. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 2.5 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists

regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (4) the trades must be enforceable.

6.3.i. If a determination is made that the activity will result in significant degradation of a Tier 2.5 water, the activity shall not be allowed.

6.3.j. If the activity is determined not to result in significant degradation of a Tier 2.5 water, the activity may be allowed. In such case the antidegradation review findings will be documented in writing and public notice activities will be initiated consistent with subsections 9.1 through 9.5 herein.

6.3.k. Short-term water quality impacts. The Secretary shall determine whether a proposed activity is short term in nature and the resulting changes in water quality will be temporary and have limited effects. Notwithstanding subdivisions 6.3.a. and 6.3.e. herein, short-term activities which result in less than a 10% change in the available assimilative capacity may be deemed to have limited effects. Determinations will be made on a case-by-case basis and shall be made after consideration of the following factors:

6.3.k.1. The length of time during which the water quality will be lowered;

6.3.k.2. The percent change in ambient concentrations;

6.3.k.3. The parameters affected;

6.3.k.4. The likelihood for long-term water quality benefits to the segment (e.g., as may result from dredging of contaminated sediments);

6.3.k.5. The degree to which achieving applicable water quality standards during the proposed activity may be at

risk;

6.3.k.6. The potential for any residual long-term influences on existing uses; and

6.3.k.7. The cumulative impacts from all sources for the parameters affected.

§60-5-7. Tier 3 Protection Review Procedures (Outstanding National Resource Waters). See ~~46 CSR 1-4.1.d and 46 CSR 1-2.15~~ 47 CSR 2-4.1.d and 47 CSR 2-2.9 for a description of Outstanding National Resource Waters (ONRW).

7.1. Tier 3 waters. ONRWs are to be maintained, protected and improved where necessary. Any proposed new or expanded regulated activity that would degrade (result in a lowering of water quality) a water body that has been ~~approved as~~ designated an ONRW, other than temporary lowering of water quality, is prohibited.

7.2. Tier 3 antidegradation review. The agency shall use the following antidegradation implementation procedures for evaluating new or expanded regulated activities that have the potential to affect Outstanding National Resource Waters (ONRWs), as described in ~~46 CSR 1-4.1.c.~~ 47 CSR 2 - 4.1.d. and as ~~nominated and approved~~ listed in accordance with ~~the provisions of this rule.~~ subsection 8.2.

7.2.a. Determine whether the proposed activity is short term in nature and the resulting changes in water quality will be temporary. Such determination will be made on a case-by-case basis and shall be made after consideration of the following factors:

7.2.a.1. The length of time during which the water quality will be lowered;

7.2.a.2. The percent change in ambient concentrations;

7.2.a.3. The parameters affected;

7.2.a.4. The likelihood for long-term water quality benefits to the segment

(e.g., as may result from dredging of contaminated sediments);

7.2.a.5. The degree to which achieving applicable water quality standards during the proposed activity may be at risk; and

7.2.a.6. The potential for any residual long-term influences on existing uses.

7.2.b. If after review of the factors in paragraphs 7.2.a.1 through 7.2.a.6, the agency determines that the proposed activity will be short term in nature and the changes in water quality will be temporary and limited, the proposed activity may be authorized. In such case the antidegradation review findings shall be documented and public notice activities shall be initiated. If after review of the factors in paragraphs 7.2.a.1 through 7.2.a.6, the agency determines that the proposed activity will not be short term in nature or that changes in water quality will not be temporary and limited, the proposed activity shall be denied.

7.3. Sources upstream from an ONRW. Any proposed activity that would result in a permanent new or expanded discharge upstream of an ONRW segment is prohibited except where such source would improve or not degrade the existing water quality of the downstream ONRW segment.

7.3.a. To determine whether the proposed activity will result in the lowering of water quality in the downstream ONRW segment, the following factors, when applicable, shall be considered:

7.3.a.1. Change in ambient concentrations predicted at the appropriate critical condition(s);

7.3.a.2. Change in loadings (i.e., the new or expanded loadings compared to total existing loadings to the segment);

7.3.a.3. Reduction in available assimilative capacity;

7.3.a.4. Nature, persistence and potential effects of the parameter;

7.3.a.5. Potential for cumulative effects;

7.3.a.6. Degree of confidence in the various components of any modeling technique utilized (e.g., degree of confidence associated with the predicted effluent variability); and

7.3.a.7. Other factors determined by the Secretary, when appropriate.

7.3.b. If a preliminary determination is made that the applicable criteria in paragraphs 7.3.a.1. through 7.3.a.7. will be met, the antidegradation review findings shall be documented and the applicable public notice activities shall be initiated. If after review of the factors in paragraphs 7.3.a.1. through 7.3.a.7., the Secretary determines that the proposed activity will result in the lowering of water quality in the downstream ONRW stream segment, the proposed activity shall be denied.

7.4. For ONRWs in areas designated as federal Wilderness, nothing in this rule is intended to authorize activities not authorized by the Wilderness Act.

7.5. A proposed activity that will result in a new or expanded discharge in a water subject to Tier 3 protection may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade. The basis of the trade will be documented and will be consistent with the trading assessment procedure that has been approved by the Secretary. A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment. In addition, (1) the effluent trade must be for the same parameter; (2) where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required; (3) dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or

expanded discharge; and (4) the trade must be enforceable.

§60-5-8. Designation of Tier 2.5 and Tier 3 Waters.

8.1. Listing process for Tier 2.5.

8.1.a. Tier 2.5 Nomination Procedures. Any interested party or the Board Secretary may nominate a water to be listed as a Water of Special Concern. After reviewing the nomination the Board Secretary shall consider the qualification criteria and may designate the nominated water as a Tier 2.5 water in accordance with the ~~notice and comment provisions of 46 CSR 6, Procedural Rules Governing Site Specific Revisions to Water Quality Standards, legislative rulemaking process pursuant to W.Va. Code § 29A-3-1 et seq.~~ The address for filing such petitions is ~~West Virginia Environmental Quality Board, 1615 Washington Street, East, Room 301, Charleston, West Virginia 25311-2126. West Virginia Department of Environmental Protection, Attn: Tier 2.5 List, 601 57th Street, SE, Charleston, WV 25304.~~ The nominating party has the burden of establishing a basis for listing of a water segment as a Tier 2.5 water. The Board Secretary shall return insufficient nominations to the nominating party. Generally, nominations that fail to address at least three of the qualification criteria shall be considered insufficient.

8.1.a.1. Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 2.5 water pursuant to the ~~Board's State's~~ antidegradation policy, the Board Secretary shall, within 180 days of receipt of the nomination, notify each locality in which the water or segment lies and shall provide individual notice to property owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided. The written notice shall include, at a minimum:

8.1.a.1.A. A description of the location of the waters or segment;

8.1.a.1.B. The procedures and criteria for designation as well as the impact of the designation;

8.1.a.1.C. The name of the person(s) making the nomination; and

8.1.a.1.D. The name of a contact person at the ~~Environmental Quality Board~~ Department of Environmental Protection who is knowledgeable about the nomination of the waters or segment. After receipt of the notice of the nomination, landowners, the public and localities shall be provided 60 days to comment.

8.1.a.2. Qualification Criteria. Factors to be considered in determining whether to assign a Water of Special Concern designation to a water from another category shall include the following:

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8.1.a.2.A. Impact on private property owners;

8.1.a.2.B. Whether the interests of all affected parties have been adequately represented during the nomination and designation process;

8.1.a.2.C. The location of the water;

8.1.a.2.D. Any previous special designations;

8.1.a.2.E. Existing water quality;

8.1.a.2.F. Factors that indicate unique or exceptional ecological, recreational or aesthetic resource value;

8.1.a.2.G. Impact on economic development in the area, including development of demonstrated natural resources; and

8.1.a.2.H. Other factors determined by the Board Secretary, when applicable.

8.1.a.3. Reclassification of

a Water of Special Concern. The Board Secretary may on its own, or at the request of an interested party, consider reclassifying a Water of Special Concern to another antidegradation tier after following notice and comment procedures consistent with paragraph 8.1.a.1. In considering a reclassification, the Board Secretary shall review the criteria outlined in subparagraphs 8.1.a.2.A. through 8.1.a.2.H. above. After such consideration, the Board Secretary may reclassify a Tier 2.5 water in accordance with the ~~notice and comment provisions of 46 CSR 6, Procedural Rules Governing Site Specific Revisions to Water Quality Standards.~~ legislative rulemaking process pursuant to W.Va. Code §29A-3-1 et seq.

8.2. Listing process for Tier 3 waters.

8.2.a. Tier 3 Nomination Procedures. Any interested party or the Board Secretary may nominate a water as an ONRW. After reviewing the nomination the Board Secretary shall consider the qualification criteria and may classify the nominated water as a Tier 3 water in accordance with the notice and comment provisions of ~~46 CSR 6, Procedural Rules Governing Site Specific Revisions to Water Quality Standards.~~ this subsection. The address for filing such petitions is ~~West Virginia Environmental Quality Board, 1615 Washington Street, East, Room 301, Charleston, West Virginia 25311-2126.~~ West Virginia Department of Environmental Protection, Attn: Tier 3 List, 601 57th Street, SE, Charleston, WV 25304. The nominating party has the burden of establishing a basis for listing of a water segment as a Tier 3 water. The Board Secretary shall return insufficient nominations to the nominating party. Generally, nominations that fail to address at least three of the qualification criteria set out in paragraph 8.2.a.2. of this rule shall be considered insufficient.

8.2.a.1. Upon receiving a sufficient nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the ~~Board's State's~~ antidegradation policy, the Board Secretary shall notify each locality in which the water or segment lies and shall provide individual notice to property

owners on the nominated segment. Where individual notice to property owners is impracticable, constructive notice by publication shall be provided. The written notice shall include, at a minimum:

8.2.a.1.A. A description of the location of the waters or segment;

8.2.a.1.B. The procedures and criteria for designation as well as the impact of the designation;

8.2.a.1.C. The name of the person(s) making the nomination; and

8.2.a.1.D. The name of a contact person at the ~~Environmental Quality Board~~ Department of Environmental Protection who is knowledgeable about the nomination of the waters or segment. After receipt of the notice of the nomination, landowners, the public and localities shall be provided 60 days to comment.

8.2.a.2. Qualification Criteria. Factors to be considered in determining whether to assign an ONRW designation to a water from another category shall include the following:

8.2.a.2.A. Impact on private property owners;

8.2.a.2.B. Whether the interests of all affected parties have been adequately represented during the nomination and designation process;

8.2.a.2.C. The location of the water;

8.2.a.2.D. Any previous special designations;

8.2.a.2.E. Existing water quality;

8.2.a.2.F. Outstanding ecological value;

8.2.a.2.G.

Outstanding recreational or aesthetic value; and

8.2.a.2.H.

Other factors determined by the ~~Board~~ Secretary, when applicable.

§60-5-9. Public Participation in Antidegradation Reviews/Appeals.

9.1. All antidegradation review findings shall be documented by the Secretary and made part of the public record. The findings, including the baseline water quality, the existing uses, and the tier assigned to the water body are to be available to the public.

9.2. Any required public notice will be provided through the appropriate Class I or Class II legal advertisement in a qualified newspaper with the largest circulation for the county where the activity will occur. The notice will identify the action being considered, list all existing uses identified of the water, and call for comments from the public regarding the proposed activity. The cost of such publication will be borne by the applicant.

9.3. Public notice, opportunity for public comment, and opportunity for a public hearing, consistent with the requirements of 47 CSR 10-12, will be provided of all activities proposed to be allowed after a Tier 1, 2, 2.5, or 3 antidegradation review. Such public notice may be combined with other required notifications, such as notification to agencies as part of required intergovernmental coordination or notification of a proposed permit decision. Public notice is not required to be provided for proposed activities on Tier 1 or Tier 2 waters for which a review process has not been required, such as activities covered by a WV/NPDES general permits, except that any trading approved by the Secretary for antidegradation purposes will require public notice consistent with the requirements of 47 CSR 10-12.

9.4. Public notice of Tier 2 antidegradation reviews.

9.4.a. After a full Tier 2 review has been completed for a proposed activity, the public notice shall include notice of the availability of the following:

9.4.a.1. The decision as to whether the proposed activity has been determined to comply with the antidegradation implementation rule;

9.4.a.2. Findings from the alternatives analysis;

9.4.a.3. A determination of the impact of the activity to ambient concentrations and baseline water quality;

9.4.a.4. The results of the socio-economic evaluation of the activity;

9.4.a.5. The determination regarding existence of reasonable and cost effective non-degrading or less degrading alternatives; and

9.4.a.6. A description of the water segment that is subject to the antidegradation review.

9.5. Once the intergovernmental coordination and public notice requirements of subsections 9.1. through 9.5. are satisfied, the Secretary shall make a determination concerning the social or economic importance in the area in which the affected water bodies are located. All determinations, including determinations to prohibit the activity, shall be documented and made a part of the public record.

9.6. Appeals-Final agency decisions, made after public comment, that identify applicable uses, designate tiers, or that find regulated activities to be allowed or prohibited, are final actions that are appealable ~~as set forth in the Administrative Procedures Act. Final agency actions made by the Secretary are appealable to the Board;~~ provided that the designation of waters as Tier 2.5 waters pursuant to subsections 6.2 and 8.1 shall not be subject to appeal.

APPENDIX A

~~WV DNR and WV DEP~~ Waters of Special Concern (Tier 2.5 Waters)

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<u>STREAM CODE</u>	<u>STREAM NAME</u>	<u>LOCATION</u>	<u>L E N G T H</u> <u>(MILES)</u>
<u>Tug Fork Watershed</u>			
<u>BST-60-D</u>	<u>CUB BRANCH</u>	<u>The section of stream within Panther Creek State Park, - tributary of Panther Creek of Tug Fork River</u>	<u>0.3</u>
<u>Kanawha River Watershed</u> <u>(Upper & Lower)</u>			
<u>K-13</u>	<u>LITTLE SIXTEENMILE CREEK</u>	<u>Upper section of stream that is within Chief Cornstalk WMA - tributary of the (Lower) Kanawha River</u>	<u>1.2</u>
<u>K-14-B-1</u>	<u>UNT OF FIVEFORK BRANCH</u>	<u>Entire length of unnamed tributary that drains into Fivefork Branch approx. 0.45 miles upstream of its confluence with Sixteenmile Creek of (Lower) Kanawha River</u>	<u>1.9</u>
<u>K-39-E-3</u>	<u>BAYS FORK</u>	<u>Entire length - tributary of Middle Fork of Davis Creek of (Lower) Kanawha River</u>	<u>1.9</u>
<u>K-39-M-1-A</u>	<u>HOFFMAN HOLLOW</u>	<u>Entire length - tributary of Middleick Branch of Davis Creek of (Lower) Kanawha River</u>	<u>2.3</u>
<u>K-39-O</u>	<u>SHREWSBURY HOLLOW</u>	<u>Entire length - tributary of Davis Creek of (Lower) Kanawha River</u>	<u>1.5</u>
<u>K-76</u>	<u>LOOP CREEK</u>	<u>Entire length - tributary of Kanawha River</u>	<u>20.0</u>
<u>Elk River Watershed</u>			
<u>KE-135</u>	<u>BIG RUN</u>	<u>Entire length (south headwater fork incl.) This stream is located approx. 1.78 mi. upstream Blackhole Run - tributary of Elk River</u>	<u>1.9</u>
<u>KE-136</u>	<u>PROPS RUN</u>	<u>Begins with headwater forks downstream to mouth - tributary of Elk River</u>	<u>1.4</u>
<u>KE-137</u>	<u>LAUREL RUN/ELK RIVER</u>	<u>Entire length (south headwater fork included) - tributary of Elk River</u>	<u>2.6</u>
<u>KE-139-B</u>	<u>CROOKED FORK</u>	<u>Begins with headwater forks downstream to mouth - tributary of Old Field Fork of Elk River</u>	<u>2.5</u>
<u>KE-98-C-1</u>	<u>LAUREL PATCH RUN</u>	<u>Tributary of Left Fork of Holly River of Elk River - section within Elk River WMA</u>	<u>1.5</u>
<u>Gauley River Watershed</u>			
<u>KG-34-B</u>	<u>COAL SIDING RUN</u>	<u>Begins with headwater forks downstream to mouth - tributary of Cherry River</u>	<u>1.5</u>
<u>KG-34-H</u>	<u>NORTH FORK /CHERRY RIVER</u>	<u>Entire length - tributary of Cherry River</u>	<u>16.3</u>

<u>KG-34-H-14</u>	<u>BEAR RUN</u>	<u>Entire length - tributary of North Fork of Cherry River</u>	<u>2.2</u>
<u>KG-34-H-4</u>	<u>HUNTERS RUN</u>	<u>Entire length - tributary of North Fork of Cherry River</u>	<u>3.1</u>
<u>KG-34-H-5</u>	<u>COATS RUN</u>	<u>Entire length downstream of Summit Lake - tributary of North Fork Cherry</u>	<u>1.1</u>
<u>KG-34-H-9</u>	<u>ARMSTRONG RUN</u>	<u>Entire length - tributary of North Fork of Cherry River</u>	<u>1.2</u>
<u>KGC</u>	<u>CRANBERRY RIVER</u>	<u>Section from the South Fork shelter (between Red Run and Lost Run) downstream to mouth - tributary of the Gauley River</u>	<u>26.6</u>
<u>KGC-14</u>	<u>LUCK BRANCH</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>1.2</u>
<u>KGC-15</u>	<u>HANGING ROCK BRANCH</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>1.2</u>
<u>KGC-19</u>	<u>DOGWAY FORK</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>8.8</u>
<u>KGC-21</u>	<u>BIRCHLOG RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.2</u>
<u>KGC-4</u>	<u>BARRENSHREE RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>4.6</u>
<u>KGC-7</u>	<u>BEE RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.2</u>
<u>KGC-8</u>	<u>FOXTREE RUN</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.3</u>
<u>KGC-9</u>	<u>ALDRICH BRANCH</u>	<u>Entire length - tributary of Cranberry River of Gauley River</u>	<u>2.2</u>
<u>KGW</u>	<u>WILLIAMS RIVER</u>	<u>Tributary of the Gauley River - section from Lick Branch upstream to headwaters.</u>	<u>23.2</u>
<u>KGW-1</u>	<u>CRAIG RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.7</u>
<u>KGW-19</u>	<u>UPPER BANNOCK SHOALS RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.8</u>
<u>KGW-2</u>	<u>JONATHAN RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.4</u>
<u>KGW-20</u>	<u>TEA CREEK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>6</u>
<u>KGW-20-A</u>	<u>LICK CREEK</u>	<u>Entire length - tributary of Tea Creek of Williams River of Gauley River</u>	<u>1.8</u>
<u>KGW-21</u>	<u>SUGAR CREEK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>3.6</u>
<u>KGW-22</u>	<u>LITTLE LAUREL CREEK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.5</u>
<u>KGW-26</u>	<u>BLACK MOUNTAIN RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.7</u>
<u>KGW-27</u>	<u>MOUNTAIN LICK RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.1</u>
<u>KGW-4</u>	<u>SPICE RUN</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.8</u>
<u>KGW-8</u>	<u>WHITE OAK FORK</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>2.7</u>
<u>KGW-9</u>	<u>LICK BRANCH</u>	<u>Entire length - tributary of Williams River of Gauley River</u>	<u>1.4</u>
<u>New River Watershed</u>			
<u>KN-17</u>	<u>MANNS CREEK</u>	<u>Entire length within Babcock State park Boundaries</u>	<u>5.2</u>
<u>KN-24</u>	<u>SLATER CREEK</u>	<u>Section within New River Gorge Nat. River - tributary of (Lower) New River</u>	<u>0.8</u>
<u>KN-27-C</u>	<u>CHESTNUT KNOB FORK</u>	<u>Entire length - tributary of Laurel Creek of (Lower) New River</u>	<u>3.5</u>
<u>KN-32</u>	<u>MEADOW CREEK</u>	<u>Section w/in New River Gorge National River that is upstream of</u>	<u>2.6</u>

<u>KNG-78-H-1</u>	<u>LONG RUN</u>	<u>Entire length - tributary of Poca Run of East Fork of Greenbrier River</u>	<u>2.8</u>
<u>KNG-78-K</u>	<u>MULLENAX RUN</u>	<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>2.9</u>
<u>KNG-78-L</u>	<u>ABES RUN</u>	<u>Entire length - tributary of East Fork of Greenbrier River</u>	<u>2.6</u>
<u>KNG-79</u>	<u>WEST FORK GREENBRIER RIVER</u>	<u>Entire length - tributary of Greenbrier River</u>	<u>18.7</u>
<u>KNG-79-C</u>	<u>LITTLE RIVER</u>	<u>From headwater forks downstream to mouth - tributary of West Fork of Greenbrier River</u>	<u>7.6</u>
<u>KNG-79-C-1</u>	<u>SPAN OAK RUN</u>	<u>Entire length - tributary of Little River of West Fork of Greenbrier River</u>	<u>2.3</u>
<u>KNG-79-C-2</u>	<u>CLUBHOUSE RUN</u>	<u>Entire length - tributary of Little River of West Fork of Greenbrier River</u>	<u>2.7</u>
<u>KNG-79-C-3</u>	<u>HINKLE RUN</u>	<u>Entire length - tributary of Little River of West Fork of Greenbrier River</u>	<u>2.6</u>
<u>Cheat River Watershed</u>			
<u>MC-2-A</u>	<u>DARNELL HOLLOW</u>	<u>Section within Coopers Rock State Forest - tributary of Morgan Run of Cheat (Lake)</u>	<u>1.6</u>
<u>MC-33-A-2</u>	<u>WATKINS RUN</u>	<u>Entire length - tributary of Flag Run</u>	<u>1.5</u>
<u>MC-45</u>	<u>TOBES RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>1.2</u>
<u>MC-51-A</u>	<u>RIGHT FORK CLOVER RUN</u>	<u>Entire length - Rt Fork of Clover Run of Cheat</u>	<u>5.5</u>
<u>MC-51-B</u>	<u>LEFT FORK CLOVER RUN</u>	<u>Entire length - tributary of Cheat</u>	<u>9.2</u>
<u>MC-52-0.7A</u>	<u>BRIDGE RUN</u>	<u>Entire length - tributary of Minear Run of Cheat. Mainstem entirely on Pub Land</u>	<u>1.1</u>
<u>MC-54-A</u>	<u>MIKE RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat. Mainstem entirely on Pub Land</u>	<u>3.9</u>
<u>MC-54-C</u>	<u>MAXWELL RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>2.9</u>
<u>MC-54-D</u>	<u>HYLE RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>3.9</u>
<u>MC-54-G</u>	<u>LYNN RUN</u>	<u>Entire length - tributary of Horseshoe Run of Cheat</u>	<u>1.3</u>
<u>MC-60-K-1</u>	<u>THREE SPRING RUN</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-11</u>	<u>MCCRAY CREEK</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>2.4</u>
<u>MC-60-K-14</u>	<u>DANIELS CREEK</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>3.2</u>
<u>MC-60-K-17</u>	<u>EAST FORK GLADY FORK</u>	<u>Section upstream of Louk Run - tributary of Gladly Fork</u>	<u>4.8</u>
<u>MC-60-K-17-A</u>	<u>LOUK RUN</u>	<u>Entire length - tributary of East Fork of Gladly Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-2A</u>	<u>HOG RUN</u>	<u>Entire length - tributary of Panther Camp Run of Gladly Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-K-4</u>	<u>FIVE LICK CREEK</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>1.7</u>
<u>MC-60-K-6</u>	<u>BAKER CAMP RUN</u>	<u>Entire length - tributary of Gladly Fork of Dry Fork</u>	<u>1.2</u>
<u>MC-60-N-4</u>	<u>BEAVERDAM RUN</u>	<u>Headwaters downstream to confluence of unnamed tributary -</u>	<u>2.1</u>

<u>MC-60-R</u>	<u>TORY CAMP RUN</u>	tributary of Laurel Fork of Dry Fork	<u>2.4</u>
<u>MC-60-T</u>	<u>GANDY CREEK</u>	Entire length - tributary of Dry Fork	<u>18.5</u>
<u>MC-60-T-1</u>	<u>LOWER TWO SPRING RUN</u>	Entire length except lowermost 1.3 miles - tributary of Dry Fork	<u>2.3</u>
<u>MC-60-T-10</u>	<u>NARROW RIDGE RUN</u>	Entire length - tributary of Gandy Creek of Dry Fork	<u>2.2</u>
		Entire length (downstream of Spruce Knob Lake) - tributary of Gandy Creek of Dry Fork	
<u>MC-60-T-11</u>	<u>WARNER RUN</u>	Entire length - tributary of Gandy Creek of Dry Fork	<u>1.8</u>
<u>MC-60-T-2</u>	<u>UPPER TWO SPRING RUN</u>	Entire length - tributary of Gandy Creek of Dry Fork	<u>2.5</u>
<u>MC-60-T-3</u>	<u>SWALLOW ROCK RUN</u>	Entire length - tributary of Gandy Creek of Dry Fork	<u>1.8</u>
<u>MC-60-T-6</u>	<u>TAYLOR RUN</u>	Entire length - tributary of Gandy Creek of Dry Fork	<u>0.9</u>
<u>MC-60-T-8</u>	<u>BIG RUN</u>	Entire length - tributary of Gandy Creek of Dry Fork	<u>3.8</u>
<u>MCS-12</u>	<u>LITTLE LAUREL RUN</u>	Entire length - tributary of Shavers Fork of Cheat	<u>1.3</u>
<u>MCS-13</u>	<u>LITTLE BLACK FORK</u>	Entire length - tributary of Shavers Fork of Cheat	<u>4.7</u>
<u>MCS-3-A</u>	<u>SOUTH BRANCH</u>	Entire length - tributary of Haddit Run of Shavers Fork of Cheat	<u>3.6</u>
<u>MCS-40</u>	<u>YOKUM RUN</u>	Entire length - tributary of Shavers Fork of Cheat	<u>2.6</u>
<u>MCS-46</u>	<u>RED RUN</u>	Entire length - tributary of Shavers Fork of Cheat	<u>2.8</u>
<u>MCS-47</u>	<u>BLISTER RUN</u>	Entire length - tributary of Shavers Fork of Cheat	<u>2</u>
<u>MCS-49</u>	<u>LAMBERT RUN</u>	Entire length - tributary of Shavers Fork of Cheat	<u>3.2</u>
<u>MCS-5</u>	<u>LAUREL RUN / SHAVERS FORK</u>	Entire length - tributary of Shavers Fork of Cheat	<u>3.5</u>
<u>MCS-50</u>	<u>FIRST FORK</u>	Entire length - tributary of Shavers Fork of Cheat	<u>5.4</u>
<u>MCS-53</u>	<u>BEAVER CREEK</u>	Entire length - tributary of Shavers Fork of Cheat	<u>1.7</u>
<u>MCS-54</u>	<u>SECOND FORK</u>	Entire length - tributary of Shavers Fork of Cheat	<u>4.1</u>
<u>Tygart River Watershed</u>			
<u>MT-64</u>	<u>MILL CREEK</u>	Begins with headwater forks downstream to confluence of unnamed trib approx. 0.47 mi. above the confluence of Buck Run - tributary of Tygart Valley	<u>10.7</u>
<u>MT-64-C</u>	<u>GLADE RUN</u>	Entire length - tributary of Mill Creek of Tygart Valley	<u>1.6</u>
<u>MT-64-E</u>	<u>MEATBOX RUN</u>	Entire length - tributary of Mill Creek of Tygart Valley	<u>1.2</u>
<u>MT-64-F</u>	<u>POTATOHOLE RUN</u>	Entire length - tributary of Mill Creek of Tygart Valley	<u>1.8</u>
<u>MT-66-B</u>	<u>MC GEE RUN</u>	Entire length - tributary of Riffle Creek Tygart Valley	<u>3.4</u>
<u>Upper Ohio North</u>			
<u>O-102-A</u>	<u>WHITEOAK RUN</u>	Section of White Oak Run (including forks) w/in Tomlinson Run S.P. - tributary of Tomlinson Run of Ohio River	<u>0.5</u>
<u>Twelvepole Creek Watershed</u>			
<u>O-2-H-2-A</u>	<u>STOWERS BRANCH</u>	Begins with headwater forks downstream to entering Beech Fork	<u>1</u>

<u>O-2-P-23</u>	<u>ARKANSAS BRANCH</u>	<u>Lake - tributary of Beech Fork of Twelvepole Creek</u>	<u>2</u>
<u>O-2-P-25</u>	<u>SWEETWATER BRANCH</u>	<u>Entire length - tributary of West Fork of Twelvepole Creek</u>	<u>0.9</u>
<u>O-2-P-26</u>	<u>LONG BRANCH</u>	<u>Entire length w/n Cabwaylingo S.P. - tributary of West Fork of Twelvepole Creek</u>	<u>2.6</u>
<u>O-2-P-27</u>	<u>SPRUCE FORK</u>	<u>Entire length - tributary of West Fork of Twelvepole Creek</u>	<u>1.8</u>
<u>O-2-Q-14</u>	<u>RICH CREEK</u>	<u>The section of Rich Creek w/n East Lynn Lake WMA - tributary of East Fork of Twelvepole Creek</u>	<u>1.3</u>
<u>O-2-Q-16</u>	<u>BLUELICK BRANCH</u>	<u>Entire length to East Lynn Lake - tributary of East Fork of Twelvepole Creek</u>	<u>2.3</u>
<u>Guyandotte River Watershed</u>			
<u>OG-102</u>	<u>BRICKLE BRANCH</u>	<u>Entire length - tributary of Guyandotte River</u>	<u>1.6</u>
<u>OG-29-C</u>	<u>HORSESHOE BRANCH</u>	<u>Entire length - tributary of Sixmile of Guyandotte River</u>	<u>1</u>
<u>OG-38-D</u>	<u>LAUREL CREEK</u>	<u>Headwaters downstream to unnamed tributary between Doss Fork and Chestnut Oak Creek</u>	<u>1.6</u>
<u>OG-61</u>	<u>BUFFALO CREEK</u>	<u>Entire length of stream that is w/n Chief Logan S.P. - tributary of Guyandotte River</u>	<u>2.8</u>
<u>OG-96-A</u>	<u>STURGEON BRANCH</u>	<u>Entire length - tributary of Big Run Creek to Guyandotte River</u>	<u>1.6</u>
<u>OGM-8-B</u>	<u>LEFT FORK MILL CREEK</u>	<u>Begins with headwater forks downstream to approx. 0.93 mi. upstream of the convergence of the Left Fork and Right Fork of Mill Creek - tributary of Mill Creek of Mud River of Guyandotte River</u>	<u>2.7</u>
<u>Potomac Direct Drains Watershed</u>			
<u>P-9-G-2</u>	<u>SOUTH FORK INDIAN RUN</u>	<u>Entire length - tributary of Indian Creek</u>	<u>3.8</u>
<u>Cacapon River Watershed</u>			
<u>PC-0.9</u>	<u>CONNER HOLLOW</u>	<u>Entire length - tributary of Cacapon</u>	<u>3.8</u>
<u>PC-1</u>	<u>CONSTANT RUN</u>	<u>Entire length - tributary of Cacapon</u>	<u>2.6</u>
<u>PC-10</u>	<u>EDWARDS RUN</u>	<u>Headwaters downstream to about 0.9 mi. from mouth - tributary of Cacapon</u>	<u>7</u>
<u>South Branch/Potomac River Watershed</u>			
<u>PSB-28-A-1</u>	<u>BIG RUN</u>	<u>Entire length - tributary of Jordan Run of North Fork of South Branch Potomac</u>	<u>2.6</u>

<u>PSB-28-A-2</u>	<u>LAUREL RUN / JORDAN RUN</u>	Entire length - tributary of Jordan Run of North Fork of South Branch Potomac	<u>3.2</u>
<u>PSB-28-B</u>	<u>SAMUEL RUN</u>	Entire length - tributary of North Fork of South Branch Potomac	<u>2.8</u>
<u>PSB-28-E</u>	<u>HIGH RIDGE RUN</u>	Entire length - tributary of North Fork of South Branch Potomac	<u>2.3</u>
<u>PSB-28-EE</u>	<u>BIG RUN</u>	Entire length - tributary of North Fork of South Branch Potomac	<u>12.8</u>
<u>PSB-28-EE-2</u>	<u>SAWMILL BRANCH</u>	Entire length - tributary of North Fork of the South Branch Potomac	<u>3.2</u>
<u>PSB-28-EE-2-A</u>	<u>BACK RUN</u>	Entire length - tributary of Sawmill Branch of Big Run of North Fork of the South Branch Potomac	<u>3.4</u>
<u>PSB-28-EE-3</u>	<u>TEETER CAMP RUN</u>	Entire length - tributary of Big Run of North Fork of the South Branch Potomac	<u>3.7</u>
<u>PSB-28-EE-3-B</u>	<u>LEONARD SPRING HOLLOW</u>	Branch Potomac	
<u>PSB-28-EE-3-C</u>	<u>MIDDLE RIDGE HOLLOW</u>	Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac	<u>1.2</u>
<u>PSB-28-EE-3-D</u>	<u>BUD HOLLOW</u>	Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac	<u>1.2</u>
<u>PSB-28-EE-4</u>	<u>ELK RUN</u>	Entire length - tributary of Teeter Camp Run of Big Run of North Fork of the South Branch Potomac	<u>0.9</u>
<u>PSB-28-GG-1</u>	<u>VANCE RUN</u>	Entire length - tributary of Big Run of North Fork of the South Branch Potomac	<u>3.9</u>
<u>PSB-28-GG-1-A</u>	<u>SAMS RUN</u>	Branch Potomac	
<u>PSB-28-GG-1-B</u>	<u>LITTLE LOW PLACE HOLLOW</u>	Entire length - tributary of Vance Run of North Fork of South Branch Potomac	<u>3.3</u>
<u>PSB-28-K</u>	<u>SENECA CREEK</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-28-K-2-B</u>	<u>LONG RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-28-K-3</u>	<u>HORSECAMP RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-28-K-4</u>	<u>STRADER RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-28-K-6</u>	<u>WHITES RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-28-K-6-B</u>	<u>UPPER GULF RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-30</u>	<u>LONG RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>
<u>PSB-32</u>	<u>BRIGGS RUN</u>	Entire length - tributary of Vance Run of Laurel Fork of North Fork of South Branch Potomac	<u>1.1</u>

APPENDIX B

ANTIDegradation Implementation Procedures Intergovernmental Coordination Agencies

STATE AGENCIES

Bureau of Commerce

Department of Natural Resources
Division of Forestry
Development Office

Department of Health and Human Resources

Bureau for Public Health

Bureau of the Environment

Department of Environmental Protection - all offices

Department of Agriculture

Soil Conservation Agency

Department of Transportation

Division of Highways

FEDERAL AGENCIES

US Environmental Protection Agency, Region III
US Fish and Wildlife Service
US Army Corps of Engineers
US Forest Service
US Office of Surface Mining

APPENDIX C

Initial Presumptive Listing for Tier 2.5

<u>BNR CODE</u>	<u>STREAM NAME</u>	<u>LENGTH (miles)</u>
Tug Fork Watershed		
BS1-60-D	CUB BRANCH	0.72
BS1-60-E	GEORGE BRANCH	3.79
BS1-60-F	GRANE CREEK	1.22
BS1-60-G	HURRICANE BRANCH	2.99
BS1-60-H+2	WHITE OAK BRANCH	1.78
BS1-70-N	LITTLE SLATE CREEK	3.42
BS1-70-U-1	BIG BRANCH	1.86
BS1-70-W	JACOBS FORK	10.50
BS1-70-Z	VALL CREEK	2.34
BS1-76-E	DAYCAMP BRANCH	1.67
BS1-99	ELKHORN CREEK	8.44
		38.68 total miles
James River Watershed		
J-1-A	EWING RUN	2.64
J-1-C	NORTH FORK	5.88
J-2	SWEET SPRINGS CREEK	6.10
J-3	COVE CREEK	6.66
		21.27 total miles
Kanawha River Watershed (Upper & Lower)		
K-13	LITTLE SIXTEEN MILE CREEK	4.45
K-14-B-1	UNT OF FIVE FORK BRANCH	1.87
K-39-E-3	BAYS BRANCH	1.89
K-39-M-1	HOFFMAN HOLLOW	2.32
K-39-O	SHREWSBURY HOLLOW	1.54
K-76	LOOP CREEK	19.98
		32.06 total miles
Goat River Watershed		
KG-10-22	WHITE OAK BRANCH	2.08
KG-31-B	HOPKINS FORK	8.95
		11.03 total miles

Elk River Watershed

KE	ELK RIVER	5.00
KE-102-A	CAMP CREEK	14.19
KE-111-K	SUGAR CREEK	10.51
KE-111-K-2	LITTLE SUGAR CREEK	7.61
KE-117-B	RIGHT FORK	13.60
KE-118	BERGGOO CREEK	8.19
KE-127	BIG RUN	2.53
KE-129	VALLEY FORK	2.68
KE-133	DRY FORK	3.80
KE-135	BIG RUN	1.94
KE-136	PROPS RUN	1.38
KE-137	LAUREL RUN	2.63
KE-138	BIG SPRING FORK	9.67
KE-138-B	CUP RUN	2.02
KE-139-5A	SLATY FORK	4.79
KE-139-B	CROOKED FORK	2.51
KE-14-P	PANTHER HOLLOW	1.55
KE-50-B-10	IKE FORK	1.88
KE-50-1	ROCKCAMP RUN	6.66
KE-76-L-5	TUG FORK	3.83
KE-76-O	POPLAR CREEK	6.29
KE-76-U	JOHNSON BRANCH	2.44
KE-98-B-16	DESERT FORK	4.97
KE-98-C	LEFT FORK	5.73
KE-98-C-1	LAUREL PATCH RUN	1.51
KE-98-C-11	LAUREL FORK	5.59
KE-98-C-14	FALL RUN	6.06
KE-98-C-15	BIG RUN	3.79
KE-98-C-1-A	LONG FORK	2.56
	145.90 total miles	

Gautley River Watershed

KG	GAULEY RIVER	26.56
KG-19-A	DOGWOOD CREEK	5.08
KG-19-C	ANGLINS CREEK	12.77
KG-19-J	BRACKENS CREEK	6.55
KG-19-U-1	BROWN CREEK	3.19
KG-19-U-2-C	OLD FIELD BRANCH	2.88

KG-19-U-2-D	JOB KNOB BRANCH	3.85
KG-19-V-5	LAUREL CREEK	3.64
KG-19-V-7	KUHN BRANCH	1.94
KG-20	COLLISON CREEK	4.98
KG-24	HOMINY CREEK	23.40
KG-24-E	GRASSY CREEK	5.68
KG-24-E-2	BRUSHY MEADOW CREEK	5.23
KG-24-J	PRGE FORK	2.83
KG-26-K	BRUSHY FORK	5.53
KG-32-J	CRANES NEST RUN	2.26
KG-34-B	GOAL SIDING RUN	1.50
KG-34-E	LAUREL CREEK	9.48
KG-34-E-11	MIDDLE BRANCH	3.34
KG-34-E-13	GOLD SPRING BRANCH	1.74
KG-34-E-3	SPRING RUN	1.52
KG-34-E-8	BEECH RUN	3.08
KG-34-E-9	HOGGAMP RUN	2.55
KG-34-F	LITTLE LAUREL CREEK	9.87
KG-34-F-2	IMPROVEMENT BRANCH	1.86
KG-34-G	SOUTH FORK	7.24
KG-34-G-10	GOLD KNOB FORK	5.60
KG-34-G-13	BIG RUN	1.44
KG-34-G-5	ELKICK RUN	2.40
KG-34-G-6	ROCKY RUN	3.54
KG-34-G-8	BECKY RUN	2.56
KG-34-H	NORTH FORK	16.37
KG-34-H-14	BEAR RUN	2.24
KG-34-H-4	HUNTERS RUN	3.09
KG-34-H-5	COATS RUN	1.08
KG-34-H-9	ARMSTRONG RUN	1.24
KG-45-BIG	LAUREL CREEK	6.56
KG-57	MILLER MILL RUN	4.37
KG-58	LAUREL CREEK	2.07
KG-59	BIG RUN	1.32
KG-5-F-3	BEARPEN FORK	1.27
KG-5-H	ASH FORK	3.09
KG-5-J	NEL BRANCH	2.65
KG-6	RICH CREEK	6.74
KG-60	TURKEY CREEK	4.86
KG-61	HUGHES RUN	2.79

KG-65	WILLIAMS CAMP RUN	1.66
KG-67	STRAIGHT CREEK	1.83
KG-70	BIG RUN	3.22
KG-72	MIDDLE FORK	1.96
KG-73	NORTH FORK	3.29
KG	GRANBERRY RIVER	38.39
KG-14	LICK BRANCH	1.22
KG-15	HANGING ROCK BRANCH	1.24
KG-19	DOGWAY FORK	8.75
KG-21	BIRCHLONG RUN	2.18
KG-23-E	CHARLES CREEK	2.59
KG-24-C	LEFT FORK	1.52
KG-3	JAKEMAN RUN	2.06
KG-4	BARRENSHE RUN	4.59
KG-7	BEE RUN	1.57
KG-8	FOXTREE RUN	1.56
KG-9	ALDRICH BRANCH	1.25
KGW	WILLIAMS RIVER	34.70
KGW-1	CRAIG RUN	2.00
KGW-19	UPPER BANNOCK SHOALS RUN	1.83
KGW-2	JONATHAN RUN	1.38
KGW-20	TEA CREEK	5.96
KGW-20-A	LICK CREEK	1.82
KGW-21	SUGAR CREEK	3.63
KGW-22	LITTLE LAUREL CREEK	2.47
KGW-25	DAY RUN	3.08
KGW-26	BLACK MOUNTAIN RUN	1.65
KGW-27	MOUNTAIN LICK RUN	2.11
KGW-3	SAWYER RUN	1.33
KGW-4	SPICE RUN	1.81
KGW-8	WHITE OAK FORK	2.14
KGW-9	LICK BRANCH	1.43
		379.30 total miles

New River Watershed (Upper & Lower)

KN-17	MANNS CREEK	3.37
KN-18	EPHRAIM CREEK	4.22
KN-23	BUFFALO CREEK	2.41
KN-24	SLATER CREEK	5.08
KN-26	PINEY CREEK	16.91

KN-26-B	FAT CREEK	6.56
KN-27	LAUREL CREEK	12.37
KN-27-C	CHESTNUT KNOB FORK	3.54
KN-29	GLADE CREEK	5.76
KN-29-E	PINCH CREEK	5.74
KN-32	MEADOW CREEK	2.59
KN-37	FALL BRANCH	1.93
KN-51-O	TURKEY CREEK	9.19
KN-61	RICH CREEK	2.85
KNB-12-B	LAUREL CREEK	4.86
KNB-13	CAMP CREEK	9.29
KNB-13-D	MASH FORK	2.94
KNB-13-G	SENG BRANCH	1.48
KNB-3	LITTLE BLUESTONE RIVER	4.73
KNB-30	CRANE CREEK	5.40

111.16 total miles

Greenbrier River Watershed

KN-G	GREENBRIER RIVER	25.30
KN-G(S)-1	MILLIGAN CREEK	5.74
KN-G(S)-2-B	FLYNN CREEK	4.27
KN-G(S)-3-A	BURNS RUN	4.08
KN-G-23	SECOND CREEK	6.06
KN-G-28	ANTHONY CREEK	15.70
KN-G-28-D	LITTLE CREEK	8.08
KN-G-28-P-1	LAUREL RUN	4.20
KN-G-28-Q-2	TWOMILE RUN	1.55
KN-G-47	BEAVER CREEK	8.18
KN-G-49	SWAGO CREEK	3.77
KN-G-53-G	BARGLAY RUN	1.74
KN-G-53-H	DOUTHAT CREEK	9.02
KN-G-60	LAUREL RUN	3.00
KN-G-66-D	SHOGK RUN	4.46
KN-G-66-H-2	LEFT PRONG	3.29
KN-G-68	DEER CREEK	8.75
KN-G-68-A	NORTH FORK	10.73
KN-G-68-A-3	SUTTON RUN	1.60
KN-G-68-A-4	TACKER FORK	2.46
KN-G-68-A-5	BLACK RUN	2.43
KN-G-68-A-6	ELLEBER RUN	3.08

KNK-68-A-6-A	GRIFFIN RUN	1.69
KNK-70	LEATHERBARK RUN	4.69
KNK-74	TROUT RUN	1.14
KNK-75	ALLEGHENY RUN	5.33
KNK-77	ELK CREEK	2.56
KNK-78	EAST FORK	19.87
KNK-78-A	JOHNS RUN	2.21
KNK-78-C	LITTLE RIVER	6.28
KNK-78-G	FIVEMILE HOLLOW	2.29
KNK-78-H	POCA RUN	2.73
KNK-78-H-1	LONG RUN	2.85
KNK-78-K	MULLENAX RUN	2.92
KNK-78-L	ABES RUN	2.65
KNK-79	WEST FORK	17.68
KNK-79-B	FILL RUN	1.91
KNK-79-C	LITTLE RIVER	7.59
KNK-79-C-1	SPAN OAK RUN	2.32
KNK-79-C-2	CLUBHOUSE RUN	11.02
KNK-79-C-3	HINKLE RUN	10.41

245.59 total miles

Little Kanawha River Watershed

LK-111	LAUREL RUN	6.04
LK-131	GETOUT RUN	3.01
LK-86-E-4	PINE RUN	1.57
LK-95-L	CARPENTER FORK	5.04

15.66 total miles

Cheat River Watershed

MC-12-A	LAUREL RUN	6.13
MC-12-B-3	HOG RUN	4.42
MC-12-B-6	MILL RUN	3.95
MC-18	ROARING CREEK	8.03
MC-1-A	RYAN HOLLOW	2.33
MC-20	ELSEY RUN	3.40
MC-2-A	DARNELL RUN	2.08
MC-33-A	FLAG RUN	5.51
MC-36	WOLF CREEK	6.90
MC-41	LONG RUN	1.22
MC-45	TOBES RUN	1.16

MC-46-B	RIGHT FORK	3.80
MC-47	JOHNATHAN RUN	1.86
MC-50	UPPER JOHNATHAN RUN	2.53
MC-51	CLOVER RUN	1.34
MC-51-	LEFT FORK	9.16
MC-51-A	RIGHT FORK	5.45
MC-51-B	INDIAN FORK	4.16
MC-52	MINER RUN	6.63
MC-52-0.7	BRIDGE RUN	1.12
MC-52-A	ROARING RUN	2.12
MC-53	DRY RUN	2.73
MC-54	HORSESHOE RUN	15.55
MC-54-A	MIKE RUN	3.86
MC-54-C	MAXWELL RUN	2.92
MC-54-D	LYLE RUN	3.92
MC-54-E	LICK DRAIN	1.79
MC-54-F	LAUREL RUN	2.87
MC-54-G	LYNN RUN	1.33
MC-54-H	THUNDERSTUCK RUN	3.89
MC-54-I	LEADMINE RUN	4.81
MC-54-I-1	LIME HOLLOW RUN	1.14
MC-54-J	WOLF RUN	1.80
MC-54-K	TWELVE MILE RUN	2.25
MC-55	DRY RUN	3.19
MC-56	MILL RUN	4.77
MC-57	WOLF RUN	1.90
MC-60	DRY FORK	3.76
MC-60-A	ROARING RUN	0.77
MC-60-C	ELKHORN RUN	4.52
MC-60-C-3	JOHN B. HOLLOW	1.12
MC-60-D-10	SAND RUN	3.19
MC-60-D-11	YOAKUM RUN	2.48
MC-60-D-	LOWER BLACKWATER RIVER	2.62
MC-60-G	RED RUN	5.56
MC-60-I	MILL RUN	2.92
MC-60-J	ELKHORN RUN	2.59
MC-60-K	GLADY FORK	31.31
MC-60-K-1	THREE SPRING RUN	1.25
MC-60-K-11	MCGRAY CREEK	2.41
MC-60-K-15	DANIELS CREEK	3.18

MC-60-K-16	WEST FORK GLADY FORK	6.13
MC-60-K-16	WEST FORK GLADY FORK	4.27
MC-60-K-17	EAST FORK GLADY FORK	7.28
MC-60-K-17-A	LOUK RUN	1.19
MC-60-K-2	PANTHER CAMP RUN	1.73
MC-60-K-2-A	HOG RUN	1.17
MC-60-K-4	FIVE LICK CREEK	1.74
MC-60-K-5	WOODBORD RUN	1.14
MC-60-K-6	BAKER CAMP RUN	1.19
MC-60-L	BIG RUN	3.69
MC-60-N	LAUREL FORK	21.52
MC-60-N-4	BEAVERDAM RUN	2.12
MC-60-N-8	FIVE LICK RUN	2.45
MC-60-O	RED CREEK	6.77
MC-60-O-1	BIG RUN	3.47
MC-60-O-2	FLATROCK RUN	2.89
MC-60-O-3	GANDY RUN	2.26
MC-60-P	SPRUGE RUN	3.25
MC-60-Q	HORSE CAMP RUN	4.59
MC-60-R	TORY CAMP RUN	2.43
MC-60-T	GANDY CREEK	15.68
MC-60-T-1	LOWER TWO SPRING RUN	2.29
MC-60-T-10	NARROW RIDGE RUN	2.16
MC-60-T-11	WARNER RUN	2.24
MC-60-T-2	UPPER TWO SPRING RUN	2.53
MC-60-T-3	SWALLOW ROCK RUN	1.82
MC-60-T-6	TAYLOR RUN	0.87
MC-60-T-8	BIG RUN	3.75
MC-60-T-9	GRANTS BRANCH	2.80
MC-S	SHAVERS FORK	7.26
MC-S-12	LITTLE LAUREL RUN	1.34
MC-S-13	LITTLE BLACK RUN	4.74
MC-S-14	CLIFTON RUN	2.14
MC-S-15	RATTLESNAKE RUN	5.03
MC-S-16	JOHNS RUN	2.70
MC-S-2	HAWK RUN	1.09
MC-S-22	TAYLOR RUN	2.97
MC-S-22-A	STALNAKER RUN	1.64
MC-S-28	UPPER POND LICK	6.29
MC-S-3	HADBIT RUN	2.68

MCS-33	FISHING HAWK CREEK	3.60
MCS-3-A	SOUTH BRANCH	3.56
MCS-4	JOBS RUN	1.72
MCS-40	YOKUM RUN	2.56
MCS-43	GLADE RUN	2.67
MCS-46	RED RUN	2.75
MCS-47	BLISTER RUN	1.95
MCS-48	FISH HATCHERY RUN	2.66
MCS-49	LAMBERT RUN	3.23
MCS-5	LAUREL RUN	3.48
MCS-50	FIRST FORK	5.42
MCS-54	BEAVER CREEK	1.74
MCS-55	SECOND FORK	4.15
MCS-57	BLACK RUN	2.28
MCS-6	PLEASANT RUN	3.52
MCS-6-B	AARONS RUN	2.35
MCS-7	STONEHOCK RUN	1.68
MCS-8	LAUREL RUN	1.18
MCS-9	NAL RUN	1.74

445.11 total miles

Tygart River Watershed

MT-18-E-5-B	FROG RUN	2.36
MT-23-F	MILL RUN	4.03
MT-23-H	MILL RUN	3.72
MT-38	ZEBBS CREEK	4.04
MT-44	MATHEUS RUN	1.66
MT-45-C	RIGHT FORK	3.24
MT-47	BEAVER CREEK	6.20
MT-50-A	RIGHT FORK OF FILES CREEK	8.33
MT-50-A-1	LIMEKILN RUN	2.12
MT-50-B	LEFT FORK FILES CREEK	2.84
MT-61	SHAVERS RUN	6.95
MT-64	MILL CREEK	10.69
MT-64-C	GLADE RUN	1.59
MT-64-E	MEATBOX RUN	1.19
MT-64-F	POTATOHOLE FORK	1.84
MT-66	RIFFLE CREEK	1.91
MT-66-B	MCGEE RUN	3.40
MT-66-C	BACK FORK	2.01

MT-67	RAFE RUN	1.54
MT-68	BECKY CREEK	9.41
MT-68-A	BIG BRANCH	2.25
MT-72	HAMILTON RUN	2.49
MT-73	CLAY RUN	2.61
MT-74	ELK WATER FORK	5.20
MT-74-A	MOWRY RUN	2.34
MT-74-B	LIMEKILN RUN	1.93
MT-75	STEWART RUN	8.08
MT-77	CONLEY RUN	7.10
MT-78	RASTON RUN	6.99
MT-79	WINDY RUN	4.60
MT-80	LOGAN RUN	2.49
MT-81	BIG RUN	5.14
MTB-25-A	RIGHT FORK	3.88
MTB-27	PANTHER FORK	4.08
MTB-28	BIG RUN	3.03
MTB-31	RIGHT FORK	2.24
MTB-31-B	REGER RUN	1.13
MTB-31-C	ALEC RUN	1.93
MTB-31-D	MILSITE RUN	3.76
MTB-32	LEFT FORK	6.85
MTB-32-B	BEARGAMP RUN	5.00
MTB-32-H	BEECH RUN	4.62
MTM	MIDDLE FORK RIVER	7.32
MTM-1	HANGING RUN	4.68
MTM-11	RIGHT FORK MIDDLE FORK RIVER	7.42
MTM-11-D	JACKSON FORK	3.88
MTM-11-E	JENKS FORK	3.70
MTM-13	LONG RUN	7.66
MTM-16	CASSITY FORK	4.25
MTM-16-A	PANTHER RUN	4.43
MTM-21	PLEASANT RUN	1.82
MTM-22	LAUREL RUN	2.57
MTM-23	LAUREL BRANCH	4.00
MTM-24	SUGAR RUN	2.30
MTM-25	SCHOOLCRAFT RUN	3.08
MTM-25-A	BIRCH FORK	1.48
MTM-26	BIRCH FORK	3.56
MTM-27	MITCHELL LICK FORK	2.52

231.49 total miles

Upper Ohio North

O-102-A WHITEOAK RUN 0.40

Twelvepole Creek Watershed

O-2-H-2-A STOWERS BRANCH 0.46
O-2-P-23 ARKANSAS BRANCH 0.75
O-2-P-25 SWEETWATER BRANCH 2.00
O-2-P-26 LONG BRANCH 2.59
O-2-P-27 SPRUCE FORK 1.84
O-2-Q-14 RICH CREEK 1.32
O-2-Q-16 BLUEHICK BRANCH 2.28
O-2-Q-18-A LITTLE LAUREL CREEK 2.09

13.33 total miles

Upper Ohio South

O-77-B LONG RUN 4.51

Guyandotte River Watershed

OG-102 BRICKLE BRANCH 1.64
OG-29-C HORSESHOE BRANCH 1.98
OG-32-F PLUM BRANCH 2.35
OG-34-E STEER FORK 1.64
OG-37 LITTLE UGLY CREEK 1.42
OG-38 BIG UGLY CREEK 8.49
OG-38-A PIGEONROOST CREEK 3.62
OG-38-B LAUREL CREEK 2.60
OG-61 BUFFALO CREEK 3.01
OG-96-A STURGEON BRANCH 1.57
OGM-8-B LEFT FORK 2.75

31.06 total miles

Potomac Direct Drains Watershed

P-16 ROCKWELL RUN 10.39
P-9-G-1 NORTH FORK INDIAN RUN 1.49
P-9-G-2 SOUTH FORK INDIAN RUN 3.76

15.63 total miles

Cacapon River Watershed

PC-0-9 CONOR HOLLOW 7.73

PC-1	CONSTANT RUN	5.23
PC-10	EDWARDS RUN	7.00
PC-17	HAWK RUN	4.62
PC-23	TROUT RUN	16.62
PC-24-H	LOWER COVE RUN	4.63

45.83 total miles

North Branch / Potomac River Watershed

PNB-14	HOWELL RUN	3.83
PNB-15	DEEP RUN	4.75
PNB-15-A	GRANBERRY RUN	2.66
PNB-16-B	WYCKOFF RUN	2.43
PNB-18	DIFFICULT CREEK	5.17
PNB-18-B-1	JOHNNYCAKE RUN	3.28

22.11 total miles

South Branch / Potomac River Watershed

PSB-13	MILL RUN	8.95
PSB-24-F	DUMPLING RUN	2.60
PSB-24-K	ROUGH RUN	6.92
PSB-25-C-2	SPRING RUN	2.98
PSB-28-A-1	BIG RUN	2.61
PSB-28-A-2	LAUREL RUN	3.17
PSB-28-B	SAMUEL RUN	2.85
PSB-28-C	BROAD RUN	2.39
PSB-28-D	MOYER FORK	7.92
PSB-28-E	HIGH RIDGE RUN	2.28
PSB-28-EE	BIG RUN	12.84
PSB-28-EE-2	SAWMILL BRANCH	3.22
PSB-28-EE-2-A	BACK RUN	3.39
PSB-28-EE-3	TEETER CAMP RUN	3.71
PSB-28-EE-3-A	HEMLOCK RUN	1.91
PSB-28-EE-3-B	LEONARD SPRING HOLLOW	4.64
PSB-28-EE-3-C	MIDDLE RIDGE HOLLOW	4.81
PSB-28-EE-3-D	BUD HOLLOW	3.54
PSB-28-EE-4	ELK RUN	3.93
PSB-28-G	ZEKE RUN	3.70
PSB-28-GG-1	VANCE RUN	3.27
PSB-28-GG-2	SAMS RUN	1.10
PSB-28-GG-2-A	LITTLE LOW PLACE HOLLOW	1.10
PSB-28-I	POWDERMILL RUN	2.84

PSB-28-K	SENEGA CREEK	20.26
PSB-28-K-1	BRUSHY RUN	7.79
PSB-28-K-2	ROARING CREEK	6.13
PSB-28-K-2-B	LONG RUN	2.23
PSB-28-K-3	HORSECAMP RUN	4.06
PSB-28-K-3-B	WAMSLEY RUN	1.52
PSB-28-K-4	STRADER RUN	2.56
PSB-28-K-5	GULF RUN	1.46
PSB-28-K-6	WHITES RUN	3.86
PSB-28-K-6-A	LOWER GULF RUN	4.67
PSB-28-K-6-B	UPPER GULF RUN	2.67
PSB-28-R	BLIZZARD RUN	3.60
PSB-28-S	BRIERY GAP RUN	2.65
PSB-28-T	LAUREL RUN	2.74
PSB-29	REDMAN RUN	3.44
PSB-30	LONG RUN	2.88
PSB-32	BRIGGS RUN	4.57
PSB-33	REEDS CREEK	11.16
PSB-40	PETERS RUN	5.08
PSB-47	THORN CREEK	9.08
PSB-9	MILL CREEK	25.38
		224.40

Shenandoah River Watershed (Hardy County)

S-9-A CAPON RUN 2.19

Total number of streams 444

Total Miles 2006.80

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

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

hydrofluorocarbons	0.855
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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 deterrent 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