WEST VIRGINIA
SECRETARY OF STATE
Betty Ireland
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

FILED

2007 JUN -5 PM 3:33

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: West Virginia Department of Environmental Protection, Secretarys Office TITLE NUMBER: 60

RULE TYPE: Legislative CITE AUTHORITY: §22-25-4

AMENDMENT TO AN EXISTING RULE: YES [X] NO [ ]

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 8

TITLE OF RULE BEING AMENDED: Environmental Excellence Program Rule

IF NO, SERIES NUMBER OF RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

DATE OF PUBLIC HEARING: July 17, 2007 TIME: 7:00 p.m.

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

COMMENTS LIMITED TO: ORAL [ ] WRITTEN [ ] BOTH [X]

DATE WRITTEN COMMENT PERIOD ENDS: July 17, 2007 TIME: 7:00 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.

Public Information Office
West Virginia Department of Environmental Protection
601 57th Street, South East
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: 60CSR8, Environmental Excellence Program Rule

A. AUTHORITY:

W.Va. Code §22-25-4

B. SUMMARY OF RULE:

West Virginia Code §60-8-1 et seq. authorizes the West Virginia Department of Environmental Protection to establish the eligibility, procedures, standards, and legal documents required for developing and implementing a voluntary Environmental Excellence Program as specified under West Virginia Code §22-25-4, Powers and Duties of the Department.

The purpose of the Environmental Excellence Program Rule is to establish an environmental excellence program that encourages, promotes, recognizes, and rewards superior environmental performance and enhanced public involvement.

The Environmental Excellence Program Rule institutionalizes the framework for the establishment and implementation of the necessary program elements for Environmental Excellence Program participation. Environmental Excellence Program elements include: eligibility criteria for participation; environmental performance record; environmental management system; environmental performance goals; public participation; incentives; procedures for application; notice; action on application; environmental performance agreement; annual performance report; annual facility visitations; procedures for retention, renewal, or termination of Environmental Excellence Program designation; impact on incentives from termination of Environmental Excellence Program designation; and, application fees and annual renewal fees.

Eligible facilities may participate at one of three levels: Bronze Leaf, Silver Leaf, or Gold Leaf. Level of participation and incentives granted are based on facility's environmental management system, environmental performance goals, and public involvement.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

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.

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

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

E. CONSTITUTIONAL TAKINGS DETERMINATION:

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

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

At its meetings on May 30, 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
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 SO_2 & PM NAAQS include correction of SO_2 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 NO_2 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/m^3. This should be 65 ug/m^3, 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 NOx Rule - Incorporates revisions 40 CFR to Part 96.

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

45CSR41 – Control of Annual Sulfur Dioxide Emissions

Annual CAIR SO_2 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 NOx RACT for EGUs under the PM2.5 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: D AQ 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.

<u>Division of Water and Waste Management</u>

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 thanks 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 completed deleted, just the 1996 standards. This will allow the agency to use the most current standards.

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

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

Jackie Hallinan: The program is a good idea.

Meeting was adjourned by Deputy Cabinet Secretary Randy Huffman.

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

Bill...

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

Water Quality Standards Rule (47CSR2)

Only concern relates to the Trout Stream List:

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

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

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

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

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

Mining & Reclamation Rule (38 CSR 2)

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

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

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

401 Water Quality Certification Rule (47 CSR 5A)

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

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

West Virginia Coal Association

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

July 18, 2006

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

Re: Comments on Proposed Revisions to 47 CSR 5A

Dear Mr. Sturey:

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

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

General Comments

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

History of State § 401 Mitigation Requirements.

The state's mitigation program as maintained by the WVDEP and implemented through the § 401 rules is not a required component of the federal § 404 permitting program. The § 401 certification program is intended to insure that issuance of a federal permit does not result in a violation of state water quality standards:

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

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

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

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

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

---

[1] Programmatic Environmental Impact Statement. Corps, EPA et.al. 2005. page II.C-42.
[2] Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits. U.S. Army Corps of Engineers, Dec. 13, 1996. 61 Fed. Reg. 241.
[3] Programmatic Environmental Impact Statement. Corps, EPA et al. 2005. Page II.C-52

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

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

Federal Mitigation Requirements are Comprehensive.

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

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

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

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

> This guidance acknowledges the uniqueness of regional and site-specific conditions, recognizes that features constructed in accordance with the Surface Mining Control and Reclamation Act may contribute to overall mitigation plans, and identifies several appropriate ways to accomplish appropriate mitigation projects.
>
> Surface mining operations can result in the creation of intermittent and and/or perennial streams depending on the on-site hydrologic conditions and the chosen method of dealing with groundwater and/or runoff. Applicants are encouraged to optimize these opportunities for on-site mitigation.
>
> ....Corps staff, Office of Surface Mining staff, and the mining operator should coordinate to explore options for incorporating....features required by SMCRA into compensatory mitigation plans. If successfully implemented, channels and other features will help maintain and potentially improve the physical, chemical and biological integrity of waters of the United States.[6]

---

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

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

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

> In the interest of achieving functional replacement, in-kind compensation of aquatic resources will often be appropriate.[7]
>
> Mitigation should be required, when practicable, in areas adjacent or contiguous to the discharge site. On-site mitigation generally compensates for locally important functions, e.g., local flood control functions or unusual wildlife habitat.[8]
>
> Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.[9]

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

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

---

[7] Regulatory Guidance Letter No 01-1. U.S. Army Corps of Engineers, October 31, 2001.
[8] Regulatory Guidance Letter No.02-2. U S Army Corps of Engineers, December 24, 2002.
[9] Compensatory Mitigation Guidelines- Huntington District U.S Army Corps of Engineers, Huntington, WV District. January 30, 2004.
[10] See attached power point presentation---Central Appalachian Protocol.

and beyond that which is required by the Corps despite the mandate of W. Va. Code § 22-11-7a(a)(2)(C):

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

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

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

Specific Comments

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

<u>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.</u>

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.~~ <u>the ordinary high water mark.</u> 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 ½ 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 ½ 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.APermanent 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.CTemporary 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,

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.

<u>Trout Streams</u>

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 be 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,

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 CSR5A
TROUT LISTING

2.5 Biogenic Sources include COAL

3.2 turned an exemption into an inclusion
5.3 "Shall Provide information"

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 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 (SF_6).

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.

7
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.

hydrofluorocarbons	0.855
perfluorocarbons	1.09

sulfur hexafluoride	0.42

Prep plants under title IV

only stationary sources

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 SF_6 Emissions Reduction Partnership for Electric Power Systems. Greenhouse gas emissions inventory information from other widely recognized and verified greenhouse gas emissions inventory programs may be submitted by affected sources under this subsection, but shall be subject to approval by the Secretary on a case-by-case basis.

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

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

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

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

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

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

entire surface Area / underground Area is an 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.

13 results for: *Biogenic*

Displaying 1 best match. Browse all 13 results below

View results from: Dictionary | Thesaurus | Encyclopedia | All Reference | the Web

Biogenic substance

Wikipedia, the free encyclopedia – *Cite This Source*

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.

13 More from Wikipedia »

All 13 results for: *Biogenic*

13 from Wikipedia

From: "Charles Harris" <clharris@hsc.wvu edu>
To: <jhallinan@hallinanlaw.com>, <rick@lcpsd.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 PM2.5 and Ozone are not adequately protective. I recommend that the standards be lowered from 15 $\mu g/m^3$ to 13 $\mu g/m^3$ 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 PM2.5 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.

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

Questions/Comments on DEP's 2007 Proposed Rules

- **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/m^3. This should be 65 ug/m^3, 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 repor 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

<u>INDUSTRY'S REVISIONS</u>

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 <u>significantly</u> 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 (SF_6)

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 <u>et seq</u>

§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<u>, excluding biogenic emissions</u>, 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 <u>emitted above *de minimis* amounts</u> to the Secretary under section 4:

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

nitrous oxide	32.6
perfluorocarbons	1.09
sulfur hexafluoride	0.42
hydrofluorocarbons	0.855

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

§45-42-4. Reporting Requirements.

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

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

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

4.4. Notwithstanding the provisions of subsection 4.3, to satisfy the greenhouse gas emission reporting requirements under this section, affected sources may submit greenhouse gas emissions inventory information from documented greenhouse gas inventories such as those provided to the Environmental Protection Agency's Climate Leaders Program, Chicago Climate Exchange Registry, the International Organization for Standardization and the SF_6 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 <u>net</u> economic development<u> or will result in a deterrent to net economic development</u> 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

<u>Summary of Industry's Suggested Changes and Comments on</u>
<u>45 CSR 42, Greenhouse Gas Emissions Inventory Program</u>

- Section 2.3. The definition of "anthropogenic" should be revised to state that it is the "result of natural processes that have been influenced <u>significantly</u> 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 <u>greenhouse gases emitted above the *de minimis* amounts</u> 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 <u>emitted above the *de minimis* amounts</u> 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 <u>direct</u> 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

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

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

DLY:shb

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Environmental Excellence Program Rule, 60CSR8

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

Agency: West Virginia Department of Environmental Protection

Address: 601 57th Street, South East

Charleston, West Virginia 25304

Phone Number: (304) 926-0499 Extension 1332 Email: gadolfson@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.

To recover costs to the department in reviewing applications; developing, negotiating, and publicizing an environmental performance agreement; reviewing annual performance reports; coordinating annual facility visitations; etc.; the secretary has established a reasonable application fee and triennial renewal fee. An "Environmental Excellence Program Administrative Fund" was created in the state treasury for deposit of fees dedicated and appropriated to the department for program administration. An application fee of one thousand dollars ($1,000.00 and $300.00 for small businesses) must be paid by the applicant to cover the first three years of membership and a triennial renewal fee of five hundred dollars ($500.00 and $150.00 for small businesses) must be paid by the member at each three year anniversary date. The application/triennial renewal fee will be waived for all public entities seeking membership in the environmental excellence program.

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	10,900.00
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	10,900.00

Rule Title:

Rule Title: Environmental Excellence Program Rule, 60CSR8

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

Fiscal Years 2006, 2007, and 2008 "Estimated Total Costs" are estimates based on program participation (Revenues) and are appropriated to the department to administer the program (Costs).

Fiscal Years 2006 and 2007 "Estimated Total Revenues" are $0.00 (zero dollars) since the program will not begin until Fiscal Year 2008 (July 1, 2007 through June 30, 2008).

Fiscal Year 2008 "Estimated Total Revenues" are estimates based on program participation (Revenues) and are based on 10 (ten) application fees of one thousand dollars ($1,000.00) and 3 (three) application fees of three hundred dollars ($300.00).

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.

If there is no program participation, there will be no Revenues or Costs.

Date: 05-30-2007

Signature of Agency Head or Authorized Representative

____

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

SERIES 8
ENVIRONMENTAL EXCELLENCE PROGRAM RULE

§60-8-1. General.

1.1. Scope. -- This legislative rule establishes the eligibility, procedures, standards and legal documents required for establishing a voluntary environmental excellence program.

1.2. Authority. -- W. Va. Code §22-25-4.

1.3. Filing Date. --~~April 13, 2006~~.

1.4. Effective Date. -- ~~July 13, 2006~~.

§60-8-2. Definitions.

Unless the context in which used clearly requires a different meaning, the definitions contained in W. Va. Code §22-25-3 will apply to the terms in this rule in addition to the definitions expressly set forth in this rule.

2.1. "Applicant" means an individual or entity who has fulfilled the department's requirements to be considered for admission (including payment of the application fee, if any) and who has been notified of one of the following actions: admission, non-admission, or application withdrawn (by applicant or department).

2.2. "Capital Improvement Project" means a project that helps maintain and/or improve an asset to be included in the capital budget, designed to reduce discharges and/or emissions from the facility below the environmental performance baseline for the specified discharges and/or emissions, and/or promotes sustainability, that is:

2.2.a. New construction, expansion, renovation, and/or a replacement project for an existing facility or facilities and must have a total cost of at least $10,000.00, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., over the life of the project, and may include the cost of land, engineering, architectural planning, and contract services needed to complete the project; and/or,

2.2.b. Purchase of major equipment (assets) costing $50,000.00 or more, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., with a useful life of at least 10 years; and/or,

2.2.c. Major maintenance or rehabilitation project for existing facilities with a cost of $10,000.00 or more, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., and an economic life of at least 10 years; and/or,

2.2.d. Sustainability project costing $10,000.00 or more, in cash and/or in-kind contributions that are realized in goods, commodities, and/or services, etc., with a useful life of at least 10 years, that integrates economic, environmental, social, and community elements, and essentially is about living, working, and ordering society and communities in ways that are environmentally sustainable, encouraging reduction of pollution, re-use of resources, promoting biodiversity, etc., whereas:

2.2.d.1. Sustainability is a concept and strategy by which facilities seek economic development approaches that benefit the local environment, society, communities, and overall quality of life, and:

2.2.d.1.A. Sustainable development provides a framework under which facilities can use resources efficiently, create efficient infrastructures, protect and enhance the quality of life, reserve the ability of an ecosystem to maintain a defined and desired state of ecological integrity over time, and create new businesses to strengthen their economies and communities; and.

2.2.d.1.B. Sustainable communities are achieved by facilities that establish short-term and long-term methodologies for developing integrated approaches to develop and achieve a healthy community by addressing economic, environmental, social, and community issues, while fostering a strong sense of community and building partnerships and consensus among key stakeholders are also important elements.

2.3. "Community Advisory Panel" means a committee, task force, or board comprised of citizens affected by facilities that provides a public forum for community members to present and discuss their needs and concerns about the decision-making process at facilities affecting them.

2.4. "Environmental Management Program" means an activity for achieving a facility's environmental objectives and environmental targets that includes designation of responsibility for achieving environmental objectives and environmental targets at relevant functions and levels within the facility, and the means and time-frame by which they are to be achieved.

2.5. "Facility" means places, buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person, or by any person who controls, is controlled by, or is under common control with, such person that provides a particular service or is used for a particular industry; and also means the piece of land, with or without facilities, that is within the jurisdiction of federal, state, and/or municipal government.

2.6. "Person" means any and all persons, natural or artificial, including the State of West Virginia or any other State, the United States of America, any municipal, statutory, public, or private corporation, organized or existing under the laws of this or any other state or country, and any firm, partnership, or association of whatever nature.

2.7. "Pollution Prevention" means any practice that reduces the use of any hazardous substance or amount of a pollutant or contaminant prior to reuse, recycling, treatment, or disposal, and reduces the hazards to public health and the environment associated with the use and release of hazardous substances, pollutants or contaminants; pollution prevention does not include cross-media pollution transfers that do not result in a net decrease of discharge, emission or impact to the environment, as specified under W. Va. Code §22-25-3; and includes:

2.7.a. "Pollution Prevention", for the purpose of this rule, also means "Source Reduction" as specified under the Pollution Prevention Act (42 U.S.C. §§13101–13109), as follows:

2.7.a.1. "Source Reduction" means any practice that:

2.7.a.1.A. Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal;

2.7.a.1.B. Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants;

2.7.a.1.C. Includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control; and.

2.7.a.1.D. Does not alter the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity that itself is not integral to and necessary for the production of a product or the providing of a service.

2.7.a.2. "Source at a United States Environmental Protection Agency National Environmental Performance Track Member Facility" means a major or area source located at a facility that has been accepted by the United States Environmental Protection Agency for membership in the National Environmental Performance Track and is still a member of the National Environmental Performance Track as specified under the Pollution Prevention Act (42 U.S.C. §§13101–13109).

2.7.a.3. "Source at an Environmental Excellence Program Member Facility" means a major or area source located at a facility that has been accepted by the department for membership in the environmental excellence program and is still a member of the environmental excellence program.

2.8. "Public Entity" means a political subdivision of the state, including a municipality and its subdivisions, a school district, a regional educational attendance area, an organization composed of political subdivisions of the state; and any department, agency, special purpose district, or other instrumentality of the state or local government.

2.9. "Responsible Official" means one of the following:

2.9.a. For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

2.9.a.1. The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or,

2.9.a.2. The secretary approves the delegation of authority to such representative in advance.

2.9.b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively; or,

2.9.c. For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this rule, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of the United States Environmental Protection Agency).

2.10. "Small Business" means a for-profit or non-profit enterprise that has either gross annual receipts not exceeding $5 million or total payroll not exceeding $1.5 million and/or any facility with fewer than fifty full-time employees. A United States business that is independently owned and operated, is not dominant in its field of operation and can qualify under criteria concerning number of employees, average annual receipts or other criteria as outlined by the United States Small Business Administration (CFR Title 13, Part 121, as amended).

2.11. "Supplemental Environmental Project (SEP)" means an environmentally beneficial project which a facility agrees to undertake in settlement of an enforcement action, but which the facility is not otherwise legally required to perform.

2.11.a. "Environmentally Beneficial" means a SEP must improve, protect, or reduce risks to public health, or the environment at large, and, while in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

2.11.b. "In Settlement of an Enforcement Action" means the United States Environmental Protection Agency and/or the department has the opportunity to help shape the scope of the project before it is implemented and the project is not commenced until after the United States Environmental Protection Agency and/or the department has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).

2.11.c. "Not Otherwise Legally Required to Perform" means the project or activity is not required by any federal, state or local law or regulation, and further, SEPs cannot include actions which the facility is likely to be required to perform as injunctive relief as part of an existing settlement or order in another legal action; or, by a state or local requirement.

2.12. "National Environmental Performance Track" means a United States Environmental Protection Agency program that is a public/private partnership recognizing top environmental performance among participating United States facilities of all types, sizes, and complexity, public and private.

§60-8-3. Purpose and Goals.

3.1. The purpose of this rule is to establish an environmental excellence program that promotes, rewards, and encourages superior environmental performance and enhanced public involvement.

3.2. Eligible facilities may participate at one of three levels: Bronze Leaf, Silver Leaf, and Gold Leaf. The level of participation and the incentives granted are based on the facility's environmental management system, environmental performance goals, and public involvement.

3.3. Nothing in this rule authorizes any violation of federal and/or state law, rule, regulation, and/or legislation.

§60-8-4. Eligibility Criteria for Participation.

Environmental excellence program applicants must meet the following eligibility criteria that may include, but will not be limited to, the following:

4.1. Bronze Leaf environmental excellence program applicants must:

4.1.a. Have documentation of a proven environmental performance record;

4.1.b. Develop and implement an environmental management system within one year of acceptance into the program;

4.1.c. Develop and implement one environmental performance goal within one year of acceptance into the program and two additional environmental performance goals within three years of acceptance into the program;

4.1.d. Develop and implement a plan for public participation within one year of acceptance into the program;

4.1.e. Prepare and submit an annual performance report; and,

4.1.f. Authorize the department to conduct annual facility visitations.

4.2. Silver Leaf environmental excellence program applicants must:

4.2.a. Have documentation of a proven environmental performance record;

4.2.b. Already have developed and implemented an environmental management system;

4.2.c. Already have developed and implemented two environmental performance goals and commit to develop and implement four additional environmental performance goals, and, a small business has the option to already have developed and implemented one environmental performance goal and commit to develop and implement two additional environmental performance goals;

4.2.d. Already have developed and implemented a plan for public participation;

4.2.e. Already have prepared and published an annual performance report; and, 4.2.f. Authorize the department to conduct annual facility visitations.

4.3. Gold Leaf environmental excellence program applicants must:

4.3.a. Have documentation of a proven environmental performance record;

4.3.b. Already have developed and implemented an environmental management system;

4.3.c. Already have developed and implemented two environmental performance goals and commit to develop and implement four additional environmental performance goals, and, a small business has the option to already have developed and implemented one environmental performance goal and commit to develop and implement two additional environmental performance goals, and one additional environmental performance goal that must be a capital improvement project;

4.3.d. Already have developed and implemented a plan for public participation;

4.3.e. Already have prepared and published an annual performance report; and,

4.3.f. Authorize the department to conduct annual facility visitations.

4.4. Participation in, and recognition of, federal programs. If the applicant's facility is registered and/or a member of an environmental excellence program implemented by the United States Environmental Protection Agency, such as the National Environmental Performance Track, the applicant automatically qualifies to participate in the environmental excellence program at the Silver Leaf level unless the secretary determines that the applicant has not met all of the environmental excellence program eligibility criteria for participation at the Silver Leaf level as specified under subsection 4.2.

§60-8-5. Environmental Performance Record.

Environmental excellence program applicants and environmental excellence program members must meet the following environmental performance record requirements that may include, but will not be limited to, the following:

5.1. All persons, who operate a facility in West Virginia, are eligible to seek entry into the environmental excellence program and/or retain environmental excellence program designation, and are required to demonstrate compliance with all environmental laws by having documentation of a proven environmental performance record. A facility has a proven record of compliance with environmental laws if none of the following criminal, civil, or administrative actions apply to the facility or its employees:

5.1.a. Criminal actions.

5.1.a.1. Corporate criminal conviction or plea for felony violations of environmental laws involving the corporation and/or corporate officer within the past five (5) years preceding the filing of the initial environmental excellence program application;

5.1.a.2. Corporate criminal conviction or plea for misdemeanor violations of environmental laws involving the corporation and/or corporate officer within the past three (3) years preceding the filing of the initial environmental excellence program application;

5.1.a.3. Criminal conviction or plea of employee at the same facility for violations of environmental laws within the past five (5) years preceding the filing of the initial environmental excellence program application;

5.1.a.4. Ongoing criminal investigation and/or prosecution of corporation, corporate officer, and/or employee at the same facility for violations of environmental laws; and,

5.1.a.5. Responsibility of a corporation, corporate officer, and/or employee, as determined by a court of appropriate jurisdiction, for an illegal action that caused substantial endangerment to the public health, safety, and/or welfare and/or to the environment.

5.1.b. Civil actions.

5.1.b.1. Assessment by an environmental appeals board or court of appropriate jurisdiction of any civil fine, penalty, and/or supplemental environmental project (SEP) where the total amounts exceeds $10,000.00 for violations of any environmental law within a three-year period before filing the initial environmental excellence program application; and,

5.1.b.2. Responsibility of a corporation, corporate officer, and/or employee, as determined by a court of appropriate jurisdiction, for an illegal action that caused substantial endangerment to the public health, safety, and/or welfare and/or to the environment.

5.1.c. Administrative actions.

5.1.c.1. Administrative settlement, entered into with the department within a three-year period before filing the initial environmental excellence program application, where the total amount of the administrative assessments, fines, penalties, and/or SEP's exceeds $25,000.00; and,

5.1.c.2. Planned, but not yet filed, administrative action at the facility.

5.2. In the case of a change of ownership, the secretary will consider the environmental performance record of the new owner or operators in determining whether the environmental excellence program applicant and/or current member meet the requirements of this rule.

5.3. In the case of a new facility, the secretary will consider the environmental performance record of other facilities owned and/or operated by the same entity, and in such a case, an entity's overall environmental performance record will be considered in determining the facility's ability to achieve superior environmental performance.

§60-8-6. Environmental Management System.

Environmental excellence program applicants and environmental excellence program members must meet the following environmental management system requirements that may include, but will not be limited to, the following:

6.1. Environmental excellence program applicants and environmental excellence program members must demonstrate conformance to environmental management system requirements through:

6.1.a. Registration or certification to an environmental standard, such as ISO 14001 or equivalent, as approved by the secretary; or,

6.1.b. Bronze Leaf environmental excellence program designation that includes a commitment to the development, implementation, and management of an environmental management system, by a date provided by the applicant and approved by the secretary, that must operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit; and, after one year in the environmental excellence program, already have developed, implemented, and managed an environmental management system; or,

6.1.c. Silver Leaf environmental excellence program designation that includes already developed, implemented, and managed environmental management systems, that operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit; or,

6.1.d. Gold Leaf environmental excellence program designation that includes already developed, implemented, and managed environmental management systems, that operate in accordance with a one-year environmental management system cycle as evidenced by an environmental management system audit.

~~6.2. Environmental excellence program applicants and environmental excellence program members must provide documentation~~

~~of an environmental management system, appropriate to the nature, scale, and potential environmental impacts of the facility, that:~~

~~6.2.a. Adopts an environmental policy, approved by the responsible official or operate under an adopted corporate environmental policy, that must demonstrate a high level of commitment to environmental management through the establishment of guiding principles, that:~~

~~6.2.a.1. Articulates the environmental excellence program member's mission, vision, and core values;~~

~~6.2.a.2. Emphasizes continual environmental improvement; and~~

~~6.2.a.3. Promotes multi-media pollution prevention through the development, implementation, and management of an effective multi-media pollution prevention program that:~~

~~6.2.a.3.A. Adopts an environmental policy that documents the environmental excellence program member's philosophy of multi-media pollution prevention that promotes:~~

~~6.2.a.3.A.1. Eliminates or reduces wastes at the source of generation;~~

~~6.2.a.3.A.2. Reuses wastes, including purchases of recycled material; and~~

~~6.2.a.3.A.3. Promotes environmentally sound, on-site and off-site, recycling.~~

~~6.2.a.3.B. Establishes and maintains a facility-specific multi-media pollution prevention program that:~~

~~6.2.a.3.B.1. Adopts and posts a multi-media pollution prevention policy, as specified under subparagraph 6.2.a.3.A that is signed by a responsible official;~~

~~6.2.a.3.B.2. Conducts periodic multi-media pollution prevention program assessments that identify opportunities for eliminating wastes at the source, and promotes reuse and recycling;~~

~~6.2.a.3.B.3. Establishes multi-media pollution prevention program goals that specify the environmental media and types of pollution to be prevented or reduced, implementation activities, and projected time frames; and~~

~~6.2.a.3.B.4. Records and maintains reports to demonstrate progress on pollution prevention technologies.~~

~~6.2.a.3.C. Participates, formally, in the environmental excellence program by being a member in good standing in a recognized multi media pollution prevention program.~~

~~6.2.a.4. Acknowledges the importance of and provide for communication with the public as specified under subdivision 6.2.j and section 8;~~

~~6.2.a.5. Emphasizes environmental compliance, with relevant environmental laws, legislation, and regulations, that:~~

~~6.2.a.5.A. Demonstrates compliance with all applicable environmental laws, legislation, regulations and other environmental requirements that:~~

~~6.2.a.5.A.1. Provides to the department, as part of the environmental excellence program application, a statement signed by a responsible official that he or she has reviewed the environmental excellence program compliance record and that, to the best of his or her knowledge, the environmental excellence program member is in compliance with all applicable environmental requirements and has no outstanding unresolved past or current violation that has not been corrected or, in the case of renewal, resolved by the environmental excellence program member's adherence to a binding compliance schedule to abate the violation;~~

~~6.2.a.5.A.2. Addresses any violation cited in a notice of violation by~~

~~resolving the violation, making a showing to the secretary that the violation did not occur, or in the case of a renewal, being in compliance with a binding schedule, agreed to by the secretary, to correct any violation specified in a notice of violation issued by the secretary; and~~

~~6.2.a.5.A.3. Provides documentation that the facility has not been found by the secretary to be in violation of environmental requirements established by a local unit of government as specified under section 5.~~

~~6.2.a.5.B. Provides a binding and significant or measurable reduction in wastes below what would otherwise be required by applicable environmental requirements or include a significant or measurable reduction of pollutants if the environmental excellence program member does not meet the requirements as specified under subparagraph 6.2.a.5.A, then the secretary will consider an application for membership into the environmental excellence program; and~~

~~6.2.a.5.C. Provides documentation of a proven environmental performance record in the case of a change of ownership and control whereas the secretary will consider the environmental performance record of the new owner or owners in determining whether the requirements of this rule have been met and whether the secretary has approved membership into the environmental excellence program.~~

~~6.2.a.6. Recognizes that every individual at the facility can contribute to continual environmental performance and continual environmental improvement.~~

~~6.2.b. Establishes and maintains environmental management programs and procedures that:~~

~~6.2.b.1. Identifies the environmental aspects and environmental impacts of the environmental excellence program member's activities, products, and services over which the environmental excellence program member can be expected to have an influence to determine the activities, products, or services that have or can have significant impacts on the environment, and ensure that the impacts and opportunities for continual environmental improvement are considered in setting the environmental excellence program member's environmental objectives and environmental targets; and~~

~~6.2.b.2. Develops and implements environmental objectives, environmental targets, and environmental management programs within each organizational level of the environmental excellence program member's organizational hierarchy.~~

~~6.2.c. Establishes a procedure to provide for a regular environmental management system audit that assures that there is an effective mechanism in place to promptly and adequately respond to and address any noncompliance with applicable environmental laws and any nonconformance with environmental management system requirements that are found;~~

~~6.2.d. Identifies specific organizational operations and activities, products, and services that have significant environmental impact or the potential for significant environmental impact, and have procedures in place that:~~

~~6.2.d.1. Monitors and measures the operations and activities, products, and services;~~

~~6.2.d.2. Assures that the operations and activities, products, and services remain within acceptable parameters;~~

~~6.2.d.3. Includes provisions to implement prompt correction if a deviation occurs; and~~

~~6.2.d.4. Provides for systematic review of records and reports on environmentally related actions relative to the operations and activities, products, and services.~~

~~6.2.e. Establishes necessary reporting and record keeping that documents the environmental status of all operations and activities, products, and services;~~

~~6.2.f. Establishes and maintains procedures to identify and track the environmental training needs of all personnel who have responsibility or authority over activities, products, and services that have significant environmental impact or the potential for significant environmental impact;~~

~~6.2.g. Establishes and maintains procedures to respond to and report, as appropriate, accidents, malfunctions, spills, upsets, and other emergency situations and to mitigate any associated environmental impacts, and provides for a review of the procedures after the occurrence of an accident or emergency;~~

~~6.2.h. Defines the authority, responsibility, and methodology for an environmental management system audit for correcting and preventing nonconformance with the procedures set forth in the environmental management system;~~

~~6.2.i. Develops and maintains procedures for internal communication of the environmental management system and environmental issues between personnel across all functional and organizational levels; and~~

~~6.2.j. Establishes and maintains an effective public communication process and procedures for communicating information on environmental issues, significant environmental impacts, and the environmental management system with the public, including the local community and environmental interest groups that facilitate and encourage public understanding and dialogue on environmental issues.~~

§60-8-7. Environmental Performance Goals.

7.1. The applicant must propose environmental performance goals that it intends to implement and achieve for the achievement of superior environmental performance. Environmental performance goals may be achieved through the implementation of environmental management programs, capital improvement projects, or other discernable programs.

7.2. The applicant must describe the program or project that it intends to implement to achieve superior environmental performance.

7.3. The applicant must quantify the environmental performance goals that the proposed program or project must achieve in terms of numerical standards or percent reductions.

7.4. The proposal must include objective standards by which the environmental performance goal must be monitored, measured, and evaluated with respect to the environmental performance baseline~~;~~.

§60-8-8. Public Participation.

8.1. Environmental excellence program applicants and environmental excellence program members must demonstrate public participation through the development, implementation, and management of a public participation plan to ensure that the environmental performance goals are understood and supported.

8.2. Environmental excellence program applicants and environmental excellence program members must develop a public participation plan that may include, but will not be limited to, the following:

8.2.a. Identifies and assesses issues and concerns of the public that are affected by an environmental management program, capital improvement project, other discernable program, issue, or long-term plan;

8.2.b. Defines objectives of environmental excellence program member involvement effort that broadly addresses public concerns as well as planning and environmental management program, capital improvement project, or other discernable program development goals, where the objectives must guide the outreach activities and can be established as part of the initial phase of public participation activities and usually do not change over the course of the effort;

8.2.c. Identifies pertinent public participation activities; including development, implementation, and management of a community advisory panel; that considers the target audience, intended message, and any environmental excellence program member budget constraints;

8.2.d. Evaluates environmental excellence program member efforts based on achievement of environmental excellence program member objectives with well designed milestones during the public participation process, and understands that issues and concerns change over time and that the environmental excellence program member public participation plan should reflect those changes; and.

8.2.e. Distributes annual performance report to the public on an annual basis as specified under subsection 14.6.e.

§60-8-9. Incentives

Environmental excellence program members are eligible for incentives that may include, but will not be limited to, the following:

9.1. The department will grant recognition and regulatory incentives that are commensurate with the quantity and quality of environmental performance goals selected by the member. Bronze Leaf members must only be entitled to recognition incentives. Silver and Gold Leaf members are entitled to recognition and regulatory incentives.

9.2. Recognition Incentives.

9.2.a. The department will issue a numbered certificate of recognition to each participant in the program that specifies the level of achievement, i.e. Bronze, Silver, or Gold Leaf, and a unique facility identification number;

9.2.b. The department will identify each member on an internet site maintained by the department at http://www.wvdep.org;

9.2.c. The department will annually provide notice of the participation of each member in the program to newspapers in the area in which each member operates; and.

9.2.d. Members may use an environmental excellence program logo selected by the department on written materials produced by the member.

9.3. Regulatory and Administrative Incentives.

9.3.a. Silver and Gold Leaf members must be entitled to regulatory and administrative incentives that are commensurate with the degree of superior environmental performance achieved by the participating member.

9.3.a.1. General Incentives.

9.3.a.1.A. Low priority for routine inspections. The department will conduct any inspections of the member's facility at the lowest frequency permitted under law, except that the department may conduct an inspection whenever it has reason to believe that a participant is out of compliance with the environmental performance agreement or any environmental law;

9.3.a.1.B. Single point of contact with department for all permitting actions. The department will assign an employee to be the primary interface with the member to provide technical support and guidance on permitting actions and permitting activities;

9.3.a.1.C. Credit, dollar-for-dollar, for environmental excellence program triennial renewal fee toward permit fees;

9.3.a.1.D. A network established to promote the environmental excellence program and its members to recognize the accomplishments of environmental excellence program members and to provide networking opportunities with department officials and other members; and.

9.3.a.1.E. Letter in good standing provided by the department to environmental excellence program member in order to obtain financial support from a financial investor that provides incentives to firms that promote environmental and social performance.

9.3.a.2. Air Incentives.

9.3.a.2.A. Flexible permits. The department will work with members to design flexible permits that are designed to reduce permitting costs and uncertainty and allow for planned process changes for operating flexibility; and.

9.3.a.2.B. Reduced reporting frequency and simplified reporting requirements for facilities governed by Maximum Available Control Technology (MACT). Facilities subject to MACT reporting requirements may be entitled to the reduced and simplified reporting provisions for National Environmental Performance Track members promulgated by the United States Environmental Protection Agency, 40 CFR §63.10 and §63.16.

9.3.a.3. Water Incentives.

9.3.a.3.A. Waiver of permit modification fees as specified under W. Va. Code of State Rules §47-26-6; and,

9.3.a.3.B. Reduced frequency for filing discharge monitoring reports (DMR) with the department. Participants may be entitled to file DMRs on a quarterly basis. Other required documents are to be kept on file at the facility and made available upon request.

9.3.a.4. Waste Incentives.

9.3.a.4.A. Reduced permitting requirements for generators of hazardous wastes. Facilities that generate hazardous wastes may accumulate hazardous wastes up to 180 days, and in certain cases 270 days, without a Resource Conservation and Recovery Act (RCRA) permit or interim status provided the facility follows the Performance Track facility extended time requirements promulgated by the United States Environmental Protection Agency, 40 CFR §262.34.

§60-8-10. Procedures for Application

10.1. To participate in the environmental excellence program, the facility must submit an environmental excellence program application on a form provided by the department that includes information pertaining to the facility that demonstrates compliance with and conformance to the eligibility requirements as specified under section 4, that may includes but will not be limited to, the following:

10.1.a. Identification and contact information regarding the applicant facility; parent company; point-of-contact; street address; mailing address (if different from facility address); physical location and geographic boundary of the facility; city; state; zip code; phone number; facsimile number; electronic mail address; website address; environmental excellence program level applying for, whether Bronze Leaf, Silver Leaf, or Gold Leaf; and desired incentives;

10.1.b. Background and an identification of the environmental requirements that demonstrate the major federal, state, tribal, and/or local environmental laws that are applicable;

10.1.c. Environmental performance record that demonstrates compliance with all environmental laws as evidenced by a signature by a responsible official and conformance to section 5;

10.1.d. Environmental management system that demonstrates conformance with the environmental excellence program and environmental management system audit requirements as specified under section 6;

10.1.e. A description of the environmental performance goals and past achievements and future commitments that demonstrate superior environmental performance as specified under section 7;

10.1.f. Public participation to ensure that the environmental excellence program is broadly supported, its environmental implications are fully understood, and provides for ongoing engagement of the public as specified under section 8;

10.1.g. A Summary of public comments received by the applicant and the department during the public review period and the applicant's response to the comments received; and,

10.1.h. Environmental excellence program application certification, signed by a responsible official, that demonstrates compliance with and conformance to the terms and conditions for eligibility criteria for participation, procedures for application, and incentives in the environmental excellence program as specified under this section and sections 4 and 9.

10.2. The department will distribute environmental excellence program requests for applications to potential environmental excellence program members and the public on November 1 and May 1 of each year.

10.3. Due dates for submission of environmental excellence program applications to the department are February 1 through April 30 and August 1 through October 31 of each year.

§60-8-11. Notice.

11.1. Before submitting an application to the department, the applicant must provide for a public review of the application and related documentation for a period of not less than 30 days. The applicant must notify the department of its intention to submit an application for environmental excellence program designation not less than 30 days before the end of the public review period. Public review will, at a minimum, include posting a notice in a local newspaper of the applicant's intent to file the environmental excellence program application and of the availability of the application and related documentation for review. The application and related documentation must be made available at a local public library or other public building for not less than 30 days. The public notice must allow for comments to be made to the applicant or the department.

§60-8-12. Action on Application.

12.1. The department will complete its initial review of the environmental excellence program application within 14 days of receipt of the application that must include a cursory review of the application inventorying the contents and issuing a letter to the applicant detailing any shortcomings or acknowledging its completeness.

12.2. The department will publish, in the department calendar maintained on an internet site at http://www.wvdep.org, a notice of receipt of the application and related documentation and of the availability of the application and related documentation for public review and comment not less than 30 days before the department makes a decision on the application.

12.3. Within 60 days of receipt of a complete application, unless an extension of time is requested by the applicant, the department will consider public comments, determine whether the criteria of these rules have been met, and notify the applicant, in writing, whether the applicant is eligible to participate in the environmental excellence program.

12.4. The department will provide public notice of its decision regarding the eligibility of the applicant to participate in the environmental excellence program within 30 days after rendering its decision concerning eligibility.

12.5. In cases where the department determines that the applicant is eligible to participate in the program, the department may hold an informational meeting on the applicant's proposal.

12.6. Within 30 days after the public notice specified under subsection 12.4, interested persons may request that the department grant them authorization to participate under the negotiations as specified under section 13. The secretary will determine whether a person who makes a request under this section must participate in the negotiations based on whether the person has demonstrated sufficient interest in the issues raised by the application for eligibility to warrant that participation.

12.7. Any person adversely affected by the secretary's eligibility determination may appeal to the environmental quality board, pursuant to the provisions of article one [§22B-1-1 et seq.], chapter twenty-two-b of the West Virginia Code.

12.8. The department will determine whether the environmental excellence program applicant meets the requirements of this rule and will inform the environmental excellence program applicant of acceptance into the environmental excellence program at the Bronze Leaf or Silver Leaf or Gold Leaf designation by January 1 of each year.

§60-8-13. Environmental Performance Agreement.

13.1. Upon the secretary's determination that the applicant is eligible to participate in the environmental excellence program, the department will begin negotiations concerning an environmental performance agreement with the environmental excellence program applicant and any person or persons to whom the department granted permission as specified under subsection 12.6.

13.2. The environmental performance agreement will include information pertaining to environmental performance record, environmental management system, environmental performance goals, public participation, incentives, annual performance report, annual facility visitations, and application fees and triennial renewal fees as specified under section 18.

13.3. The department will conclude negotiations within 12 months of beginning negotiations unless the applicant and the department agree to an extension.

13.4. If negotiations as specified under subsection 13.1 result in a draft environmental performance agreement, the department will provide public notice about the draft environmental performance agreement in the geographic area in which the subject facility or activity, product, and service is located or performed. The draft environmental performance agreement must be made available at a local public library or other public building for not less than 30 days. The public notice must allow for comments to be made to the department.

13.5. After providing public notice of a draft environmental performance agreement, the department will hold a public meeting in the geographic area in which the subject facility or activity, product, and service is located or performed to further discuss the draft environmental performance agreement. The department will consider all public comments received during the public comment period under subsection 13.4 and at the public meeting before finalizing the environmental performance agreement.

13.6. The term of the environmental performance agreement will be three years.

§60-8-14. Annual Performance Report.

14.1. Each member facility must complete and submit an annual performance report that demonstrates to the department and the public the eligibility criteria for participation, environmental performance record, environmental management system, environmental performance goals, public participation, incentives, annual facility visitations, and maintenance of the environmental performance agreement. For environmental excellence program Silver Leaf members that already participate in the United States Environmental Protection Agency National Environmental Performance Track, submission of the National Environmental Performance Track annual performance report may be accepted in lieu of this requirement as determined by the secretary.

14.2. Annual performance reports may include, but will not be limited to, the following:

14.2.a. Self-certification of the facility's environmental excellence program that demonstrates compliance with and conformance to environmental excellence program membership eligibility criteria for participation as specified under section 4;

14.2.b. Summary of the facility's environmental performance record as specified under section 5;

14.2.c. Summary of the facility's environmental management system assessment activities and progress towards meeting environmental management system requirements including environmental objectives, environmental targets, and environmental management programs, including brief descriptions of audits conducted and improvements made, as specified under section 6;

14.2.d. Information on progress made in meeting the facility's environmental performance goals as specified under section 7;

14.2.e. Summary of the facility's public participation plan and associated activities as specified under section 8;

14.2.f. Summary of the facility's incentives as specified under section 9; and.

14.2.g. Summary of the facility's annual facility visitation as specified under section 15.

14.3. Due date for the annual performance report is April 1 of each year, beginning with April 1st following the year in which an environmental excellence program applicant is accepted into the program, and annually thereafter, and therefore the annual performance report will be based on a calendar year.

14.4. Confidential business information should not be included in the annual performance report as the department will make the report available to the public.

14.5. Review of the annual performance report is performed by the department to identify significant problems, and if found, the annual performance report will be revised and reviewed by the department, and if accepted, will make the report available to the public.

14.6. Distribution of the annual performance report to the public is required by the environmental excellence program member on an annual basis and the department expects each facility to select and document a means consistent with situations and the public participation plan as specified under section 8.

14.7. Supporting documentation must be maintained on-site to enable the environmental excellence program member to prepare the annual performance report and to make the report readily accessible to the department upon request.

§60-8-15. Annual Facility Visitations.

15.1. The department will conduct annual facility visitations with environmental excellence program members to evaluate the effectiveness of the environmental excellence program and compliance with the environmental performance agreement.

§60-8-16. Procedures for Retention, Renewal, or Termination of Environmental Excellence Program Designation.

16.1. Retention of environmental excellence program designation requires that an environmental excellence program member, at least 30 days before the anniversary date of the current environmental excellence program designation, submit a renewal request, supporting information, and a certification that the environmental excellence program member meets the requirements as specified under sections 4, 5, 6, 7, 8, 9, 14, and 15.

16.2. The supporting information as specified under section 14 includes an annual performance report that specifically describes the status of the activities, products, and services and details the actions undertaken to maintain and implement the environmental management system as specified under section 6.

16.3. A renewal request must include a statement by the responsible official that demonstrates that the environmental excellence program member is in compliance with and conforms to all applicable environmental requirements and has no outstanding unresolved violations, or is in compliance with and conforms to a binding schedule to correct and prevent any outstanding violations.

16.4. The secretary will terminate the environmental excellence program designation if, after the effective date of the current environmental excellence program designation, the secretary determines that the environmental excellence program member:

16.4.a. Failed to meet the requirements of the environmental performance record as specified under section 5 or:

16.4.a.1. Failed to promptly and adequately correct and prevent a violation of environmental requirements as specified under section 5.

16.4.b. Failed to meet the requirements of the environmental management system as specified under section 6;

16.4.c. Failed to meet the requirements of the environmental performance goals as specified under section 7;

16.4.d. Failed to meet the requirements of public participation as specified under section 8;

16.4.e. Failed to meet the requirements of the incentives as specified under section 9;

16.4.f. Significantly or repeatedly abused its designation as an environmental excellence program member, by claiming or implying environmental excellence program designation for facilities and/or persons other than those identified in the application as specified under section 10;

16.4.g. Failed to meet the requirements of the environmental performance agreement as specified under section 13;

16.4.h. Failed to meet the requirements of the annual performance report as specified under section 14; and.

16.4.i. Failed to meet the requirements of annual facility visitations as specified under section 15.

16.5. The secretary will advise a facility of his or her intent to terminate the environmental excellence program designation not less than 30-days before terminating the environmental excellence program membership.

16.6. There is no appeal of the secretary's environmental excellence program membership termination decision.

16.7. A person operating a facility in West Virginia, that was a former environmental excellence program member, may reapply for environmental excellence program designation at any time as long as the environmental excellence program applicant meets the requirements of this rule.

§60-8-17. Impact on Incentives from Termination of Environmental Excellence Program Designation.

17.1. Upon the secretary's termination of an environmental excellence program designation, all incentives, provided to the former environmental excellence program member and as specified under section 9, will be terminated and/or restricted as provided in this section and as determined by the secretary.

§60-8-18. Application Fees and Triennial Renewal Fees.

18.1. An application fee of one thousand dollars ($1,000.00) must be paid by the environmental excellence program applicant and is to be submitted at the time the application is filed in the form of a check payable to the Department of Environmental Protection for deposit in the Environmental Excellence Program Administrative Fund for environmental excellence program administration, provided that an applicant which qualifies as a "small business" must pay an application fee of three hundred dollars ($300.00), and provided further that the application fee will be waived for all public entities seeking membership in the environmental excellence program.

18.2. A triennial renewal fee of five hundred dollars ($500.00) must be paid by the environmental excellence program member and is to be submitted at the time the renewal is filed in the form of a check payable to the West Virginia Department of Environmental Protection for deposit in the Environmental Excellence Program Administrative Fund for environmental excellence program administration, provided that an environmental excellence program member which qualifies as a "small business" must pay a triennial renewal fee of one hundred and fifty dollars ($150.00), and provided further that the triennial renewal fee will be waived for all members that are public entities.