

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF THE SECRETARY OF STATE
WEST VIRGINIA

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

AGENCY: Environmental Quality Board TITLE NUMBER: 46 CSR 1

CITE AUTHORITY 22B-3-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

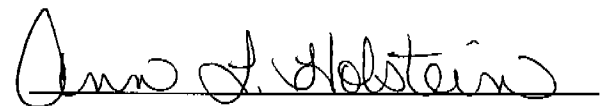
TITLE OF RULE BEING AMENDED: _____

Requirements Governing Water Quality Standards

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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



Authorized Signature

\$15.20 w/out comments
\$35.00 w/comments



Executive Office
#10 McJunkin Road
Nitro, WV 25143-2506
Telephone: (304) 759-0515
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West Virginia Bureau of Environment

Cecil H. Underwood
Governor

Michael P. Miano
Commissioner

July 30, 1999

Ms. Judy Cooper
Director, Administrative
Law Division
Secretary of State's Office
Capitol Complex
Charleston, WV 25305

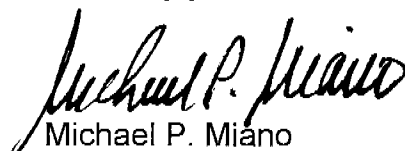
RE: 46CSR1 - "Requirements Governing Water Quality
Standards"

Dear Ms. Cooper:

This letter is to give my approval for filing of the above-referenced rule with your Office and the Legislative Rule-Making Review Committee as "Notice of an Agency-Approved Rule."

Your cooperation in this matter is very much appreciated. If you should have questions or need additional information, please call Libby Chatfield at 558-4002.

Sincerely yours,


Michael P. Miano
Commissioner

MPM:cc

Attachment

cc: Libby Chatfield
Carrie Chambers



ENVIRONMENTAL QUALITY BOARD

1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126

Telephone: (304) 558-4002
Fax: (304) 558-4116

August 6, 1999

Telephone: 1-800-480-4598
E-Mail: clerk@mail.wvnet.edu

Judy Cooper, Director
Administrative Law Division
Office of the Secretary of State
Building 1 Suite 157 K
1900 Kanawha Blvd., East
Charleston, WV 25305-0771

Dear Ms. Cooper:

Please find enclosed a Notice of Filing of Agency Approved Rule for proposed amendments to 46 CSR 1, Requirements Governing Water Quality Standards.

Our public hearing regarding these amendments was held on July 29, 1999. A court reporter recorded the meeting, but she has not yet completed the transcript. We intend to supplement this filing with the transcript as soon as we receive it.

Thank you for your consideration of this matter. If you have any questions, please call me at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Libby Chatfield".

Libby Chatfield
Technical Advisor

attachments



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August 6, 1999

The Honorable Mike Ross and Mark Hunt, Co-chairs
Legislative Rule-Making Review Committee
Building 1, Room M-427
1900 Kanawha Blvd, East
Charleston, WV 25305-0610

RE: 46 CSR 1, Requirements Governing Water Quality Standards

Dear Senator Ross and Delegate Hunt:

Attached for the committee's consideration are proposed amendments to the Water Quality Standards rule. These amendments include the addition of antidegradation implementation procedures in Appendix F. These implementation procedures are intended to supplement the existing antidegradation policy in section 4 of the rule. The primary goal of the policy is to ensure that existing uses of the waters of the state are maintained by protecting the water quality required to support those uses.

The procedures were developed by a drafting committee including representatives of the Office of Water Resources of the Division of Environmental Protection, the Division of Natural Resources and the Environmental Quality Board (Board) in 1998. A public hearing was held to take comments on the procedures in July 1998. After holding the hearing, the Board decided not to file the procedures for consideration in the 1999 session, but to instead ask the drafting committee to prepare responses to the comments received. Further, the Board agreed to convene a stakeholder group to review the policy after those responses were completed. Responses to the comments were submitted to the Board by the drafting committee in March 1999. The Board then put together a stakeholder group, consisting of representatives from all of the constituencies which have expressed interest in the proposal. The stakeholder group is scheduled to begin meeting this month.

Until recently, the Board had intended to propose changes to the rule for consideration in the 2001 legislative session, after receiving recommendations from the stakeholder group. Several activities have occurred in the past few months, however, which have prompted the Board to expedite its actions and file the procedures for consideration in the 2000 legislative session. One of the primary reasons is that a Notice of Intent to Sue USEPA was filed by the West Virginia Rivers Coalition and several other environmental organizations on May 28, 1999. That notice indicates an intention to sue the USEPA for their failure to ensure the promulgation of antidegradation implementation methods as required by the federal Clean Water Act. Further incentive was provided in a Preliminary Performance Review of the Board submitted to the Joint Government Operations committee of the Legislature by the Office of the Legislative Auditor. That report, which was considered by the joint committee in June, provides a recommendation that the Board complete the antidegradation implementation procedures for approval by

the legislative session of the year 2000. Finally, the Board received a letter from USEPA on June 22 indicating that if antidegradation implementation procedures are not in place by April 1, 2000, EPA will pursue federal promulgation of those procedures for the state

With these recent activities in mind, the Board submitted a Notice of Public Hearing on changes to the rule on June 29, 1999 and held that hearing on July 29, 1999. The Board received numerous comments on the proposal, as we had in 1998. After serious deliberations the Board decided to file the rule at this time, with the intention of establishing a rigorous meeting schedule for the stakeholder group with the goal of receiving recommendations from them by December, 1999. Upon receipt of those recommendations, we will have an opportunity to provide further information to the committee with regard to the antidegradation implementation proposal.

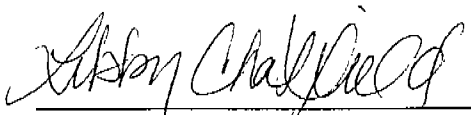
To assist the committee in its review of this proposal, we wish to identify some issues of concern raised by parties commenting on the rule. This is not intended to be an exhaustive list of the comments received. The Board intends that the stakeholder group will consider all of the comments received and will incorporate appropriate responses to them into the recommendations that they submit to the Board. Issues which have been addressed in the comments include:

- Sections 4B.4, 4C.2.a.2 F, 4D.2.c: Trading provisions
- Section 4C.2: Definition of significant degradation
- Section 4A.2: Application of the procedures to nonpoint source activities
- Section 4C.1: Identification procedures for High Quality (tier 2) waters
- Section 4A.1: Application of procedures to parameters without numeric criteria
- Section 4C.4: Analysis of availability of non-degrading or less degrading alternatives.
- Protection against cumulative impacts to waters of the State


As stated above, we had hoped to be able to convene the stakeholder group and consider their recommendations before going to notice and filing the rule with this committee. However, in light of the activities which have occurred in the last few months, the Board has chosen to move forward with this proposal as quickly as possible. While we recognize that the course of action we have taken is somewhat unconventional we are compelled by the importance of establishing procedures which will provide for a fair and consistent application of the antidegradation policy, a policy which is critical to the protection of the waters of West Virginia.

We appreciate your consideration of these comments. If you have questions about this proposal, please call Libby Chatfield, the Board's technical advisor at 558-4002

Sincerely,



Donald Tarter, Ph. D., Co-chair
Edward Snyder, Ph.D., Co-chair



QUESTIONNAIRE

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

DATE: August 6, 1999

TO: Legislative Rule-Making Review Committee

FROM:(Agency Name, Address & Phone No.) Environmental Quality Board

1615 Washington Street, East, Charleston, WV 25311

(304) 558-4002

LEGISLATIVE RULE TITLE: "Requirements Governing Water Quality Standards"

1. Authorizing statute(s) citation 22B-3-4

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

June 29, 1999

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

Published in Charleston Newspapers on July 7, 1999 and July 21, 1999 as well as a Press Release to the WV Press on July 1, 1999, also distributed notice to our internal mailing list of approximately 55 people.

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

July 29, 1999 7:00 p.m.

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

Attached X No comments received

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

August 6, 1999

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

Elizabeth Chatfield, Technical Advisor

1615 Washington Street, East - Room 301

Charleston, WV 25311-2126

558-4002 / 558-4116 / chatfe@mail.wvnet.edu

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

Same

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

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

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

46 CSR 1
Requirements Governing Water Quality Standards
August 6, 1999

Summary of Proposed Changes

Antidegradation Implementation

The proposed changes address the implementation of the antidegradation policy in section 4 of the rule. The rule will be amended to include two new appendices, F and F1 and additional language is proposed in several places in the text of the rule.

Appendix F includes specific guidance regarding how the provisions in the antidegradation policy, section 4, are to be implemented. This guidance includes determinations regarding identification of existing uses of the state's waters, and provisions addressing how those uses will be protected. Additionally, guidance is outlined regarding requirements in the antidegradation policy to carry out intergovernmental coordination (Appendix F1 includes a list of contact agencies) and to conduct socio-economic evaluations prior to making decisions to allow discharges which would degrade existing stream quality in high quality streams.

Other changes proposed in the text of the rule include clarification of the application of the 4 tiers of antidegradation protection (section 4) as well as the addition of a definition for waters of special concern (section 2).

Weirton Steel Variance

Amendments are proposed to section 7.2.d.16.2 addressing an existing socio-economic variance from water quality standards granted to Weirton Steel in Harmon Creek, a tributary of the Ohio River. The instream limit for free cyanide will change from 70 ug/l to 6.9 ug/l; zinc will change from 200 ug/l to 181 ug/l and fluoride from 2.0 mg/l monthly average and 4.0 mg/l daily maximum to 3.1 mg/l daily maximum. Also proposed is an extension of the term of the variance from June 29, 2000 to June 29, 2001.

46 CSR 1
Requirements Governing Water Quality Standards
August 6, 1999

Statement of Circumstances Requiring Proposed Amendments

Antidegradation Implementation

The federal Clean Water Act requires the Environmental Quality Board to review the Water Quality Standards legislative rule, 46 CSR 1, Requirements Governing Water Quality Standards, every three years. Any changes proposed and adopted by the legislature are then reviewed by the US Environmental Protection Agency (EPA) for final approval. The EPA conditionally approved the state's antidegradation policy in 1995 because it lacked implementation guidelines, and recommended that the state develop such guidelines within one year. Further, during the most recent triennial review of the standards reviewed by the EPA, that agency provided notice that if West Virginia fails to promptly develop and adopt antidegradation implementation methods that adequately support its antidegradation policy, Region 3 will recommend that the Administrator of the EPA exercise her discretionary authority under Section 303(c)(4)(B) of the Clean Water Act to identify implementation methods for West Virginia's antidegradation policy.

In addition to the EPA's communications to the Board, other actions related to the status of the antidegradation implementation policy have taken place. One is a Preliminary Performance Review Report submitted to the Joint Government Operations Committee of the West Virginia Legislature by the Legislative Auditor's Office. That report includes a discussion of the Board's failure to promulgate antidegradation implementation guidelines and recommends that the Board "complete the Anti-Degradation Implementation Plan for approval by the legislative session of the year 2000." Another action is the filing of a Notice of Intent to Sue USEPA by the West Virginia Rivers Coalition. That notice indicates that organization's intent to file a lawsuit to pursue EPA's failure to enforce the Clean Water Act requirement that each state have an antidegradation policy and implementation guidance for that policy.

Appendices F and F1 comprise the Board's proposed antidegradation implementation procedures, which address EPA's conditional approval of the antidegradation policy.

Weirton Steel Variance - Section 7.2.d.16.2

Weirton Steel has requested an extension for its socio-economic variance from water quality standards for 5 parameters - lead, total phenolic materials, free cyanide, zinc, iron and fluoride. The current term of the variance ends on July 29, 2000. An extension is proposed through July 29, 2001, in order to ensure that the company's NPDES permit limits continue to comply with the Water Quality Standards rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: **Requirements Governing Water Quality Standards**
 Type of Rule: X Legislative Interpretive Procedural
 Agency: **Environmental Quality Board**
 Address: **1615 Washington Street, East - Room 301**
Charleston, West Virginia 25311-2126

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

N/A

3. Objectives of these rules: **To clarify implementation of the antidegradation provisions in the rule.**

Rule Title: Requirements Governing Water Quality Standards

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

New antidegradation provisions may require additional training and/or additional staffing by the agency implementing the rule. Cost of such activities is unknown at this time.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

The antidegradation implementation procedures may result in additional requirements for those applying for or renewing national pollutant discharge elimination system (NPDES) permits in the state of West Virginia. These requirements may include providing information about ambient water quality, the existence of non-degrading or less-degrading alternatives to the proposed activity and documentation of the social and economic importance of the proposed activity. The proposed procedures will also result in some changes in the NPDES permit review process employed by the division of environmental protection, which may ultimately affect the requirements in permits issued by that agency. All of these changes may result in increased costs to permit applicants. Conversely, the trading provisions outlined in the rule may defray certain costs to permit applicants. None of the financial impacts described above can be accurately quantified at this time.

C. Economic Impact on Citizens/Public at Large.

Possible benefits of these procedures are upgrading of streams, and improving the local economic climate due to installation of additional treatment mechanisms.

Date: August 6, 1999

Signature of Agency Head or Authorized Representative

Ann D. Holstein

FILED
Aug 3 3 07 PM '99

**TITLE 46
LEGISLATIVE RULES
ENVIRONMENTAL QUALITY BOARD
SERIES 1
REQUIREMENTS GOVERNING WATER
QUALITY STANDARDS**

OFFICE OF THE CLERK OF THE SENATE
SECRETARY OF STATE

§46-1-1. General.

1.1. Scope. -- These rules establish requirements governing the discharge or deposit of sewage, industrial wastes and other wastes into the waters of the State and establish water quality standards for the waters of the State standing or flowing over the surface of the State. It is declared to be the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, and other aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development. (See W. Va. Code § 22-11-2.)

1.2. Authority. -- W. Va. Code §22B-3-4

1.3. Filing Date. --

1.4. Effective Date. --

§46-1-2. Definitions.

The following definitions in addition to those set forth in W. Va. Code §22-11-3, shall apply to these rules unless otherwise specified herein, or unless the context in which used clearly requires a different meaning:

2.1. "Board" is the Environmental Quality Board.

2.2. "Chief" is the Chief of the Office of Water Resources of the West Virginia Division of Environmental Protection.

2.3. "Conventional treatment" is the treatment of water as approved by the State Health Department to assure that the water is safe for human consumption.

2.4. "Cumulative" means a pollutant which increases in concentration in an organism by

successive additions at different times or in different ways (bio-accumulation).

2.5. "Designated uses" are those uses specified in water quality standards for each water body or segment whether or not they are being attained. (See section 6.2.)

2.6. "Dissolved metal" is operationally defined as that portion of metal which passes through a 0.45 micron filter

2.7. "Existing uses" are those uses actually attained in a water body on or after November 28, 1975, whether or not they are included in the water quality standards.

2.8. The "Federal Act" means the Clean Water Act (also known as the Federal Water Pollution Control Act) Public Law 92-500, as amended by Public Law 100-4, 33 U.S.C. 1251, et seq.

2.9. "High quality waters" (also known as "Tier 2 waters"): are those waters whose quality is equal to or better than the minimum levels necessary to achieve the national water quality goal uses.

2.10. "Intermittent streams" are streams which have no flow during sustained periods of no precipitation and which do not support aquatic life whose life history requires residence in flowing waters for a continuous period of at least six (6) months.

2.11. "Outstanding national resource waters" (also known as "Tier 3 waters") are those whose unique character, ecological or recreational value or pristine nature constitutes a valuable national or State resource.

2.12. "Natural" or "naturally occurring" values or "natural temperature" shall mean for all of the waters of the State:

2.12a. Those water quality values which exist unaffected by -- or unaffected as a consequence of -- any water use by any person; and

2.12b. Those water quality values which exist unaffected by the discharge, or direct or indirect deposit of, any solid, liquid or gaseous substance from any point source or non-point source.

2.13. "Non-point source" shall mean any source other than a point source from which pollutants may reach the waters of the State.

2.14. "Persistent" shall mean a pollutant and its transformation products which under natural conditions degrade slowly in an aquatic environment.

2.15. "Point source" shall mean any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

2.16. "Representative important species of aquatic life" shall mean those species of aquatic life whose protection and propagation will assure the sustained presence of a balanced aquatic community. Such species are representative in the sense that maintenance of water quality criteria will assure both the natural completion of the species' life cycles and the overall protection and sustained propagation of the balanced aquatic community.

2.17. The "State Act" or "State Law" shall mean the West Virginia Water Pollution Control Act, W. Va. Code §22-11-1.

2.18. "Total recoverable" refers to the digestion procedure for certain heavy metals as referenced in 40 CFR 136, as amended June 15, 1990, Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act.

2.19. "Trout waters" are streams or stream segments which sustain year-round trout populations. Excluded are those streams or stream segments which receive annual stockings of trout but which do not support year-round trout populations.

2.20. "Waters of Special Concern" (also known as "Tier 2.5 waters") are those waters, which due to their location or other special designation, are assigned an antidegradation protection level above high quality waters. See section 4.1.c. for a list of Waters of Special Concern.

~~2.20~~ 21. "Water quality criteria" shall mean levels of parameters or stream conditions that are required to be maintained by these regulations. Criteria may be expressed as a constituent concentration, levels, or narrative statement, representing a quality of water that supports a designated use or uses.

~~2.21- 22.~~ 22. "Water quality standards" means the combination of water uses to be protected and the water quality criteria to be maintained by these rules.

~~2.22- 23.~~ 23. "Wetlands" are those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

~~2.23- 24.~~ 24. "Wet weather streams" are streams that flow only in direct response to precipitation or whose channels are at all times above the water table.

§46-1-3. Conditions Not Allowable In State Waters.

3.1. Certain characteristics of sewage, industrial wastes and other wastes cause pollution and are objectionable in all waters of the State. Therefore, the Environmental Quality Board does hereby proclaim that the following general conditions are not to be allowed in any of the waters of the State.

3.2. No sewage, industrial wastes or other wastes present in any of the waters of the State shall cause therein or materially contribute to any of the following conditions thereof:

3.2.a. Distinctly visible floating or settleable solids, suspended solids, scum, foam or oily slicks;

3.2.b. Deposits or sludge banks on the bottom;

3.2.c. Odors in the vicinity of the waters;

3.2.d. Taste or odor that would adversely affect the designated uses of the affected waters;

3.2.e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life;

3.2.f. Distinctly visible color;

3.2.g. Concentrations of bacteria which may impair or interfere with the designated uses of the affected waters;

3.2.h. Requiring an unreasonable degree of treatment for the production of potable water by modern water treatment processes as commonly employed; and

3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

§46-1-4. Anti-Degradation Policy.

4.1. It is the policy of the State of West Virginia the waters of the state shall be maintained and protected as follows:

4.1.a. Tier 1 Protection. Existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. Existing uses are those

uses actually attained in the water body on or after November 28, 1975, whether or not they are included as designated uses within these water quality standards.

4.1.b. The existing high quality waters of the State must be maintained at their existing high quality unless it is determined after satisfaction of the intergovernmental coordination of the State's continuing planning process and opportunity for public comment and hearing that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. If limited degradation is allowed, it shall not result in injury or interference with existing stream water uses or in violation of State or Federal water quality criteria that describe the base levels necessary to sustain the national water quality goal uses of protection and propagation of fish, shellfish and wildlife and recreating in and on the water.

In addition, the Board and the chief shall assure that all new and existing point sources shall achieve the highest established statutory and regulatory requirements applicable to them and shall assure the achievement of cost-effective and reasonable best management practices for non-point source control in accordance with the West Virginia Nonpoint Source Management Plan.

4.1.b.1. High quality waters are those waters meeting the definition at section 2.9 herein.

~~4.1.b.2. High quality waters include but are not limited to the following:~~

~~4.1.b.2.A. Streams designated by the West Virginia Legislature under the West Virginia Natural Stream Preservation Act, pursuant to W. Va. Code Section 22-13-5; and~~

~~4.1.b.2.B. Streams listed in West Virginia High Quality Streams, Fifth Edition, prepared by the Wildlife Resources Division, Department of Natural Resources (1986).~~

~~4.1.b.2.C. Streams or stream segments which receive annual stockings of trout but which do not support year round trout populations.~~

4.1.b.2. All waters not designated as Waters of Special Concern (Tier 2.5) or Outstanding National Resource Waters (Tier 3) will be considered High Quality Waters unless it can be demonstrated that the water quality is not better than necessary to attain both fishable (Category B) and swimmable (Category C) uses. If either the fishable or swimmable use is attained, the water is a High Quality Water.

4.1.c. Tier 2.5 Protection. In waters which constitute a water of special concern no activities which result in the reduction of ambient water quality shall be allowed. Waters of

special concern include:

4.1.c.1. All Federally designated rivers under the "Wild and Scenic Rivers Act" Public Law 95-542 as amended, 16 U.S.C. 1271, et seq .

4.1.c.2. All naturally reproducing trout streams.

4.1.c.3. All streams and other bodies of water in State and National Forests and Recreation Areas.

4.1.c.4. National Rivers. "National Parks and Recreation Act of 1978." Public Law 95-625, as amended, 16 U.S.C.1, et seq.

4.1.d. Tier 3 Protection. In all cases, waters which constitute an outstanding national resource shall be maintained and protected and improved where necessary. Outstanding national resource waters include, but are not limited to, all streams and rivers within the boundaries of Wilderness Areas designated by The Wilderness Act (16 U.S.C. 1131 et seq.) within the State.

Additional waters may be nominated for inclusion in that category by any interested party or by the Board on its own initiative. To designate a nominated water as an outstanding national resource water, the Board shall follow the public notice and hearing provisions as provided in 46 C.S.R. 6 and Appendix F herein.

4.1.e. All applicable requirements of Section 316 (a) of the Federal Act shall apply to modifications of the temperature water quality criteria provided for in these rules.

4.1.f. Implementation guidance procedures for this antidegradation policy are outlined in Appendix F.

§46-1-5. Mixing Zones.

5.1. In the permit review and planning process or upon the request of a permit applicant or permittee, the chief may establish on a case-by-case basis an appropriate mixing zone.

5.2. The following guidelines and conditions are applicable to all mixing zones:

5.2.a. The chief will assign, on a case-by-case basis, definable geometric limits for mixing zones for a discharge or a pollutant or pollutants within a discharge. Applicable limits shall include, but may not be limited to, the linear distances from the point of discharge, surface area involvement, volume of receiving water, and shall take into account other nearby mixing zones. Mixing zones shall take into account the mixing conditions in the receiving stream (i.e: whether complete or incomplete mixing conditions exist). Mixing zones will not be

allowed until applicable limits are assigned by the chief in accordance with this section.

5.2.b. Concentrations of pollutants which exceed the acute criteria for protection of aquatic life set forth in Appendix E shall not exist at any point within an assigned mixing zone or in the discharge itself unless a zone of initial dilution is assigned. A zone of initial dilution may be assigned on a case-by-case basis at the discretion of the chief. The zone of initial dilution is the area within the mixing zone where initial dilution of the effluent with the receiving water occurs, and where the concentration of the effluent will be its greatest in the water column. Where a zone of initial dilution is assigned by the Chief, the size of the zone shall be determined using one of the four alternatives outlined in Section 4.3.3 of EPA's Technical Support Document for Water Quality-based Toxics Control (EPA/505/2-90-001 PB91-127415, March 1991). Concentrations of pollutants shall not exceed the acute criteria at the edge of the assigned zone of initial dilution. Chronic criteria for the protection of aquatic life may be exceeded within the mixing zone but shall be met at the edge of the assigned mixing zone.

5.2.c. Concentrations of pollutants which exceed the criteria for the protection of human health set forth in Appendix E shall not be allowed at any point unless a mixing zone has been assigned by the Chief after consultation with the Commissioner of the West Virginia Bureau of Public Health. Human health criteria may be exceeded within an assigned mixing zone, but shall be met at the edge of the assigned mixing zone. Mixing zones for human health criteria shall be sized to prevent significant human health risks and shall be developed using reasonable assumptions about exposure pathways. In assessing the potential human health risks of establishing a mixing zone upstream from a drinking water intake, the Chief shall consider the cumulative effects of multiple discharges and mixing zones on the drinking water intake. No mixing zone for human health criteria shall be established on a stream which has a seven (7) day, ten (10) year return frequency of 5 cfs or less.

5.2.d. Mixing zones, including zones of initial dilution, shall not interfere with fish spawning or nursery areas or fish migration routes; shall not overlap public water supply intakes or bathing areas; cause lethality to or preclude the free passage of fish or other aquatic life; nor harm any threatened or endangered species, as listed in the Federal Endangered Species Act.

5.2.e. The mixing zone shall not exceed one-third ($1/3$) of the width of the receiving stream, and in no case shall the mixing zone exceed one-half ($1/2$) of the cross-sectional area of the receiving stream.

5.2.f. In lakes and other surface impoundments, the volume of a mixing zone shall not affect in excess of ten (10) percent of the volume of that portion of the receiving waters available for mixing.

5.2.g. A mixing zone shall be limited to an area or volume which will not adversely alter the existing or designated uses of the receiving water, nor be so large as to

adversely affect the integrity of the water body.

5.2.h. Mixing zones shall not:

5.2.h.1. Be used for, or considered as, a substitute for technology-based requirements of the Clean Water Act and other applicable State and Federal laws.

5.2.h.2. Extend downstream at any time a distance more than five times the width of the receiving watercourse at the point of discharge.

5.2.h.3. Cause or contribute to any of the conditions prohibited in Section 46-1-3.

5.2.h.4. Be granted where instream waste concentration of a discharge is greater than 80%.

5.2.h.5. Overlap one another.

5.2.h.6. Overlap any ½ mile zone described in section 7.2.a.2 herein.

5.2.i. In the case of thermal discharges, a successful demonstration conducted under Section 316(a) of the Clean Water Act shall constitute compliance with all provisions of this section.

5.2.j. The Chief may waive the requirements of subsections (e) and (h)(B) above if a discharger provides an acceptable demonstration of:

5.2.j.1. Information defining the actual boundaries of the mixing zone in question; and

5.2.j.2. Information and data proving no violation of subsection (d) and (g) above by the mixing zone in question.

5.2.k. Upon implementation of a mixing zone in a permit, the permittee shall provide documentation that demonstrates to the satisfaction of the Chief that the mixing zone is in compliance with the provisions outlined in subsections (b),(c),(e) and (h)(B).

5.2.l. In order to facilitate a determination or assessment of a mixing zone pursuant to this section, the chief may require a permit applicant or permittee to submit such information as deemed necessary.

§46-1-6. Water Use Categories.

6.1. These rules establish general Water Use Categories and Water Quality Standards for the waters of the State. Unless otherwise designated by these rules, at a minimum all waters of the State are designated for the Propagation and maintenance of Fish and Other Aquatic Life (Category B) and for Water Contact Recreation (Category C) consistent with Clean Water Act goals. Incidental utilization for whatever purpose may or may not constitute a justification for assignment of a water use category to a particular stream segment.

6.1.a. Waste assimilation and transport are not recognized as designated uses. The classification of the waters must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial and other purposes including navigation.

Subcategories of a use may be adopted and appropriate criteria set to reflect varying needs of such subcategories of uses, for example to differentiate between trout water and other waters.

6.1.b. At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under Sections 301 (b) and 306 of the Federal Clean Water Act and use of cost-effective and reasonable best management practices for non-point source control. Seasonal uses may be adopted as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria. If seasonal uses are adopted, water quality criteria will be adjusted to reflect the seasonal uses; however, such criteria shall not preclude the attainment and maintenance of a more protective use in another season. A designated use which is not an existing use may be removed, or subcategories of a use may be established if it can be demonstrated that attaining the designated use is not feasible because:

6.1.b.1. Application of effluent limitations for existing sources more stringent than those required pursuant to Section 301 (b) and Section 306 of the Federal Act in order to attain the existing designated use would result in substantial and widespread adverse economic and social impact; or

6.1.b.2. Naturally-occurring pollutant concentrations prevent the attainment of the use; or

6.1.b.3. Natural, ephemeral, intermittent or low flow conditions of water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges to enable uses to be met; or

6.1.b.4. Human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

6.1.b.5. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original

condition or to operate such modification in a way that would result in the attainment of the use;
or

6.1.b.6. Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses.

6.1.c. The State shall take into consideration the quality of downstream waters and shall assure that its water quality standards provide for the attainment of the water quality standards of downstream waters.

6.1.d. In establishing a less restrictive use or uses, or subcategory of use or uses, and the water quality criteria based upon such uses, the Board shall follow the requirements for revision of water quality standards as required by W. Va. Code §22B-3-4 and Section 303 of the Federal Act and the regulations thereunder. Any revision of water quality standards shall be made with the concurrence of EPA. The Board's administrative procedural regulations for applying for less restrictive uses or criteria shall be followed.

6.2. Category A -- Water Supply, Public. -- This category is used to describe waters which, after conventional treatment, are used for human consumption. This category includes streams on which the following are located:

6.2.a. All community domestic water supply systems;

6.2.b. All non-community domestic water supply systems, (i.e. hospitals, schools, etc.);

6.2.c. All private domestic water systems;

6.2.d. All other surface water intakes where the water is used for human consumption. (See Appendix B for partial listing of category A waters; see section 7.2.a.B. for additional requirements for category A waters.)

6.3. Category B -- Propagation and maintenance of fish and other aquatic life. -- This category includes:

6.3.a. Category B1 -- Warm water fishery streams. -- Streams or stream segments which contain populations composed of all warm water aquatic life.

6.3.b. Category B2 -- Trout Waters. -- As defined in Section 2.19 (See Appendix A for a representative list.)

6.3.c. Category B4 -- Wetlands. -- As defined in section 2.22; certain numeric

stream criteria may not be appropriate for application to wetlands (see Appendix E).

6.4. Category C -- Water contact recreation. -- This category includes swimming, fishing, water skiing and certain types of pleasure boating such as sailing in very small craft and outboard motor boats. See Appendix D for a representative list of category C waters.

6.5. Category D. -- Agriculture and wildlife uses.

6.5.a. Category D1 -- Irrigation. -- This category includes all stream segments used for irrigation.

6.5.b. Category D2 -- Livestock watering. -- This category includes all stream segments used for livestock watering.

6.5.c. Category D3 -- Wildlife. -- This category includes all stream segments and wetlands used by wildlife.

6.6. Category E -- Water supply industrial, water transport, cooling and power. -- This category includes cooling water, industrial water supply, power production, commercial and pleasure vessel activity, except those small craft included in Category C.

6.6.a. Category E1 -- Water Transport. -- This category includes all stream segments modified for water transport and having permanently maintained navigation aides.

6.6.b. Category E2 -- Cooling Water. -- This category includes all stream segments having one (1) or more users for industrial cooling.

6.6.c. Category E3 -- Power production. -- This category includes all stream segments extending from a point 500 feet upstream from the intake to a point one half (½) mile below the wastewater discharge point. (See Appendix C for representative list.)

6.6.d. Category E4 -- Industrial. -- This category is used to describe all stream segments with one (1) or more industrial users. It does not include water for cooling.

§46-1-7. West Virginia Waters.

7.1. Major River Basins and their Alphanumeric System. All streams and their tributaries in West Virginia shall be individually identified using an alphanumeric system as identified in the "Key to West Virginia Stream Systems and Major Tributaries" (1956) as published by the Conservation Commission of West Virginia and revised by the West Virginia Department of Natural Resources, Division of Wildlife (1985).

7.1.a. J - James River Basin. All tributaries to the West Virginia - Virginia State

line.

7.1.b. P - Potomac River Basin. All tributaries of the main stem of the Potomac River to the West Virginia - Maryland - Virginia State line to the confluence of the North Branch and the South Branch of the Potomac River and all tributaries arising in West Virginia excluding the major tributaries hereinafter designated:

7.1.b.1. S - Shenandoah River and all its tributaries arising in West Virginia to the West Virginia - Virginia State line.

7.1.b.2. PC - Cacapon River and all its tributaries.

7.1.b.3. PSB - South Branch and all its tributaries.

7.1.b.4. PNB - North Branch and all tributaries to the North Branch arising in West Virginia.

7.1.c. M - Monongahela River Basin. The Monongahela River Basin main stem and all its tributaries excluding the following major tributaries which are designated as follows:

7.1.c.1. MC - Cheat River and all its tributaries except those listed below:

7.1.c.1.A. MCB - Blackwater River and all its tributaries.

7.1.c.2. MW - West Fork River and all its tributaries.

7.1.c.3. MT - Tygart River and all its tributaries except those listed below:

7.1.c.3.A. MTB - Buckhannon River and all its tributaries.

7.1.c.3.B. MTM - Middle Fork River and all its tributaries.

7.1.c.4. MY - Youghieny River and all its tributaries to the West Virginia - Maryland State line.

7.1.d. O Zone 1 - Ohio River - Main Stem. The main stem of the Ohio River from the Ohio - Pennsylvania - West Virginia State line to the Ohio - Kentucky - West Virginia State line.

7.1.e. O Zone 2 - Ohio River - Tributaries. All tributaries of the Ohio River excluding the following major tributaries:

7.1.e.1. LK - Little Kanawha River. The Little Kanawha River and all its tributaries excluding the following major tributary which is designated as follows:

7.1.e.1.A. LKH - Hughes River and all its tributaries.

7.1.e.2. K - Kanawha River Zone 1. The main stem of the Kanawha River from mile point 0, at its confluence with the Ohio River, to mile point 72 near Diamond, West Virginia.

7.1.e.3. K - Kanawha River Zone 2. The main stem of the Kanawha River from mile point 72 near Diamond, West Virginia and all its tributaries from mile point 0 to the headwaters excluding the following major tributaries which are designated as follows:

7.1.e.3.A. KP - Pocatalico River and all its tributaries.

7.1.e.3.B. KC - Coal River and all its tributaries.

7.1.e.3.C. KE - Elk River and all its tributaries.

7.1.e.3.D. KG - Gauley River. The Gauley River and all its tributaries excluding the following major tributaries which are designated as follows:

7.1.e.3.D.1. KG-19 - Meadow River and all its tributaries.

7.1.e.3.D.2. KG-34 - Cherry River and all its tributaries.

7.1.e.3.D.3. KGC - Cranberry River and all its tributaries.

7.1.e.3.D.4. KGW - Williams River and all its tributaries.

7.1.e.3.E. KN - New River. The New River from its confluence with the Gauley River to the Virginia - West Virginia State line and all tributaries excluding the following major tributaries which are designated as follows:

7.1.e.3.E.1. KNG - Greenbrier River and all its tributaries.

7.1.e.3.E.2. KNB - Bluestone River and all its tributaries.

7.1.e.3.E.3. KN-60 - East River and all its tributaries.

7.1.e.3.E.4. K(L)-81-(1) - Bluestone Lake.

7.1.e.4. OG - Guyandotte River. The Guyandotte River and all its

tributaries excluding the following major tributary which is designated as follows:

7.1.e.4.1. OGM - Mud River and all its tributaries.

7.1.e.5. BS - Big Sandy River. The Big Sandy River to the Kentucky - Virginia - West Virginia State lines and all its tributaries arising in West Virginia excluding the following major tributary which is designated as follows:

7.1.e.5.1 BST - Tug Fork and all its tributaries.

7.2. Applicability of Water Quality Standards. The following shall apply at all times unless a specific exception is granted in this section:

7.2.a. Water Use Categories as described in Section 6.

7.2.a.1. Based on meeting those Section 6 definitions, tributaries or stream segments may be classified for one or more Water Use Categories. When more than one use exists, they shall be protected by criteria for the use category requiring the most stringent protection.

7.2.a.2. Each segment extending upstream from the intake of a water supply public (Water Use Category A), for a distance of one half (½) mile or to the headwater, must be protected by prohibiting the discharge of any pollutants in excess of the concentrations designated for this Water Use Category in Section 8. In addition, within that one half (½) mile zone, the Chief may establish for any discharge, effluent limitations for the protection of human health that require additional removal of pollutants than would otherwise be provided by this rule. (If a watershed is not significantly larger than this zone above the intake, the water supply section may include the entire upstream watershed to its headwaters.) Until June 30, 2003, the one-half mile zone described in this section shall not apply to the Ohio River main channel (between Brown's Island and the left descending bank) between river mile points 61.0 and 63.5.

7.2.b. In the absence of any special application or contrary provision, water quality standards shall apply at all times when flows are equal to or greater than the minimum mean seven (7) consecutive day drought flow with a ten (10) year return frequency (7Q10). NOTE: With the exception of section 7.2.c.5 listed herein exceptions do not apply to trout waters nor the requirements of Section 3.

7.2.c. Exceptions: Numeric water quality standards shall not apply: (See section 7.2.d for site specific revisions)

7.2.c.1. When the flow is less than 7Q10;

7.2.c.2. In wet weather streams (or intermittent streams, when they are dry

or have no measurable flow): Provided, That the existing and designated uses of downstream waters are not adversely affected;

7.2.c.3. In any assigned zone of initial dilution of any mixing zone where a zone of initial dilution is required by section 5.2.b herein, or in any assigned mixing zone for human health criteria or aquatic life criteria for which a zone of initial dilution is not assigned; In zones of initial dilution and certain mixing zones: Provided, That all requirements described in §5 herein shall apply to all zones of initial dilution and all mixing zones;

7.2.c.4. Where lesser quality is due to natural conditions. In such cases the naturally occurring values shall be the applicable criteria. Provided, That the existing and designated uses of downstream waters are not adversely affected.

7.2.c.5. For the upper Blackwater River from the mouth of Yellow Creek to a point 5.1 miles upstream, when flow is less than 7Q10. naturally occurring values for Dissolved Oxygen as established by data collected by the dischargers within this reach and reviewed by the Board and Division of Environmental Protection shall be the applicable criteria.

7.2.d. Site-specific applicability of water use categories and water quality criteria - State-wide water quality standards shall apply except where site-specific numeric criteria, variances or use removals have been approved following application and hearing, as provided in 46 C.S.R. 6. (See §8.3 and §8.4) The following are approved site-specific criteria, variances and use removals:

7.2.d.1. James River - (Reserved)

7.2.d.2. Potomac River

7.2.d.2.1. Except that a site-specific numeric criterion for aluminum, not to exceed 500 ug/l, shall apply to the section of Opequon Creek from Turkey Run to the Potomac River.

7.2.d.3. Shenandoah River - (Reserved)

7.2.d.4. Cacapon River - (Reserved)

7.2.d.5. South Branch - (Reserved)

7.2.d.6. North Branch

7.2.d.6.1 Except that the Stony River downstream from the limit of the thermal mixing zone (as established by Board Order of 11/20/75) for the Mount Storm

Lake wastewater treatment facility to its confluence with the North Branch of the Potomac River is exempt from the 5°F above natural temperature rise; however, the maximum temperature outside the mixing zone shall not exceed 87°F at any time during the months of May through November and not exceed 73°F at any time during the months of December through April. This exception shall apply until the successful completion of a study conducted pursuant to section 316(a) of the Federal Clean Water Act or December 31, 1998, whichever comes first.

7.2.d.7. Monongahela River

7.2.d.7.1. Except that flow in the main stem of the Monongahela River, as regulated by the Tygart Reservoir, operated by the U. S. Army Corps of Engineers, is based on a minimum flow of 345 cfs at Lock and Dam No. 8, river mile point 90.8. This exception does not apply to tributaries of the Monongahela River.

7.2.d.8. Cheat River

7.2.d.8.1. Except that the following site-specific numeric criteria shall apply to the unnamed tributary of Daugherty Run approximately one mile upstream of Daughterty Run's confluence with the Cheat River: iron not to exceed 3.5 mg/l and selenium not to exceed 15.24 ug/l and the following site-specific numeric criteria shall apply to Fly Ash Run of Daugherty Run: aluminum: 888.5 ug/l and manganese: 5 mg/l.

7.2.d.9. Blackwater River - (Reserved)

7.2.d.10. West Fork River - (Reserved)

7.2.d.11. Tygart River - (Reserved)

7.2.d.12. Buckhannon River - (Reserved)

7.2.d.13. Middle Fork River - (Reserved)

7.2.d.14. Youghiogheny River

7.2.d.14.1 Water Use Categories A and E are excluded from the tributaries of the Youghiogheny River in West Virginia which flow into Maryland.

7.2.d.15. Ohio River Main Stem - (Reserved)

7.2.d.16. Ohio River Tributaries.

7.2.d.16.1. Except that site-specific numeric criteria shall apply to

the stretch of Conners Run (0-77-A), a tributary of Fish Creek, from its mouth to the discharge from Conner Run impoundment, which shall not have the Water Use Category A and may contain selenium not to exceed 62 ug/l; and iron not to exceed 3.5 mg/l as a monthly average and 7 mg/l as a daily maximum.

7.2.d.16.2. Except that a socio-economic variance shall apply to that segment of Harmon Creek (0-97) from its confluence with the Ohio River to a point 2.2 miles upstream, which shall not have water use Category A designation, and which shall have the following instream criteria: Free Cyanide ~~70~~ 6.9 ug/l, Daily Maximum; Lead 14 ug/l, Daily Maximum, Total Phenolic Materials 10 ug/l, Daily Maximum, Zinc ~~200~~ 181 ug/l, Daily Maximum, Temperature 100° F (monitored per Footnote 12 of the permit); Iron 4.0 mg/l, Monthly Average and 8.0 mg/l, Daily Maximum (monitored per Footnote 12 of the permit); Fluoride ~~2.0 mg/l, Monthly Average and 4.0~~ 3.1 mg/l, Daily Maximum (monitored per Footnote 12 of the permit). Provided, however, that the criteria for Free Cyanide, Lead, Total Phenolic Materials, Zinc, Temperature and Iron shall not apply, and instead the state-wide criteria for these parameters shall apply, unless: Weirton Steel Corporation (1) submits to the Office of Water Resources on or before ~~May 30, 1999~~ March 1, 2000 a report setting forth the water quality of the discharge from Outlet 004 for these parameters during the period from ~~June 1, 1998 to May 1, 1999~~ May 1, 1999 to February 1, 2000; (2) offers further proposals for any appropriate reductions in the above excepted levels; (3) provides ~~an~~ any appropriate additional engineering analysis of potential alternatives for reducing further the concentrations of said parameters in the discharge toward achieving statewide criteria; and (4) ~~continues to~~ submits to the Office of Water Resources on a semi-annual basis commencing on December 31, 1997~~9~~, summary reports on the water quality of the discharge from Outlet 004 and the efforts made by Weirton Steel Corporation during the prior six (6) months to improve the quality of said discharge. Additionally Weirton Steel must determine the water quality of Harmon Creek both immediately upstream of and below the discharge of outlet 004 at the Con Rail Bridge by sampling for Flow, pH, Free Cyanide, Total and Dissolved Lead, Total Phenolic Materials, Total and Dissolved Zinc, Iron, Fluoride, Temperature and Hardness on at least a monthly basis and submit the results to the Office of Water Resources with the semi-annual report commencing December 31, 1999. These exceptions shall be in effect until action by the Environmental Quality Board to revise such exceptions or until June 29, 2000 1, whichever comes first.

7.2.d.17. Little Kanawha River. - (Reserved)

7.2.d.18. Hughes River - (Reserved)

7.2.d.19. Kanawha River Zone 1 - Main Stem

7.2.d.19.1 For the Kanawha River main stem, Zone 1, Water Use Category A shall not apply; and

7.2.d.19.2. The minimum flow shall be 1,960 cfs at the Charleston

gauge.

7.2.d.20. Kanawha River Zone 2 and Tributaries.

7.2.d.20.1. For the main stem of the Kanawha River only, the minimum flow shall be 1,896 cfs at mile point 72.

7.2.d.20.2. Except the stretch between the mouth of Little Scary Creek (K-31) and the Little Scary impoundment shall not have Water Use Category A. The following site-specific numeric criterion shall apply to that section: selenium not to exceed 62 ug/1 and copper not to exceed 105 ug/1 as a daily maximum nor 49 ug/1 as a 4-day average.

7.2.d.20.3. Except for Simmons Creek (K-54) from its mouth to a point 1200 feet upstream to which the following site-specific numeric criterion shall apply: a maximum daily temperature not to exceed 38°C (100°F) nor a monthly average temperature to exceed 34°C. This exception shall apply until the successful completion of a study conducted pursuant to section 316(a) of the Federal Clean Water Act or May 30, 1998, whichever comes first.

7.2.d.21. Pocatalico River - (Reserved)

7.2.d.22. Coal River - (Reserved)

7.2.d.23. Elk River - (Reserved)

7.2.d.24. Gauley River - (Reserved)

7.2.d.25. Meadow River - (Reserved)

7.2.d.26. Cherry River - (Reserved)

7.2.d.27. Cranberry River - (Reserved)

7.2.d.28. Williams River - (Reserved)

7.2.d.29. New River - (Reserved)

7.2.d.30. Greenbrier River - (Reserved)

7.2.d.31. Bluestone River - (Reserved)

7.2.d.32. Bluestone Lake

7.2.d.32.1. Category E Water Uses are deleted in Bluestone Lake and temperature rise shall be limited to no more than 3°F above natural not to exceed 81°F at any time during the months of May through November and not to exceed 73°F at any time during December through April.

7.2.d.33. East River - (Reserved)

7.2.d.34. Guyandotte River - (Reserved)

7.2.d.35. Mud River - (Reserved)

7.2.d.36. Big Sandy River - (Reserved)

7.2.d.37. Tug Fork River - (Reserved)

§46-1-8. Specific Water Quality Criteria.

8.1. Charts of specific water quality criteria are included in Appendix E.

8.1.a. Specific state (i.e. total, total recoverable, dissolved valence, etc.) of any parameter to be analyzed shall follow 40 CFR 136, Guidelines Establishing Test Procedures for Analysis of Pollutants Under the Clean Water Act, as amended, June 15, 1990. (See also Section 7.3 of 47 CSR 10 - National Pollutant Discharge Elimination System (NPDES) Program.)

8.1.b. Compliance with aquatic life water quality criteria expressed as dissolved metal shall be determined based on dissolved metals concentrations.

8.1.b.1. The aquatic life criteria for all metals listed in Appendix E, Table 2 shall be converted to a dissolved concentration by multiplying each numerical value or criterion equation from Appendix E by the appropriate conversion factor (CF) from Appendix E, Table 2.

8.1.b.2. Permit limits based on dissolved metal water quality criteria shall be prepared in accordance with the U.S. EPA document "The Metals Translator: Guidance For Calculating A Total Recoverable Permit limit From A Dissolved Criterion, June 1996: (translator document).

8.1.b.3. NPDES permit applications may petition the Office of Water Resources of the Division of Environmental Protection (OWR) to develop a site-specific translator consistent with the provisions in this section. The OWR may, on a case-by-case basis require an applicant applying for a translator to conduct appropriate sediment monitoring through SEM/AVS ratio, bioassay or other approved methods to evaluate effluent limits that prevent toxicity to aquatic life.

8.1.c. An "X" or numerical value in the use columns of Appendix E shall represent the applicable criteria.

8.1.d. Charts of water quality criteria in Appendix E shall be applied in accordance with major stream and use applications, Sections 6 and 7.

8.2. Criteria for Toxicants.

8.2.a. Toxicants which are carcinogenic have human health criteria (Water Use Categories A and C) based upon an estimated risk level of one additional cancer case per one million persons (10^{-6}) and are indicated in Appendix E with an endnote (^b).

8.2.b. A final determination on the critical design flow for carcinogens is not made in this rule, in order to permit further review and study of that issue. Following the conclusion of such review and study, the Legislature may again take up the authorization of this rule for purposes of addressing the critical design flow for carcinogens: Provided, That until such time as the review and study of the issue is concluded or until such time as the Legislature may again take up the authorization of this rule, the regulatory requirements for determining effluent limits for carcinogens shall remain as they were on the date this rule was proposed.

8.3. Variances from Specific Water Quality Criteria. A variance from numeric criteria may be granted to a discharger if it can be demonstrated that the conditions outlined in subsections 6.1.b.A - F limit the attainment of one or more specific water quality criteria. Variances shall apply only to the discharger to whom they are granted and shall be reviewed by the Board at least every three years. In granting a variance, the requirements for revision of water quality standards in 46 CSR Series 6 shall be followed.

8.4. Site-specific numeric criteria. The Board may establish numeric criteria different from those set forth in Appendix E for a stream or stream segment upon a demonstration that existing numeric criteria are either over-protective or under-protective of the aquatic life residing in the stream or stream segment. A site-specific numeric criterion will be established only where the numeric criterion will be fully protective of the aquatic life and the existing and designated uses in the stream or stream segment. The site-specific numeric criterion may be established by conducting a Water Effect Ratio study pursuant to the procedures outlined in EPAs "Interim Guidance on the Determination and Use of Water-Effect Ratios for Metals" (February 1994); other methods may be used with prior approval by the Board. In adopting site-specific numeric criteria, the requirements for revision of water quality standards set forth in 46 CSR 6 shall be followed.

§46-1-9. Establishment Of Safe Concentration Values.

When a specific water quality standard has not been established by these rules and there

is a discharge or proposed discharge into waters of the State, the use of which has been designated a Category B1, B2, B3 or B4, such discharge may be regulated by the chief where necessary to protect State water through establishment of a safe concentration value as follows:

9.1. Establishment of a safe concentration value shall be based upon data obtained from relevant aquatic field studies, standard bioassay test data which exists in substantial available scientific literature, or data obtained from specific tests utilizing one (1) or more representative important species of aquatic life designated on a case-by-case basis by the chief and conducted in a water environment which is equal to or closely approximates that of the natural quality of the receiving waters.

9.2. In those cases where it has been determined that there is insufficient available data to establish a safe concentration value for a pollutant, the safe concentration value shall be determined by applying the appropriate application factor as set forth below to the 96-hour LC 50 value. Except where the chief determines, based upon substantial available scientific data that an alternate application factor exists for a pollutant, the following appropriate application factors shall be used in the determination of safe concentration values:

9.2.a. Concentrations of pollutants or combinations of pollutants that are not persistent and not cumulative shall not exceed 0.10 (1/10) of the 96-hour LC 50.

9.2.b. Concentrations of pollutants or combinations of pollutants that are persistent or cumulative shall not exceed 0.01 (1/100) of the 96-hour LC 50.

9.3. Persons seeking issuance of a permit pursuant to these rules authorizing the discharge of a pollutant for which a safe concentration value is to be established using special bioassay tests pursuant to subsection 9.1 of this section shall perform such testing as approved by the chief and shall submit all of the following in writing to the chief:

9.3.a. A plan proposing the bioassay testing to be performed.

9.3.b. Such periodic progress reports of the testing as may be required by the chief.

9.3.c. A report of the completed results of such testing including, but not limited to, all data obtained during the course of testing, and all calculations made in the recording, collection, interpretation and evaluation of such data.

9.4. Bioassay testing shall be conducted in accordance with methodologies outlined in the following documents: U.S. EPA Office of Research and Development Series Publication, Methods for Measuring the Acute Toxicity (EPA/600/4-90/027F, August 1993, 4th Edition) or Short Term Methods for Estimating Chronic Toxicity of Effluents and Receiving Waters to

Freshwater Organisms (EPA/600/4-89/001), March 1989; Standard Methods for the Examination of Water and Wastewater (18th Edition); or ASTM Practice E 729-88 for Conducting Acute Toxicity Tests with Fishes, Macroinvertebrates and Amphibians as published in Volume 11.04 of the 1988 Annual Book of ASTM Standards. Test waters shall be reconstituted according to recommendations and methodologies specified in the previously cited references or methodologies approved in writing by the chief.

APPENDIX A
CATEGORY B-2 - TROUT WATERS

This list contains known trout waters and is not intended to exclude any waters which meet the definition in Section 2.16.

<u>River Basin</u>	<u>County</u>	<u>Stream</u>
James River		
J	Monroe	South Fork Potts Creek
Potomac River		
P	Jefferson	Town Run
P	"	Rocky Marsh Run
P	Berkeley	Opequon Creek
P	"	Tuscarora Creek (Above Martinsburg)
P	"	Middle Creek (Above Route 30 Bridge)
P	"	Mill Creek
P	"	Hartland Run
P	"	Mill Run
P	"	Tillance Creek
P	Morgan	Meadow Branch
PS	Jefferson	Flowing Springs Run (Above Halltown)
PS	"	Cattail Run
PS	"	Evitt's Run
PS	"	Big Bullskin Run
PS	"	Long Marsh Run
PC	Hampshire	Cold Stream
PC	"	Edwards Run and Impoundment
PC	"	Dillons Run
PC	Hardy	Lost River
PC	"	Camp Branch
PC	"	Lower Cove Run
PC	"	Moores Run
PC	"	North River (Above Rio)
PC	"	Waites Run
PC	"	Trout Run
PC	"	Trout Pond (Impoundment)
PC	"	Warden Lake (Impoundment)
PC	"	Rock Cliff Lake (Impoundment)
PSB	Hampshire	Mill Creek
PSB	"	Mill Run
PSB	Hardy	Dumpling Creek
PSB	Grant-Pendleton	North Fork South Branch
PSB	Grant	North Fork Lunice Creek
PSB	"	South Fork Lunice Creek
PSB	"	South Mill Creek (Above Hiser)
PSB	"	Spring Run

PSB	Pendleton	Hawes Run (Impoundment)
PSB	"	Little Fork
PSB	"	South Branch (Above North Fork)
PSB	"	Senena Creek
PSB	"	Laurel Fork
PSB	"	Big Run
PNB	Mineral	North Fork Patterson Creek
PNB	"	Fort Ashby (Impoundment)
PNB	"	New Creek
PNB	"	New Creek Dam 14 (Impoundment)
PNB	"	Mill Creek (Above Markwood)

Monongahela River

M	Monongalia-Marion	Whiteday Creek (Above Smithtown)
MC	Monongalia	Morgan Run
MC	"	Coopers Rock (Impoundment)
MC	"	Blaney Hollow
MC	Preston	Laurel Run
MC	"	Elsey Run
MC	"	Saltlick Creek
MC	"	Buffalo Creek
MC	"	Wolf Creek
MC	Tucker	Clover Run
MC	"	Elklick Run
MC	"	Horseshoe Run
MC	"	Maxwell Run
MC	"	Red Creek
MC	"	Slip Hill Mill Branch
MC	"	Thomas Park (Impoundment)
MC	"	Blackwater River (Above Davis)
MC	Randolph	Camp Five Run
MC	"	Dry Fork (Above Otter Creek)
MC	"	Glady Fork
MC	"	Laurel Fork
MC	"	Gandy Creek (Above Whitmer)
MC	"	East Fork Glady Fork (Above C & P Compressor Station)
MC	Randolph	Shavers Fork (Above Little Black Fork)
MC	"	Three Spring Run
MC	"	Spruce Knob Lake (Impoundment)
MW	Harrison	Dog Run (Pond)
MW	Lewis	Stonecoal
MT	Barbour	Brushy Fork (Above Valley Furnace)
MT	"	Teter Creek Lake (Impoundment)
MT	"	Mill Run
MT	Taylor-Barbour	Tygart Lake Tailwaters (Above Route

MT	Preston	119 Bridge)
MT	Randolph	Roaring Creek (Above Little Lick Branch)
MT	"	Tygart River (Above Huttonsville)
MT	"	Elkwater Fork
		Big Run
MTB	Upshur-Randolph-Lewis	Right Fork Buckhannon River
MTB	Upshur	Buckhannon River (Above Beans Mill)
MTB	Upshur	French Creek
MTB	Upshur-Randolph	Left Fork Right Fork
MTN	Upshur	Right Fork Middle Fork River
MTM	Randolph	Middle Fork River (Above Cassity)
MY	Preston	Rhine Creek
Little Kanawha River		
LK	Upshur	Left Fork-Right Fork Little Kanawha River)
LK	Upshur-Lewis	Little Kanawha River (Above Wildcat)
Kanawha river		
KE	Braxton	Sutton Reservoir
KE	"	Sutton Lake Tailwaters (Above Route 38/5 Bridge)
KE	Webster	Back Fork
KE	"	Desert Fork
KE	"	Fall Run
KE	"	Laurel Fork
KE	"	Left Fork Holly River
KE	"	Sugar Creek
KE	"	Elk River (Above Webster Springs)
KC	Raleigh	Stephens Lake (Impoundment)
KC	"	Marsh Fork (Above Sundial)
KG	Nicholas	Summersville Reservoir (Impoundment)
KG	"	Summersville Tailwaters (Above Collison Creek)
KG	Nicholas	Deer Creek
KG	Randolph-Webster	Gauley River (Above Moust Coal Tipple)
KG	Fayette	Glade Creek
KG	Nicholas	Hominy Creek
KG	"	Anglins Creek
KG	Greenbrier	Big Clear Creek
KG	"	Little Clear Creek and Laurel Run
KG	"	Meadow Creek
KG	Fayette	Wolf Creek
KG	Nicholas	Cherry River
KG	Greenbrier-Nicholas	Laurel Creek
KG	" "	North Fork Cherry River

KG	Greenbrier	Summit Lake (Impoundment)
KG	Greenbrier-Nicholas	South Fork Cherry River
KGC	Pocahontas-Webster-Nicholas	Cranberry River
KGC	Pocahontas	South Fork Cranberry River
KGW	Pocahontas	Tea Creek
KGW	Pocahontas-Webster	Williams River (Above Dyer)
KN	Raleigh	Glade Creek
KN	Summers	Meadow Creek
KN	Fayette	Mill Creek
KN	"	Laurel Creek (Above Cotton Hill)
KN	Raleigh	Pinch Creek
KN	Monroe	Rich Creek
KN	"	Turkey Creek
KN	Fayette	Dunloup Creek (Downstream from Harvey Sewage Treatment Plant)
KN	Mercer	East River (Above Kelleysville)
KN	"	Pigeon Creek
KN	Monroe	Laurel Creek
KNG	Monroe	Kitchen Creek (Above Gap Mills)
KNG	Greenbrier	Culverson Creek
KNG	"	Milligan Creek
KNG	Greenbrier-Monroe	Second Creek (Rt. 219 Bridge to Nickell's Mill)
KNG	Greenbrier	North Fork Anthony Creek
KNG	"	Spring Creek
KNG	"	Anthony Creek (Above Big Draft)
KNG	Pocahontas	Watoga Lake
KNG	"	Beaver Creek
KNG	"	Knapp's Creek
KNG	"	Hills Creek
KNG	"	North Fork Deer Creek (Above Route 28/5)
KNG	"	Deer Creek
KNG	"	Sitlington Creek
KNG	"	Stoney Creek
KNG	"	Swago Creek
KNG	"	Buffalo Fork (Impoundment)
KNG	"	Seneca (Impoundment)
KNG	"	Greenbrier River (Above Hosterman)
KNG	"	West Fork-Greenbrier River (Above the impoundment at the tannery)
KNG	"	Little River-East Fork
KNG	"	Little River-West Fork
KNG	"	Five Mile Run
KNG	"	Mullenax Run
KNG	"	Abes Run
KNB	Mercer	Marsh Fork

KNB	"	Camp Creek
OG	Wyoming	Pinnacle creek
BST	McDowell	Dry Fork (Above Canebrake)

APPENDIX B

This list contains known waters used as public water supplies and is not intended to exclude any waters as described in Section 6.2.

<u>River Basin</u>	<u>County</u>	<u>Operating Company</u>	<u>Source</u>
Shenandoah River			
S	Jefferson	Charlestown Water	Shenandoah River
Potomac River			
P	Jefferson	3-M Company	Turkey Run
P	"	Shepherdstown Water	Potomac River
P	"	Harpers Ferry Water	Elk Run
P	Berkeley	DuPont Potomac River Works	Potomac River
P	"	Berkeley County PSD	Le Feure Spring
P	"	Opequon PSD	Quarry Spring
P	"	Hedgesville PSD	Speck Spring
P	Morgan	Paw Paw Water	Potomac River
PSB	Hampshire	Romney Water	South Branch Potomac River
PSB	"	Peterkin Conference Center	Mill Run
PSB	Hardy	Moorefield Municipal Water	South Fork River
PSB	Pendleton	U.S. Naval Radio Sta.	South Fork River
PSB	"	Circleville Water Inc.	North Fork of South Branch, Potomac River
PSB	Grant	Mountain Top PSD	Mill Creek, Impoundment
PSB	"	Petersburg Municipal Water	South Branch, Potomac River
PNB	Grant	Island Creek Coal	Impoundment
PNB	Mineral	Piedmont Municipal Water	Savage River, Maryland
PNB	"	Keyser Water	New Creek
PNB	"	Fort Ashby PSD	Lake
Monongahela River			
M	Monongalia River	Morgantown Water Comm.	Colburn Creek & Monongahela
M	"	Morgantown Ordinance Works	Monongahela River
M	Preston	Preston County PSD	Deckers Creek
M	Monongalia	Blacksville # 1 Mine	Impoundment
M	"	Loveridge Mine	Impoundment
M	"	Consolidation Coal Co.	Impoundment
M	Preston	Mason Town Water	Block Run

MC	Preston	Fibair Inc.	Impoundment
MC	Monongalia	Cheat Neck PSD	Cheat Lake
MC	"	Lakeview County Club	Cheat Lake-Lake Lynn
MC	"	Union Districk PSD	Cheat Lake-Lake Lynn
MC	"	Cooper's Rock State Park	Impoundment
MC	Preston	Kingwood Water	Cheat River
MC	"	Hopemount State Hosp.	Snowy Creek
MC	"	Rowlesburg Water	Keyser Run & Cheat River
MC	"	Albright	Cheat River
MC	Tucker	Parsons Water	Shavers & Elk Lick Fork
MC	"	Thomas Municipal	Thomas Reservoir
MC	"	Hamrick PSD	Dry Fork
MC	"	Douglas Water System	Long Run
MC	"	Davis Water	Blackwater River
MC	"	Hambleton Water System	Roaring Creek
MC	"	Canaan Valley State Park	Blackwater River
MC	Pocahontas	Cheat Mt. Sewer	Shavers Lake
MC	"	Snowshoe Co. Water	Shavers Fork
MC	Randolph	Womelsdorf Water	Yokum Run
MW	Harrison	Lumberport Water	Jones Run
MW	"	Clarksburg Water Bd.	West Fork River
MW	"	Bridgeport Mun. Water	Deacons & Hinkle Creek
MW	"	Salem Water Board	Dog Run
MW	"	West Milford Water	West Fork Ricer
MW	Lewis	W.V. Water-Weston District	West Fork River
MW	"	Jackson's Mill Camp	Impoundment
MW	"	West Fork River PSD	West Fork River
MW	"	Kennedy Compressor Station	West Fork River
MW	"	Jane Lew Water Comm.	Hackers Creek
MW	Harrison	Bel-Meadow Country Club	Lake
MW	"	Harrison Power Station	West Fork River
MW	"	Oakdale Portal	Impoundment
MW	"	Robinson Port	Impoundment
MT	Marion	Fairmont Water Comm.	Tygart River
MT	"	Mannington Water	Impoundment
MT	"	Monongah Water Works	Tygart River
MT	"	Eastern Assoc. Coal Corp.	Impoundment
MT	"	Four States Water	Impoundment
MT	Harrison	Shinnston Water Dept.	Tygart River
MT	Taylor	Grafton Water	Tygart River-Lake
MT	Barbour	Phillippi Water	Tygart River
MT	"	Bethlehem Mines Corp.	Impoundment
MT	"	Belington Water Works	Tygart River & Mill Run Lake

	MT	Randolph	Elkins Municipal Water	Tygart River	
	MT	"	Beverly Water	Tygart river	
	MT	"	Valley Water	Tygart River	
	MT	"	Huttonsville Medium Security Prison	Tygart River	
	MT	"	Mill Creek Water	Mill Creek	
	MTB	Upshur	Buckhannon Water Board	Buckhannon River	
Ohio River					
	O	Zone 1	Hancock	Chester Water & Sewer	Ohio River
	O	"	Brooke	City of Weirton	Ohio River
	O	"	"	Weirton Steel Division	Ohio River
	O	"	Ohio	Wheeling Water	Ohio River
	O	"	Tyler	Sistersville Mun. Water	Ohio River
	O	"	Pleasants	Pleasants Power Station	Ohio River
	O	"	Cabel	Huntington Water Corp.	Ohio River
	O	"	Marshall	Mobay Chemical Co.	Ohio River
	O	"	Wood	E. I. DuPont	Ohio River
	O	Zone 2	Marshall	Cameron Water	Glass House Hollow
	O	"	"	New Urindahana Water System	Wheeling Creek
	O	"	Wetzel	Pine Grove Water	North Fork, Fishing Creek
	O	"	Marshall	Consolidated Coal Co.	Impoundment
	O	"	Tyler	Middlebourne Water	Middle Island Creek
	O	"	Doddridge	West Union Mun. Water	Middle Island Creek
	O	"	Mason	Hidden Valley Country	Lake/Impoundment
	O	"	Jackson	Ripley Water	Mill Creek
	IO	"	Wayne	Wayne Municipal Water	Twelve Pole Creek
	O	"	"	East Lynn Lake	East Lynn Lake
	O	Zone 2	Wayne	Monterey Coal Co.	Impoundment
Little Kanawha					
	LK	Wood	Claywood Park PSD	Little Kanawha River	
	LK	Calhoun	Grantsville Mun. Water	Little Kanawha River	
	LK	Gilmer	Glenville Utility	Little Kanawha River	
	LK	"	Consolidated Gas Compressor	Steer Creek	
	LK	Braxton	Burnsville Water Works	Little Kanawha river	
	LK	Roane	Spencer Water	Spring Creek & Mile Tree Reservoir	
	LK	Wirt	Elizabeth Water	Little Kanawha River	
	LKH	Ritchie	Cairo Water	North Fork Hughes River	
	LKH	"	Harrisville Water	North Fork Hughes River	
	LKH	"	Pennsboro Water	North Fork Hughes River	

Kanawha River

K	Putnam	Buffalo Water	Cross Creek
K	"	Winfield Water	Poplar Fork & Crooked Creek
K	"	South Putnam PSD	Poplar Fork & Crooked Creek
K	Kanawha	Cedar Grove Water	Kanawha River
K	"	Pratt Water	Kanawha River
K	Fayette	Armstrong PSD PO-K1-CO-EL	Kanawha River & Gum Hollow
K	"	Kanawha Water Co.- Beards Fork	Unnamed Tributary Kanawha River
K	Kanawha	Midland Trail School	Impoundment
k	"	Cedar Coal Co.	Impoundment
K	Fayette	Elkem Metals Co.	Kanawha River
K	"	Deepwater PSD	Kanawha River
K	"	Kanawha Falls PSD	Kanawha River
K	"	W.V. Water-Montgomery	Kanawha River

Pocatalico river

KP	Kanawha	Sissonville PSD	Pocatalico River
KP	Roane	Walton PSD	Silcott Fork Dam

Coal River

KC	Kanawha	St. Albans Water	Coal River
KC	"	Washington PSD	Coal River
KC	Lincoln	Lincoln PSD	Coal River
KC	Boone	Coal River PSD	Coal River
KC	"	Whitesville PSD	Coal River
KC	Raleigh	Armco Mine 10	Marsh Fork
KC	"	Armco Steel-Montc. Stickney	Coal River
KC	Raleigh	Peabody Coal	Coal River
KC	"	Stephens Lake Park	Lake Stephens
KC	Boone	W.V. Water-Madison Dist.	Little Coal River
KC	"	Van PSD	Pond Fork
KC	Raleigh	Consol. Coal Co.	Workmans Creek
KC	Boone	Water Ways Park	Coal River

Elk River

KE	Kanawha	Clendenin Water	Elk River
KE	"	W.V. Water-Kanawha Valley District	Elk River
KE	Kanawha	Pinch PSD	Elk River
KE	Clay	Clay Waterworks	Elk River
KE	"	Prociuous PSD	Elk River
KE	Braxton	Flatwoods-Canoe Run PSD	Elk River
KE	"	Sugar Creek PSD	Elk River
KE	"	W.V. Water-Gassaway Dist.	Elk River
KE	"	W.V. Water-Sutton Dist.	Elk River
KE	Webster	W.V. Water-Webster Springs	Elk River
KE		Holly River State Park	Holly River

Gauley River

KG	Nicholas	Craigsville PSD	Gauley River
KG	"	Summersville Water	Impoundment/Muddlety Creek
KG	"	Nettie-Leivasy PSD	Jim Branch
KG	Webster	Cowen PSD	Gauley River
KG	Nicholas	Wilderness PSD	Anglins Creek & Meadow River
KG	"	Richwood Water	North Fork Cherry River

New river

KN	Fayette	Ames Heights Water	Mill Creek
KN	"	Mt. Hope Water	Impounded Mine (Surface)
KN	"	Ansted Municipal Water	Mill Creek
KN	"	Fayette Co. Park	Impoundment
KN	"	New River Gorge Campground	Impoundment
KN	"	Fayetteville Water	Wolfe Creek
KN	Raleigh	Beckley Water	Glade Creek
KN	"	Westmoreland Coal Co.	Farley Branch

Bluestone River

KNB	Summers	Jumping Branch-Nimitz	Mt. Valley Lake
KNB	"	Bluestone Conf. Center	Bluestone Lake
KNB	"	Pipestem State Park	Impoundment
KNB	Mercer	Town of Athens	Impoundment
KNB	"	Bluewell PSD	Impoundment
KNB	"	Bramwell Water	Impoundment
KNB	"	Green Valley-Glenwood PSD	Bailey Reservoir
KNB	"	Kelly's Tank	Spring
KNB	"	W.V. Water Princeton	Impoundment/Brusch Creek
KNB	"	Lashmeet PSD	Impoundment
KNB	"	Pinnacle Water Assoc.	Mine
KNB	"	W.V. Water Bluefield	Impoundment

Greenbrier River

KNG	Summers	W.V. Water Hinton	Greenbrier River & New River
KNG	"	Big Bend PSD	Greenbrier River
KNG	Greenbrier	Alderson Water Dept.	Greenbrier River
KNG	"	Ronceverte Water	Greenbrier River
KNG	"	Lewisburg Water	Greenbrier river
KNG	Pocahontas	Denmar State Hospital Water	Greenbrier River
KNG	"	City of Marlinton Water	Knapp Creek
KNG	"	Cass Scenic Railroad	Leatherbark Creek

KNG	"	Upper Greenbrier PSD	Greenbrier River
KNG	"	The Hermitage	Greenbrier
Guyandotte River			
OG	Cabell	Salt Rock PSD	Guyandotte River
OG	Lincoln	West Hamlin Water	Guyandotte River
OG	Logan	Logan Water Board	Guyandotte River
OG	"	Man Water Works	Guyandotte River
OG	"	Buffalo Creek PSD	Buffalo Creek/ Mine/Wells
OG	Logan	Chapmanville	Guyandotte River
OG	"	Logan PSD	Whitman Creek/ Guyandotte River
OG	Mingo	Gilbert Water	Guyandotte River
OG	Wyoming	Oceana Water	Laurel Fork
OG	"	Glen Rogers PSD	Impoundment
OG	"	Pineville Water	Pinnacle Creek/ Guyandotte River
OG	Raleigh	Raleigh Co. PSD-Amigo	Tommy Creek
OMG	Cabell	Milton Water Works	Guyandotte River
OMG	"	Culloden PSD	Indian Fork Creek
OMG	Putnam	Hurricane Municipal Water	Impoundment
OMG	"	Lake Washington PSD	Lake Washington
Big Sandy River			
BS	Wayne	Kenova Municipal Water	Big Sandy River
BS	"	Fort Gay Water	Tug Fork
BST	Mingo	Kermit Water	Tug Fork
BST	"	Matewan Water	Tug Fork
BST	"	A & H Coal Co., Inc.	Impoundment
BST	"	Williamson Water	Impoundment
BST	McDowell	City of Welch	Impoundment/Wells
BST	"	City of Gary	Impoundment/Mine

APPENDIX C
CATEGORY E-3 - POWER PRODUCTION

This list contains known power production facilities and is not intended to exclude any waters as described in Section 6.6.c.

<u>River Basin</u>	<u>County</u>	<u>Station Name</u>	<u>Operating Company</u>
Monongahela River			
M	Monongalia	Fort Martin Power Station	Monongahela Power
M	Marion	Rivesville Station	Monongahela Power
MC	Preston	Albright Station	Monongahela Power
Potomac	Grant	Mt. Storm Power Station	Virginia Electric & Power Company
Ohio River			
O - Zone 1	Wetzel	Hannibal (Hydro)	Ohio Power
O " "	Marshall	Kamer	Ohio Power
O " "	"	Mitchell	Ohio Power
O " "	Pleasants	Pleasants Station	Monongahela Power
O " "	"	Willow Island Station	Monongahela Power
O " "	Mason	Phillip Sporn Plant	Central Operating (AEP)
O " "	"	Racine (Hydro)	Ohio Power
O " "	"	Mountaineer	Appalachian Power Co.
K	Putnam	Winfield (Hydro)	Appalachian Power Co.
K	Kanawha	Marmet (Hydro)	Appalachian Power Co.
K	"	London (Hydro)	Appalachian Power Co.
K	"	Kanawha River	Appalachian Power Co.
K	"	John E. Amos	Appalachian Power Co.

APPENDIX D
CATEGORY C - WATER CONTACT RECREATION

This list contains waters known to be used for water contact recreation and is not intended to exclude any waters as described in Section 6.4.

<u>River Basin</u>	<u>Stream Code</u>	<u>Stream</u>	<u>County</u>
Shenandoah	S	Shenandoah River	Jefferson
Potomac	P	Potomac River	Jefferson
	P	" "	Hampshire
	P	" "	Berkeley
	P	" "	Morgan
	P-9	Sleepy Creek & Meadow Branch	Berkeley
	P-9-G-1	North Fork of Indian Run	Morgan
South Branch	PSB	South Branch of Potomac River	Hampshire
	PSB	" "	Hardy
	PSB	" "	Grant
	PSB-21-X	Hawes Run	Pendleton
	PSB-25-C-2	Spring Run	Grant
	PSB-28	North Fork South Branch Potomac River	Grant
North Branch	PNB	North Branch of Potomac River	Mineral
	PNB-4-EE	North Fork Patterson Creek	Grant
	PNB-7-H	Linton Creek	Grant
	PNB-17	Stoney River-Mt. Storm Lake	Grant
	PC	Cacapon River	Hampshire
Monongalia			
Cheat	MC	Cheat Lake/Cheat river	Monongalia/Preston
	MC	Alpine Lake	Preston
	MC-6	Coopers Rock Lake/Quarry Run	Monongalia
	MC-12	Big Sandy Creek	Preston
	MSC	Shavers Fork	Randolph
	MTN	Middle Fork River	Barbour/Randolph/Upshur
	MW	West Fork River	Harrison

	MW-18	Stonecoal Creek/ Stonecoal Lake	Lewis
Ohio	O	Ohio River	Brooke/Cabell/ Hancock/Jackson/ Marshall/Mason/ Ohio/Pleasants/ Tyler/Wayne/Wood/ Wetzel
	O-2-H	Beech Fork of Twelvepole Creek/Beech Fork Lake	Wayne
	O-2-Q	East Fork of Twelvepole Creek/East Lynn Lake	Wayne
	O-3	Fourpole Creek	Cabell
	O-21	Old Town Creek/ McClintic Ponds	Mason
	Omi	Middle Island Creek/ Crystal Lake	Doddridge
	OG	Guyandotte River	Cabell
	OG	Guyandotte River/ R. D. Bailey Lake	Wyoming
	OGM	Mud River	Cabell
Little Kanawha	LK	Little Kanawha River/ Burnsville Lake	Braxton
Kanawha	K	Kanawha River	Fayette/Kanawha/ Mason/Putnam
	K-1	Unnamed Tributary Krodel Lake	Mason
	KC KC-45-Q	Coal River Stephens Branch/ Lake Stephens	Kanawha Raleigh
	KE	Elk River	Kanawha/Clay/ Braxton/Webster/ Randolph
	KE	Sutton lake	Braxton
	KN	New River	Fayette/Raleigh/ Summers
	KN-26-F	Little Beaver Creek	Raleigh
	KNG	Greenbrier River	Greenbrier/Pocahontas/ Summers

KNG-23-E-1	Little Devil Creek/ Moncove Lake	Monroe
KNG-28 KNG-28-P	Anthony Creek Meadow Creek/ Lake Sherwood	Greenbrier Greenbrier
KNB	Bluestone River/ Bluestone Lake	Summers
KG KG	Gauley River Gauley River/ Summersville Lake	Webster Nicholas
KGW	Williams River	Webster

APPENDIX E

PARAMETER	USE DESIGNATION					
	AQUATIC LIFE			HUMAN HEALTH		ALL OTHER USES
	B1, B4	B2	CHRON ²	ACUTE ¹	CHRON ²	
						ACUTE ¹

8.1 Aluminum (ug/l) Not to exceed:(Sec 7.2.d.B(b))	750			750				
8.2 Ammonia (ug/l): Un-ionized ammonia (UA) shall be determined from values of total ammonia-N, pH and temperature according to the following equation: $UA = \frac{1.2(\text{total ammonia-N})}{1 + 10^{(pKa-pH)}}$ where $pKa = 0.0902 + 2730/(273.2 + T)$ and $T = \text{temperature } (^{\circ}C)$ The concentration of un-ionized ammonia (NH3) shall not exceed 50 ug/l.								50

APPENDIX E

PARAMETER	USE DESIGNATION						
	AQUATIC LIFE				HUMAN HEALTH		
	B1, B4		B2		C ³	A ⁴	
	ACUTE ¹	CHRON ²	ACUTE ¹	CHRON ²			

8.2.1 Acute and chronic aquatic life criteria for ammonia shall be determined using the tables and formulae in the National Criteria section of USEPAs Ambient Water Quality Criteria for Ammonia - 1984 (EPA 440/5-85-001, January 1985)	X					X				
8.3 Antimony (ug/l) Not to exceed:								4300	14	
8.4 Arsenic ^b (ug/l) Not to exceed:								50	50	100
8.4.1 Dissolved Trivalent Arsenic Not to exceed:	360 x CF ⁵	190 x CF ⁵	360 x CF ⁵	190 x CF ⁵						
8.5 Barium (mg/l) Not to exceed:									1.0	
8.6 Beryllium (ug/l)	130					130				.0077

APPENDIX E

PARAMETER	USE DESIGNATION							ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH				
	B1, B4		B2	C ³	A ⁴	C ³	A ⁴	
	ACUTE ¹	CHRON ²	ACUTE ¹					

8.9 Copper (ug/l) Not to exceed:								1000	
8.9.1 The four-day average concentration of dissolved copper shall not exceed the value determined by the following equation ^a : $Cu = e^{(0.8549 \ln(\text{hardness}) - 1.465)} \times CF^5$		X				X			
8.9.2 The one-hour average concentration of dissolved copper shall not exceed the value determined by the following equation ^a : $Cu = e^{(0.9422 \ln(\text{hardness}) - 1.464)} \times CF^5$	X					X			
8.10 Cyanide (ug/l) (As free cyanide HCN+CN ⁻) Not to exceed:	22	5.0			22	5.0		5.0	
8.11 Dissolved Oxygen ^f : not less than 5 mg/l at any time.	X							X	X
8.11.1 Kanawha River main stem, Zone 1 - Not less than 4.0 mg/l at any time.	X								

APPENDIX E

PARAMETER	USE DESIGNINATION						
	AQUATIC LIFE			HUMAN HEALTH		ALL OTHER USES	
	B1, B4	B2	CHRON ²	ACUTE ¹	CHRON ²		C ³
						ACUTE ¹	
8.11.2 Ohio River main stem - the average concentration shall not be less than 5.0 mg/l per calendar day and shall not be less than 4.0 mg/l at any time or place outside any established mixing zone - provided that a minimum of 5.0 mg/l at any time is maintained during the April 15-June 15 spawning season.							
8.11.3. Not less than 7.0 mg/l in spawning areas and in no case less than 6.0 mg/l at any time.	X						
8.12 Fecal Coliform: Maximum allowable level of fecal coliform content for Primary Contact Recreation (either MPN or MF) shall not exceed 200/100 ml as a monthly geometric mean based on not less than 5 samples per month; nor to exceed 400/100 ml in more than ten percent of all samples taken during the month.				X			X

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PARAMETER	USE DESIGNATION							ALL OTHER USES	
	AQUATIC LIFE			HUMAN HEALTH			A ⁴		
	B1, B4		B2	C ³	A ⁴				
	ACUTE ¹	CHRON ²	ACUTE ¹		CHRON ²				
8.12.1 Ohio River main stem (zone 1) - During the non-recreational season (November through April only) the maximum allowable level of fecal coliform for the Ohio River (either MPN or MF) shall not exceed 2000/100 ml as a monthly geometric mean based on not less than 5 samples per month.							X		
8.13 Fluoride (mg/l) Not to exceed:								1.4	
8.13.1 Not to exceed 2.0 for category D uses									X
8.14, Dissolved Hexavalent chromium (ug/l) Not to exceed:	16 x CF ⁵	11 x CF ⁵	16 x CF ⁵	7.2 x CF ⁵				50	
8.15 Iron ^c (mg/l) Not to exceed:		1.5		0.5				1.5	
8.16 Lead (ug/l) Not to exceed:								50	

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PARAMETER	USE DESIGNATION						
	AQUATIC LIFE			HUMAN HEALTH		ALL OTHER USES	
	B1, B4	B2	C ³	A ⁴			
	ACUTE ¹	CHRON ²	ACUTE ¹	CHRON ²			

8.16.1 The four-day average concentration of dissolved lead shall not exceed the value determined by the following equation ^a : $Pb = e^{(1.273[\ln(\text{hardness})]-4.705)} \times CF^5$		X					
8.16.2 The one-hour average concentration of dissolved lead shall not exceed the value determined by the following equation ^a : $Pb = e^{(1.273[\ln(\text{hardness})]-1.46)} \times CF^5$				X			
8.17 Manganese (mg/l) Not to exceed:							1.0
8.17.1 Effluent limitations regarding Mn shall not apply where the applicant certifies the stream or stream segment is not category A water.							
8.18 Mercury The total organism body burden of any aquatic species shall not exceed 0.5 ug/g as methylmercury.						0.5	0.5
8.18.1 Total mercury in any unfiltered water sample shall not exceed (ug/l):	2.4			2.4		0.15	0.14

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PARAMETER	USE DESIGNATION										
	AQUATIC LIFE					HUMAN HEALTH					
	B1, B4		B2		CHRON ²	ACUTE ¹	CHRON ²	ACUTE ¹	C ³	A ⁴	ALL OTHER USES
	ACUTE ¹	CHRON ²	CHRON ²	ACUTE ¹							
8.18.2 Methylmercury (water column) Not to exceed (ug/l):		.012						.012			
8.19 Nickel (ug/l) Not to exceed:								4600	510		
8.19.1 The four-day average concentration of dissolved nickel shall not exceed the value determined by the following equation ^a : $Ni = e^{(0.846 \ln(\text{hardness}) + 1.1665)} \times CF^5$			X								
8.19.2 The one-hour average concentration of dissolved nickel shall not exceed the value determined by the following equation ^a : $Ni = e^{(0.846 \ln(\text{hardness}) + 3.361)} \times CF^5$											
8.20 Nitrate (as Nitrate-N) (mg/l)	X						X			10	
8.21 Nitrite (as Nitrite-N) (mg/l) Not to exceed:								.060			
8.22 Organics											
Chlordane ^b (ng/l)	2400	4.3					2400	4.3	0.46	0.46	0.46

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PARAMETER	USE DESIGNATION								
	AQUATIC LIFE				HUMAN HEALTH				
	B1, B4		B2		C ³		A ⁴		ALL OTHER USES
	ACUTE ¹	CHRON ²	ACUTE ¹	CHRON ²					
DDT ^b (ng/l)	1100	1.0	1100	1.0		0.024	0.024	0.024	
Aldrin ^b (ng/l)	3.0		3.0			0.071	0.071	0.071	
Dieldrin ^b (ng/l)	2500	1.9	2500	1.9		0.071	0.071	0.071	
Endrin (ng/l)	180	2.3	180	2.3		2.3	2.3	2.3	
Toxaphene ^b (ng/l)	730	0.2	730	0.2		0.73	0.73	0.73	
PCB ^b (ng/l)		14.0		14.0		0.045	0.044	0.045	
Methoxychlor (ug/l)		0.03		0.03		0.03	0.03	0.03	
Dioxin (2,3,7,8- TCDD) ^b (pg/l)						0.014	0.013	0.014	
Acrylonitrile ^b (ug/l)						0.66	0.059		
Benzene ^b (ug/l)						71	0.66		
1,2-dichlorobenzene (mg/l)						17	2.7		
1,3-dichlorobenzene (mg/l)						2.6	0.4		
1,4-dichlorobenzene (mg/l)						2.6	0.4		
2,4-dinitrotoluene ^b (ug/l)						9.1	0.11		
Hexachlorobenzene ^b (ng/l)						0.77	0.72		

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PARAMETER	USE DESIGNATION							
	AQUATIC LIFE				HUMAN HEALTH			
	B1, B4		B2		C ³		A ⁴	
	ACUTE ¹	CHRON ²	ACUTE ¹	CHRON ²				ALL OTHER USES
Carbon tetrachloride ^b (ug/l)						4.4	0.25	
Chloroform ^b (ug/l)	28,900	1,240	28,900	1,240		470	0.19	
Halomethanes (ug/l)						15.7	0.19	
1,2-dichloroethane ^b (ug/l)						99	0.035	
1,1,1-trichloroethane ^b (mg/l)							12	
1,1,1,2-tetrachloroethane (ug/l)		2400		2400		11	0.17	
1,1-dichloroethylene ^b (ug/l)						3.2	0.03	
Trichloroethylene ^b (ug/l)						81	2.7	
Tetrachloroethylene ^b (ug/l)						8.85	0.8	
Toluene ^b (mg/l)						200	6.8	
Polynuclear Aromatic Hydrocarbons (PAH) ^b (ug/l)						0.031	.0028	
Phthalate esters (ug/l)		3.0		3.0				
Vinyl chloride ^b (chloroethene)(ug/l)						525	2.0	
alpha-BHC (alpha-Hexachloro-cyclohexane) ^b (ug/l)						0.013	.0039	

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PARAMETER	USE DESIGNATION							ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH		CHRON ²	A ⁴	
	B1, B4		B2	C ³	A ⁴			
	ACUTE ¹	CHRON ²	ACUTE ¹					
beta-BHC(beta- Hexachloro- cyclohexane) ^b (ug/l)					0.046	0.014		
gamma-BHC (gamma- Hexachloro- cyclohexane) ^b (ug/l)	2.0	0.08	2.0	0.08	0.063	0.019		
Chlorobenzene (mg/l)					21	0.68		
Ethylbenzene (mg/l)					29	3.1		
Heptachlor ^b (ng/l)	520	3.8	520	3.8	0.21	0.21		
2-methyl-4,6- Dinitrophenol (ug/l)					765	13.4		
Fluoranthene (ug/l)					370	300		
8.22.1 The organic chemicals listed in §8.22 shall not exceed the specified water quality criteria. When the specified criteria are less than the practical laboratory quantification level, instream values will be calculated from discharge concentrations and flow rates and from fish body burden, where applicable.								

APPENDIX E

PARAMETER	USE DESIGNATION							ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH				
	B1, B4		B2	C ³	A ⁴			
	ACUTE ¹	CHRON ²	ACUTE ¹					
<p>8.22.2 The following body burden criteria shall not be exceeded in edible tissues of fish: Parameter Body Burden</p> <p>Chlordane 1.0 (ug/g) DDT 0.1 (ug/g) Aldrin - Dieldrin 0.3 (ug/g) Endrin 0.3 (ug/g) Toxaphene 1.0 (ug/g) PCB 2.0 (ug/g) Dioxin 6.4 (pg/g)</p>								
<p>8.23 pH^c No values below 6.0 nor above 9.0. Higher values due to photosynthetic activity may be tolerated.</p>	X							
<p>8.24 Phenol (ug/l) (except Category A) Not to exceed:</p>	10,200	2,560	10,200	2,560	10,200	2,560	3.5 mg/l	

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PARAMETER	USE DESIGNATION							ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH		C ³	A ⁴	
	B1, B4		B2	ACUTE ¹	CHRON ²			
	ACUTE ¹	CHRON ²	CHRON ²					
<p>8.25 Radioactivity: Gross Beta activity not to exceed 1000 picocuries per liter (pCi/l), nor shall activity from dissolved strontium-90 exceed 10 pCi/l, nor shall activity from dissolved alpha emitters exceed 3 pCi/l.</p>				X			X	
<p>8.25.1 Gross total alpha particle activity (including radium-226 but excluding radon and uranium shall not exceed 15 pCi/l and combined radium-226 and radium-228 shall not exceed 5pCi/l; provided that the specific determination of radium-226 and radium-228 are not required if dissolved particle activity does not exceed 5pCi/l; the concentration of tritium shall not exceed 20,000 pCi/l; the concentration of total strontium-90 shall not exceed 8 pCi/l in the Ohio River main stem.</p>	X						X	
<p>8.26 Selenium (ug/l) Not to exceed:</p>	20	5	5	20	5		10	

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PARAMETER	USE DESIGNATION							ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH				
	B1, B4		B2	C ³	A ⁴	C ³	A ⁴	
	ACUTE ¹	CHRON ²	ACUTE ¹					
8.27 Silver								
Hardness Silver (ug/l)								
0-50								
51-100								
101-200								
>201					X			
8.27.1								
0-50								
51-100								
101-200								
201-400								
401-500								
501-600					X			
8.27.2 The one-hour average concentration of dissolved silver shall not exceed the value determined by the following equation: $Ag = e^{(1.72(\ln(\text{hardness}) - 6.52))} \times CF^5$								
							X	
8.28 Temperature								
Temperature rise shall be								

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PARAMETER	USE DESIGNATION					
	AQUATIC LIFE			HUMAN HEALTH		
	B1, B4		B2	C ³		A ⁴
	ACUTE ¹	CHRON ²	ACUTE ¹	CHRON ²	ALL OTHER USES	
<p>limited to no more than 5°F above natural temperature, not to exceed 87°F at any time during months of May through November and not to exceed 73°F at any time during the months of December through April. During any month of the year, heat should not be added to a stream in excess of the amount that will raise the temperature of the water more than 5°F above natural temperature. In lakes and reservoirs, the temperature of the epilimnion should not be raised more than 3°F by the addition of heat of artificial origin. The normal daily and seasonal temperature fluctuations that existed before the addition of heat due to other natural causes should be maintained.</p>						

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PARAMETER	USE DESIGNATION							ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH		CHRON ²	ACUTE ¹	
	B1, B4	B2	C ³	A ⁴				
					ACUTE ¹			
8.28.1 For the Kanawha River Main Stem (K-1): Temperature rise shall be limited to no more than 5°F above natural temperature, not to exceed 90°F in any case.								
8.28.2 For the Bluestone R (KNB), Bluestone Lake (KN-60) East River (KNE), New River (KN), Gauley R. (KG) and Greenbrier River (KNG): Temperature rise shall be limited to no more than 5°F above natural temperature, not to exceed 81°F at any time during the months of May through November and not to exceed 73°F at any time during December through April.	X							
8.28.3 No heated effluents will be discharged in the vicinity of spawning areas. The maximum temperatures for cold waters are expressed in the following table: Daily Hourly Mean °F Max °F Oct-Apr 50 55 Sep-May 58 62 Jun-Aug 66 70				X				

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PARAMETER	USE DESIGNATION							
	AQUATIC LIFE				HUMAN HEALTH		ALL OTHER USES	
	B1, B4		B2		C ³		A ⁴	
	ACUTE ¹	CHRON ²	ACUTE ¹	CHRON ²				
8.28.4 For Ohio River Main Stem (01)(Section 7.1.d):								
Period Inst.								
Dates	Ave.	Max.						
Jan 1-31	45°F	50°F						
February	45	50						
March 1-15	51	56						
March 16-31	54	59						
April 1-15	58	64						
April 16-30	64	69						
May 1-15	68	73						
May 16-31	75	80						
June 1-15	80	85						
June 16-30	83	87						
July 1-31	84	89						
August 1-31	84	89						
Sept 1-15	84	87						
Sept 16-30	82	86						
Oct 1-15	77	82						
Oct 16-31	72	77						
Nov 1-30	67	72						
Dec 1-31	52	57						
8.29 Thallium (ug/l)						6.3		1.7

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PARAMETER	USE DESIGNATION						
	AQUATIC LIFE				HUMAN HEALTH		ALL OTHER USES
	B1, B4		B2	CHRON ²	C ³	A ⁴	
	ACUTE ¹	CHRON ²	ACUTE ¹				

8.30 Threshold odor Not to exceed a threshold odor number of 8 at 104°F as a daily average.		X				X		
8.31 Total Residual Chlorine (ug/l - measured by amperometric or equivalent method) Not to exceed:	19				11			
8.31.1 No chlorinated discharge allowed						X		
8.32 Turbidity No point or non-point source to West Virginia's waters shall contribute a net load of suspended matter such that the turbidity exceeds 10 NTU's over background turbidity when the background is 50 NTU or less, or have more than a 10% increase in turbidity (plus 10 NTU minimum) when the background turbidity is more than 50 NTUs.								

APPENDIX E

PARAMETER	USE DESIGNATION						
	AQUATIC LIFE				HUMAN HEALTH		ALL OTHER USES
	ACUTE ¹	B1, B4	B2	CHRON ²	ACUTE ¹	CHRON ²	
							C ³

<p>This limitation shall apply to all earth disturbance activities and shall be determined by measuring stream quality directly above and below the area where drainage from such activity enters the affected stream. Any earth disturbing activity continuously or intermittently carried on by the same or associated persons on the same stream or tributary segment shall be allowed a single net loading increase.</p>										
	X					X			X	
<p>8.32.1 This rule shall not apply to those activities at which Best Management Practices in accordance with the State's adopted 208 Water Quality Management Plan are being utilized, maintained and completed on a site specific basis as determined by the appropriate 208 cooperative or an approved Federal or State Surface Mining Permit is in effect. This exemption shall not apply to Trout Waters.</p>										
	X							X		X

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PARAMETER	USE DESIGNATION						ALL OTHER USES
	AQUATIC LIFE			HUMAN HEALTH		A ⁴	
	B1, B4		B2	C ³	A ⁴		
	ACUTE ¹	CHRON ²	ACUTE ¹				

8.33 The four-day average concentration of dissolved zinc shall not exceed the value determined by the following equation ^a : $Zn = e^{(0.8473(\ln(\text{hardness}))+0.7614)} \times CF^5$							
8.33.1 The one-hour average concentration of dissolved zinc shall not exceed the value determined by the following equation ^a : $Zn = e^{(0.8473(\ln(\text{hardness}))+0.8604)} \times CF^5$	X				X		

- 1 One hour average concentration not to be exceeded more than once every three years on the average, unless otherwise noted.
- 2 Four-day average concentration not to be exceeded more than once every three years on the average, unless otherwise noted.
- 3 These criteria have been calculated to protect human health from toxic effects through fish consumption, unless otherwise noted.
- 4 These criteria have been calculated to protect human health from toxic effects through drinking water and fish consumption, unless otherwise noted.
- 5 The appropriate Conversion Factor (CF) is a value used as a multiplier to derive the dissolved aquatic life criterion is found in Appendix E, Table 2.
 - a Hardness as calcium carbonate (mg/l). The minimum hardness allowed for use is this equation shall not be less than 25 mg/l, even if the actual ambient hardness is less than 25 mg/l. The maximum hardness value for use in this equation shall not exceed 400 mg/l even if the actual hardness is greater than 400 mg/l.

b Known or suspected carcinogen. Human health standards are for a risk level of 10^{-6}

c May not be applicable to wetlands (B4) - site-specific criteria are desirable.

APPENDIX E
TABLE 2

Conversion Factors

<u>Metal</u>	<u>Acute</u>	<u>Chronic</u>
Arsenic (III)	1.000	1.000
Cadmium	$1.136672 - [(\ln \text{ hardness})(0.041838)]$	$1.101672 - [(\ln \text{ hardness})(0.041838)]$
Chromium(VI)	0.982	0.962
Copper	0.960	0.960
Lead	$1.46203 - [(\ln \text{ hardness})(0.145712)]$	$1.46203 - [(\ln \text{ hardness})(0.145712)]$
Nickel	0.998	0.997
Silver	0.85	N/A
Zinc	0.978	0.986

APPENDIX F

ANTIDEGRADATION IMPLEMENTATION PROCEDURES

46-1-4A. Applicability

4A.1. The procedures herein are intended to apply to all activities that require a permit or a water quality certification pursuant to state or federal law, including Clean Water Act §402 NPDES permits, CWA §404 dredge and fill permits, any activities requiring a CWA §401 certification.

4A.2. Nonpoint source activities will be deemed to be in compliance with antidegradation requirements with the achievement of cost effective and reasonable best management practices in accordance with the West Virginia Nonpoint Source Management Plan.

4A.3. Application to Brownfields sites, Voluntary Remediation Clean-up sites and Groundwater variance sites.

4A.3.a. Where remediation efforts are being proposed for existing contaminated sites which do not constitute a new point source and where there is a potential for increased surface water impacts from contaminated groundwater not associated with direct point sources an antidegradation review will not be required.

4A.3.b. Where remediation efforts are being proposed for existing contaminated sites and where there is a potential for surface water impacts from activities resulting in new or increased discharges from the treatment of contaminated groundwater, an antidegradation review will be required.

4A.3.c. Where there is a request for a variance from groundwater standards pursuant to Title 47, Series 57 for existing sites where activities on those sites have the potential to impact surface water from contaminated groundwater, the socio-economic justification process required under §47-57.6.2.i will satisfy the requirements of sections 4C.6.a-c, herein.

46-1-4B. Tier 1 Protection Review Procedures. Tier 1 protection requires that existing uses and the level of water quality to protect those uses be maintained and protected. Tier 1 protection applies to all waters of the state.

4B.1. Determine the existing uses of the water.

4B.1.a. Identify the designated uses in §6.2-6.6 herein which apply to the water in question.

4B.1.b. Determine whether the water currently supports, or has supported since November 28, 1975, an existing use other than the designated uses in section §6.2.-6.6.

4B.1.c. Before any final action is taken, public notice will be provided by publication as a Class I legal advertisement in a qualified newspaper with the largest circulation for the county where the activity will occur. The notice will identify the action being considered, list all existing uses identified of the water, and call for comments from the public regarding other known existing uses. The cost of such publication will be borne by the applicant.

4B.2. Ensure maintenance and protection of water quality necessary to protect existing uses.

4B.2.a. Where a determination is made that the designated uses appropriately reflect the existing uses of the water, controls shall be applied as necessary to ensure that the appropriate numeric and narrative criteria established in this rule will be met.

4B.2.b. Where a determination is made that the designated uses do not appropriately reflect the existing uses of the water a determination as to whether numeric criteria for a related designated use would maintain water quality sufficient to protect the existing use shall be made.

4B.2.b.1. Where it is necessary to establish new criteria to protect an existing use, a proposal that appropriate revisions to the designated uses be adopted into the water quality standards shall be made to the Board at the earliest opportunity. However, no delay in Tier 1 water protection shall occur pending the reclassification action.

4B.3. All antidegradation review findings regarding uses of waters and protection of those uses shall be documented.

4B.4. Trading. A proposed activity that will result in a new or expanded source may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity. Where such trading occurs, Tier 1 requirements will be considered satisfied where the applicant can show that the level of water quality necessary to protect existing uses fully will be achieved. The basis of the trade will be documented through a total maximum daily load (TMDL) pursuant to CWA section 303(d) requirements, or through other appropriate measures.

46-1-4C. Tier 2 Protection Review Procedures (High Quality Waters) See section 46-1-4.1.b for a description of high quality waters.

4C.1. Determine whether a water is a Tier 2, high quality water.

4C.1.a. All waters not included in Tiers 2.5 and 3 will be considered high quality waters unless it can be demonstrated that the water quality is not better than necessary to attain both fishable (Category B) and swimmable (Category C) uses. If either the fishable or swimmable use is attained, the water is a high quality water.

4C.2. Determine whether the proposed activity will result in significant degradation of water quality.

4C.2.a. Significant degradation will be determined for any water quality parameter to be affected by the proposed activity on a parameter by parameter basis . The proposed activities will be considered to result in significant degradation and be subject to further Tier 2 requirements where significant degradation is projected for one or more parameters.

4C.2.a.1. For chemical condition evaluations:

4C.2.a.1.A. Any proposed activity that would increase the ambient concentration of any parameter more than 5% at critical flow conditions shall be considered significant degradation. Critical flow conditions are further defined as follows:

4C.2.a.1.A.1. For non-precipitation induced discharges the maximum permitted flow or maximum flow specified in the application for industrial activities and average design flow for municipal activities combined with the 7Q10 flow of the receiving stream.

4C.2.a.1.A.2. For precipitation induced discharges, a simple mass balance substituting drainage area for flow. Flow from disturbed areas will be assumed to be 2X that of undisturbed areas. $C_1A_1 + C_2(2A_2) = C_3A_3$. Where: A1 = undisturbed area, A2 = disturbed area, A3 = total area, C1 = ambient instream water quality, C2 (unknown), and C3 = ambient + 5%. Alternatively, other approved models may be used to determine impact to water quality due to precipitation induced discharges.

4C.2.a.2. The following circumstances shall not be considered to cause significant degradation:

4C.2.a.2.A. Temperature: provided that the temperature of a discharge complies with the temperature criteria in section 46-1-8.28 (Appendix E of this rule).

4C.2.a.2.B. Fecal coliform - provided that the fecal coliform concentrations in the discharge are established as 200/100 ml monthly average and 400/100 ml daily maximum.

4C.2.a.2.C. pH - provided that the pH of the discharge is in the range of 6.0 to 9.0 standard units. In addition, any pH permitted at ≥ 9.0 standard units will not be considered significant degradation if the purpose of the discharge is to improve the quality of the receiving stream, and a demonstration is made that such improvement is occurring.

4C.2.a.2.D. Dissolved Oxygen (DO) - any reduction of water quality of less than 0.4 ppm at maximum DO sag based upon an appropriate wasteload allocation model.

4C.2.a.2.E. Turbidity: provided that the discharge complies with the criteria in sections 46-1-8.32 and 46-1-8.32.1 of this rule.

4C.2.a.2.F. Trading. A determination may be made that a proposed activity will not pose significant degradation based upon the specifics of any upstream/downstream trading that has been agreed to by the project applicant. The basis for the trade shall be documented through a TMDL pursuant to CWA §303(d) requirements or other appropriate measures. Such documentation shall include an appropriate margin of safety, which shall address, in particular, the uncertainties associated with any proposed nonpoint source controls, as well as variability in effluent quality for point sources.

4C.3. If the proposed activity is determined not to result in significant degradation to the water, that finding will be documented and no further antidegradation review is necessary.

4C.4. If a determination is made that significant degradation will occur, the applicant must determine whether less-degrading or non-degrading alternatives to the proposed activity exist.

4C.4.a. An applicant requesting a permit for any new or expanded activity that would significantly degrade water quality in a high quality water is required to prepare an evaluation of alternatives to the proposed activity. The evaluation is required at a minimum, to provide substantive information pertaining to the cost and environmental impacts associated with the following alternatives: (a) pollution prevention measures (e.g., substitution of less toxic substances) (b) reduction in scale of project, (c) water recycle or reuse, (d) process changes, (e) innovative treatment technology, (f) advanced treatment technology, (g) seasonal or controlled discharge options to avoid critical water quality periods, (h) improved operation and maintenance of existing treatment systems, and (i) alternative discharge locations.

4C.5. After a determination that alternatives to allowing degradation have been adequately evaluated, a preliminary determination shall be made regarding whether non-degrading or less-degrading alternatives to the proposed activity shall be required.

4C.5.a. If no less-degrading or non-degrading alternatives to the proposed activity are determined to exist, the Tier 2 review shall continue and the substance and basis for the preliminary determination shall be documented.

4C.5.b. If it is determined that less-degrading or non-degrading alternatives to the proposed activity do exist, coordination with the project applicant may occur to revise the project design. If mutually acceptable resolutions are not reached, the alternatives analysis findings will be documented and the activity will not be allowed.

4C.6. Determine whether the proposed activity is necessary to accommodate important economic or social development in the area in which the waters are located.

4C.6.a. The applicant shall provide documentation of the social and economic

importance of the proposed activity. The factors to be addressed in such documentation may include, but are not necessarily limited to, the following: (a) employment (e.g., increasing, maintaining or avoiding a reduction in employment), (b) increased production, (c) improved community tax base, (d) housing, and (e) correction of an environmental or public health problem.

4C.6.b. In addition to the above, an applicant may be required to submit the following: (a) information pertaining to current aquatic life, recreational, or other water uses, (b) information necessary to determine the environmental impacts that may result from the proposed activity, (c) facts pertaining to the current state of economic development in the area (e.g., population, area employment, area income, major employers, types of businesses, (d) government fiscal base, and (e) land use in the areas surrounding the proposed activity.

4C.6.c. Once the available information pertaining to the socio-economic importance of the proposed activity has been reviewed, a preliminary determination regarding importance shall be made. In evaluating the applicant's demonstration of socio-economic importance, the agency may use EPA's Interim Economic Guidance for Water Quality Standards Workbook (EPA 823-B-95-002, March, 1995). If the proposed activity is determined to have social or economic importance in the area in which the affected waters are located, the substance and basis for that preliminary determination shall be documented and the Tier 2 review shall continue.

4C.6.d. If a preliminary determination that the proposed activity does not have social or economic importance in the area in which the affected waters are located is made, that antidegradation review finding shall be documented and the proposed activity shall not be allowed.

4C.7. Prior to authorizing any proposed activity that would significantly degrade a Tier 2 water, existing uses of the water shall be fully protected consistent with Tier 1 implementation procedures.

4B.8. Intergovernmental coordination and public notice requirements.

4C.8.a. The intergovernmental coordination requirements in section 46-1-4.1.b will be accomplished by providing notice to the agencies listed in Appendix F1. Such coordination will be accomplished by the agency performing the antidegradation review by notifying the agencies outlined in Appendix F1 of the results of any antidegradation review and requesting comments from them regarding that review.

4C.8.b. Based upon comments and information received during the public comment period, the preliminary determinations made as a result of the antidegradation review may be reversed.

4C.8.c. The public notice of the activity prepared by the agency shall include:

4C.8.c.1. Notice that the proposed activity has been determined to comply with the antidegradation rule and

4C.8.c.2. Notice of the availability of a antidegradation review sheet, which may include:

4B.8.c.2.A. A determination of existing uses and their protection level,

4C.8.c.2.B. A determination of the impact of the activity to ambient water quality,

4C.8.c.2.C. The results of the socio-economic evaluation of the activity, and

4C.8.c.2.D. A determination regarding existence of non-degrading or less degrading alternatives.

4C.8.c.2.E. A description of the water which is subject to the antidegradation review.

46-1-4D. Tier 2.5 Protection Review Procedures: Waters of Special Concern See section 46-1-4.1.c for a description of waters of special concern.

4D.1. Determine whether the water is a water of special concern.

4D.2. Determine on a parameter-by-parameter basis whether the activity will lower ambient water quality conditions.

4D.2.a. If a determination is made that the activity will result in lowering of water quality conditions, the activity shall not be allowed.

4D.2.b. If the activity is determined not to result in the lowering of water quality conditions, the activity may be allowed. In such case the antidegradation review findings will be documented in writing and public notice activities will be initiated.

4D.2.c. Discharges from activities in waters upstream of a water of special concern shall not result in a lowering of ambient water quality of the water.

4D.2.c. Trading. A proposed activity that will result in a new or expanded source in a Tier 2.5 water may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity. Where such trading occurs on or upstream of a Tier 2.5 segment or water, Tier 2.5 requirements will be considered satisfied where the applicant can show that water quality at all points within the study area will be either maintained or improved. The basis for trade will be

documented the through a TMDL pursuant to CWA §303(d) requirements or other appropriate method, which will include an appropriate margin of safety. Such a margin of safety will address, in particular, the uncertainties associated with any proposed nonpoint source controls, as well as variability in effluent quality for point sources.

4D.3. The public notice of the activity shall include:

4D.3.a. Notice that the proposed activity has been determined to comply with the antidegradation rule.

4D.3.b. Notice of the availability of a antidegradation review sheet, which may include:

4D.3.b.1. A determination of existing uses and their protection level,

4D.3.b.2. A determination that the activity will not result in the reduction of ambient water quality and the basis for that determination.

46-1-4E. Tier 3 Protection Review Procedures: Outstanding National Resource Waters.
See §46-4.1.c for a description of outstanding national resource waters.

4E.1. Determine whether the water is an Outstanding National Resource Water (ONRW).

4E.2. Determine whether the proposed activity is short term in nature and the resulting changes in water quality will be temporary. Generally, activities with durations of less than one month and which result in less than a 5% change in ambient concentration will be deemed to have temporary and limited effects. Such determination will be made on a case-by-case basis and shall be made after consideration of the following factors:

4E.2.a. The length of time during which the water quality will be lowered,

4E.2.b. The percent change in ambient concentrations,

4E.2.c. The parameters affected,

4E.2.d. The likelihood for long-term water quality benefits to the segment (e.g., as may result from dredging of contaminated sediments),

4E.2.e. The degree to which achieving applicable water quality standards during the proposed activity may be at risk, and

4E.2.f. The potential for any residual long-term influences on existing uses.

4E.3. If a determination is made that the criteria in §4E2 a-f will be met, the activity may be authorized. In such case the antidegradation review findings shall be documented and public notice activities shall be initiated.

4E.4 The public notice of the activity shall include:

4E.4.a. Notice that the proposed activity has been determined to comply with the antidegradation rule and

4E.4.b. Notice of the availability of a antidegradation review sheet, which may include:

4E.4.b.1. A determination of existing uses and their protection level.

4E.4.b.2. A determination that the activity will be short-term in nature and the resulting changes in water quality will be temporary. This determination shall be based on the factors listed in section 4E.2.a-f, above.

4E.5 For ONRWs in federally designated Wilderness Areas, nothing in this rule is intended to authorize activities not authorized by the Wilderness Act.

4E.6. If it is determined that the criteria in §4E.2 will not be met, the agency shall deny the activity.

4E.7. All upstream segments of a ONRWs shall be considered ONRWs.

4E.8. Tier 3 Nomination Procedures.

4E.8.1. Qualification Criteria. Factors to be considered in determining whether to assign an ONRW designation to a water from another category may include the following:

4E.8.1.a. The location of the water,

4E.8.1.b. Any previous special designations: such as Wild and Scenic River,

4E.8.1.c. Existing water quality: e.g., pristine or naturally occurring.

4E.8.1.d. Ecological value: e.g., presence of threatened or endangered species during one or more life stages,

4E.8.1.e. Recreational or aesthetic value: e.g., presence of an

outstanding recreational fishery and

4E.8.1.f. Other factors that indicate outstanding ecological or recreational resource value: e.g., rare or valuable wildlife habitat.

4E.9. Any interested party or the Board may nominate a water for inclusion in the Outstanding National Resource Water (ONRW) antidegradation category according to the notice and comment provisions of 46 CSR 6 - Procedural Rules Governing Site-Specific Revisions to Water Quality Standards. The address for filing such petitions is:

West Virginia Environmental Quality Board
1615 Washington Street, East
Room 301
Charleston, West Virginia 25311-2126

APPENDIX F-1

ANTIDEGRADATION IMPLEMENTATION PROCEDURES

INTERGOVERNMENTAL COORDINATION AGENCIES

STATE AGENCIES

Bureau of Commerce

Division of Natural Resources

Division of Forestry

Development Office

Department of Health and Human Resources

Bureau for Public Health

Bureau of the Environment

Division of Environmental Protection - all offices

Department of Education and the Arts

Division of Culture and History

Department of Agriculture

Soil Conservation Agency

Public Service Commission

FEDERAL AGENCIES

US Environmental Protection Agency, Region III

US Fish and Wildlife Service

US Army Corps of Engineers

National Park Service

US Forest Service

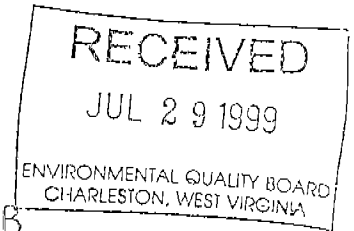
US Office of Surface Mining

Federal Energy Regulatory Commission

US Geological Survey

OTHER

Regional Planning Councils (statewide)



SIERRA CLUB
WEST VIRGINIA CHAPTER

Rt. 2 Box 84
Terra Alta, WV 26764
July 29, 1999

Libby Chatfield
Technical Advisor
Environmental Quality Board
1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126

Dear Ms. Chatfield:

I'm writing to comment on implementation of antidegradation policy, in particular concerning changes to 46 CSR 1. Thank you for the opportunity to participate by way of these comments.

I know that EQB and OWR have worked hard on the guidance document. Implementation of meaningful antidegradation policy is important. It should be a significant step toward protecting and improving our water quality.

Let me outline several areas that I am concerned about.

◆ Maintaining and restoring water quality, the goals of the Clean Water Act, must be the basis for West Virginia's antidegradation policy. Antidegradation policy should provide protection not only for "uses" achieved in a watershed, but also for water quality that is better than needed to attain these uses. The proposed implementation language is not sufficiently protective of water quality that exceeds use criteria or standards.

◁ An antidegradation review is currently required only if more than a 5% increase in a pollutant is expected. I feel an antidegradation review should occur if any measurable degradation is predicted.

↳ Cumulative impacts are not adequately addressed. The review process proceeds on the basis of individual permits. Protection of water quality requires that cumulative impacts be incorporated into the policy.

↳ Effective nonpoint source criteria are essential. Reliance on best management practices would be a serious mistake. BMPs are voluntary, and uncertain to be followed. They are not technically defined.

Please consider an approach to nonpoint sources that more clearly limits nonpoint impacts, especially when water quality standards are threatened or violated.

↳ Trading of any kind should not be permitted. It has no place in a genuine anti-degradation policy, in which any degradation must cause a review.

In sections 4B.4, 4C.2.a.2.F., and 4D.2.C it is stated the basis for a trade will be made through a TMDL or "other appropriate measures". I strongly object to the language "other appropriate measures" as it makes the basis of these trades discretionary, without any clearly defined, scientifically sound criteria. This gives polluters a way to legally evade the intent of the antidegradation provision of the CWA.

Sincerely,

Jim Sconyers
Conservation Committee

RECEIVE STOP

Vivian Stockman
Concerned Citizens' Coalition
Otto Rt. Box 105A
Spencer WV 25276

27 July 1999

Libby Chatfield, Technical Advisor
Environmental Quality Board
1615 Washington Street East, Room 301
Charleston, WV 25311-2126.

Dear Ms. Chatfield:

Please accept these comments from the Concerned Citizens Coalition (CCC) regarding implementation of the antidegradation provision of the Clean Water Act (CWA). Members of CCC are thrilled that the Environmental Quality Board is undertaking this task. Antidegradation is central to the intent of the Clean Water Act and implementation of antidegradation can make significant improvements in the quality of our state's waters.

CCC hopes that in your efforts you will consider some of our important concerns:

- The building blocks for an antidegradation policy are the CWA goals of maintaining and restoring water quality. An antidegradation policy is meant to provide protection for "uses" already achieved in a watershed, AND to provide additional protection for water quality that is better than needed to attain these uses. We are concerned that while the proposed implementation language may slow the decline of water quality it is not really protective of water quality that exceeds standards.
- Antidegradation review is triggered only if greater than 5% increase in a pollutant is anticipated. Reliance on any "significant" degradation is not sufficiently protective. If any measurable degradation is predicted, an anti-degradation review should occur.
- Cumulative impacts are not considered in the proposed rule. The process is driven by individual permit applications and not by an overview of water quality in a given watershed. If individual multiple point source impacts fall below the suggested 5% criteria but have a cumulative effect of greater than 5% they can still be permitted without an antidegradation review. The same is true for point sources that carry a large non-point source component.
- The policy does not adequately address non-point sources of pollution. As proposed, non-point sources are deemed to be "in compliance with the achievement of cost effective and reasonable best management practices in accordance with the WV Non-Point Source Management Plan." This seriously undermines the very definition of antidegradation and further isolates non-point impacts from any link to water quality standards. At a minimum, compliance with antidegradation for nonpoint discharges

should be assumed only where monitoring data are available that verify the effectiveness of best management practices.

- Trading should not be permitted. Trading has no place in an antidegradation policy. If any amount of degradation would trigger review, and non-point sources were included, and cumulative impacts are adequately considered, etc., trading need not be an issue. Furthermore, trading, whether between point sources or between point and non-point sources is not desirable. The latter poses a particular problem in that while point sources have regulatory oversight, public notification, and monitoring requirements, non-point sources have none of these requirements. Further, reliable verification of specific non-point reductions is nearly impossible because of variations in daily, seasonal and annual rainfall and access to testing sites.

CCC members thank you for this opportunity to provide comments.

Sincerely,

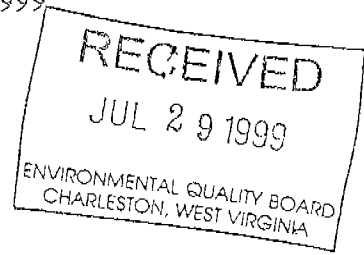


Vivian Stockman

(Signed copy to follow via regular mail)

July 29, 1999

Libby Chatfield, Technical Advisor
Environmental Quality Board
1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126



Dear Ms. Chatfield:

Please accept these comments in reference to the proposed changes in the Water Quality Standards Rule, 46 CSR 1, dated June 29, 1999 regarding the implementation of the antidegradation policy.

I appreciate the time and effort that both the Environmental Quality Board and the Office of Water Resources have devoted to developing the antidegradation implementation guidance document. I realize that in a time of extreme budgetary constraints this was a significant commitment of resources.

I strongly support this effort. The implementation of the antidegradation provision of the Clean Water Act has the potential to make a significant difference to improve the water quality of our waterways.

While I support this effort, I do have some serious concerns:

1. The Clean Water Act goals of maintaining and restoring water quality must be upheld as the basis for West Virginia's antidegradation policy. An antidegradation policy is meant to provide protection not only for "uses" achieved in a watershed, but more importantly to provide additional protection for water quality that is better than needed to attain these uses. I am concerned that while the proposed implementation language may slow the decline of water quality, it is not really protective of water quality that exceeds use criteria or standards.
2. The document currently states that an antidegradation review is triggered only if greater than 5% increase in a pollutant is anticipated. Reliance on any "significant" degradation is not sufficiently protective. If any measurable degradation is predicted, an antidegradation review should occur.
3. The limit of cumulative impacts of multiple, new or expanded point sources or point sources that are associated with significant nonpoint source impacts - impacts either above or below the suggested 5% criteria - are not outlined. The antidegradation review process is driven permit by permit and not by an overview of water quality in a given watershed and therefore is not ultimately protective of high quality waters. Cumulative impacts must be outlined and incorporated into the policy.
4. Meaningful nonpoint source criteria for antidegradation implementation are absolutely necessary for a successful program. Sole reliance on best management practices is a

serious weakness of the draft antidegradation implementation policy. Since best management practices in every sector are voluntary, there is no assurance BMPs will themselves be implemented. Additionally, best management practices are not technically linked to water quality standards. This approach further isolates nonpoint source pollution from the jurisdiction of water quality standards and severely undermines the EPA mandated task of including cumulative effects in the antidegradation implementation document.

I strongly urge the Board to consider an alternative approach to nonpoint source issues, one that more clearly limits nonpoint impacts especially when water quality standards are threatened or violated. At a minimum, compliance with antidegradation for nonpoint discharges should be assumed only where monitoring data is available that verifies the effectiveness of best management practices.

5. Trading should not be permitted, either between point sources or between point and nonpoint sources of pollution. Trading has no place in a truly anti-degradation policy i.e. if any amount of degradation would trigger review, and nonpoint sources were included, and cumulative impacts were adequately considered, etc., trading would not be an issue.

Trades between point and nonpoint sources pose a particular problem in that while point sources have regulatory oversight, public notification, and monitoring requirements, nonpoint sources have none of these requirements. Further, reliable verification of short to medium term specific nonpoint reductions is nearly impossible because of variations in daily, seasonal, and annual rainfall and access to testing sites.

Trades should not be exempt from antidegradation review as in 4C 2.a.2 and 4C.3. This creates a significant loophole in the policy.

In sections 4B.4, 4C.2.a.2 F., and 4D.2.C it is stated the basis for a trade will be made through a TMDL or "other appropriate measures". I strongly object to the language "other appropriate measures" as it makes the basis of these trades discretionary, without any clearly defined, scientifically sound criteria. This is especially important because TMDL's generally are only established when water fails to meet a standard and so the "other appropriate measures" would be the only method available for trades in the higher quality waters that the antidegradation policy is supposed to protect. This allows a clear way out of antidegradation constraints for point source discharges and seriously threatens the intent of the antidegradation provision of the CWA.

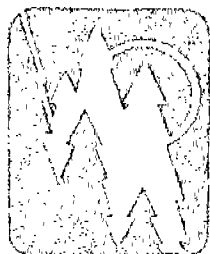
Thank you for the opportunity to provide comments. I hope the implementation of the antidegradation policy will help preserve the outstanding rivers of West Virginia, protect the health of all citizens of the state, and promote sustainable economic development.

Sincerely,



Chuck Merritt

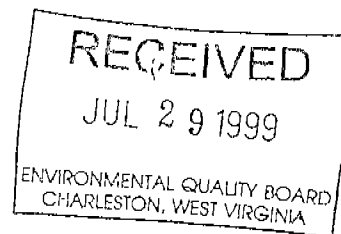
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west
virginia
highlands
conservancy

MAILING ADDRESS • P. O. Box 306 • Charleston, West Virginia 25321

Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide



July 29, 1999

Dr Edward Snyder, Chair
Environmental Quality Board
1615 Washington Street, East
Charleston, WV 25311-2126

RE: Antidegradation Implementation Guidance

Dear Dr. Snyder,

West Virginia Highlands Conservancy (WVHC) would like to reiterate its position taken last year at this time with regard to the proposed antidegradation guidance document. Although we have not had the opportunity to review and compare all the differences between last year's proposal and the one currently being discussed, we understand that the two are similar. Hence, we submit a copy of our comments submitted July 20, 1998 and review here briefly the main concerns addressed in those comments.

First and foremost we commend the Board once again for attempting to implement official guidance to implement the antidegradation provisions of WV Water Quality Standards.

We are generally pleased with the tone and direction of the proposed guidance, but continue to be concerned about the following issues that are discussed in more detail in our resubmitted comments from July 20, 1998.

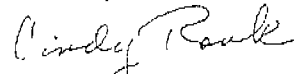
- The proposed definition of "significant" degradation is not protective enough especially as it relates to high quality headwater streams
- Less than adequate consideration of cumulative impacts is given when several point sources occur in a single watershed, and especially if non-point sources are also present.
- Monitoring data must be available to verify the effectiveness of BMP's at non Point discharges.
- Trading should not be permitted.
- Protection levels for Tier 2.5 waters must be applied to all upstream reaches.
- Protective measures must be clear for the outlying, relatively isolated and pristine areas, especially with regard to the Board's historically upheld assumption that ALL waters of the state are capable of supporting Public A unless an applicant for a permit makes a showing otherwise
- The adequacy of the intergovernmental coordination is questionable.

We thank you for the opportunity to comment, and ask that you consider our comments submitted July 20, 1999 and resubmitted here. We also concur with the comments submitted on behalf of West Virginians for Clean Water, a coalition of groups including WVHC.

Again, we appreciate the effort of the Board to take on the difficult but necessary task of setting forth the required guidance document.

Please contact me at the address and/or phone numbers below with any questions you may have, or any request for additional clarification.

Sincerely,



Cindy Rank, Chair
WVHC Mining Committee
HC 78, Box 227
Rock Cave, WV 26234

Phone: (h) (304) 924-5802
(w) (304) 924-6263

cc: Frank Young, President, WVHC
Pamela Moe-Merritt, WV for Clean Water

West Virginia Farm Bureau

Member of American Farm Bureau Federation

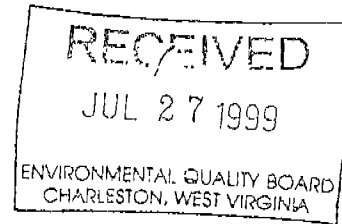
1 Red Rock Road, Buckhannon, WV 26201
(304) 472-2080 • 1-800-398-4630
July 21, 1999 FAX (304) 472-6554



Environmental Quality Board
1615 Washington Street East
Charleston, WV 25311

Attn: Ms. Libby Chatfield

Dear Ms. Chatfield:



Please consider this document and the memorandum enclosed as the comments of WV Farm Bureau to the proposed stream antidegradation policy set for hearing July 29 at 7:00 there in Charleston.

Steve Hannah the Executive Director of WV Farm Bureau asked me to prepare a memorandum analyzing the proposed waterbody antidegradation policy. I attempted to do that and found I had as many questions as answers. I do not believe it is workable in its present form. I am an attorney and have actively practiced law for many years outside the State of WV.

It appears to me that the policy, including the portion of it as it stands in the Water Quality Regulations and the proposed implementation policy, evolved over a time period with inputs from many interested persons. As a consequence only those closely involved in the drafting process could know what was intended. I envision only misunderstanding and litigation until it is rewritten. It is not sufficient that those who wrote it can answer my questions and apply the policy.

As part of the antidegradation stakeholder process Farm Bureau suggests that a new starting document be prepared restating the policy in a more comprehensive, understandable fashion.

WV Farm Bureau would not support the policy as drafted.

Thank you for the opportunity to comment. I would ask that my memorandum originally intended only for Steve Hanna be reviewed and considered by the Board.

Sincerely yours,

Sam P. Lockard, Environmental Coordinator

ANTIDEGRADATION
In Office Use Memorandum

In order to try to understand the subject, I took the existing antidegradation subject matter of the basic water quality regulations (basic regulations) and analyzed that first. I tried to make sense out of as a separate matter as that should remain the law even if implementing regulations are not adopted. In the existing regulations there is no preface or statement that it applies only to NPDES permits and the like, hence maybe the existing antidegradation policy is where the general concept originates that all streams keep their quality regardless of application for new discharges?

The second part of the memo attempts to make sense out of the proposed *implementation Appendix F*, which begins by stating that it applies to activities where a permit is required, such as an NPDES permit.

I understand both the existing framework and the implementing regulations to set out four classes of waters for antidegradation protection: 1. Tier 1-undefined; 2. Tier 2- High Quality Waters; 3. Tier 2.5-Waters of Special Concern; and 4. Tier 3-Outstanding Natural Resource Waters.

Policy in Existing Basic Water Quality Regulations
Which Exists Separate and Apart From Proposed
Implementing Regulations

Tier 1

Tier 1 waters-need a definition in the basic regulations as the other Tiers seem to be defined! From reading Sec 46-1-4.1.a of the existing regs stating Tier 1 protection maintains existing uses, and the portion of the proposed implementing regulations 46-1-4B was some help with understanding it. 46-1-4B, appendix F, says that all waters are given Tier 1 protection. It may be a Tier 1 stream is defined by a manner of protection in the implementation regs as opposed to classifying or defining the streams in the basic regs as with tier 2, 2.5, and 3. Tier 1 protection applies to all waters of the state in the proposed implementation document without defining Tier 1 waters there either. Maybe a Tier 1 stream could be thought of as one that is neither fishable *or* swimmable? [If swimmable or fishable (and not defined as a Tier 3 or Tier 2.5) it is a high quality water or Tier 2? See Sec 46-1-4.1.b.2]

Antidegradation protection for Tier 1 streams. Sec 46-1-4.1.a States Tier 1 protection requires existing water uses and the level of water quality necessary to protect existing uses shall be maintained and protected. Existing uses are those uses actually attained on

or after Nov. 28, 1975, whether or not they are designated uses in the regs. I do not see any language in the present regulations indicating an administrative procedure for applicants for permits to discharge in Tier 1 streams. Does that mean in the existing regulations that stream quality may deteriorate in a Tier 1 stream by the effect of gradual degradation and new discharge permits, but only so long as existing uses are protected? If so it does not state that policy clearly.

As far as non-point source BMPs and the effect, there is no reference to non-point source activities or mandates.

Tier 2

Tier 2 waters Sec 46-1-2.2.9 -High Quality Waters are waters which quality is equal to or better than the minimum levels necessary to achieve the national water quality goal uses. (I do not know what “minimum levels to achieve the national water quality goal uses” means unless (as taken from another section) it is a base level necessary to sustain the national water quality goal uses of protection and propagation of fish, shellfish and wildlife and recreating in and on the water.) Sec 46-1-4.1.b.2 states that all waters not designated as Tier 2.5 Waters of Special Concern or Tier 3 waters of Outstanding National Resource Waters will be considered Tier 2 High Quality Waters unless it can be shown that the water quality is too poor to attain *either* fishable or swimmable uses. If swimmable or fishable use is attained, Category B or C, it is a High Quality Tier 2 Water. (apparently if you cannot *fish or swim* in it, ergo. it is Tier 1?)

Antidegradation policy for Tier 2 streams. I read Sec 46-1-4.1.b to say Tier 2 streams are to be maintained at their existing quality unless a showing in the continuing planning process and after hearing there is important economic or social development shown to justify it. Here stream quality must mean maintaining existing use as well as by measured criteria? If limited degradation is allowed, it shall not result in injury with existing uses, or go below base levels necessary to sustain the national water quality goal uses of fish, shellfish, wildlife, and recreation.

After the allowance for the possibility of Tier 2 stream deterioration is a paragraph relating to non-point and it does not have a separate designation as applying to all Tiers of streams, meaning to me it must be limited to stream quality under Tier 2 only. It says the EQB shall assure “new and existing point sources shall achieve the highest established statutory and regulatory requirements applicable to them and shall assure the achievement of cost-effective and reasonable best management practices for non-point source control in accord with WV non-point source management plan (NRCS BMPs). I cannot figure out what was intended here. Does it mean if a new discharge permit is sought which would degrade a stream that non-point contributors exercising BMPs are

ignored when allowing the new discharge? If the EQB is charged with assuring BMPs are in place by the above statement, are they to send out inspectors to check each farm on a stream which is degrading and make all non-point contributors comply with BMPs? Does it mean only a Tier 2 stream can be allowed to continue to degrade (even in the absence of a new permit application setting) if all, a part, or a majority of non-point sources are following BMPs?

Whatever is intended, I believe it applies only to Tier 2 streams.

Tier 2.5 Waters

Tier 2.5 waters Sec 46-1-2.2.20- are Waters of Special Concern and are those waters which due to their location or other special designation, are assigned an antidegradation protection level above High Quality Tier 2 waters. They are defined in Section 46.4.1.c which has a list of those waters and includes naturally reproducing trout streams, streams in national and state forests and recreation areas, national rivers under federal law.

Antidegradation policy for Tier 2.5 streams. Existing reg, Sec 46-1-4.1.c, states that no activities which result in the reduction of ambient water quality shall be allowed. No provision for administrative policy in the existing regulations allows for new activities and stream degradation. If a Tier 2.5 stream is degrading BMPs seem to not play any role in anything.

Tier 3

Tier 3 waters Sec 46-1-2.11-are Outstanding National Resource waters which have a unique character, ecological or recreational value or pristine nature constituting a valuable national or State resource. These waters include, but are not limited to, all streams and rivers within the boundaries of wilderness areas under federal law.

Antidegradation policy for Tier 3 waters. Section 46-1-4.1.d says Tier 3 waters shall be maintained, protected, and improved. Obviously no room for new activities and degradation in these streams.

I have extracted a few definitions from the existing regulations to help in understanding the memorandum:

Existing uses are those uses actually attained on or before November 28, 1975, whether or not they are included in the water quality standards.

Designated uses are those uses specified in water quality standards for waterbodies, whether or not they are being attained. See sec 6.2 which defines: Category A waters

which are essentially municipal water supplies; Category B waters which are for propagation and maintenance of fish and aquatic life; Category C which are waters contact recreation waterbodies; Category D which are for agriculture and wildlife uses; and Category E waters which are for industrial, water transport, cooling and power.

Water quality criteria means levels of parameters of stream conditions that are required to be maintained. Criteria may be expressed as constituent concentration levels, or narrative statement, representing a quality of water that supports a designated use.

Water quality standards means the combination of water uses to be protected and the water quality criteria to be maintained.

Section 6.1 states that the rules establish general water use categories and water quality standards for the waters of the state. Unless otherwise designated by these rules, at a minimum all waters of the state are designated for the propagation and maintenance of fish and aquatic life (category B) and for water contact recreation (category C)

Proposed Implementation Antidegradation Regulations

The stated intention at the beginning is to apply the policy to all activities that require a permit, such as NPDES permits, 404 permits or CWA 401 permits.

Next following is a statement which appears to apply to all Tiers of waters. 4A.2 Nonpoint source activities will be deemed to be in compliance with antidegradation requirements with the achievement of cost effective and reasonable best management practices in accordance with the WV Nonpoint Source Management Plan. What does this mean in practical application? Does it mean that any non-point activity may continue on a degrading stream of any Tier classification so long as BMPs are in place, or does it apply only in cases of streams where a new discharge is sought? Does it apply to all Tiers and if so how is it implemented in actual practice? What is to happen to the farmer on a degrading stream when he does not have satisfactory BMPs? Is he going to be cited for a violation of some kind? Will injunctive relief be sought in court to make him implement BMPs? Under the existing policy in the present regulations the EQB is specifically given some administrative function regarding BMPs, but no explanation is given as to how it carries out that role. If this non-point exemption applies only to certain Tiers of waters, it needs clarification.

Tier 1

Tier 1 protection, Sec 46-1-4B states that existing uses and existing water quality to

protect those uses shall be maintained and protected. Tier 1 protection applies to all waters of the state!!!!!! As there is no definition of a Tier 1 stream I suppose all Tiers of streams can be allowed a new permit if the following is adhered to in allowing the permit application? I cannot understand its application to all waters!!!

Steps to apply antidegradation Tier 1 policy are: 1. determine existing uses of the water; 2. identify the designated uses as per the categories of use A through E; 3. ascertain if the water use supports an existing use other than the designated uses; 4. public notice and comments etc., before acting on the proposed activities' request.

A caveat obtains to ensure maintenance and protection of water quality to protect existing uses. If it is found that designated use is same as existing use, controls are to be made which ensure numeric and narrative criteria are met. If found that designated use does not reflect existing use you need to determine whether a new numeric criteria for a related designated use would maintain water quality sufficient to protect the existing use.

There is a trading provision if the applicant for the activity can exchange his degree of contribution to a stream for shutting down an upstream activity.

Tier 2

Tier 2 or 46-1-4C High Quality Waters protection to a Tier 2 High Quality Water is first to determine if it is in fact a Tier 2 High Quality Water. You do that by excluding Tier 2.5 water and Tier 3 and all else is Tier 2, except if it will not support both category C and B uses. If either the swimmable or fishable use is obtained, it is Tier 2. If water quality will not support both fishable and swimmable uses (category B and category C) it is not a Tier 2 stream (and must therefore be a Tier 1?).

Once you find it to be Tier 2, next is to ascertain if the proposed activity will result in significant degradation of water quality. Existence of significant degradation by the proposed activity is to be determined on a case by case basis. If one or more stream parameter guidelines are significantly degraded then further Tier 2 requirements are to be satisfied to allow the applied for activity.

For chemical evaluations the proposed implementation document sets out formulas to follow.

Section then follows stating that specified circumstances are not deemed to be significant degradation, such as certain temperature increases. Fecal coliform is allowed so long as the discharge does not exceed a monthly average of 200/100 ml and 400/100 ml daily maximum. (How many samples are required for calculation of coliform as present sampling methodology does not allow for averages and daily measurements?)

Sounds like a new applicant will have to take a lot of samples, which makes more sense than present DEP practice for impairment findings.) Proposal then sets out pH, DO, and turbidity allowances.

There is a trading of discharge paragraph with other upstream/downstream dischargers, which will be impossible or impractical to implement for an applicant. A TMDL or equivalent is required.

If applicant activities will cause significant stream degrading, he must determine whether he has other non or less degrading alternatives. Much specific information required at this point in the process and hoops to jump through.

If no viable options exist to the potential permittee, next look to the necessity of accomodating important economic or social development of the activity. Factors are: employment increases and reduction; production related to the activity; tax base; housing; and whether there is a correction of an environmental or health concern. Many other factors are to be examined.

Many agencies and notification, etc., involved.

However, prior to authorization of significant degradation activity on Tier 2, High Quality Water, existing uses of the water shall be fully protected consistent with Tier 1 implementation procedures.

Tier 2.5

Tier 2.5 Tier 2.5 policy 46-1-4D. The antidegradation procedure on Waters of Special Concern is more strict.

If a determination is made that the activity will result in lowering of water quality conditions, the activity shall not be allowed. I assume that means permanent or temporary lowering? If a temporary lowering is allowed as with Tier 3 waters, or not allowed at all, the policy should set that out. If new discharge is allowed public notice and hearing required.

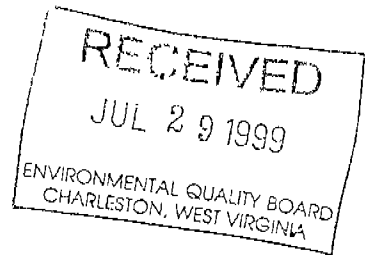
A discharger trading provision is there, but difficult in application.

Tier 3

Tier 3 policy Outstanding Natural Resource Waters 46-1-4E. Permitted new activities turn on whether the activity is short term with temporary results. If it can be done in less than a month and no more than 5% change in ambient concentration of ????? then it will be considered temporary. No long term activity affecting a stream will be allowed. Done on a case by case basis and after a consideration of factors such as length of time of the activity, the percent of change, etc.

Subject : Proposed changes to WQS Rule, 46 CSR 1 / comments
Date: Thu, 29 Jul 1999 13:52:06 -0400
From: I'am Kasey <buckwheat@imagixx.net>
To: chatfe@mail.wvnet.edu

Libby Chatfield
Technical Advisor
Environmental Quality Board
1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126



Dear Ms. Chatfield:

Please accept my comments in reference to the proposed changes in the Water Quality Standards Rule, 46 CSR 1, dated June 29, 1999 regarding the implementation of the antidegradation policy.

I appreciate the time and effort that both the Environmental Quality Board and the Office of Water Resources have devoted to developing the antidegradation implementation guidance document. This work was a significant commitment of resources and I strongly support this effort. The implementation of the antidegradation provision of the Clean Water Act has the potential to make a significant difference to improve the water quality of West Virginia's waterways.

While I support this effort, I do have some serious concerns:

1. The Clean Water Act goals of maintaining and restoring water quality must be upheld as the basis for West Virginia's antidegradation policy. An antidegradation policy is meant to provide protection not only for "uses" achieved in a watershed, but more importantly to provide additional protection for water quality that is better than needed to attain these uses. I am concerned that while the proposed implementation language may slow the decline of water quality, it is not really protective of water quality that exceeds use criteria or standards.
2. The document currently states that an antidegradation review is triggered only if greater than 5% increase in a pollutant is anticipated. Reliance on any "significant" degradation is not sufficiently protective. If any measurable degradation is predicted, an antidegradation review should occur.
3. The limit of cumulative impacts of multiple, new or expanded point sources or point sources that are associated with significant nonpoint source impacts - impacts either above or below the suggested 5% criteria - are not outlined. The antidegradation review process is driven permit by permit and not by an overview of water quality in a given watershed and therefore is not ultimately protective of high quality waters. Cumulative impacts must be outlined and incorporated into the policy.
4. Meaningful nonpoint source criteria for antidegradation implementation are absolutely necessary for a successful program. Sole reliance on best management practices is a serious weakness of the draft antidegradation implementation policy. Since best management practices in every sector are voluntary, there is no assurance BMPs will themselves be implemented. Additionally, best management practices are not technically linked to water quality standards. This approach further isolates nonpoint source pollution from the jurisdiction of water quality standards and severely undermines the EPA mandated task of including cumulative effects in the antidegradation implementation document.

I strongly urge the Board to consider an alternative approach to

nonpoint source issues, one that more clearly limits nonpoint impacts especially when water quality standards are threatened or violated. At a minimum, compliance with antidegradation for nonpoint discharges should be assumed only where monitoring data is available that verifies the effectiveness of best management practices.

5. Trading should not be permitted, either between point sources or between point and nonpoint sources of pollution. Trading has no place in a truly anti-degradation policy ie. if any amount of degradation would trigger review, and nonpoint sources were included, and cumulative impacts were adequately considered, etc., trading would not be an issue.

Trades between point and nonpoint sources pose a particular problem in that while point sources have regulatory oversight, public notification, and monitoring requirements, nonpoint sources have none of these requirements. Further, reliable verification of short to medium term specific nonpoint reductions is nearly impossible because of variations in daily, seasonal, and annual rainfall and access to testing sites.

Trades should not be exempt from antidegradation review as in 4C.2.a.2 and 4C.3. This creates a significant loophole in the policy.

In sections 4B.4, 4C.2.a.2.F., and 4D.2.C it is stated the basis for a trade will be made through a TMDL or "other appropriate measures". I strongly object to the language "other appropriate measures" as it makes the basis of these trades discretionary, without any clearly defined, scientifically sound criteria. This is especially important because TMDL's generally are only established when water fails to meet a standard and so the "other appropriate measures" would be the only method available for trades in the higher quality waters that the antidegradation policy is supposed to protect. This allows a clear way out of antidegradation constraints for point source discharges and seriously threatens the intent of the antidegradation provision of the CWA.

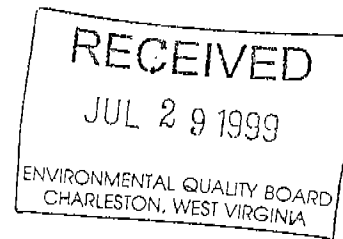
Thank you for the opportunity to provide comments. I hope the implementation of this antidegradation policy will help preserve the outstanding rivers of West Virginia, protect the health of all citizens of the state, and promote sustainable economic development.

Sincerely,
Pam Kasey
Pam Kasey
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Bryan K. Moore
787 Twin Oaks Dr.
Bridgeport, WV 26330
(304)842-2779

July 29, 1999



Libby Chatfield
Technical Advisor
Environmental Quality Board
1615 Washington St., East, Suite 301
Charleston, WV 25311-2126

Dear Ms. Chatfield,

Please accept my comments in reference to the proposed changes in the Water Quality Standards Rule, 46 CSR 1, dated June 29, 1999 regarding the implementation of the antidegradation policy.

I would like to state that I appreciate the time that both the Environmental Quality Board and the Office of Water Resources have devoted to developing the antidegradation implementation guidance document. This work was a significant commitment of resources and I strongly support this effort. The implementation of the antidegradation provision of the Clean Water Act has the potential to make a significant difference to improve the water quality of West Virginia's waterways. While I support this process, I do have some concerns in specific areas.

The following are my suggestions and recommendations for changes that I believe are necessary to clarify and strengthen the document:

- 2.15 - after the word "discharged," add: "and are measurable at a designated point."
- 2.23 - under the description of wetlands, add: "ponds and channels (rivers and streams)."
- 4.1.b - after the phrase "non-point source control," add: "using the highest established statutory and regulatory requirements."
- 4.1.c - Tier 2.5, add: definition wording at 2.16
- 4.1.c.2 - after "trout streams," add: "and high-quality reproducing smallmouth bass streams."
- 5.2 - strike language in 5.2.a - 5.2.1:
Mixing zones conflict with the intention and spirit of the Clean Water Act. The waiver of water quality rules and criteria is in opposition to the stated goals of national water quality in addition to 6.3 Category B and 6.4 Category C. A zone that exceeds chronic or acute toxicity levels would create an immediate stream segment impairment as defined by the Clean Water Act. The pollutant or pollutants must be pretreated so as not to exceed chronic/acute criteria prior to stream entry.
- 6.1.b - see addition to 4.1.b
- 6.1.b.2 - define for clarity: "naturally-occurring pollutant."
- 6.1.b.6 - add to address: "the removal or disruption of the natural features of the water body shall be recognized as an impairment to the attainment and protection of aquatic life uses."
- 7.2.c.3 - strike: mixing zones are a cause of immediate impairment.

7.2.c.4 - add to clarify: examples of lesser quality due to conditions.

7.2.d.6.1 - this exception needs to be removed and water quality brought into compliance based on the maximum temperatures for cold waters and spawning areas.

8.2.b - to clarify: define and state an expiring timeline for the critical design flow for carcinogens.

8.3 - add to clarify: "variance will only apply to existing discharger and will not apply to new or increased discharges. There will be no allowable variance of biological criteria."

8.4 - edit: site specific numeric criteria should only be used to identify and monitor points not meeting acceptable water quality criteria to aid in bringing individual dischargers into compliance.

Appendix A, Category B-2

- after "Trout Waters," add: "and Other Waters of Special Concern."

- add to statement to clarify: "in addition to the list referred to below, a list of known streams with reproduction will be maintained by the Division of Natural Resources and the Division of Environmental Protection for specific site reference. If a stream in question is not contained on the list, the stream shall be referred to the DNR for evaluation. A separate list of high-quality waters supporting reproduction of smallmouth bass should also be referred to and recognized as waters of special concern."

Appendix F - Antidegradation Implementation Procedures:

4A.2 - after "plan," add: "using the highest established statutory and regulatory requirements."

4A.3.a - edit to clarify: "if there is a potential for increased surface water impacts from contaminated groundwater from existing sites, an antidegradation review will be required without regard to point source association."

4A.3.c - add to clarify: "does not apply to Tier 2, 2.5 or 3 level waters."

4B.1.c - add to expand: "shall also be posted electronically to the DEP website and call for public comment."

4B.4 - the word "Trading" changed to "Watershed Trading".

addition of defined standards:

- 1) must be based on established TMDL's.
- 2) good compliance records by potential trading partners.
- 3) pollution limits in discharge permits.
- 4) enforcement.
- 5) adequate trading ratio of greater than 2:1, 4:1 for non-point trading.
- 6) avoidance of "hot spots."
- 7) sufficient monitoring standards.
- 8) ban on trades among different pollutants, across watersheds and of toxic poisons.
- 9) US EPA oversight.
- 10) public participation and comment required.

4C - edit to clarify: "significant" changed to "measurable" throughout 4C to provide a more sufficient level of protection.

4C.2.a.1.A.1 - edit for quality: critical flow conditions for antidegradation should be based on seasonal variation. The use of 7Q10 does not adequately address protection or daily maximum loading.

4C.2.a.2.A, B, C, E - edit to clarify: change the word "discharge" to "source".

4C.2.a.2.F - see edit at 4B.4

4C.6.b - edit to clarify: change "may be required" to "shall be required".

4D.2.c - strike this section.

Due to the sensitivity of Tier 2.5 waters, trading is not a viable option. Any source, point or non-point source, on a tier 2.5 stream should not have the ability to increase discharges through trading.

4E.1, 2, 4 - strike this section.

Any degradation of a Tier 3 water, even if short term and temporary, would be an issue of non-compliance of water quality standards. Short term and temporary are far too subjective to apply to Tier 3 streams. The example of dredging contaminated sediments as a benefit does not address the potential release of legacy pollutants.

4E.6 - strike this section.

criteria in 4E.2 does not apply to or take the place of The Wilderness Act.

4E.8.1 - add to clarify: "any waters located in newly designated wilderness areas."

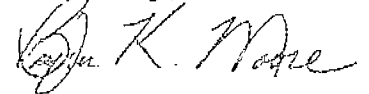
4E.8.1.d - after the word "outstanding", add: "or species sensitive".

Turbidity standard definition - edit last sentence in first paragraph to read:

"Any earth disturbing activity continuously or intermittently carried on by the same or associated persons on the same stream or tributary segment shall be allowed a single net loading increase if authorized under an NPDES permit."

Thank you for the opportunity to provide these suggestions and recommendations. The implementation of the antidegradation policy will work to preserve the outstanding rivers of West Virginia, protect the health of the citizens, and promote sustainable economic development.

Sincerely,

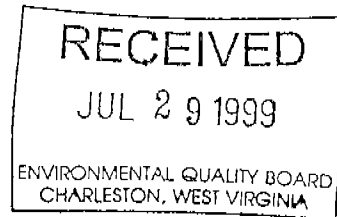


Bryan K. Moore
Secretary,
Mountaineer Chapter
Trout Unlimited

Libby Chatfield, Technical Advisor
Environmental Quality Board

Libby Chatfield
Environmental Quality Board
1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126

July 28, 1998



Dear Ms. Chatfield,

Please accept these comments in reference to the proposed changes in the Water Quality Standards Rule relative to antidegradation implementation.

We strongly support the efforts of the Environmental Quality Board to move the antidegradation implementation process forward. The implementation of this vital part of the Act is long overdue and has the potential to make a significant difference in state water quality and through the watershed approach to standardize environmental protection from region to region.

We do have serious concerns in some areas. The Clean Water Act goals of maintaining and restoring water quality must be upheld as the basis for West Virginia's antidegradation policy. An antidegradation policy is meant to provide protection not only for "uses" achieved in a watershed, but more importantly to provide additional protection for water quality that is better than needed to attain these uses. We are concerned that while the proposed implementation language may slow the decline of water quality, it is not really protective of water quality that exceeds use criteria or standards.

Clarification is needed concerning the agencies involved in antidegradation implementation. Without an updated state continuing planing process we have no assurance of adequate authority for intergovernmental cooperation in the implementation of this guidance. Since the mission of many agencies may be impacted and since these missions may at times be in conflict with each other we are concerned about authority for coordination. What is the protocol for decision making and what specific obligations exist for Office of Water Resources, the Environmental Quality Board and other state and federal agencies? Agencies participating in the development of nonpoint source best management practices need to be involved in this process above and beyond a simple notification process. The development of best management practices and their technical connection to water quality standards are critical.

Additionally, the limit of cumulative impacts of multiple, new or expanded point sources or point sources that are associated with significant nonpoint source impacts - impacts either above or below the suggested 5% criteria - are not outlined. The antidegradation review process is driven permit by permit and not by an overview of water quality in a given watershed and therefore is not ultimately protective of high quality waters. This approach will eventually drive the quality of each stream to be at or below water quality standards.

Meaningful nonpoint source criteria for antidegradation implementation are necessary for a successful program. Sole reliance on best management practices is a serious weakness of the antidegradation implementation guidance document. Since best management practices in every sector are voluntary, there is no assurance BMPs will themselves be implemented. Additionally, best management practices are not technically linked to water quality standards. This approach further isolates nonpoint source pollution from the jurisdiction of water quality standards and severely undermines the EPA mandated task of including

cumulative effects in the antidegradation implementation document. We strongly urge the Board to consider an alternative approach to nonpoint source issues, one that more clearly limits nonpoint impacts especially when water quality standards are threatened or violated. At a minimum, compliance with antidegradation for nonpoint discharges should be assumed only where monitoring data is available that verifies the effectiveness of best management practices.

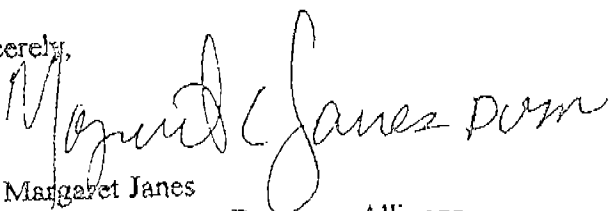
Trading should not be permitted, either between point sources or point/nonpoint sources of pollution. Trading has no place in a truly antidegradation policy i.e. if any amount of degradation would trigger review, nonpoint sources were included, and cumulative impacts were adequately considered, etc., trading would not be an issue.

Nonpoint/point source trades pose a particular problem in that while point sources have regulatory oversight, public notification, and monitoring requirements, nonpoint sources have none of these requirements. Further, reliable verification of short to medium term specific nonpoint reductions is nearly impossible because of variations in daily, seasonal, and annual rainfall and access to testing sites.

Trades should not be exempt from antidegradation review.

We respectfully submit these comments for your consideration. We hope the implementation of the antidegradation policy will help preserve the outstanding rivers of West Virginia, protect the health of all citizens of the state, and promote sustainable economic development.

Sincerely,



Dr. Margaret Janes
Potomac Headwaters Resource Alliance
HC 67 Box 27aa
Mathias, WV 26812

FAX

TO: Libby Chatfield 558-4116

FROM: Margaret Janes 897-6048

DATE: 7/29/99

PAGES WITH COVER: 3

Hello Libby -Comments on antidegradation implementation follow. Thanks for your work. MJ



Office of Water Resources
 1201 Greenbrier Street
 Charleston, WV 25311-1088
 Telephone: (304) 558-0375
 Fax: (304) 558-5903



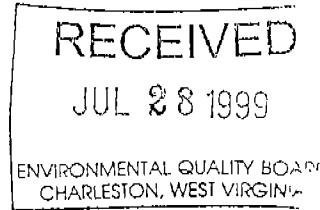
West Virginia Division of Environmental Protection

Cecil H. Underwood
 Governor

Michael P. Miano
 Director

July 27, 1999

Dr. Edward M. Snyder, Chairman
 Environmental Quality Board
 1615 Washington Street, East
 Charleston, West Virginia 25311-2126



RE: Proposed changes to the WQS
 46 CSR 1

Dear Dr. Snyder:

The Office of Water Resources (OWR) wishes to take this opportunity to support the EQB's proposals of 6/29/99 and particularly those regarding implementation procedures for anti-degradation contingent on the following comments:

- Section 4A.1.
 - Is the EQB's intention to have the procedures apply to all activities requiring a permit or only to any "new or expanded" activities requiring permits? If intention is to apply to "only new and expanded" as resulting from the previous Workgroup's recommendations, this language needs to be added.
 - Additionally the OWR still advocates inclusion of applicability to any new or expanded activity subject to non-point source control requirements or regulations as failure to address non-point source related activities will likely impede any measurable progress toward preventing, reducing and abating water quality impacts. As the EQB may recall, this was included on the original language recommendation of the Anti-Degradation Subgroup and Workgroup.
- Section 4.1.c.3.
 - This sentence could be construed to include all State Recreation Areas, which OWR does not believe is the intent. Re-wording should specify State Forests and Parks and National Forests, Parks, and Recreation Areas.
- Section 4A.3.
 - Delete phrase "Brownfields sites Voluntary Remediation Cleanup" and replace with "groundwater remediation/cleanup" as resulted in the Workgroup discussion meeting of 7/2/98.
- Section 4B.4.
 - Suggest phrase "new or expanded source" be revised to "new or expanded activity" or "discharge" consistent with results of 7/2/98 Workgroup session.
- Section 4C.1.a.
 - With minor exceptions in addition to the word "designated" vs "included" this language mirrors that of 4.1.b.2. Should the language be identical and/or is it necessary to duplicate 4.1.b.2. in this Appendix at all?

"To use all available resources to protect and restore West Virginia's environment in concert with the needs of present and future generations."



West Virginia
 Division of
 Environmental Protection

Section 4C.2.a.2.A. • Believe this section should read “provided that the temperature of the permitted discharge is written to comply with temperature standards” consistent with the 3/30/98 recommendation of the Subgroup. Worded as proposed implies that the discharge itself must comply with the temperature criteria itself and the OWR does not believe this was the intent of the Subgroup’s recommendations for this parameter.

Section 4C.5.a. • Delete duplicative word “and”.

Section 4C.5.b. • Although Section 4C.4.a. suggests areas to address in preparing an evaluation of alternatives, no criteria or guidance is offered for evaluating the reasonableness or cost effectiveness of less degrading alternatives. As these evaluations could lead to substantive subjective evaluations, OWR staff decisions will be subject to much scrutiny and potential appeal. OWR therefore strongly urges that the EQB offers appropriate direction or guidance on conducting these reviews.

Additionally, in response to one of the comments submitted in the original proposal in 1998 regarding this issue, the reference was made to a “preliminary decision” that could be made by the agency which would be put out for public notice and comment after which the agency could alter its decision or then decide to deny the activity.

It is understood that the EQB recognizes the need for clarification of this entire section and encourages the stakeholders group to discuss this Tier 2 review process with this option in mind. However, the OWR’s position has been to minimize the time needed for additional public notification in this process by combining with the draft permit public notice. Again, OWR feels strongly that substantive guidance or direction should be offered to streamline the decision making process where these instances occur which will allow for as prompt action as possible in approving or denying at this stage.

Section 4C.6.a • The following language after the word “economics” appears to be inadvertently omitted - “importance of the proposed activity. The factors to be addressed in such documentation may”.

Section 4C.6.b. & c. • A number of lines were not underlined as suggested proposed new language this should be clarified.
& 4C.8.a

Section 4C.6.c. • Reference is made to the possible use of “EPA’s Interim Economic Guidance for Water Quality Standards” in making a preliminary determination regarding the importance of the activity.

At this juncture, the OWR has not reviewed the contents of this document to determine if this can be applied by existing OWR staff. It is quite likely that the OWR does not have the existing qualified personnel to offer appropriate judgments on a social and economic basis.

Dr. Edward M. Snyder
July 27, 1999
Page three

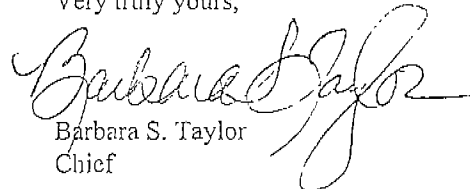
Again, more substantial direction and guidance is necessary in this area to minimize the potential for appeal in what will also likely be a subjective decision.

- Section 4C.8.c.1. pgs. 64 & 65 • Language duplicated. Suggest delete language of page 64 since that of page 65 is correctly underlined.
- Section 4D.2.c. • It is not clear whether the last three words, "of the water," pertain to upstream waters, the water of special concern, or both. Needs re-worded.
- Section 4D.2.c. on "Trading" • Should be listed as 4D.2.d.
- The following language as originally proposed in the Board's 1998 proposal after the phrase "The basis for the trade will be" has apparently been inadvertently omitted - "documented through a TMDL pursuant to CWA §303(d) requirements or other appropriate method which will include an appropriate margin of safety. Such a margin of safety will address in particular, the uncertainties associated with any proposed non-point source controls as".
- See also comments on 4B.4. above.
- Section 46-1-4E • Reference to 46-4.1.c. should be 46-4.1.d.
- Section 4E.3. • Reference to 4D.2.a-f should be 4E.2.a-f.
- General • There is a nomination procedure for Tier 3.0 streams. Should consideration be included for nomination of Tier 2.5 streams?

Finally, the OWR still urges that the EQB consider those comments not yet addressed in memo to Libby Chatfield from Randy Sovic dated 7/7/98, specifically relating to: Sections 2.18, 6.1.b.2., 6.1.c., and 6.3.c. and further urges that the number of oversites and necessary corrections to the rule offered in letter to Ms. Chatfield dated 7/6/98 also be addressed.

Again, the Office of Water Resources appreciates the opportunity to provide comments on these or other rule changes.

Very truly yours,


Barbara S. Taylor
Chief

BST:rsr
cc: Bob Koroncai
EPA Region III

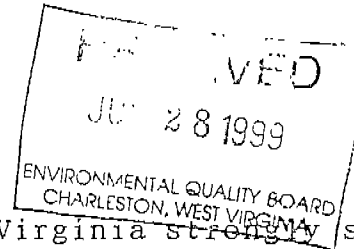


LEAGUE OF WOMEN VOTERS OF WEST VIRGINIA

2023 Huber Road
Charleston, WV 25314
Phone 304-342-2706
FAX 304 342-1377

July 26, 1999

Environmental Quality Board
Attn: Libby Chatfield
1615 Washington St. E, Suite 301
Charleston, WV 25311-2126



Dear Ms. Chatfield,

The League of Women Voters of West Virginia strongly supports West Virginia enacting anti-degradation implementation procedures as required by the Clean Water Act. We believe that when enacting such procedures we should protect waters that exceed the standards as well as those meeting existing instream water uses.

We do have some concerns. The term "significant degradation occurs" several times. We wonder how "significant degradation" would be determined. Who would decide whether "significant degradation" has happened? It seems that using this terminology could lead to legal action by stakeholders on various sides of the issue. We would prefer a measurable standard for triggering an anti-degradation review.

We believe that cumulative impacts to water quality should trigger anti-degradation review, not necessarily impacts from one or few sources. Both point and non-point sources may result in anti-degradation of our waters.

We also are concerned about the effects of trading. Trading should not be allowed if waters which exceed standards are allowed to deteriorate. We also question the phrase "through other appropriate measures". Any trading should require verifiable results including nonpoint pollution improvements as well as point pollution improvements. Trading should be included under anti-degradation review. If any of these issues are not covered in the regulations, then trading should not be permitted.

4A.2 It can not be assumed that "nonpoint source activities" are "in compliance with antidegradation requirements" without a strong monitoring program.

We praise the Environmental Quality Board for again starting the process for establishing an anti-degradation implementation policy in West Virginia.

Sincerely,

ES/HG

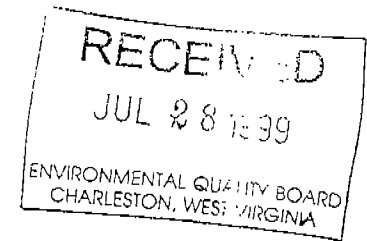
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Helen Gibbins, Natural Resources
6128 Gideon Rd.
Huntington, WV 25705



P. O. Box 235
Alloy, WV 25002
July 25, 1999

Libby Chatfield
WV Environmental Quality Board
1615 Washington Street, East
Room 301
Charleston, WV 25311-2126



Re: Proposed changes to the Water Quality Standards Rule

Dear Ms Chatfield:

We are pleased that the Environmental Quality Board has developed a proposed antidegradation guidance procedure and we hope that an effective plan will be implemented.

Appendix A, Category B-2 Trout Waters states that: "This list contains known trout waters and is not intended to exclude any waters which meet the definition in Section 2.16." It appears that the reference to Section 2.16 is a mistake because it is Section 2.19 that defines trout waters.

Section 2.19 states that: "'Trout waters' are streams or stream segments which sustain year-round trout populations." This definition of trout waters would include all native brook trout streams. However, since the brook trout is the only trout native to West Virginia, I suggest that the following sentence be added to Section 2.19:


"All native brook trout streams are trout waters."

Appendix A, Category B-2 Trout Waters contains many of the trout waters in West Virginia, but the list is incomplete. Several streams that have reproducing brown trout or reproducing rainbow trout are not on the list. Several native brook trout streams are on the list, but there are hundreds of native brook trout streams that are not on the list. Also, many of the streams that receive brown trout fingerlings and support trout year-round are not on the list.

It would seem that a separate list of reproducing trout streams should be developed since Tier 2.5 Protection is provided for: "4.1.c.2 All naturally reproducing trout streams."

All known trout streams should be included on appropriate lists to avoid confusion on the part of companies developing plans and governmental agencies reviewing proposed plans. I am sure that Mike Shingleton, Assistant Chief in Charge of Coldwater Resources for DNR, will be glad to assist in developing appropriate lists of trout streams. Trout Unlimited is also willing to help in this effort.

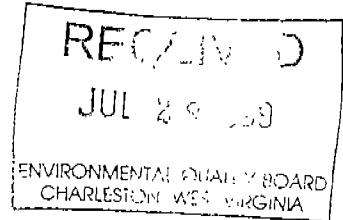
Please contact me if you have any questions about the suggestions.

Sincerely,

Ernie Nester
Vice Chair- South
WV Council of Trout Unlimited
304-779-2706
seenester@newwave.net

Copy to: Mike Shingleton, DNR
Ed Crum, Chair, WVCTU

THE LAW OFFICES OF
STUART CALWELL, PLLC

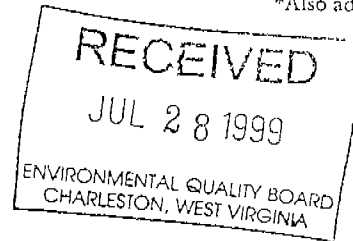
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Stuart Calwell
John H. Skaggs
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D. Christopher Hedges
*Also admitted in VA

Wednesday, July 28, 1999



West Virginia Environmental Quality Board
1615 Washington Street, East
Suite 301
Charleston, WV 2530f

Re: **Comments of the Affiliated Construction Trades Foundation on the proposed Antidegradation Implementation Policy**

Dear Sirs and Madam,

Enclosed for filing in a timely manner are the comments of the Affiliated Construction Trades Foundation, ("ACT"), on the proposed Antidegradation Implementation Policy submitted by the West Virginia Environmental Quality Board for public review and comment.

If there are any questions in this regard, please call. Thank you for your attention to this matter.

Very truly yours,

Shirley Skaggs /RSW.
Shirley A. Skaggs

Enclosure

cc: Mr. Steve White, Director
The Affiliated Construction Trades Foundation, w/enclosure

Comments on Proposed Antidegradation Implementation Policy

Prepared for:
Affiliated Construction Trades Foundation
523 Central Avenue
Charleston, WV 25302

Prepared by:
Carpenter Environmental Associates, Inc.
70 Hilltop Road
Ramsey, New Jersey 07446

CEA No. 97039
July 26, 1999

Carpenter Environmental Associates, Inc. (CEA), on behalf of the Affiliated Construction Trades Foundation (ACT) has reviewed the draft antidegradation implementation policy proposed by the Environmental Quality Board (Board). We commend the Board for the development of a comprehensive antidegradation implementation policy. We hope that the policy will be utilized by the State of West Virginia to ensure that the waters of the State are protected. We recommend that the proposed implementation policy be adopted with a few minor adjustments:

1. The regulations need to clarify the roles of the state and other agencies in implementing the antidegradation policy. According to the March 25, 1999 Summary of Comments Received on Antidegradation Implementation Procedures the roles of state and other agencies would be clarified through the development of flow charts outlining the roles of the Office of Water Resources, the Environmental Quality Board, and other state and federal agencies. It appears that these flow charts have yet to be developed. The roles of the agencies must be clarified and included in the regulations. The Summary of Comments further stated that it was intended that the antidegradation policy would be implemented by the Office of Water Resources and suggested that references to that agency or its chief would be added to the policy for clarification. No such wording has been added.
2. According to Section 4C.1.a, a waterbody is to be considered a “high quality” water if it meets either the fishable or swimmable goal. This limited definition of a high quality water would allow the potential for a large number of waterbodies not to receive appropriate antidegradation protection. For example, a waterbody could not meet the fishable/swimmable goals due to an exceedance of one or two parameters, and be a high quality water for all other parameters. According to United States Environmental Protection Agency (EPA) guidance (Water Quality Standards Handbook, 2nd Edition) “all parameters do not need to be better quality than the State’s ambient criteria for the water to be deemed a “high-quality water”,

EPA believes that it is best to apply anti-degradation on a parameter-by-parameter basis. Otherwise, there is potential for a large number of waters not to receive antidegradation protection...”. The Summary of Comments dated March 25, 1999, states that it was the intention of the Board to establish high quality waters on a parameter by parameter basis and that the language of 4C.1.a. would be clarified to reflect this intention. This has not been done. The regulations must be revised to reflect the parameter-by-parameter approach for determining high quality waters.

3. Section 4C.2.a.1.A states any proposed activity that would increase the ambient concentration of any parameter more than 5% at critical flow conditions shall be considered significant degradation. This method has the effect of allowing very slight increases in discharges to “clean” waters and greater discharges to more highly polluted waters. To fully protect both clean and polluted waters, we strongly urge adopting the EPA’s proposed method of determining significant degradation. As pointed out by the EPA in its July 20, 1998 comments, the method proposed by the Board could allow substantial amounts of remaining assimilative capacity to be used without an antidegradation review in waters with ambient concentrations close to the criterion. The EPA recommended determining significant degradation based upon either remaining assimilative capacity or increases above ambient concentrations. As illustrated by Attachment I, by applying the more stringent of the two methods, both very clean waters and waters with relatively high concentrations of a pollutant would be protected.
4. Cumulative impacts are not addressed by the proposed regulations. In fact, the use of an increase of 5% over the ambient concentration as the basis for determining significant degradation has the effect increasing cumulative impacts. As now written, a facility would benefit if there were already numerous discharges of a parameter to a waterbody – the ambient concentration would be relatively higher and therefore so would the allowable 5% increase over ambient concentrations which would be necessary to trigger an antidegradation review. The more of a

pollutant being discharged, the less review necessary to add more of that pollutant. The use of 5% of the remaining assimilative capacity would help address cumulative impacts by preventing more pollutants from being discharged to a polluted stream than a clean one.

5. Section 4C.2.a.2.D states that any reduction of water quality of less than 0.4 ppm at maximum dissolved oxygen (DO) sag would not be considered significant degradation. According to the Summary of Comments, the value of 0.4 ppm represents 5% of the initial DO in typical DO modeling procedures (95% of DO saturation values at temperatures between 21° and 27° C. We question the appropriateness of the 0.4 ppm value. Using assimilative capacity calculations as recommended by the EPA, we calculate a value of 0.15 ppm (5% of the assimilative capacity of a waterbody at 27° C assuming a water quality standard of 5.0 ppm and a saturation concentration of 7.95 ppm). We recommend using this value to determine significant degradation due to oxygen reduction. We would also recommend that the regulations specify that any reduction in DO would be allowable only if no water quality violations of the DO standard were predicted using appropriate wasteload allocation modeling.

6. Section 4C.2.a.2.F. allows a trade to avoid significant degradation review for high quality waters. The trading proposed by the regulations should only be allowable after a complete antidegradation review including a social and economic justification analysis and public participation. EPA guidance (EPA Water Quality Standards Handbook: 2nd Edition) states that when a pollutant discharge ceases for any reason, the waste load allocations for other discharges in the area may be adjusted to reflect the additional loading available for high quality waters “where after full satisfaction of all public participation and intergovernmental review requirements, such adjustments are considered necessary to accommodate important economic or social development...”

7. Sections 4B.4, 4C.2.a.2.F., and 4D.2.C state that trading would be done through the TMDL process or other appropriate measures. The term “other appropriate measures” is too vague. We have no way of knowing what these “appropriate measures” would constitute and whether they would be subject to the public participation process. Since the “other appropriate measures” would constitute the majority of trades (It is unlikely that TMDLs will be utilized as TMDLs are developed to ensure that impaired waterbodies meet water quality standards, rather than to ensure that waterbodies do not become degraded), these measures must be better defined to ensure that they will be technically sound and subject to enforcement actions if found to be violated.

8. Section 4C.6.a sets forth that the social and economic evaluation would include increased production as one of the factors considered. Increased production alone should not be considered sufficient reason to allow a discharge which would cause significant degradation.

ATTACHMENT I

Calculation of Significance Based upon Instream Concentration

If, for a chemical X with a criterion value of 10 mg/l, the ambient concentration is zero, no increase would be insignificant because $5\% \times 0 = 0$.

If the ambient concentration is 1 mg/l, an 0.05 mg/l increase in instream concentration would be significant.

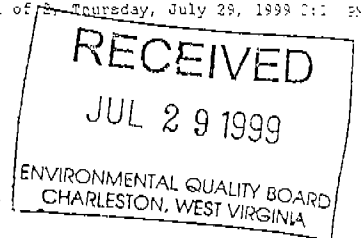
If the ambient concentration is 9.5, an insignificant discharge would essentially use all of the remaining assimilative capacity ($9.5 \times 5\% = 0.475$, which when added to the ambient concentration approximately equals the criterion.)

Calculation of Significance Based upon Assimilative Capacity

If for chemical X with a criterion value of 10 mg/l, the ambient concentration is zero, an increased load would need to lower water quality by 0.5 mg/l in order to be significant.

If the ambient concentration is 1 mg/l, an 0.45 mg/l increase in instream concentration would be significant

If the ambient concentration is 9.5 mg/l, an insignificant discharge would be allowed to use very little of the remaining assimilative capacity ($(10-9.5) \times 5\% = 0.035$ mg/l).



Mountaineer Chapter Trout Unlimited

FROM THE DESK OF DONALD S. GARVIN, JR. - MCTU PRESIDENT
 P.O. BOX 666 - BUCKHANNON, WV 26201
 PHONE. OFFICE AND FAX - 304/472-8658 OR HOME - 304/472-8716

Libby Chatfield
 Technical Advisor
 WV Environmental Quality Board
 1615 Washington Street East, Suite 301
 Charleston, WV 25311-2126

July 29, 1999
 Via Fax

RE: WV Antidegradation Implementation Policy

Dear Ms. Chatfield:

I am submitting these comments on behalf of the nearly 300 members of the Mountaineer Chapter of Trout Unlimited. The Mountaineer Chapter is comprised of volunteer members from north-central West Virginia, from Fairmont to Buckhannon. Our mission is to preserve, protect, restore and enhance our coldwater fisheries and their watersheds.

Because of our concerns with the implementation of the Clean Water Act in West Virginia, we are pleased that the Environmental Quality Board and the Office of Water Resources seem to be committed to implementing an antidegradation policy for the state's rivers and streams. This is long overdue. Implementation of a strong antidegradation policy will be of significant benefit to the state's waters, and to the state's citizens as well.

However, we do have some concerns with the antidegradation implementation plan as it is now proposed (Water Quality Standards Rule, 46 CSR 1, dated June 29, 1999). These concerns are the following:

A). We are concerned that the list of trout waters (Appendix A, Category B-2 Trout Waters) is not complete. We urge you to work with the appropriate DNR personnel, as well as Trout Unlimited members, to develop a more comprehensive list of known reproducing trout streams. In addition, since the brook trout is the only trout native to the state, we urge you to clarify the protection of this resource by adding the following language to Section 2.19: "All native brook trout streams are trout waters."

B). Generally, we do not oppose the "Trading" provisions in Appendix F at 4B.4, as long as they are considered on a watershed basis under the following defined standards:

- 1). Trading must be based on established TMDL's
- 2). There is a good compliance record by potential trading partners
- 3). There are pollution limits in discharge permits
- 4). Trades should not be exempt from antidegradation review
- 5). The trading ratio is greater than 2:1 for point source, 4:1 for non-point
- 6). Trading must avoid creation of "hot spots"
- 7). There are sufficient monitoring standards and adequate enforcement mechanisms
- 8). Trades of toxics are banned, as well as trades among different pollutants and across
- 9). There is adequate EPA oversight
- 10). There is opportunity for public notice and comment

Page 2 Comments
Water Quality Standards Rule, 46 CSR 1

C). We oppose the "Mixing Zones" provisions as currently offered in Section 46-1-5. The language as it now stands would actually permit degradation of streams, or, at the very least, of stream segments.

D). We are concerned that the current implementation plan does not go far enough to protect streams where the water quality already exceeds water quality standards. In that regard, an antidegradation review should occur if any "measurable" degradation is predicted, rather than being triggered only if greater than 5% increase (or "significant" increase) is anticipated. Further, the proposed rule does not adequately consider cumulative impacts as a trigger for review. We urge you to strengthen the plan's protection provisions in these regards.

E). Finally, it is our opinion that this implementation plan does not adequately address nonpoint source pollution. As proposed, non-point sources are deemed to be "in compliance" as long as there are "cost effective and reasonable best management practices" in place -- even if there is evidence of severe or chronic water quality degradation. This seems to us to be wholesale exemption of nonpoint source pollution from antidegradation standards. We realize that addressing the nonpoint issue is difficult, but nonpoint pollution is the biggest problem facing many of this state's trout streams, and we hope you can address it more effectively.

Thank you for considering our comments, and feel free to call on us if we can be of any assistance in your efforts to protect West Virginia's unimpaired waters.

Respectfully,

Donald S. Garvin, Jr., President
Mountaineer Chapter Trout Unlimited

WEST VIRGINIA



PAM MOE-MERRITT
CONSERVATION PROGRAM DIRECTOR

WEST VIRGINIA
RIVERS COALITION

TO

EOB

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Libby Chatfield

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Libby -

7-29-99

*Here's our comments
on Antideg. implementation
policy. See you tonight?*

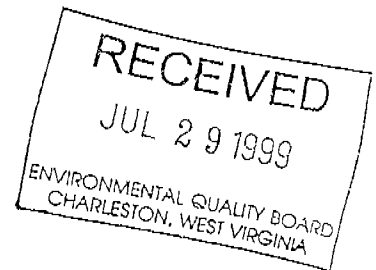
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JUL 29 1999



Dr. Edward M. Snyder, Chairman
Environmental Quality Board
1615 Washington Street, East
Charleston, WV 25311-2126

Dear Dr. Snyder:

The Environmental Protection Agency (EPA) has received notice of the Environmental Quality Board's proposed changes to the Water Quality Standards Rule, 46 CSR 1 including the adoption of antidegradation implementation methods. Pursuant to 40 CFR § 131.20(b), EPA offers specific comments on the proposed antidegradation implementation methods.

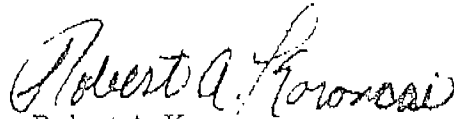
EPA conditionally approved West Virginia's Antidegradation Policy on November 9, 1995 contingent on the development and adoption of antidegradation implementation procedures the following year. Accordingly, a stakeholders committee, consisting of members from the Division of Environmental Protection, Department of Natural Resources, and the Environmental Quality Board (EQB), was formed to identify and propose implementation methods. At a public hearing held on July 20, 1998, the committee presented and accepted comments on proposed procedures. Significant negative comment was posed by industry. In order to address comments from industry, the EQB removed the implementation methods from legislative consideration in the 1999 session and formed a new stakeholders committee which included representation from industry.

Due to the withdrawal of the proposed implementation procedures from submittal to the Legislature Review Rulemaking Committee in August of 1998, the methods were not included in West Virginia's 1998 Water Quality Standards triennial review. Consequently, on June 22, 1999, EPA Region III notified West Virginia that Region III will recommend that the Administrator identify federally-developed implementation methods.

Since then, the EQB has decided to submit antidegradation implementation procedures to the Legislative Rulemaking Review Committee this year in time for legislative consideration during the 2000 session. EPA is pleased that the EQB is moving forward with the adoption of implementation methods; however, we also recognize that this process was interrupted once before. We urge EQB to continue with adoption of antidegradation implementation procedures to avoid the need for the Administrator to identify federally-developed implementation methods.

The enclosed documents outline substantive comments on the Antidegradation Implementation Procedures. EPA hopes that these comments will assist EQB in further refining this document to ensure that antidegradation implementation procedures are protective of the waters of West Virginia and consistent with current federal and state policy and regulations.

Sincerely,



Robert A. Koronca
VA/WV Branch Chief

Enclosure

Enclosure
General & Specific Comments on Antidegradation Implementation Procedures

I. General Comments

- Definitions should be added for the following terms to the Water Quality Standards definition section to aid the interpretation of the implementation procedures:
 - disturbed area
 - best management practices
 - ambient
 - increased discharge
- The procedures should indicate where the findings of the antidegradation review will be documented.
- Please provide an explanation of how and where the state will provide a list of Tier 2, Tier 2.5 and Tier 3 waters.
- Will a Tier designation be considered a legislative action? What is the process for nominating a Tier 2.5 and Tier 3 water? Who approves the process and nomination? How is the public notified of the nomination process? What information, if any, does the person seeking the nomination need to provide?

II. Specific Comments

46-1-4A

- The language of Section 4A.1 may limit the applicability of this section. The EPA suggests that the following language be inserted: "The procedures herein are intended to apply, *but are not limited to*, activities that require..."
- The EPA believes that the language addressing Nonpoint Sources in section 4A.2 is adequate for now. However, as a result of the recent Clean Water Action Plan, EPA is required to develop guidance that more specifically defines expectations and procedures for states to follow to fully implement antidegradation policies relating to polluted runoff. Once that guidance is completed, EPA expects that West Virginia will modify the procedures in accordance with guidance.
- West Virginia should clarify who will be responsible for implementing these procedures.
- Please clarify the intent of section 4A.3 and types of activities covered. Is the socio-economic justification process under 47-57.6.9.2 consistent with the socio-economic process required in these procedures?

46-1-4B

- Section 4B.1 does not clearly identify how an existing use is determined. Please clarify how the state intends for this language to determine existing uses. The following example is intended to provide the state with one possibility: "Existing uses can be established by: (1) demonstrating that a use has actually occurred on or after November 28, 1975, or (2) by demonstrating that although a use has not occurred, the water quality is suitable to allow such a use to occur, unless there are physical problems which prevent the use from being attained."
- In Section 4B.2.b, the procedure for correcting a situation in which the designated use is less than an existing use is not consistent with 131.10(i) which states, "Where existing water quality standards specify designated uses less than those which are presently being attained, the state shall revise its standards to reflect the uses actually being attained." Section 4B.2.b.1 appears to be reflective of this regulation, therefore, section 4B.2.b should be revised and combined with 4B2.b.1. In addition, please ensure that this regulation is clear and consistent.

46-1-4C

- In section 4C.1, please clarify the procedures or methods the state plans on using to provide a list of Tier 2 waters, and where it will be listed. As stated before, this is unnecessary if Tier 2 is the default.
- Section 4C.1.a appears to be an "all or nothing" approach to designating waters as high quality. For example, if a water did not attain the fecal coliform standard, thus exceeding the "swimmable" use standard, and the copper criterion, thus exceeding the "fishable" use standard, that water would not qualify for protection under Tier 2 even though that water may be of high quality and have sufficient assimilative capacity for all other relevant parameters. During development of these procedures, did the state consider using a parameter-by-parameter approach for designating Tier 2 waters? If so, why was this approach discarded in favor of the current approach? The EPA would like to discuss this further with the state. EPA is concerned that this approach may exclude the majority of waters in West Virginia from Tier 2 protection.
- EPA recommends WV consider basing the "de minimus" calculation on the remaining assimilative capacity. By basing this calculation on an increase above the ambient concentration, very small additional loads in very clean waters are significant while it requires much larger loads to be significant in more polluted waters. For example:
 - (1) If, for chemical X with a criterion value of 10 mg/L, the ambient concentration is zero (not an unlikely scenario for man-made organics) NO increase would be insignificant because $5\% \times 0 = 0$, and
 - (2) if the ambient concentration is 1 mg/L, 0.05 mg/L increase in instream concentration would be significant.
 - (3) On the other hand, if the ambient concentration is 9.5 mg/L, an insignificant discharge

would essentially use all of the remaining assimilative capacity ($9.5 \times 5\% = 0.475$, which, when added to the ambient concentration approximately equals the criterion.)

This provides the highest level of protection to the cleanest waters (not a bad idea) but also allows substantial amounts of remaining assimilative capacity to be used without an antidegradation review in waters closer to the criterion.

By basing the significance test on remaining assimilative capacity, the argument above is reversed, allowing larger loads to be insignificant in cleaner water while progressively reducing the amount that can be insignificant as assimilative capacity is used up. Using the above example:

(1) If, for chemical X with a criterion value of 10 mg/L, the ambient concentration is zero an increased load would need to lower water quality by 0.5 mg/L in order to be significant,

(2) if the ambient concentration is 1 mg/L, 0.45 mg/L increase in instream concentration would be significant, and

(3) if the ambient concentration is 9.5 mg/L, an insignificant discharge would be allowed to use very little of the remaining assimilative capacity ($(10-9.5) \times 5\% = 0.035$).

If WV wants to protect BOTH very clean waters AND remaining assimilative capacity, it could apply the more stringent of the above two approaches.

- Our interpretation of section 4C.2.a.2 is that these parameters are exempt from an antidegradation review. If the intent of this section is otherwise, please clarify the exact intent and how this will be applied to antidegradation reviews.
- Please provide the rationale used to justify that any reduction of less than 0.4 ppm at maximum DO sag based upon an appropriate wasteload allocation model will not cause significant degradation. Based on the rationale discussed above, the EPA suggests that the state consider a percentage of the assimilative capacity of DO in this situation.
- In section 4C.5.b, does finding a less or non-degrading alternative complete the review or does the alternative itself need to be addressed by a separate antidegradation review? In addition, please specify the decision criteria which will lead to choosing one alternative over another and the authority with whom this power resides.
- What will trigger the applicant to be required to submit the information listed in section 4C.6.b? Furthermore, who has the authority to require this information? At what point during the review would the applicant be required to submit this information?
- Any determinations or decisions made as part of section 4C.3, 4C.5.b and 4C.6.d should be preliminary determinations and be included as part of the public participation process and the appropriate comment period should be provided.
- Under section 4C.8.c, please specify the duration of the public comment period and the manner in which the public comment and findings will be advertised.

46-1-4D

- What procedures or methods are used to designate a "water of special concern"? Can Tier 2.5 waters be nominated in the same manner as Tier 3 waters? Does the state plan on providing a list of water which are designated Tier 2.5?
- The state should ensure that the information required in the antidegradation review sheet of section 4D.3.b is included in the public notice. The use of "may" in this section introduces an aspect of subjectivity which gives the impression that this information may not be required in all situations.

46-1-4E

- How does the state intend to protect Tier 3 waters?
- Similar to Tier 2 and Tier 2.5 waters, what procedures or methods will be used to designate a Tier 3 water? Does the state plan on providing a list of Tier 3 waters? Again, if Tier 2 is the default, there is no need for a designation method of Tier 2.
- Do all of the factors included in section 4E.2 have to be met for an activity to be allowed?
- Similar to the comments made in section 4D.3.b, the state should ensure that the information required in the antidegradation review sheet of section 4E.4.b is included in the public notice.
- Section 4E.6 should be moved so that it directly follows section 4E.3.
- It appears that Section 4E.7 attempts to provide consistency with 40 CFR §131.10(b) which states, "In designating uses of a water body and the appropriate criteria for those uses, the state shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." Please explain how the state plans on implementing this policy.



FAX TRANSMISSION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

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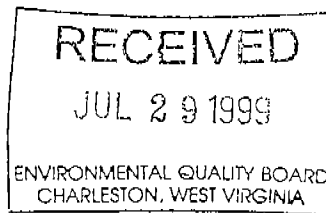
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Subject: [Fwd: (no subject)]
Date: Thu, 29 Jul 1999 15:56:37 -0400
From: Jerry Burke <burke@mountain.net>
Reply-To: burke@mountain.net
To: chatfe@mail.wvnet.edu

Subject: (no subject)
Date: Thu, 29 Jul 1999 15:45:34 -0400
From: Jerry Burke <burke@mountain.net>
Reply-To: burke@mountain.net
To: chatfe@mail.wv.net.edu



July 29, 1999

Libby Chatfield
Technical Advisor
Environmental Quality Board
1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126

Dear Ms. Chatfield:

Please accept my comments in reference to the proposed changes in the Water Quality Standards Rule, 46 CSR 1, dated June 29, 1999 regarding the implementation of the antidegradation policy.

I appreciate the time and effort that both the Environmental Quality Board and the Office of Water Resources have devoted to developing the antidegradation implementation guidance document. This work was a significant commitment of resources and I strongly support this effort. The implementation of the antidegradation provision of the Clean Water Act has the potential to make a significant difference to improve the water quality of West Virginia's waterways.

While I support this effort, I do have some serious concerns:

1. The Clean Water Act goals of maintaining and restoring water quality

must be upheld as the basis for West Virginia's antidegradation policy. An antidegradation policy is meant to provide protection not only for "uses" achieved in a watershed, but more importantly to provide additional protection for water quality that is better than needed to attain these uses. I am concerned that while the proposed implementation language may slow the decline of water quality, it is not really protective of water quality that exceeds use criteria or standards.

2. The document currently states that an antidegradation review is triggered only if greater than 5% increase in a pollutant is anticipated. Reliance on any "significant" degradation is not sufficiently protective. If any measurable degradation is predicted, an antidegradation review should occur.

3. The limit of cumulative impacts of multiple, new or expanded point sources or point sources that are associated with significant nonpoint source impacts - impacts either above or below the suggested 5% criteria

- are not outlined. The antidegradation review process is driven permit by permit and not by an overview of water quality in a given watershed and therefore is not ultimately protective of high quality waters. Cumulative impacts must be outlined and incorporated into the policy.

4. Meaningful nonpoint source criteria for antidegradation implementation are absolutely necessary for a successful program. Sole reliance on best management practices is a serious weakness of the draft

antidegradation implementation policy. Since best management practices in every sector are voluntary, there is no assurance BMPs will themselves be implemented. Additionally, best management practices are not technically linked to water quality standards. This approach further isolates nonpoint source pollution from the jurisdiction of water quality standards and severely undermines the EPA mandated task of

including cumulative effects in the antidegradation implementation document.

I strongly urge the Board to consider an alternative approach to

nonpoint source issues, one that more clearly limits nonpoint impacts especially when water quality standards are threatened or violated. At a minimum, compliance with antidegradation for nonpoint discharges should be assumed only where monitoring data is available that verifies the effectiveness of best management practices.

5. Trading should not be permitted, either between point sources or between point and nonpoint sources of pollution. Trading has no place in a truly anti-degradation policy i.e. if any amount of degradation would trigger review, and nonpoint sources were included, and cumulative

impacts were adequately considered, etc., trading would not be an issue.

Trades between point and nonpoint sources pose a particular problem in that while point sources have regulatory oversight, public notification, and monitoring requirements, nonpoint sources have none of these requirements. Further, reliable verification of short to medium term specific nonpoint reductions is nearly impossible because of variations in daily, seasonal, and annual rainfall and access to testing sites.

Trades should not be exempt from antidegradation review as in 4C.2.a.2 and 4C.3. This creates a significant loophole in the policy.

In sections 4B.4, 4C.2.a.2.F., and 4D.2.C it is stated the basis

for a trade will be made through a TMDL or "other appropriate measures". I strongly object to the language "other appropriate measures" as it makes the basis of these trades discretionary, without any clearly defined, scientifically sound criteria. This is especially

important because TMDL's generally are only established when water fails

to meet a standard and so the "other appropriate measures" would be the only method available for trades in the higher quality waters that the antidegradation policy is supposed to protect. This allows a clear way

out of antidegradation constraints for point source discharges and seriously threatens the intent of the antidegradation provision of the CWA.

Thank you for the opportunity to provide comments. I hope the implementation of this antidegradation policy will help preserve the outstanding rivers of West Virginia, protect the health of all citizens of the state, and promote sustainable economic development.

Sincerely,
Jerry Burke
9Point Drive
Petersburg, WV 26847

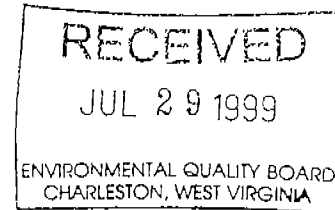


Public Employees for Environmental Responsibility

2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER(7337) • fax: 202-265-4192
e-mail: info@peer.org • website: http://www.peer.org

July 29, 1999

Ms. Elizabeth Chatfield
Technical Advisor
Environmental Quality Board
1615 Washington Street East, Room 301
Charleston WV 25311-2126



Dear Libby,

Thank you for the opportunity to file comments on behalf of WV Public Employees for Environmental Responsibility (PEER.) WV-PEER is a chapter of PEER, a national non-profit alliance of local state and federal resource professionals — scientists, land managers, law enforcement officers — dedicated to upholding environmental laws and values.

WV-PEER would like to commend the Environmental Quality Board for its effort to implement the WV's anti-degradation provision of the water quality standards. WV-PEER feels strongly that anti-degradation is the heart of the original goals and intent of the Clean Water Act.

Specific Comments:

1. WV-PEER recommends that EQB take a closer review of cumulative impacts to the waters of the state. OWR has recently implemented a watershed approach to water quality management and began looking at the cumulative impacts of non-point and point sources on watersheds of the state. Reviewing impacts on a watershed on a permit by permit basis is not a sound technical method of assessing degradation to a water of the state.
2. WV-PEER urges the EQB to consider stronger language and policy to address impacts from non-point sources of pollution. In recent years, non-point sources of pollution have become the uncontrolled source of damage to West Virginia's waterways. Current voluntary best management practices do not adequately address sources of water quality contamination.
3. WV-PEER is very concerned by the use of 5% increase in a pollutant as a trigger for an anti-degradation review. The very definition of anti-degradation means no further degrading of a water way, not 5% degrading of a water. Given that waters of the state have been without an anti-degradation policy for years in West Virginia, it would appear any measurable degradation should trigger a review of the cumulative impacts.

WV-PEER * P.O. Box 6241 * Charleston, WV * 25362 * 304.346.3965 * wvpeer@peer.org

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4. WV-PEER urges the EQB to include protection for water ways that exceed water quality standards. WV-PEER strongly believes there should be no room for backsliding in quality of West Virginia's waters.

Again, Thank you for the opportunity to comment on this valuable, long awaited policy for the protection and improvement of West Virginia's waters.

Sincerely,

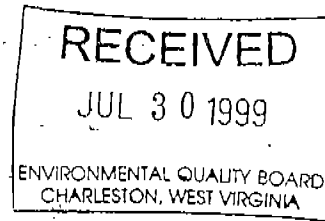


Wendy E. Radcliff
WV-PEER Coordinator



E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED
BELLE, WEST VIRGINIA 25015

AGRICULTURAL PRODUCTS DEPARTMENT
BELLE PLANT, 901 W. DU PONT AVENUE



July 30, 1999

Dr. Ed Snyder, Chair
West Virginia Environmental Quality Board
1615 Washington Street East Suite 301
Charleston, WV 25311

Re: Antidegradation Implementation Regulation

On behalf of the West Virginia Manufacturers Association, I would again express our concern over the draft Antidegradation Implementation Regulation which is currently being considered by the Environmental Quality Board. We believe that the proposed regulation is badly flawed scientifically and could cause serious damage to West Virginia's economy if implemented in its current form.

As I stated in my public comments last night, we believe that the current draft regulation should be withdrawn at this time. We believe that the proposed regulation is unclear in its language and intent; is based on faulty premises and is onerous in its possible application. This proposed regulation is far more stringent and inflexible than the equivalent antidegradation implementation policies of surrounding states. The proposed regulation is also more stringent than the EPA's guidance from Region III and far more stringent than the guidance document from EPA's national offices.

We are extremely concerned that the "process" we are involved in is severely flawed in that there is no incentive for those who favor the current draft regulation to work in good faith towards resolution of the problems we have identified with the draft; They need only sit resolutely for the draft to move forward as-is. We in the Manufacturers Association Water Team do not believe that this is a healthy situation or one that the Board intended when they agreed to a Stakeholders Process to address this issue.

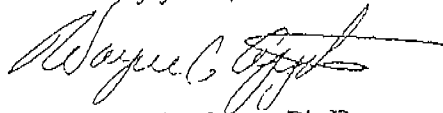
I would also point out, however, that even those at the public hearing who disagreed with the position of the Manufacturers Association also identified issues which need to be addressed.

Several of the representatives from the "citizen's groups" present questioned the draft regulation's treatment of non-point sources. Their comments are consistent with the same criticism I made in my remarks and written commentary last year (a copy of which is attached). I agree that this an additional serious flaw which should be addressed before the state adopts an antidegradation implementation policy.

I have attached for your interest an article which was submitted to both the Charleston Gazette and Daily Mail in rebuttal to the printed op-ed commentary submitted by the representative of the Rivers Coalition last night.

We in the Manufacturers Association support the need to move forward on an antidegradation implementation plan. However, we believe that the current draft is so badly flawed and so murky in it's language that it is dangerous to move forward in the legislative process with this specific document. We urge you to withdraw the current draft, let a meaningful Stakeholder Process move forward and submit a scientifically defensible and economically viable plan to legislature next year.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Wayne C. Appleton".

Wayne C. Appleton, Ph.D.

Comments Submitted to the Environmental Quality Board on the
Proposed Water Quality Antidegradation Policy—July 20th 1998

Wayne C. Appleton, Ph.D. E.I. DuPont de Nemours and Company, Inc.
West Virginia Manufacturers Association Water Team Captain

As a chemist involved in the effort to bring new products and processes to West Virginia chemical plants, I have serious concerns about the proposed Water Antidegradation Policy as written.

The criteria for chemical condition evaluations (4.c.2.a. I.A) defining significant degradation as an increase in the ambient concentration of any parameter by more than 5% at critical flow could effectively STOP any new chemical products or processes from being installed in any plant in the state in the future. By this standard, *any* chemical not already in the ambient waters could be prohibited from manufacture. The wording of the policy is very clear that any increase of 5% or more over the ambient concentration of any parameter would trigger an anti-degradation review and would be prohibited if the agency and the applicant could not reach agreement on ways to reduce the impact to less than 5% of ambient concentrations. This is a significant change in public policy with serious implications for both the permitting process and future economic development in West Virginia. I do not believe that the Board intends this consequence of a literal reading of the proposed policy as written.

In a similar manner, this definition of "significant" degradation could prevent the use of chemicals and processes which are used to make water safe for drinking, in permitted waste treatment facilities or for the remediation of environmental problems. Chemicals are added in these processes, or generated by the chemistry of the process, which would be above the 5% of ambient level criterion. This could trigger an anti-degradation review and subsequently be prohibited if they could not be brought into compliance with the 5% rule even though the intent was improved public safety and a cleaner environment.

The policy doesn't define which "water quality parameters" are to be measured and which may be excluded from consideration. By this standard, any change in very minor components in the effluent from a permitted facility could trigger a finding that the waters had suffered significant degradation. As an example, an increase in hypothetical compound X from 1 ppb in the affected waters to 2 ppb could be prohibited even if compound X was considered nonhazardous at that level. The policy needs to be more specific in defining those parameters which are covered by the policy. One valid

approach would be to specify that the parameters to be considered are those listed in the NPDES permits for a facility. Without specifying which parameters are included, a literal reading of this policy could require every permitted facility in the state to analyze their outfalls for every conceivable component at concentrations which would otherwise be without regulatory or environmental concern. Surely, this is not the intention of the Board.

The choice of the 5% increase in the ambient concentration of a parameter at critical flow conditions as the criterion for "significant degradation" is totally arbitrary and not justified scientifically. The more scientifically defensible position is to establish the "assimilative capacity" of the stream for that parameter and write permits on that basis. This would allow for future development without endangering the waters that the policy is trying to protect.

Having been an analytical chemist for ten years, I would also raise the issue of whether the 5% increase versus ambient conditions could be reliably measured for some parameters. This could be a significant added cost for new analytical method development and the additional oversight costs could significantly impact both the permitted facility and the agency.

The policy as written does not define where measurements are to be made to determine "significant degradation". Is this an "end of pipe" measurement or downstream of the outfall? If the determination is to be made downstream of the outfall, how far downstream is the determination of "significant degradation" to be made? This policy needs to be specific enough to provide meaningful direction for both the regulatory agency and the regulated community.

This policy effectively ignores the contribution of non-point sources to the overall level of any given parameter in a body of water by stating that these non-point sources will be deemed to be in compliance "with the achievement of cost effective and reasonable best management practices in accordance with the West Virginia Nonpoint Source Management Plan (A42). For some low-level compounds, the nonpoint sources may comprise the majority contributors of the total for a given parameter. For many of the parameters of interest the data to define the "nonpoint sources" to be managed doesn't exist and the Nonpoint Source Management Plan is not a workable plan for managing these parameters.

I support the need for a consistent water anti-degradation policy but believe the current proposal is seriously flawed in some aspects. In light of this, and

considering that the federal EPA has this month opened a dialogue aimed at establishing a new national anti-degradation policy, I urge the Board to withdraw the proposed policy at this time.

The following article was written in response to a commentary written by Margaret James and Pam Kasey of the West Virginia Rivers Coalition, which appeared in the Charleston Gazette on Friday July 23rd, 1999. Dr. Wayne Appleton is the head of the West Virginia Manufacturers Association Water Team and is a member of the West Virginia Chamber of Commerce Environmental Committee.

Bad Science Does Not Make Good Public Policy

In an article in Friday July 23rd's Gazette entitled "Clean water finally on EPA fast track", Margaret James and Pam Kasey of the West Virginia Rivers Coalition gave their perspective on the draft "antidegradation implementation policy" which is currently being considered by the Environmental Quality Board. After a long tirade about greedy industrial, mining and energy interests poisoning the waters of West Virginia and blocking the implementation of the Clean Water Act, they ask the question "we wonder why some in industry opposed this law". The answer to that is very straightforward. The draft policy is badly flawed as written; it is based on bad scientific assumptions and, if implemented as written, could have a devastating effect on West Virginia's economy.

The draft implementation policy defines "significant degradation" of a stream as any increase in any parameter by more than 5% of the "ambient concentration at critical flow". This sounds good to some folks but it isn't so good if think a little further. The current draft makes no distinction between toxic and non-toxic materials nor does it set any lower limit on how far down the concentration scale you have to look before you realize the numbers don't mean anything any more. It doesn't distinguish between materials that are a real environmental concern and those that are totally biodegradable to harmless byproducts like carbon dioxide and water.

If the current draft policy is enacted into law as written and interpreted strictly, it could be unlawful to treat municipal sewage to kill pathogenic bacteria or to improve the removal of solids in the water discharged to the river--both processes change trace level concentrations of some stream components by more than 5%.

By a strict interpretation of the wording of the draft policy, treatment of streams damaged by acid mine drainage could also be unlawful. By definition the treatment process changes some stream parameters by more than the 5% of ambient criterion for "significant degradation".

Under the current proposed wording of this policy, manufacturing facilities of all kinds could be required to install very expensive water treatment facilities that would not

actually improve water quality to any meaningful extent. Alternately, manufacturing units which released incredibly tiny amounts of non-toxic biodegradable materials could be forced to shut down if they could not meet the arbitrary "5% of ambient" standard. The potential impact on the state's economy cannot be overstated. The number of jobs lost due to this proposed policy is potentially very significant in our struggling economy.

What exactly did "industry" do that blocked this legislation last year? Well, we pointed out the problems in the current proposal. We made recommendations for changes to improve the scientific basis for decision making on permits and to correct wording which we believed was inconsistent with current state and federal law. We recommended that the determination of "significant degradation" be made on the basis of the "assimilative capacity" of the water in question rather than on the "ambient concentration". This is a more scientifically valid approach to improve water quality and is the method used by neighboring states such as Ohio and Virginia. This is also the approach recommended by US EPA Region III.

We would point out that almost all of those interested parties who commented on this proposed policy last year identified the same serious flaws. We would also note that US EPA made many of the same recommendations in their written comments on the proposed policy dated 7/20/98. We in industry do not understand how we can be accused of blocking the adoption of this policy out of our own "narrow interests" when we and US EPA Region III have pointed out the same flaws in the proposed policy and made some of the same recommendations to correct these flaws.

Following the public comment period on the proposed Antidegradation Implementation Policy last year, we in the regulated community expected that the serious flaws in the document would be corrected and that the staff of the Environmental Quality Board would submit a workable policy to the Board this year. Instead, in response to a threatened suit by environmental activists, they have resubmitted the same flawed proposal which we correctly criticized last year.

West Virginia needs to adopt an Antidegradation Implementation Policy that is based on sound science and good economics. We in industry will continue working to make that happen.

Dr. Wayne C. Appleton
1418 Virginia Street East
Charleston, WV 25301
357-1723 (work) 342-0884 (home)

**Comments Submitted to the Environmental Quality Board on the
Proposed Water Quality Antidegradation Implementation Policy**

Wayne C. Appleton, Ph.D. E.I. DuPont de Nemours and Company, Inc.
West Virginia Manufacturers Association Water Team Captain

9/29/99

I would like to address the Board on the proposed Antidegradation Implementation Policy from two different standpoints: as a chemist and environmental scientist, I have some technical comments addressing the proposed regulation and I have specific comments on behalf of the WVMA Water Team on the process we are currently engaged in.

TECHNICAL ISSUES

The draft policy:

- doesn't distinguish between toxic and nontoxic materials, or between bioaccumulative and highly biodegradable materials
- doesn't define practical de minimis levels below which degradation would be considered insignificant or below which monitoring and remediation would not be required. Under this proposal permittees could be required to monitor for and control trace level components at levels absurdly below any reasonable level of concern.
- if interpreted literally, would prohibit the addition to a stream of any new compound not already present in the stream; regardless of the actual toxicity or environmental fate of the compound or any economic benefit that would be achieved by permitting the source of the material.
- if interpreted literally, would prohibit the use of water treatment chemicals in industrial or municipal applications and also the addition of chemicals to the water to remediate other water quality problems.
- does not define where measurements are to be made to determine "significant degradation". Is this an "end of pipe" measurement or downstream of the outfall? If the determination is to be made downstream of the outfall, how far downstream is the determination of "significant degradation" to be made? This policy needs to be specific enough to provide meaningful direction for both the regulatory agency and the regulated community.
- does not address actual degradation of the waters or the use of those waters for fishing, recreation or human consumption. It defines an arbitrary standard for significant degradation without regard to whether the waters in

question are actually impaired by the concentration levels of the compound in question.

- In the Draft regulation before us, the criteria for chemical condition evaluations (4.c.2.a. I.A) defines significant degradation as any increase in the ambient concentration of any parameter by more than 5% at critical flow. This is far more stringent than the most restrictive policies of our surrounding states and inconsistent with current Federal practice.

Consider a hypothetical situation: a manufacturing unit discharges 0.1 parts-per-million of a non-toxic highly biodegradable material to the nearest river—say table sugar (sucrose). Because of how rapidly sucrose is metabolized by microorganisms, this would surely be more than the ambient concentration normally found in the stream. Although the sugar concentration is well below the level to cause concerns about BOD, COD or biotoxicity to any species along the river, under a literal reading of this policy, this would be considered “significant degradation” even though the sugar would be rapidly consumed by micro-organisms in the water and would have no significant negative impact on any species or any use of the water.

Our surrounding states which have antidegradation implementation plans in place use the “assimilative capacity” of the waterway for the specific compound to define degradation. The Federal EPA in their Great Lakes Initiative (GLI) documents also endorses the use of assimilative capacity in defining “significant degradation”. US EPA Region III, in their written comments last July specifically recommended the use of assimilative capacity rather than ambient concentration as the preferred means to achieve cleaner waters.

The choice of the 5% increase in the ambient concentration of a parameter at critical flow conditions as the criterion for “significant degradation” is totally arbitrary and is not justified scientifically. Surrounding states such as the Commonwealth of Virginia use a higher percentage of the assimilative capacity to define degradation. Even the GLI recommendations, which many would argue are far too restrictive, allow a higher fraction of the assimilative capacity to define significant degradation.

Having been an analytical chemist for over ten years, I would also raise the issue of whether the arbitrary standard of a 5% increase versus ambient conditions could be reliably measured for some parameters. This could be a significant added cost for new analytical method development and the additional oversight costs could significantly impact both the permitted facility and the agency without yielding any meaningful improvement in water quality.

THE PROCESS

This is a significant change in public policy with serious implications for both the permitting process and future economic development in West Virginia. I do not believe that the Board intends the consequences that are likely if the current draft implementation policy is enacted into law. Speaking on behalf of the West Virginia Manufacturers Association Water Team, I have some specific comments to make on the process we are engaged in this evening:

- WVMA supports the use of a Stakeholders Process to achieve a workable and scientifically and economically defensible Implementation Policy. We are concerned at the slow pace in making this occur. We recommended that this be done months ago.
- We are extremely concerned that this flawed policy could move forward and be sent to the legislature as-is or be imposed upon us as the "default policy" because of the process we are using. We believe that this policy as written would cause serious economic damage to West Virginia without having any significant positive impact on the quality of our waters.
- We are extremely distressed and righteously indignant that the Board has chosen to bring forward the same draft policy which was withdrawn last summer after the previous public comment period. This was a "fatally flawed" document then and none of the flaws have been corrected. We view this as "bad science" and terribly bad public policy. This document should not have been brought forward again without addressing the legitimate criticisms that were made during the public comment period last summer. Those criticisms are still valid despite the fact that the staff chose to ignore them.
- It is essential that the serious flaws in this draft implementation policy be corrected quickly and that the document to be submitted to the legislature reflects a valid scientific approach and sound public policy. I urge the Board to withdraw the draft implementation policy.

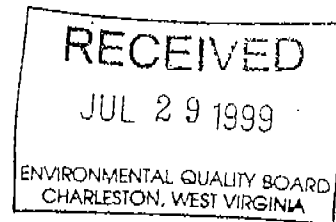
Thank you.



WEST VIRGINIA RIVERS COALITION

July 29, 1999

Libby Chatfield
Technical Advisor
Environmental Quality Board
1615 Washington Street East - Suite 301
Charleston, West Virginia 25311-2126



Dear Ms. Chatfield:

On behalf of the West Virginia Rivers Coalition and the West Virginians for Clean Water Campaign please accept these comments in reference to the proposed changes in the Water Quality Standards Rule, 46 CSR 1, dated June 19, 1999.

We appreciate the time and effort that both the Environmental Quality Board and the Office of Water Resources have devoted to developing the antidegradation implementation guidance document. We realize that in a time of extreme budgetary constraints this was a significant commitment of resources. We strongly support this effort. The implementation of the antidegradation provision of the Clean Water Act has the potential to make a significant difference in state water quality, and through the watershed approach, to standardize environmental protection from region to region.

While we support this effort, we have a number of serious concerns that we urge you to consider and clarify in the implementation policy.

I. Antidegradation Implementation Procedures (Appendix F)

The Clean Water Act goals of maintaining and restoring water quality must be upheld as the basis for West Virginia's antidegradation policy. An antidegradation policy is meant to provide protection not only for "uses" achieved in a watershed, but more importantly to provide additional protection for water quality that is better than needed to attain these uses. We are concerned that while the proposed implementation language may slow the decline of water quality, it is not protective of water quality that exceeds use criteria or standards.

Clarification is needed concerning the agencies involved in antidegradation implementation. Without an updated state Continuing Planning Process we have no assurance of adequate authority for intergovernmental cooperation in the

implementation of this guidance. Since the mission of many agencies may be impacted, and since these missions may at times be in conflict with each other, we are concerned about authority for coordination.

What is the protocol for decision-making and what specific obligations exist for Office of Water Resources, the Environmental Quality Board and other state and federal agencies? Agencies participating in the development of nonpoint source best management practices need to be involved in this process above and beyond a simple notification process. The development of best management practices and their technical connection to water quality standards are critical.

The limit of cumulative impacts of multiple, new or expanded point sources or point sources that are associated with significant nonpoint source impacts - impacts either above or below the suggested 5% criteria - are not outlined. The antidegradation review process is driven permit by permit and not by an overview of water quality in a given watershed and therefore is not ultimately protective of high quality waters.

46-1-4A

4A.2 Meaningful nonpoint source criteria for antidegradation implementation are absolutely necessary for a successful program. Sole reliance on best management practices is a serious weakness of the antidegradation implementation guidance document. Since best management practices in every sector are voluntary, there is no assurance BMPs will themselves be implemented. Additionally, best management practices are not technically linked to water quality standards. This approach further isolates nonpoint source pollution from the jurisdiction of water quality standards and severely undermines the EPA mandated task of including cumulative effects in the antidegradation implementation document.

We strongly urge the Board to consider an alternative approach to nonpoint source issues, one that more clearly limits nonpoint impacts especially when water quality standards are threatened or violated. At a minimum, compliance with antidegradation for nonpoint discharges should be assumed only where monitoring data is available that verifies the effectiveness of best management practices.

46-1-4A.3.

The Brownfields statute established a clear distinction between those sites where contamination existed prior to the effective date of the Act (July 1, 1996) versus those sites which became contaminated after the Act became effective [eg., 22-22-2(b) and 22-22-15(d)]. The purpose of this distinction was to establish a very clear policy of encouraging clean-ups of old abandoned sites without encouraging backsliding or carelessness at existing or new sites by relaxing standards.

While changes have been made in the wording of these two sections, we continue to urge the citation of July 1, 1996 to clarify and further assure consistency with the language and intent of the Voluntary Remediation and Redevelopment Act:

4A.3.a. Where remediation efforts are being proposed for sites contaminated by releases which occurred prior to July 1, 1996 and where there is a potential for surface water impacts from contaminated groundwater, an antidegradation review will not be required.

4A.3.b. Where remediation efforts are being proposed for sites contaminated by releases which occurred on or after July 1, 1996, or where there is a potential for surface water impacts from activities resulting in new discharges from the treatment of contaminated groundwater, an antidegradation review will be required.

46-1-4B

4B.4 Trading should not be permitted, either between point sources or between point and nonpoint sources of pollution. Trading has no place in a truly anti-degradation policy i.e. if any amount of degradation would trigger review, and nonpoint sources were included, and cumulative impacts were adequately considered, etc., trading would not be an issue.

Trades between point and nonpoint sources pose a particular problem in that while point sources have regulatory oversight, public notification, and monitoring requirements, nonpoint sources have none of these requirements. Further, reliable verification of short to medium term specific nonpoint reductions is nearly impossible because of variations in daily, seasonal, and annual rainfall and access to testing sites.

Trades should not be exempt from antidegradation review as in 4C.2.a.2 and 4C.3. This creates a significant loophole in the policy.

In sections 4B.4, 4C.2.a.2.F., and 4D.2.C it is stated the basis for a trade will be made through a TMDL or "other appropriate measures". We strongly object to the language "other appropriate measures" as it makes the basis of these trades discretionary, without any clearly defined, scientifically sound criteria. This is especially important because TMDL's generally are only established when water fails to meet a standard and so the "other appropriate measures" would be the only method available for trades in the higher quality waters that the antidegradation policy is supposed to protect. This allows a clear way out of antidegradation constraints for point source discharges and seriously threatens the intent of the antidegradation provision of the CWA.

46-1-4C

4C.2.a.1.A Antidegradation review is triggered only if greater than 5% increase in a pollutant is anticipated. Reliance on any "significant" degradation is not sufficiently

protective. If any measurable degradation is predicted, an antidegradation review should occur.

4C.2.a.2.F See comments on trading above (4B.4).

4C.6.a We would encourage the board to clarify that increased production alone without accompanying social and economic benefit to the community as a whole would not justify degradation.

4C.8.a We believe the intent of the Water Pollution Control Act goes beyond simple notification of the listed agencies. We ask the Board to outline the process for assuring adequate authority for intergovernmental cooperation to carry into effect the antidegradation implementation policy.

46-1-4D

4D.2.c See comments above (4B.4) on trading. This protocol seriously threatens the State's most pristine waters and should not be allowed especially in tier 2.5 and 3 waters.

46-1-4E

4E.3 See above (4B.4) comments on trading. The point for nonpoint trading protocol seriously threatens Tier 3 waters and should not be allowed.

II. The following is a list of questions from EPA Region III Guidelines for Review of State Antidegradation Policy Implementation Procedures to which we believe the EQB needs to clarify its answers.

In reference to development of the antidegradation policy:

(a) 4. When will the procedures become effective?

(a) 5. How will amendments to the procedures be handled?

(a) 7. What criteria will be used to identify activities to which the antidegradation procedures will apply? (Note that EPA Region III intends that the antidegradation procedures must apply at a minimum to the NPDES program and any other Federally delegated and/or funded programs.)

(a) 10. How will intergovernmental coordination be accomplished? How will the procedures handle situations which cross organizational lines at the state and local level?

(a) 11. How will the State insure that both point and nonpoint sources of pollution are addressed?

In reference to instream water uses:

(1) 4. How will the State insure that existing instream uses are maintained and protected from degradation by point sources, nonpoint sources, both individually and from cumulative impacts?

(1) 5. How will the State insure that existing instream uses are protected from impacts other than those related to water column chemistry?

In reference to Tier 2 waters:

(2) 8. How will intergovernmental coordination and public participation be fully satisfied?

(2) 10. How will "all cost-effective and reasonable best management practices for nonpoint source control" be defined? How will their implementation be assured where a decision to lower water quality is to be made?

(2) 11. Who will make the determination that degradation of water quality is warranted?

(2) 12. How will the State insure that existing instream uses are maintained where a decision to lower water quality below existing conditions is made?

We thank you for the opportunity to provide comments. Please feel free to contact me if you have any questions or desire clarification on our comments. We hope the implementation of the antidegradation policy will help preserve the outstanding rivers of West Virginia, protect the health of all citizens of the state, and promote sustainable economic development. We look forward to your response to our comments.

Sincerely,



Pamela C. Moe-Merritt
Conservation Director
West Virginia Rivers Coalition

cc: Tom Michael, Esq.
West Virginians for Clean Water Members

Headwaters

Moving mountains

Coal River is one of nation's most endangered waterways

Damage from mountaintop removal coal mining and hundreds of miles of valley fills have earned West Virginia's Coal River a bittersweet spot on the country's top ten most endangered rivers list.

The report, *America's Most Endangered Rivers of 1999*, released April 12 by American Rivers, recognizes the hundreds of miles of streams lost to valley fills in the Coal River watershed. The West Virginia Rivers Coalition spearheaded this designation, with co-sponsorship by Coal River Mountain Watch, Ohio Valley Environmental Coalition and West Virginia Highlands Conservancy.

"This report shows that the nation's attention is now focused on how mountaintop removal mining and the associated valley fills are devastating our state's waterways," said Nathan Fetty, a Program Associate with the West Virginia Rivers Coalition. "It is yet another illustration of this mining method's irreversible effects on the environment and how it impacts healthy, yet fragile, streams and rivers in the Coal River area."

For mammoth coal corporations, the Coal River's name-sake is easier and cheaper to mine by mountaintop removal, a practice in which mountaintops are leveled and the leftover soil and rock is dumped into adjacent valleys,

burying hundreds of miles of streams in West Virginia. Moreover, sediment-laden runoff from mountaintop removal sites fills in main waterways miles downstream.

"The recognition of the Coal River as one of America's 10 most endangered rivers places the issue of mountaintop removal/valley fill strip mining in the national arena -- as well it should," noted Janet Fout, Project Coordinator of the Ohio Valley Environmental Coalition. "Not only is the Coal River watershed being degraded and polluted by this highly destructive mining technique,

but also we are losing entire hardwood forest ecosystems around the Coal River. Little baseline biological data exists regarding plant and animal species which are being displaced or lost as mountains are leveled and headwater streams are buried beneath tons of rock and dirt. It's absurd that we don't even know what we are losing."

"Situated in the center of the state's low-sulfur coalfields, the Coal River has had more miles of headwater streams buried by valley fills than any other watershed in West Virginia," said Cindy Rank of the West Virginia Highlands Conservancy. "Though strip mining has been going on for nearly 50 years in this area, over the past 10 years the state regulatory agencies have allowed newer mining technologies to drive the permitting process and to subvert the protective measures required by the federal Surface Mine Con-

trol and Reclamation Act."

The result, Rank noted, has been greater harm to hills



photo by Jeff Fetty

A cemetery memorializing streams buried by valley fills stands ominously outside the West Virginia state capitol for an anti-mountaintop removal rally in January.

**West Virginia
Rivers Coalition**

*Seeking the conservation and restoration of
West Virginia's exceptional rivers and streams*

Board of Directors

Co-Chair: Margaret Janes, Co-Chair: Deb Wise, Dave Bassage,
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WEST VIRGINIA

- | | |
|---------------------------------------|--------------------------------------|
| All Seasons Outdoor Club | Ohio Valley Environmental Coalition |
| Cacapon Institute | Potomac Headwaters Resource Alliance |
| Cacapon River Committee | Save Our Mountains |
| Corridor H Alternatives | Shavers Fork Coalition |
| Downstream Alliance | Sierra Club (W.Va. Chapter) |
| Elk River Development Corp. | Student Environmental Network |
| Friends of the Little Kanawha | Trout Unlimited (W.Va. Council) |
| Friends of the Cacapon River | Trout Unlimited (Mountaineer Chapt.) |
| Friends of the Cheat | W.Va. B.A.S.S. |
| Greenbrier River Watershed Assn. | W.Va. Citizens Action Group |
| Middle Island Creek Fishermen's Assn. | W.Va. Highlands Conservancy |
| Mountain Stream Monitors | W.Va. Rails to Trails Council |
| Nat'l Audubon Society (W.Va. Council) | W.Va. Wildwater Association |
| National Committee for New River | Wilderness Co-op (D & E College) |

NATIONAL

- American Canoe Association
- American Rivers, Inc.
- American Whitewater Affiliation
- Clean Water Network
- National Wildlife Federation
- River Network, Inc.
- Wilderness Society

REGIONAL

- Blue Ridge Voyageurs (VA)
- Bluegrass Wildwater Association (KY)
- Canoe Cruisers of Greater Washington (MD, DC, VA)
- Carolina Canoe Club (NC)
- Chicago Whitewater Alliance (IL)
- Chota Canoe Club (TN)
- Coastal Canocists (VA)
- Conewago Canoe Club (PA)
- Float Fishermen of Virginia (VA)
- Greater Baltimore Canoe Club (MD)
- Keel-Haulers Canoe Club (OH)
- Philadelphia Canoe Club (PA)
- Three Rivers Paddling Club (PA)
- Viking Canoe Club (KY)

Staff

- Jeremy Muller, Executive Director
- Pamela Moe-Merritt, Conservation Director
- Kim McArthur, Outreach Associate
- Carrie Kline, Outreach Associate
- Nathan Fetty, Program Associate
- Jo Davis, Bookkeeper

Greetings from our new Executive Director

Hello. My name is Jeremy Muller, and I am very pleased to introduce myself as the new Executive Director for the West Virginia Rivers Coalition. I am excited by the challenges that lay ahead, for both myself and the WVRC, and frankly, can't wait to get started. While I am still learning about our organization, there appear to be a number of accomplishments to be proud of, as well as quite



Jeremy Muller

a few intriguing issues and projects that are on-going.

My enthusiasm stems from a few things. First is the reputation of the WVRC as a well-known, established organization with an excellent track record and a recognized name in the environmental community. Second is the variety and nature of the projects and issues with which we are involved. This is exciting work that can produce great results. Third is the staff that has been assembled. I have found, as I am sure you have, Pam, Kim, Nathan, Jo, and Carrie to be dedicated and knowledgeable professionals. This is important as I am going to rely heavily on them. Fourth is the current Board of Directors, who prove to be a collection of committed and involved individuals. This is a very promising situation.

Continued on page 5

Poultry sustainability report released

The amount of poultry litter used to fertilize farmland in the Potomac Headwaters has reached unsustainable limits in most of the counties studied, according to a report released in February.

The report, "Poultry Litter in the Potomac Headwaters: How Can We Reach a Long-Term Balance?," was written by Evan Hansen of Downstream Strategies for the Potomac Headwaters Resource Alliance and the West Virginia Rivers Coalition.

"The report looks at how much poultry litter -- or in other words, fertilizer -- you can put on the Potomac Headwaters region's farmland, and then compares that with how much litter is actually being produced by the region's poultry industry," Hansen said. "Ultimately, the major poultry producing areas generate so much manure that there is too little land to spread it on," Hansen continued. "The report looks at the maximum number of birds the poultry industry can currently produce while minimizing environmental effects, and it takes a hard look at the role litter exports can play to balance litter production and use."

Because poultry litter is rich in the nutrients phosphorous and nitrogen, it is commonly land-applied in the Potomac Headwaters region. As continued application of poultry litter leads to a long-term build-up of nutrients -- especially phosphorous -- in the soil, the soil becomes saturated over time and spills excess nutrients into local rivers and streams when it rains. Once in the river, too many nutrients can lead to algae blooms, growth of undesirable organisms, low oxygen levels and potential fish kills.

"Today, factory poultry farming in the Potomac Headwaters generates 400 percent of the phosphorous needed in the area as a whole. For farms in the Lost River watershed, that figure reached 1100 percent," stated Pam Moe-Merritt, conservation

director of WVRC.

"Additionally, the current production of nitrogen in poultry litter alone meets the area's fertilizer needs, without accounting for nitrogen from added sources such as industrial and municipal sewage residues and chemical fertilizers. So this situation demands that all farmers comply with best management practices. There is little room for error," Moe-Merritt continued. "It also demands that the distribution in the region be near perfect because farms in some areas generate far more nitrogen than they need. We cannot continue to overfertilize this region's farmland. If we do, the region's land, waters and people will suffer from negative, long-term environmental effects."

Dr. Margaret Janes, of the Potomac Headwaters Resource Alliance, agrees. "Despite the fact that agriculture has changed, the policies that govern it have not. This report brings up a big problem that has yet to be solved."

"We need to redirect and expand our approach and assistance to the local farmers. We also need to find new ways to export the litter that will provide a balance between litter production and litter use," Janes continued. "We have been supportive of the Public Law 534 monies that have been assisting the farmers for the past couple of years. But this program will come to an end. We must redirect our approach. Creating new responsible exports and value-added products needs to be actively dealt with and funded."

Janes, Hansen and Moe-Merritt note that the responsible use of poultry litter in value-added products which are then transported can lead to new jobs. They agree that this industry

must address its long-term environmental impacts to preserve its own long-term viability. Their suggestions include:

- ◆ Continuing financial and technical assistance to farmers.
- ◆ Improving pasture management practices, such as increasing rotational grazing.

The soil becomes saturated with nutrients over time and spills excess nutrients into local rivers and streams when it rains. Once in the river, too many nutrients can lead to algae blooms, growth of undesirable organisms, low oxygen levels and potential fish kills.

- ◆ Encouraging bad actors to comply with best management practices.
- ◆ Promoting transportation subsidies with integrator financial participation so farmers can move litter more easily around the state.
- ◆ Making sure that litter transported off the farms is handled responsibly at its destination.
- ◆ Promoting the creation of value-added products by creating state and federal incentive packages for research and development of new products using litter. For example, composting projects, cattle feed, road surfacing, building materials, etc.
- ◆ Making sure that the large corporation integrators who own the birds accept financial and legal responsibility for the waste their birds generate.

State Attorney General to sue Wampler Foods

By Dr. Margaret Janes

West Virginia Attorney General Darrell McGraw recently filed a notice of intent to sue Wampler Foods on behalf of poultry growers in the Potomac Headwaters.

Poultry growers approached the attorney general's office several months ago, angry with large poultry processors about low payments and confusing contracts, and suspicious of unfair practices at the scales where their payments are determined. The grower's demands included a 50/50 split between the growers and the large poultry processors for the cost of controlling polluted run-off from poultry farms.

"The state, in an effort to preserve family farms and employment and income in the South Branch Valley, has invested many millions of dollars in indirect subsidy to Wampler in infrastructure such as railroads, pollution controls and possibly technical investment," McGraw said. "What we have here is a situation where people producing chicken and eggs, the very people the state had made this invest-

ment for, are being squeezed to the point where they can't make mortgage payments and make a minimum wage. These are solid citizens able to

Harrisonburg Daily News Record asked Wampler if the withdrawal of the project was retaliatory against the growers, a spokeswoman said, "We didn't invite the attorney general in; they did."

Department of Agriculture Commissioner Gus Douglass has also stepped into the fray, asking growers to back off and writing a number of them personal letters to that effect. He has suggested that McGraw is meddling in something he doesn't know anything about. Meanwhile, Wampler has promoted Douglass as the liaison between the growers and the corporation. Wampler abruptly canceled a meeting scheduled with the growers because McGraw planned on attending as the growers' legal representative. Also, growers from Virginia have made moves recently to join their West Virginia counterparts.

WVRC strongly supports the growers in their attempt to gain equal and just compensation from the poultry integrators. It has long been a position of WVRC that integrators share in the cost of environmental protection.

Dr. Janes is Co-chair of WVRC's board of directors and is founder of the Potomac Headwaters Resource Alliance.

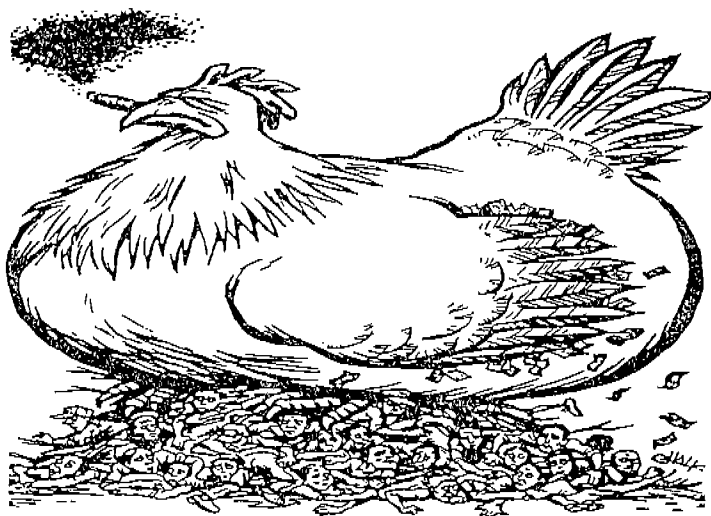


illustration courtesy of Sierra Club, Maryland Chapter

borrow hundreds of thousands of dollars to build poultry houses for Wampler. You have a problem when they can't make minimum wage."

After an investigation of the allegations, and concerned that Wampler would file an antitrust suit against the growers (they are considered independent contractors), McGraw filed a notice of intent to sue Wampler based on unfair labor practices. Days later, Wampler put a halt to a recently planned expansion at their Moorefield plant and the construction of 70 to 90 more poultry houses in the region. When a reporter from the

Feedlot strategy released

The long awaited USDA/EPA Feedlot Strategy has been released. While the plan will begin to address the enormous problems in the hog, cattle, and dairy industries, it looks like the poultry industry may have escaped the first round of controls by a tech-

nicality in the Clean Water Act!

EPA has hinted that additional tougher guidance for factory poultry farms will be coming next year, but in the meantime watch out because controls are left to state discretion. In West Virginia, that has meant a hands-

off, turn-a-blind-eye approach. WVRC counters our extreme disappointment in this strategy by promoting our own seven-point program that includes positive economic incentives for growers (see related article). We'll keep trying — there is new national legislation in the wings!

Coal River

and streams and the human communities dependent on them. "Bigger machines using fewer workers move more earth more quickly, taking apart 600-foot mountains to recover 10 to 14 seams of coal and dispose of waste rock into the streams below. The mountains are lowered several hundred feet, and the valleys raised," she said.

"Life in Appalachia has always centered around our rivers," Fout remarked. "For generations, people have depended on the rivers as a rich source of food, for drinking water, and for recreation and transportation. Now, human communities that have lived for generations around the Coal River watershed are also endangered. Those who refuse to sell out to mining companies are subjected daily to blasting and its associated damages to their homes -- wells going dry, choking dust, noise, and fly-

rock. Flooding has caused extensive property damage and loss of human life due to changes in water flow, topography, and the loss of forests. A whole way of life -- our mountain culture and natural heritage -- is suffering greatly from this unchecked destruction," she said.

"The Coal River flows through some of the most rugged, beautiful and remote terrain in Appalachia, and to destroy a stream for temporary economic gain is incredibly short-sighted," Fety remarked. "Certainly, mountaintop removal results in cheap energy, and coal mining pays good money in an area where jobs are hard to come by. But the actual costs of mountaintop removal are the devastation of a biological community and a people that are dependent on this extraordinary river. It's a tragedy that the coal industry is willing to sacrifice the long-term well-being of our

environment and communities for short-term profits."

"Clean, healthy waterways are an essential, basic part of our existence," Fety continued. "And it's only by halting mountaintop removal until we understand its impacts on our streams, wells, and human communities can we be assured that the rivers and streams will be protected from this destruction."

American Rivers has been compiling its report of the nation's most endangered rivers for 14 years. The past two years, the Potomac River has been included in the list because of pollution stemming from excess poultry waste in West Virginia's eastern panhandle. In 1995 and 1996, the Cheat River was included due to excessive acid mine drainage. The Coal River is the only river in West Virginia named to the report in 1999.



Greetings


About myself, I come to the WVRC from Pittsburgh, Pa. Since 1993 I have worked in Natural Resource and Recreation development and planning. My initial focus was on riverfront trail and greenway projects, most notably involving the Pittsburgh to Cumberland, Md. trail, which will connect the C&O Canal Towpath, forming a 400-mile trail from Pittsburgh to Washington, D.C. I have spent the past two years immersed in river conservation planning and project implementation, primarily on the Monongahela and Youghiogheny Rivers in southwestern Pennsylvania. The position with the WVRC is a natural extension of this river work; however, it affords me the opportunity to affect a wider geographical area, and to become

much more involved in advocacy and policy issues.

This is an intriguing time to be seeking the conservation and restoration of West Virginia's exceptional rivers and streams. We are faced with a variety of serious threats to our state's waterways, such as mountaintop removal coal mining, large-scale timbering and encroaching development. However, at the same time we are witnessing a renewed interest and focus on the environment in general, and specifically on rivers. National trends are stressing the importance of the quality of our natural resources and the attention we give them.

The West Virginia Rivers Coali-

tion has a lot to do in the remainder of 1999. It is my goal to expand our membership, increase the budget, establish additional programs and complete existing ones. Personally, I also have a lot to learn about our state, its residents and their rivers. I have a lot of people and organizations to meet and to develop relationships with. In addition there is you, the membership, that I must listen and prove myself to, and meet over the course of time. So please don't hesitate to make yourself known by calling, faxing or e-mailing me, or simply by visiting our offices in The Green House in Elkins.

Now I must get to work, for there is much to be done! 

WVRC Happenings

Host a party!

We are asking you to throw a party! As an effort to expand our educating opportunities and fundraising base, we are planning to throw a few house parties, and are in need of some hosts. We would send you a packet on how to host a house party. You would invite the folks in your area, and we would all get together to learn more about how to protect the rivers we love -- all with the fun of a party!

If this is something you are interested in doing, please call us at 304/637-7201, or e-mail wvrc@neumedia.net. We look forward to hearing from you!

Greening of the Corps

Conservation and taxpayer groups met in Louisiana this past March to develop a national strategy and network to reform the U.S. Army Corps of Engineers. WVRC board member Bryan Moore attended this event for the Coalition.

In the coming month, an internal document will be developed that discusses key issues and develops national strategies. If you would like to become more involved in this process or want more information, contact Pam Moe-Merritt at WVRC.



Contact us...

West Virginia Rivers Coalition

801 North Randolph Avenue, Elkins, WV 26241

phone: 304/637-7201 fax: 304/637-4084

e-mail: wvrc@neumedia.net website: www.wvrivers.org

Blackwater Review

Join the West Virginia Rivers Coalition and the West Virginia Highlands Conservancy for the 1999 Blackwater Review, May 14-16 at Blackwater Falls State Park!

The weekend's itinerary features an array of activities, including a WVRC membership meeting on Sunday morning. There will also be updates about the state's hot environmental topics, like mountaintop removal, factory poultry farming, Corridor H, and the Clean Water Act. A panel discussion about some of the attributes of and threats to the Blackwater Canyon will be held Saturday evening.

The weekend will be rounded out by field trips including fly-overs of the Canyon, canoeing and kayaking, hiking Blackwater Canyon, caving, fly fishing, auto and historic tours, wildflower walks and interpretative nature walks. For more information or to register, contact WVRC.

'Permit Watchdogging' training

WVRC will be hosting a workshop on July 17, *Permit Watchdogging*. This will be an introduction to the permitting process, which will train local folks and organizations how to better monitor and participate in their watershed's health.

Participants will get an overview of the Clean Water Act, as well as a presentation by the state DEP Office of Water Resources on the permitting process. Plus, trainer Barry Sulkin, former head of Enforcement and Compliance for the Tennessee Department of Environmental Conservation, will present *Watchdogging Permits: Tricks of the Trade*.

We're also planning a fishing or canoeing outing, and an evening presentation on either river clean-up plans or antidegradation.

If you are interested in attending, give us a call!

Blackwater Canyon: Paradise Lost?

By Mac Thornton

If you looked through the October 1998 issue of *Outside Magazine* or any of the other publications the State of West Virginia advertises, you would see a picture of a gorgeous mountain canyon stretching out before a spectacular rock outcropping.

The vista pictured is Lindy Point, near the head of Blackwater Canyon. Only one little problem -- as of the fall of 1997, Lindy Point and all of Blackwater Canyon is posted "No Trespassing" and is under 24-hour guard! If you walk out on Lindy Point, the good sheriff of Tucker County will be glad to show you the inside of his pokey. Even worse, 169 housing plots have been surveyed along the wild canyon rim near Lindy Point.

Down in the Canyon, the roar of the Blackwater River has often been drowned out by the growls of bulldozers carving crude logging roads on the steep canyon sides and the high-pitched whines of chain saws cutting down the choice 80-year-old hardwoods. Recently, a lawsuit challenging the timber company's ownership failed in the West Virginia Supreme Court, and a land swap for about a quarter of the Canyon has also fallen apart. On the plus side, an interim agreement regarding endangered species, spearheaded by the Sierra Club, has stopped most chainsaw work, at least temporarily. But environmentalists are now uniting for the ultimate brass ring: a new national park!

The Blackwater River gathers its waters as it meanders lazily across the flat floor of a valley set high on a plateau, Canaan Valley. As it passes the old lumbering boom town of

Davis, the river reaches the edge of the plateau, leaps off the 50-foot Blackwater Falls, and tumbles pell mell towards the Dry Fork Cheat

steepest rail grade east of the Rockies.

By about 1910, the Canyon's huge virgin forests had been clear-cut. Then the light organic soils dried out and were burned away in massive fires. The denuded Canyon was acquired in about 1918 by the forerunner of Allegheny Power Co. to develop hydropower. Thankfully, the dams for the power were never economically feasible, and for the next 80 years a second-growth forest had a chance to grow tall and mature. Also, the Canyon became recognized as the home of the endangered Virginia northern flying squirrel and the threatened Cheat Mountain salamander. The endangered Indiana bat and Virginia big-eared bat probably depend on the Canyon for their ever-dwindling habitat.

Meanwhile, outdoor enthusiasts discovered and had free access to Blackwater Canyon to enjoy its fabulous, expert level whitewater kayaking (first run in 1970), world famous scenic vistas, and its trails for hunting, hiking, mountain biking, cross country skiing and bird watching.

Conservation efforts got underway in 1934 with the establishment of Blackwater Falls State Park, which eventually would receive 900 acres donated by the power company. In 1989, the old railroad grade was acquired by Monongahela National Forest for a rails-to-trails project. That same year, paddlers and other environmentalists joined forces to form the West Virginia Rivers Coalition, whose first order of business was to be first to call for permanent protection of Blackwater Canyon under the Wild and Scenic Rivers Act. The river was officially found eligible for designation under that Act, but the concept stalled



photo by Steve Adams

New logging roads criss-cross the left side of Blackwater Canyon.

River, eight miles away and 1,000 feet below. The rampage forms the longest continuous, Class 3-5 rapids in the Mid-Atlantic states, and has carved a narrow, 1,500-2,000-foot deep defile, Blackwater Canyon.

Before the 1850's Blackwater Canyon was untouched due to its rugged landscape and dense primeval forest of gigantic hemlocks, oaks and other hardwoods. In this era, legendary author and illustrator Richard Hunter Strother (pen name "Porte Crayon" meaning "Carry Pencil") caught 350 trout in a day in the river and wrote about his experiences for *Harper's Monthly*, making Blackwater Canyon famous across the nation. However, to facilitate logging, in the late 1880's a railroad line was cut up the river right side of the Canyon, the

Continued on page 10

Clean Water Act: Part III

Using the law to protect yourself - Maintaining the water quality we have

By Pam Kasey

Our Fall 1998 article explained that each river is assigned a designated use by the state — for example, public water supply, trout waters, wetlands — and that each designated use calls for specific maximum pollutant levels. In Winter 1999, our series continued by showing that rivers that don't meet these standards for their designated uses have to be scheduled for clean-up plans.

The Clean Water Act established clean-up plans as a last resort, when its proposed system for maintaining water quality has failed. This third article in our Headwaters series outlines the system that the Clean Water Act specified for maintaining water quality: antidegradation and discharge permits. With these tools, you can use the Clean Water Act to help ensure that our rivers stay as clean as they are.

Antidegradation

The authors of the Clean Water Act introduced the concept of antidegradation to ensure that, at minimum, our clean rivers stay clean and our dirty rivers don't get any dirtier. Antidegradation offers three levels of protection:

- ◆ All rivers automatically receive Tier 1 protection, in which the level of water quality necessary for "existing" uses -- the highest uses that have taken place any time after November 1975 -- must be maintained.

- ◆ Rivers whose water quality exceeds that required for their designated uses -- Tier 2 waters -- are considered High Quality Waters. The quality of these waters must be main-

tained unless an important local economic or social need would be met by allowing some level of degradation. Most of West Virginia's rivers are classified as Tier 2.

- ◆ Rivers of special concern are Tier 2.5. They include designated Wild and Scenic Rivers, all naturally reproducing trout streams, all streams and bodies of water in state and national forest and recreation areas, and National Rivers. No activities which result in reduction of ambient water quality are allowed.

- ◆ Rivers of the very highest quality -- Tier 3 -- are Outstanding National Resource Waters. These include natural trout streams and rivers running through national forests. Their very high water quality must be strictly maintained, without exception.

The federal antidegradation requirement is the background against which all pollution discharges take place.

Antidegradation holds the state responsible for preventing backsliding in water quality unless there is significant economic or social justification for the pollution.

Antidegradation review for each water body is triggered regularly by the permitting process.

Discharge Permits

Every point-source discharge is subject to permit and to periodic re-evaluation by the W.Va. Division of Environmental Protection Office of Water Resources. OWR issues permits to municipalities and to industries for specific pollutants at levels that are judged appropriate for the receiving water bodies, given their designated uses.

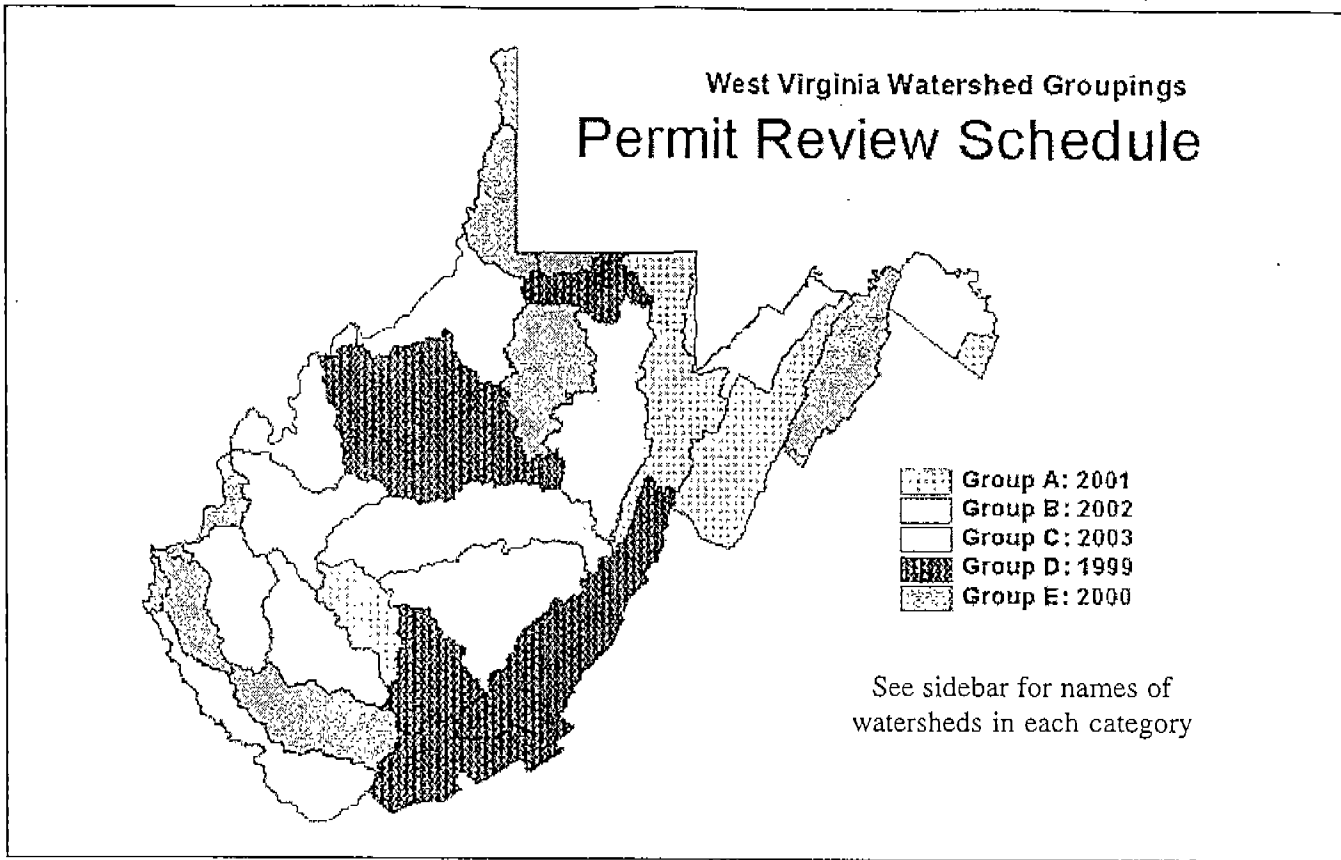
West Virginia currently has almost one hundred major discharge permits. Although permits have been issued and re-issued independently of each other in the past, focus in recent years on rationalizing the state's watershed management has brought about a system in which the state's watersheds are divided into five groups, each assigned a position in a rotating five-year watershed management process (see map and sidebar).

The permit evaluation process includes a preliminary review to ensure that the quality of water in the receiving water body would not be endangered by proposed discharges; if significant damage would occur, a full antidegradation review is supposed to follow.

At this time, West Virginia does not have an active antidegradation implementation plan that outlines the next steps. The Clean Water Act requires that the plan should set out criteria for assessing impacts of discharges on water bodies, and that the assessment should take into account the cumulative effects of both point and nonpoint sources of pollution. Until West Virginia's antidegradation implementation plan is finalized and adopted, inappropriate discharge levels may be permitted and water quality may be senselessly diminished.

However, even without an antidegradation implementation plan, citizens can still make a difference. Every discharge permit application or renewal is subject to a public comment period in which state residents can insist that pollutant levels do not increase.

Continued on page 9



Water quality

Clean Water Action Items

- ◆ Identify any major discharge permits in your watershed. Visit http://www.epa.gov/enviro/html/pcs/pcs_query.html, http://www.epa.gov/enviro/html/pcs/pcs_query.html, or contact us.

- ◆ Find out in what year permit reviews take place in your watershed: see sidebar and map.

- ◆ Participate in the public comment period any for major permits in your watershed. Reviews are listed in the legal notices section of the newspaper nearest the permitted facility, or you can find out about the public comment period for a specific facility by contacting OWR's Jessica Welsh at 304/558-3614 or at jwelsh@mail.dep.state.wv.us. Or subscribe to the Office of Water Resources' free monthly Public Notice Bulletin, which lists comment periods and other useful information for ev-

ery upcoming permit review.

- ◆ Attend the West Virginia Rivers Coalition's July 17 workshop on watchdogging discharge permits. This free workshop helps train individuals and organizations how to better monitor and participate in their watershed's health. See page six for details.

- ◆ Contact the W.Va. Environmental Quality Board and let them know you'd like to see West Virginia's antidegradation implementation policy finalized and adopted, and that it should include provisions for meaningful nonpoint source criteria.

Write: WVEQB, c/o Libby Chatfield, Technical Advisor, 1615 Washington St., East, Charleston, WV 25311-2126. Or call 1-800-480-4598.

Pam Kasey is a member of the WVRC board of directors. A freelance writer, she is an active member of the Friends of Deckers Creek. ~~~

West Virginia Watershed Groupings Permit Review Dates

Group A, Permit Review in 2001: Upper Ohio River North, Cheat, Youghiogheny, South Branch Potomac, Shenandoah

Group B, 2002: Tygart Valley, Lower Kanawha, Coal, Elk, North Branch Potomac

Group C, 2003: Tug Fork, Gauley, Middle Ohio North and South, Potomac River Direct Drains, Lower Guyandotte

Group D, 1999: Upper and Lower New, Greenbrier, James, Monongahela, Little Kanawha

Group E, 2000: Upper Ohio South, Upper Guyandotte, West Fork, Twelvepole Creek, Cacapon, Lower Ohio, Dunkard Creek, Big Sandy

Blackwater

under pressure from the so-called "wise use" property rights advocates, and a newly Republican Congress.

Unprotected, Blackwater Canyon's fate has again taken a turn for the worse. Allegheny Power put ownership of the Canyon in a corporate subsidiary which existed only on paper, with no separate employees and no separate location. In the mid-1990's, the company then began to accept bids for the 3,000 acres comprising most of the main Canyon and the canyon of the North Fork Blackwater.

The Conservation Fund of Arlington, Va. offered \$3.5 million for the 3,000 acres of Canyon, but other buyers offered more. In February 1997, the Allegheny Power subsidiary sold the Canyon for \$4.7 million to a local land developer, who turned around and sold it the same day to Allegheny Wood Products of Petersburg, W.Va. for \$5 million. (Note that a mere \$1.2 million at this critical juncture, added to the Conservation Fund bid, could have saved the Canyon forever.) Soon the bulldozers and chain saws started, shocking environmentalists and recreational users. John Crites, the owner of Allegheny Wood Products, claimed to have received anonymous threats that trees would be spiked, and so he posted the Canyon and put it under 24-hour guard.

Environmentalists and recreationalists have pulled out all the legal and political stops to save Blackwater Canyon, with limited success so far. The highlights:

◆ **Court challenge to the sale.** The West Virginia Highlands Conservancy (WVHC), West Virginia Sierra Club (WVSC) and two West Virginia Rivers Coalition members

stepped forward and challenged the sale in court, since under West Virginia law, a public utility like Allegheny Power must obtain state approval to sell its assets in the state.

Allegheny Power contended that its paper subsidiary was not subject to this requirement, and the case ended up in the W.Va. Supreme Court.

In December 1998, the West Virginia Supreme Court handed down its decision that Allegheny Power did not need state approval to sell the Canyon.

◆ **The land swap falls apart.** In late 1997, Senator Jay Rockefeller

as the short canyon section of the North Fork.

Putting these lands into public ownership would ensure future paddler access to the lower section of the river. The deal was to exchange lands of equal value elsewhere in Monongahela National Forest for these 750 acres. However, as of the beginning of 1999, Allegheny Wood Products has pulled out of the deal because they dispute the value put on the 750 acres by the government appraiser. That appraiser stated the 750 steep acres were worth only \$150/acre or so, but Allegheny Wood wants "millions" of dollars more and

refuses to agree to a neutral appraiser. (The entire canyon cost them \$5 million.)

◆ **Endangered species settlement.** In late 1998, WHVC and the Sierra Club filed formal notice of an intent to sue the U.S. Fish and Wildlife Service and Allegheny Wood Products and enjoin further logging pending compliance with the Endangered Species Act regarding the species of squirrel, salamander and bats noted above. In February, the Sierra Club entered into a settlement with Allegheny Wood which put a stop to timbering in the Canyon, for the time being, pending negotiations with the government on means reasonably necessary to study and to protect the endangered species. The company needs to obtain an "Incidental Take Permit" from the Fish and Wildlife Service, which would al-

low some adverse effects on the target species. The settlement will not affect the condo development on the rim, nor is it clear how much of the logging will be affected in the long run. While laudable, the settlement



photo by Stephen J. Shaluta, Jr.

A typically rocky, scenic stretch of the Blackwater River as it flows through the Canyon.

brokered a land exchange deal which promised to save 750 acres, about one quarter of the lands acquired by Allegheny Wood Products. Most of these acres were on the steep river right bank of the main river, as well

Blackwater

is not a complete solution. In addition, WVHC and Heartwood have opted to proceed with a formal lawsuit against Allegheny Wood Products on the endangered species issues.

◆ **Paddler access agreement.** After public access to the Canyon was shut off in late 1997, John Gangemi of American Whitewater (AW) went to work to enable paddlers to put in on the lower section of the river, allowing one to skip putting in at Blackwater Falls and running the imposing upper section. In April 1998, Crites agreed to allow paddlers to walk down the old railroad bed and get to the lower part of the river in the vicinity of the confluence of the North Fork Blackwater and the main river, as well as a 20-foot easement on both banks. While this agreement was only good for one year up to April 1999, AW is seeking an extension.

◆ **Call for National Park status.** While the W. Va. Supreme Court has publicly stated that losing the Canyon would be a tragedy, at the same time refusing to help protect it, an alliance of environmental and labor

groups led by the W. Va. Highlands Conservancy has called for the formation of the Blackwater Canyon National Park and an associated Blackwater Ecotourism Enterprise Training Center.

So far, one hundred volunteers have collected over 13,000 signatures on "Save the Blackwater Canyon" petitions. West Virginia has long been dependent on extractive boom-and-bust industries like timber and coal. As observed in the Washington Post, "... many people around here have begun to realize that industries that extract and export raw natural materials are also industries that pollute and create very few local jobs. By contrast, a local economy based on preservation and tourism is sustainable and will capitalize on the area's inherent strengths." Already, tourism brings an incredible 2.1 million visitors a year to Tucker County, and they spend about \$40 million there.

◆ **How to Help Blackwater Canyon.** Supporters of Blackwater Canyon are urged to write Representative Mollohan and Senators Robert Byrd and Rockefeller asking them to support the establishment of the

Blackwater Canyon National Park and the Ecotourism Enterprise Training Center. The Center would provide for instruction in outdoor recreation and ecotourism entrepreneurship, using public lands in the West Virginia Highlands as the principal training and demonstration area.

Write: The Honorable Alan B. Mollohan, 2346 Rayburn HOB, Washington, D.C. 20515-4801, and The Honorable Robert Byrd and Jay Rockefeller, United States Senate, Washington, D.C. If you from are out-of-state, point out that you wish to visit Blackwater Canyon and spend your vacation dollars in West Virginia. For more information, call WVRC at (304) 637-7201.

Contributions would be greatly appreciated. Send to WVRC and mark the check for "Blackwater Canyon."

Mac Thornton founded WVRC in 1989 and served as board chair until 1997. He founded and headed the Savage River Defense Fund and served as vice president for American Whitewater Affiliation.



Support the West Virginia Rivers Coalition!

Count me in! I support the river-saving efforts of the West Virginia Rivers Coalition. Enclosed is my \$ _____ tax-deductible contribution.

I'm already a member -- this is a special gift to WVRC.

Change of address

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*Some new members are former members returning to us after a lapse.

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VIEWPOINT

For the public good

Clean water finally on EPA fast track

By Margaret Janes
and Pam Kasey

THE FEDERAL Clean Water Act defined two simple goals: to clean up polluted water and to keep clean water clean. That was in 1972, 27 years ago.

The Clean Water Act is the most popular federal law on the books. Who would oppose the goal of clean water?

In a recent West Virginia University survey, more than 62 percent of West Virginians thought laws protecting our waterways were not restrictive enough. Yet our state government has failed to fully implement the backbone of water pollution control laws: the Clean Water Act (CWA). We are still polluting clean water. And we have just started to take a look at cleaning up our polluted streams.

River cleanup plans were initiated in West Virginia only after a coalition of state environmental groups took successful legal action in 1995. These plans have yet to be implemented. In the meantime, we continue to contaminate rivers across the state.

On May 28, the West Virginia Rivers Coalition et al. filed notice of intent to sue the U.S. Environmental Protection Agency for failing to assure that West Virginia had an implementation plan for antidegradation — the keep-it-clean portion of the act.

In the past coalition has strongly supported efforts by the Environmental Quality Board to move antidegradation implementation forward. But politics and profit motives stopped the board's efforts dead in their tracks.

For 27 years, federal law has mandated that antidegradation policies prohibit activities that degrade streams unless there is a clear social or economic benefit to the public. In all cases the beneficial uses of the stream were to be protected.

River cleanup plans were initiated in West Virginia only after a coalition of West Virginia environmental groups took successful legal action in 1995. These plans have yet to be implemented. In the meantime, we continue to contaminate rivers across the state.

Have you ever wondered why we have the water pollution problems we do? Since we have effective and far-reaching laws, why hasn't our state government used them?

As *Gazette* reporter Ken Ward Jr. recently pointed out, West Virginia actually has an antidegradation policy, but when the state EQB held hearings in 1998 on implementing the policy, the state's powerful industrial interests said no. The policy was put back on the shelf.

With no implementation plan, we the citizens of West Virginia were again robbed of our right to keep our streams clean.

Historically, the waters of West Virginia have been ravaged by out-of-state corporations which have chosen to treat West Virginia as a colony, rather than doing their business as an invited guest.

Mining activities and acid mine drainage have lethally impacted over 50 percent of West Virginia's 5,000 miles of waterways.

Acid rain from coal-fired power plants is now killing many of our mountain streams and forests. The very existence of West Virginia's native brook trout is threatened by this

pollution. If the environmental policies in West Virginia can threaten to eliminate a hardy fish that has inhabited our streams for eons, how can these same policies be good for the citizens of West Virginia?

The writers of the CWA realized some water pollution was necessary for our society to succeed. They weighed the benefits of clean water with those of a healthy economy, and they built both into the CWA.

They said economic development that pollutes public waters while a few people line their pockets with profit is wrong. But development that's in the public good — a factory that will employ many people, for example — may be worth some water pollution, especially if that factory is using the best pollution prevention technology available.

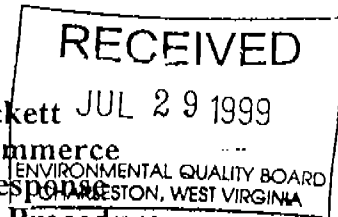
So we wonder why some in industry opposed this law — a law that so clearly benefits all citizens of West Virginia. Did they block this law from becoming public policy because they value their own profits above the public good?

In response to the notice of intent to sue, EPA contacted the West Virginia EQB, which has put passing an antidegradation implementation plan on the fast track. This proposal will come before the state Legislature later this year. When it does, West Virginia Rivers Coalition and others will be working for keeping clean waters clean.

Let's hope the state's powerful industrial interests and our Legislature will think again about this policy and realize that the health and welfare of all West Virginians should take precedence over the profits of a privileged few.

Dr. Janes is a retired veterinarian and co-chair of the West Virginia Rivers Coalition. Kasey is a free-lance writer who serves on the coalition's board of directors.

**Public Hearing Statement of Kathy G. Beckett
on Behalf of the West Virginia Chamber of Commerce
to the WV Environmental Quality Board in Response
to the Proposed Antidegradation Implementation Procedure
July 29, 1999**



My name is Kathy G. Beckett. I am here to provide a statement on behalf of the WV Chamber of Commerce ("the Chamber"). On June 29, 1999 the Environmental Quality Board proposed the Antidegradation Implementation Policy Procedures for public review and comment.

The Chamber has a number of questions and concerns that are expressed in detail in the written comments that have been filed with the Environmental Quality Board. Generally, the Chamber questions the technical, legal, and public policy goals upon which the Board relied when it elected to re-promulgate a rule that the Board itself pulled from the rulemaking process last year. As we all will recall, the Board withdrew this rule as the result of numerous comments received indicating the broad public debate over the proposed draft that was generated by an intra-agency drafting committee. In response to the large volume of issues raised, the Board directed the intra-agency committee to draft a response to comments to assist in assimilating the issues of concern. Surprisingly, the intra agency committee took almost eight months to prepare such response. And it is questionable whether this document was ever formally released to the public. For example, although I, on behalf of the WVCOC, provided oral and written comments last July, I never received a copy of this responsiveness summary until this past Monday, and then I only received it through a FOIA request.

In response to numerous public comments and requests, the Board formally decided to convene a stakeholder process. The Chamber fully supported such a decision and thought that such decision was long overdue. Many of us who are very interested in this issue have been awaiting a decision from the Board as to when we could begin to work this issue in an open public forum such as through the stakeholder process. It was initially discussed that an aggressive schedule was needed in order to demonstrate to the USEPA the fact that the Board took seriously its commitments to address the need to develop an Antidegradation Implementation Procedure. However, it has been much to the Chamber's dismay that although the Board officially agreed to convene a stakeholder group to consider the antidegradation implementation procedures as early as February of this year, such stakeholder group has yet to formally meet, let alone schedule a meeting. The Chamber finds such five month delay to be incongruous with the Board's alleged concern to develop an appropriate, balanced, AND efficient antidegradation implementation policy.

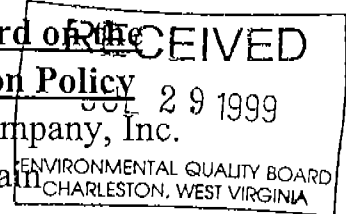
Rather than promote an open discussion of the development of an antidegradation implementation policy, the Board has now re-proposed last year's controversial rule in the face of significant debate as to its accuracy technically, legally, and on a public policy basis. In fact, the Board itself expressed concern over this draft rule and suggested that it should only be a placeholder for another rule if one were developed. Proposing a regulation that is known to be a problem seriously undermines the process for developing good public policy.

The Chamber urges the Board to withdraw this proposed rule in favor of gathering together the expertise of the various stakeholders who have already volunteered to serve and directing them to provide it with a recommended alternative implementation policy. A policy designed under such a process would result in a policy that would reflect the thoughts and ideas of representatives of the public, as well as of the administrative branch of government. The development and implementation of a WV antidegradation policy will result in significant impacts on water quality for waters of the state. This is an issue that warrants careful and measured development.

Finally, it is clear from EPA's written and oral comments that it does not require that a rule be passed during this 2000 Legislative year in order for West Virginia to demonstrate that it is committed to the development and implementation of an antidegradation policy. The Board is urged to reconsider movement forward on this proposed rule in favor of supporting the stakeholder process and in favor of developing a policy that truly reflects the law and the needs of the public.

Comments Submitted to the Environmental Quality Board of the
Proposed Water Quality Antidegradation Implementation Policy

Wayne C. Appleton, Ph.D. E.I. DuPont de Nemours and Company, Inc.
West Virginia Manufacturers Association Water Team Captain



I would like to address the Board on the proposed Antidegradation Implementation Policy from two different standpoints: as a chemist and environmental scientist, I have some technical comments addressing the proposed regulation and I have specific comments on behalf of the WVMA Water Team on the process we are currently engaged in.

TECHNICAL ISSUES

The draft policy:

- doesn't distinguish between toxic and nontoxic materials, or between bioaccumulative and highly biodegradable materials
- doesn't define practical de minimis levels below which degradation would be considered insignificant or below which monitoring and remediation would not be required. Under this proposal permittees could be required to monitor for and control trace level components at levels absurdly below any reasonable level of concern.
- if interpreted literally, would prohibit the addition to a stream of any new compound not already present in the stream; regardless of the actual toxicity or environmental fate of the compound or any economic benefit that would be achieved by permitting the source of the material.
- if interpreted literally, would prohibit the use of water treatment chemicals in industrial or municipal applications and also the addition of chemicals to the water to remediate other water quality problems.
- does not define where measurements are to be made to determine "significant degradation". Is this an "end of pipe" measurement or downstream of the outfall? If the determination is to be made downstream of the outfall, how far downstream is the determination of "significant degradation" to be made? This policy needs to be specific enough to provide meaningful direction for both the regulatory agency and the regulated community.
- does not address actual degradation of the waters or the use of those waters for fishing, recreation or human consumption. It defines an arbitrary standard for significant degradation without regard to whether the waters in question are actually impaired by the concentration levels of the compound in question.

- In the Draft regulation before us, the criteria for chemical condition evaluations (4.c.2.a. I.A) defines significant degradation as any increase in the ambient concentration of any parameter by more than 5% at critical flow. This is far more stringent than the most restrictive policies of our surrounding states and inconsistent with current Federal practice.

Consider a hypothetical situation: a manufacturing unit discharges 0.1 parts-per-million of a non-toxic highly biodegradable material to the nearest river—say table sugar (sucrose). Because of how rapidly sucrose is metabolized by microorganisms, this would surely be more than the ambient concentration normally found in the stream. Although the sugar concentration is well below the level to cause concerns about BOD, COD or biotoxicity to any species along the river, under a literal reading of this policy, this would be considered “significant degradation” even though the sugar would be rapidly consumed by micro-organisms in the water and would have no significant negative impact on any species or any use of the water.

Our surrounding states which have antidegradation implementation plans in place use the “assimilative capacity” of the waterway for the specific compound to define degradation. The Federal EPA in their Great Lakes Initiative (GLI) documents also endorses the use of assimilative capacity in defining “significant degradation”. US EPA Region III, in their written comments last July specifically recommended the use of assimilative capacity rather than ambient concentration as the preferred means to achieve cleaner waters.

The choice of the 5% increase in the ambient concentration of a parameter at critical flow conditions as the criterion for “significant degradation” is totally arbitrary and is not justified scientifically. Surrounding states such as the Commonwealth of Virginia use a higher percentage of the assimilative capacity to define degradation. Even the GLI recommendations, which many would argue are far too restrictive, allow a higher fraction of the assimilative capacity to define significant degradation.

Having been an analytical chemist for over ten years, I would also raise the issue of whether the arbitrary standard of a 5% increase versus ambient conditions could be reliably measured for some parameters. This could be a significant added cost for new analytical method development and the additional oversight costs could significantly impact both the permitted facility and the agency without yielding any meaningful improvement in water quality.

THE PROCESS

This is a significant change in public policy with serious implications for both the permitting process and future economic development in West Virginia. I do not believe that the Board intends the consequences that are likely if the current draft implementation policy is enacted into law. Speaking on behalf of the West Virginia Manufacturers Association Water Team, I have some specific comments to make on the process we are engaged in this evening:

- WVMA supports the use of a Stakeholders Process to achieve a workable and scientifically and economically defensible Implementation Policy. We are concerned at the slow pace in making this occur. We recommended that this be done months ago.
- We are extremely concerned that this flawed policy could move forward and be sent to the legislature as-is or be imposed upon us as the “default policy” because of the process we are using. We believe that this policy as written would cause serious economic damage to West Virginia without having any significant positive impact on the quality of our waters.
- We are extremely distressed and righteously indignant that the Board has chosen to bring forward the same draft policy which was withdrawn last summer after the previous public comment period. This was a “fatally flawed” document then and none of the flaws have been corrected. We view this as “bad science” and terribly bad public policy. This document should not have been brought forward again without addressing the legitimate criticisms that were made during the public comment period last summer. Those criticisms are still valid despite the fact that the staff chose to ignore them.
- It is essential that the serious flaws in this draft implementation policy be corrected quickly and that the document to be submitted to the legislature reflects a valid scientific approach and sound public policy. I urge the Board to withdraw the draft implementation policy.

Thank you.

RECEIVED

JUL 29 1999

ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

Public Hearing Statement on WV Antidegradation Implementation Procedures
7/29/99, 7:00pm

Good evening everyone. My name is Bob Koroncai, I am the Chief of the West Virginia/Virginia Branch in the Water Protection Division of USEPA Region III in Philadelphia. I first would like to thank the Environmental Quality Board for providing this opportunity for EPA to speak about West Virginia's proposed antidegradation implementation procedures.

Today I signed a letter to Chairman Snyder, providing for the record EPA's technical comments on the proposed antidegradation implementation procedures. While these comments are important and, I expect will be given serious consideration by the Board in finalizing these procedures, I choose to provide in my testimony tonight not a rehash of these comments but instead focus on the issue of the need for completing the process of adopting comprehensive antidegradation procedures in the State of West Virginia.

One year ago, the Environmental Quality Board was accepting comments to a largely similar document to the one proposed tonight. Although the Board has again initiated steps towards an adoption of implementation procedures for the state's antidegradation policy, EPA is reminded that the adoption process was interrupted last year after the public hearing held on July 20th.

Last summer, the Board withdrew implementation procedures from legislative consideration in the 1999 session; therefore, the procedures were not included in West Virginia's triennial review package. On June 22 EPA sent to Chairman Snyder our decision letter on the West Virginia Water Quality Standards approved by the Board. In this letter, EPA made notice to our intention to recommend that an Administrative Finding be made on West Virginia's Antidegradation Policy.

In conducting an Administrative Finding, EPA follows a three-step process: First, the Region notifies the state that unless the state promptly resolves a deficiency in the water quality standards, in this case the lack of implementation procedures for antidegradation, the Region will recommend that the Administrator exercise her discretionary authority to identify and promulgate federally-developed replacement methods. Second, the Region formally makes this recommendation to the Administrator. And, third, the Administrator then reviews the deficiency and initiates promulgation.

With our letter of June 22 we completed the first step in this process. Currently, we are at the second step in making an Administrative Finding. That is, an action memo from the Regional Administrator has been drafted and will be sent to Headquarters in the near future. Once the memo is sent, EPA is positioned to complete the third and last step of this process.....the promulgation of federally-developed antidegradation implementation methods.

While I am on the subject of a federal promulgation, I would like to mention some of the relevant activities occurring in other states. EPA is undertaking a national effort to resolve with

states, including West Virginia, outstanding disapprovals of state water quality standards, some of which include antidegradation implementation methods. State have been put on notice by EPA that if these outstanding disapproval items are not resolve by April 1, 2000, EPA will pursue promulgation.

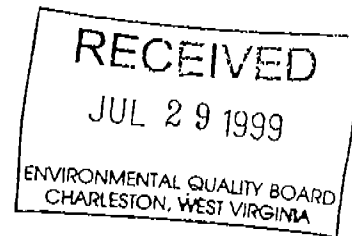
In closing, I want to reinforce the importance of the Board and the West Virginia Legislature to fully comply with EPA's regulations at 40 CFR 131.12(a) by completing the process of adoption of West Virginia's antidegradation implementation procedures. The citizens of West Virginia are better served if these procedures are developed at the state level rather than with federal promulgation. I offer any assistance of EPA in this regard.

Thank you.



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Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

July 29, 1999

Dr. Edward Snyder, Chair
Environmental Quality Board
1615 Washington Street, East
Charleston, WV 25311-2126

RE: Antidegradation Implementation Guidance

Dear Dr. Snyder,

West Virginia Highlands Conservancy (WVHC) would like to reiterate its position taken last year at this time with regard to the proposed antidegradation guidance document. Although we have not had the opportunity to review and compare all the differences between last year's proposal and the one currently being discussed, we understand that the two are similar. Hence, we submit a copy of our comments submitted July 20, 1998 and review here briefly the main concerns addressed in those comments.

First and foremost we commend the Board once again for attempting to implement official guidance to implement the antidegradation provisions of WV Water Quality Standards.

We are generally pleased with the tone and direction of the proposed guidance, but continue to be concerned about the following issues that are discussed in more detail in our resubmitted comments from July 20, 1998.

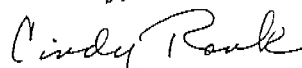
- The proposed definition of "significant" degradation is not protective enough especially as it relates to high quality headwater streams.
- Less than adequate consideration of cumulative impacts is given when several point sources occur in a single watershed, and especially if non-point sources are also present.
- Monitoring data must be available to verify the effectiveness of BMP's at non Point discharges.
- Trading should not be permitted.
- Protection levels for Tier 2.5 waters must be applied to all upstream reaches.
- Protective measures must be clear for the outlying, relatively isolated and pristine areas, especially with regard to the Boards historically upheld assumption that ALL waters of the state are capable of supporting Public A unless an applicant for a permit makes a showing otherwise.
- The adequacy of the intergovernmental coordination is questionable.

We thank you for the opportunity to comment, and ask that you consider our comments submitted July 20, 1998 and resubmitted here. We also concur with the comments submitted on behalf of West Virginians for Clean Water, a ^{coalition} coalition of groups including WVHC.

Again, we appreciate the effort of the Board to take on the difficult but necessary task of setting forth the required guidance document.

Please contact me at the address and/or phone numbers below with any questions you may have, or any request for additional clarification.

Sincerely,



Cindy Rank, Chair
WVHC Mining Committee
HC 78, Box 227
Rock Cave, WV 26234

Phone: (h) (304) 924-5802
(w) (304) 924-6263

cc: Frank Young, President, WVHC
Pamela Moe-Merritt, WV for Clean Water



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Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

July 20, 1998

Environmental Quality Board
1615 Washington Street, East
Charleston, W.V. 25311-2126

RE: Proposed Rule Changes:
Antidegradation Implementation
& Dissolved Metals Criteria

Dear Members of the Board,

As always, the West Virginia Highlands Conservancy (WVHC) appreciates the opportunity to comment on the Board's proposed language for new regulations to be submitted for review during the upcoming Legislative Session.

This year's proposal from the Board includes a much needed implementation guidance for the State's antidegradation policy and a suggested change from total to dissolved criteria for some metals.

WVHC respectfully submits the following comments with the hope that you will seriously address them in your final proposal to the Legislative Rule Making Review Committee.

I. MAJOR POSITIVE STEP

First, we thank you for finally taking the step of creating an antidegradation implementation policy. This undertaking is not only required by law but is also much needed to assure the citizens of West Virginia that the waters of the state will be protected as we move ahead into the 21st century.

The Clean Water Act recognized the need for development and improvements that would change the pristine nature of the nations waters, but also insisted that such a change or diminution be approved only when and if a much needed development could not be accomplished without some relatively minor degradation of the nations waters.

1) On several occasions during the past 15 years WVHC has recommended implementation of the antidegradation policy in order to prevent costly and inexcusable water quality problems. We are

pleased to support the efforts of the Board today in the hopes that this proposal will take us one step closer to actually utilizing the antidegradation policy and thus hopefully preventing similar problems throughout the state of W.V.

2) Second only to its very creation, perhaps the most praiseworthy aspect of the currently proposed implementation policy is the fact that it appears to drive major permittees toward appropriate and detailed site specific and parameter by parameter evaluation and documentation.

Given the regulatory agencies' lack of adequate money and personnel to adequately gather and document background and ambient water quality for all waters of the state, especially the furthest reaches of the many high quality headwater streams, it is imperative that we exercise the utmost caution when granting permission to degrade the state's excellent water quality. . . . If anything, the proposed language does not put enough responsibility upon the individual polluter to provide the necessary data and to provide adequate proof of need and lack of alternatives to rationalize any diminution of quality.

II. DEFICIENCIES AND AREAS OF CONCERN

Although pleased with the general tone and direction of the proposed guidance, it is important that WVHC emphasize some deficiencies that we believe make the guidance less protective of water quality than either Federal or State law requires.

1) Of particular concern is the Board's recommendation that an antidegradation review is triggered only when there is a "significant" level of degradation expected from a proposed activity. Any measurable degradation should require a review.

High quality headwater streams are particularly at risk in this scenario. Reliance on "significant" levels of degradation may slow the decline in water quality but will not fully protect waters of particular sensitivity. Of particular concern are areas where residents utilize surface water springs and creeks that are absent measurable amounts of pollutants even from natural sources where the barest minimum treatment (i.e. mere settling or sediment filters) is needed for using these surface waters for drinking water purposes.

(Please refer to further comments in II.6 below.)

2) **Cumulative impacts are not considered in the proposed rule.** The process is driven by individual permit applications and not by an overview of water quality in a given watershed.

This is particularly problematic when relying on a "significant" level of degradation to trigger a review. If individual multiple point source impacts fall below the suggested "significant" criteria (5% - or worse still, 10%, 20%, etc.) those individual activities can still be permitted without an antidegradation review.

This is also especially problematic when a point source activity carries with it other non-point source activities.

3) NON-POINT SOURCES ARE NOT ADEQUATELY ADDRESSED. As proposed, non-point sources are deemed to be "in compliance with the antidegradation requirements with the achievement of cost effective and reasonable best management practices in accordance with the WV Non-Point Source Management Plan." While this phrase may infer that activities where BMP's are not being implemented are not deemed to be in compliance and consequently may move to a greater use of BMPs, it does not create the needed linkage between BMPs and water quality standards. The antidegradation guidance should provide a tool by which BMPs are evaluated in relation to their ability to achieve water quality standards, and where those BMPs do not achieve standards, this guidance should be the impetus for review and improvement of BMPs currently in use.

At a minimum, compliance with antidegradation for non-point discharges should be assumed only where monitoring data are available that verify the effectiveness of BMPs.

4) TRADING SHOULD NOT BE PERMITTED. This is true for trading between point sources and between point and non-point sources.

a. Trading between point sources could not be allowed in a truly ANTIdegradation policy, i.e. where any measurable amount of degradation would trigger review, where non-point sources were included, where cumulative impacts are adequately considered, etc., --- each source would be held to the highest standards.

b. Trading between point and non-point sources poses a particular problem in that while point sources have regulatory oversight, public notification and monitoring requirements, non-point sources have none of these requirements. Furthermore, reliable verification of specific non-point reductions is nearly impossible because of variations in daily, seasonal and annual rainfall and access to testing sites.

c. If 'trading' is retained in the final proposal to the Legislature, it should not be included among those circumstances that "shall not be considered to cause significant

degradation" (4C.a.2./4C.2.a.2.F.) and thereby not trigger an antidegradation review (4C.3). Trading most certainly should undergo specific review and require evaluation of alternatives and the showings required in 4C.4, 4C.5 and 4C.6.

d. WVHC must object to the language in sections 4B.4, 4C.2.a.2.F., and 4D.2.C that states the basis for a trade will be made through a TMDL of "other appropriate measures". The phrase "other appropriate measures" makes the basis of these trades discretionary, without any clearly defined, scientifically sound criteria. This is especially important because TMDLs generally are only established when water fails to meet a standard and so the "other appropriate measures" would be the only method available for trades in the higher quality waters that the antidegradation policy is supposed to protect. If avenues beyond the TMDL strategy are available and scientifically sound they should be clearly outlined in this document.

5) While it is commendable that 4E.8.1.c. specifically affords the same level of protection (Tier 3.0) to all upstream segments of an ONWR, the same consistency should be specifically allotted to all upstream segments of waters that fall into Tier 2.5. (e.g. trout waters, etc. One can't indiscriminantly draw a line - say 100 feet - upstream from the site where a trout has been seen and then say that the waters and vegetation, etc. above that point aren't integrally connected, i.e. directly responsible for the water quality downstream that supports the trout population.)

6) For years WVHC and local citizen groups such as FOLK (Friends of the Little Kanawha) have appealed to the Board for an extra measure of protection for headwater streams which are relatively unpolluted, and in their natural state are suitable for the highest and best use, e.g. drinking water, without chemical treatment and relying only on the most basic treatment of settling or sediment filtering.

Granted, standards and protection measures for the Ohio River and the Kanawha, and even in some ways the Monongahela are overwhelming concerns for the Chamber of Commerce and the Manufacturers Association, but for individuals and communities where relatively pristine and pure waters serve as the lifeblood for our existence, more protective measures must be afforded to protect our lifestyles from the pollution meted out by mining, timbering, oil and gas road building and pit and brine waste discharges, and in some instances agriculture runoff.

Somewhere, somehow, the Board has to be clear on what protective measures are to be meted out to those outlying, relatively isolated but pristine areas.

In public meetings where the question has been raised the Board has been adamant that it assumes ALL waters of the state are to be considered capable of supporting the highest and best use (and therefore subject to the most stringent standards) unless an applicant for some activity makes a showing that limits the existing use of that stream. However, since approximately 1984 the specific language of the standards no longer is clear in this regard.

WVHC believes that it is incumbent upon the Board to clarify this grey area by either 1) in Section 6.1 explicitly designating all waters of the state for ALL USES unless proven to be of lesser quality by an applicant for some specific activity (as was the case in the WV water quality standards at least until 1983), or 2) by including ALL WATERS of the State in Tier 3 for reasons of existing water quality e.g. pristine or naturally occurring (4E.8.1.c.) unless a showing can be made that the stream segment is not of sufficient quality to be so considered.

This position has been advanced by Water Resources during the Triennial Review and is supported by the US EPA, Office of Water Regulations and Standards Criteria and Standards Division in its August 1985 Paper "Questions and Answers on: Antidegradation" page 2: "An existing use can be established by demonstrating that fishing, swimming, or other uses have actually occurred since November 28, 1995, OR, THAT THE WATER QUALITY IS SUITABLE TO ALLOW SUCH USES TO OCCUR (UNLESS THERE ARE PHYSICAL PROBLEMS WHICH PREVENT....) -- A copy is included with these comments.

IV. WVHC questions the adequacy of the intergovernmental coordination as outlined in Appendix G-1.

III. METALS CRITERIA

1) WVHC fully supports the comments submitted by ~~James~~ ^{W.V. for CLEAN WATER} ~~Katson~~ which reiterates his understanding from the metals committee that language was to be included in Section 8 that explicitly allows Water Resources to develop criteria based on sediments when sufficient basis is established.

2) WVHC supports the comments submitted by Don Brannon, Ph.D., former member of the Water Resources Board, with regard to metals. i.e.:

- Hg should be looked at again;
- Al criteria of 750 ug/l for B1 and B2 streams are too high, etc.

IV. BMPS

WVHC reiterates its long held belief and references Dr. Brannon's comments to support what we and other participants in the West Virginians for Clean Water Campaign believe RE: BMPs i.e. that 208 voluntary Best Management practices must become mandatory.

Again, on behalf of the WVHC I thank the Board for the opportunity to comment on these most important proposals.



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cc John McFerrin, President

QUESTIONS AND ANSWERS ON: ANTIDegradation

August 1985

U.S. Environmental Protection Agency
Office of Water Regulations and Standards
Criteria and Standards Division (WH-585)
401 M. Street, S.W.
Washington, DC 20460

5. WHAT COULD HAPPEN IF A STATE FAILED TO IMPLEMENT ITS ANTI-DEGRADATION POLICY PROPERLY?

If a State issues an NPDES permit which violates the required antidegradation policy, it would be subject to a discretionary EPA veto under Section 402(d) or to a citizen challenge. In addition to actions on permits, any wasteload allocations and total maximum daily loads violating the antidegradation policy are subject to EPA disapproval and EPA promulgation of a new wasteload allocation/total maximum daily load under Section 303(d) of the Act. If a significant pattern of violation was evident, EPA could constrain the award of grants or possibly revoke any Federal permitting capability that had been delegated to the State. If the State issues a §401 certification (for an EPA-issued NPDES permit) which fails to reflect the requirements of the antidegradation policy, EPA will, on its own initiative, add any additional or more stringent effluent limitations required to ensure compliance with Section 301(b)(1)(C). If the faulty §401 certification related to permits issued by other Federal agencies (e.g. a Corp of Engineers Section 404 permit), EPA could comment unfavorably upon permit issuance. The public, of course, could bring pressure upon the permit issuing agency.

6. WILL THE APPLICATION OF THE ANTIDegradation POLICY ADVERSELY IMPACT ECONOMIC DEVELOPMENT?

This concern has been raised since the inception of the antidegradation policy. The answer remains the same. The policy has been carefully structured to minimize adverse effects on economic development while protecting the water quality goals of the Act. As Secretary Udall put it in 1968, the policy serves "...the dual purpose of carrying out the letter and spirit of the Act without interfering unduly with further economic development" (Secretary Udall, February 8, 1968). Application of the policy could affect the levels and/or kinds of waste treatment necessary or result in the use of alternate sites where the environmental impact would be less damaging. These effects could have economic implications as do all other environmental controls.

7. WHAT IS THE PROPER INTERPRETATION OF THE TERM "AN EXISTING USE"?

An existing use can be established by demonstrating that fishing, swimming, or other uses have actually occurred since November 28, 1975, or that the water quality is suitable to allow such uses to occur (unless there are physical problems which prevent the use regardless of water quality). An example of the latter is an area where shellfish are propagating and surviving in a biologically suitable habitat and are available and suitable for harvesting. Such facts clearly establish that shellfish harvesting is an "existing" use, not one dependent on improvements in water quality. To argue otherwise would be to say that

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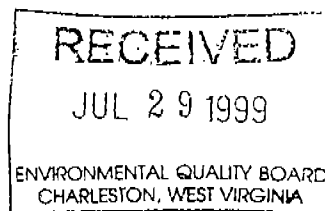
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MEMBER OF LEX MUNDI
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July 29, 1999



Hand Delivered

Dr. Edward M. Snyder

Chairman

Environmental Quality Board

1615 Washington Street, East

Charleston, West Virginia 25311

Re: Proposed Antidegradation Implementation Procedures

Dear Chairman:

Please find enclosed the comments to the Environmental Quality Board's proposed Antidegradation Implementation Procedures filed on behalf of the West Virginia Chamber.

Very truly yours,

A handwritten signature in cursive script that reads "Kathy G. Beckett".

Kathy G. Beckett

Counsel for the

West Virginia Chamber of Commerce

cc: Elizabeth M. Chatfield, Esquire

**COMMENTS OF
THE WEST VIRGINIA CHAMBER OF COMMERCE
TO THE ENVIRONMENTAL QUALITY BOARD'S PROPOSED
ANTIDEGRADATION IMPLEMENTATION PROCEDURES
July 29, 1999**

I. COMMENTS REGARDING PROCEDURE

A. Nothing has Changed Since July 1998 when this Board Rejected these Exact Same Antidegradation Implementation Procedures

In July 1998, the West Virginia Environmental Quality Board, with the cooperation of several state governmental officials, proposed revisions to the State Water Quality Standards which included adoption of Antidegradation Implementation Procedures. After accepting public input through both written and oral comments, the Board decided to reject adoption of such Antidegradation Implementation Procedures. Now, exactly one year later, the Environmental Quality Board again proposes adoption of almost the exact same Antidegradation Implementation Procedures even though the Board has not addressed the concerns that were raised in July 1998 which prompted the Board to withhold adoption of the Antidegradation Implementation Procedures. Although the Board has slightly modified the 1998 implementation procedures, the modifications were extremely minor and essentially inconsequential. Nothing has changed that should cause this Board to reconsider its July 1998 decision. In July 1998, the Environmental Quality Board considered the numerous comments and objections to the Antidegradation Implementation procedures and properly decided to reject sending it to the Legislative Rulemaking Review Committee.

1. USEPA has not required West Virginia to Adopt an Antidegradation Implementation Procedure by April 1, 2000

Apparently, the only rationale that the Board has offered for adoption of these Antidegradation Implementation Procedures is that the United States Environmental

Protection Agency (“USEPA”) has allegedly demanded the Board to adopt such implementation procedures by April 1, 2000. However, USEPA has made no such demand. In USEPA’s June 22, 1999 letter to Dr. Edward M. Snyder, USEPA notified West Virginia to “promptly develop[] and adopt[] antidegradation methods that adequately support its antidegradation policy.” Attached to the June 22, 1999 letter, USEPA made an “Administrative Finding” that if West Virginia does not “promptly develop[] and adopt[]” implementation procedures regarding its antidegradation policy, USEPA will develop its own implementation procedures for West Virginia. In the June 22, 1999 letter, USEPA offered no deadline by which West Virginia must adopt such implementation procedures other than to do so “promptly.” It is important to note that USEPA did not demand that West Virginia take such action by a certain date. Such failure to demand a deadline is significant because USEPA has yet to adopt or implement its own antidegradation implementation policy. That is, USEPA is in the process of developing a nationwide antidegradation implementation policy; but until such policy is developed, USEPA is requiring each individual state to develop its own policy. Although USEPA is requiring states such as West Virginia to “promptly” develop and adopt an implementation procedure for its antidegradation policy, USEPA is also cognizant of both a lack of federal guidance available to states and the development of a national implementation plan. Accordingly, USEPA did not provide a firm and strict deadline to West Virginia in its June 22, 1999 letter by which West Virginia must adopt an Antidegradation Implementation Procedure.

Although the June 22, 1999 letter did not include a date by which an implementation procedure must be adopted, USEPA previously sent a letter to Dr. Snyder regarding alleged inconsistencies between West Virginia’s water quality standards and the federal Clean Water

Act. This June 8, 1999 letter specifies that it is “EPA’s goal . . . to resolve” West Virginia’s inconsistencies by April 1, 2000. During the Environmental Quality Board’s June 25, 1999 public meeting, USEPA clarified its positions outlined in its June 8 and June 22, 1999 letters to Dr. Snyder. Specifically, Robert A. Koroncai and Mary A. Kuo, USEPA, Region III, participated in the Board’s June 25, 1999 public meeting. At the June 25, 1999 meeting, Ms. Betsy Dulin, West Virginia Environmental Quality Board, asked Koroncai if West Virginia had to submit an Antidegradation Implementation Procedure to the West Virginia Legislature by April 1, 2000, and Koroncai replied that West Virginia did not have to submit a proposed policy to the Legislature by April 1, 2000. Koroncai simply stated that West Virginia needs to identify an implementation procedure by April 1, 2000 and that West Virginia does not have to complete a rulemaking by such date. Further, Koroncai stated that USEPA has never federally promulgated antidegradation implementation procedures for a state. Accordingly, USEPA simply wants West Virginia to move forward with identifying Antidegradation Implementation Procedures by April 1, 2000. That is, USEPA “will be watching” what West Virginia does by April 1, 2000.

Nowhere has USEPA suggested, requested, or demanded that the West Virginia Environmental Quality Board take such extreme action as submitting the proposed Antidegradation Implementation Procedures to the West Virginia Legislative Rulemaking Committee.

2. The Objections which Convinced the Board to Withhold Adoption of the Antidegradation Implementation Procedure in July 1998 Still Remain and Have Not Been Adequately Addressed

During the comment period last year regarding the Environmental Quality Board’s development of Antidegradation Implementation Procedures, the Board considered

comments on the proposed implementation procedures. In response to the large number of comments received criticizing the proposal, the Environmental Quality Board decided to withdraw the proposed Antidegradation Implementation Procedure from legislative consideration. Since this Board's withdrawal of the proposed implementation procedures, the Environmental Quality Board has done nothing to address the concerns raised in the July 1998 public comment period. Save for a few minor typographical changes, the Antidegradation Implementation Procedure which the Board is again proposing to adopt is almost the exact same Antidegradation Implementation Procedure which the Board refused to adopt in July 1998. (See Section III.A. below.) That is, the Board is intending to forward the same rule which it withdrew from consideration in 1998 because the Board agreed that the rule as drafted included major flaws.

3. It is Poor Public Policy to Submit a Proposed Rule to the Legislature that the Submitting Agency KNOWS Contains Numerous Flaws and that the Agency Intends to Further Modify

The Environmental Quality Board is submitting a flawed rule to the legislature simply to "beat" the Legislative Rulemaking's ninety day deadline. The Board has acknowledged that the proposed Antidegradation Implementation Procedure needs substantial modification. At the June 25, 1999 public meeting, Libby Chatfield, technical advisor, Environmental Quality Board, suggested the following course of action: (1) immediately go to public notice with the 1998 Antidegradation Implementation Procedure in order to be considered by the 2000 Legislature; (2) empanel a stakeholder group to recommend changes to the 1998 Antidegradation Implementation Procedure; and (3) propose to the Legislative Rulemaking Committee that the stakeholder group's recommendations be adopted by the 2000 Legislature in order to correct and modify the Antidegradation Implementation Procedure as submitted.

In other words, the Board has suggested the following plan of action: (1) knowingly send a fatally flawed rule to the Legislature in order to complete rulemaking by April 1, 2000, even though USEPA does not require a rulemaking to be complete by such date; (2) empanel a stakeholder group to fix the fatal flaws to the proposed rule; and (3) suggest - and hope - that the Legislature considers the stakeholder group's recommendations. (The Board must hope that the Legislature considers the recommendations because there is no guarantee that the Legislature will accept such recommendation.) It is simply poor public policy to submit a rule to the Legislature that the Board knows and acknowledges requires substantial modification before such rule can become an effective and efficient policy.

Rather than take the time and effort to develop reasonable and conscientious procedures through a broadly represented stakeholder process before submitting proposed rules to the Legislature, the Board is instead "putting the cart before the horse."

The general public should not be forced to accept substandard antidegradation implementation regulations until the Board finally does what numerous entities have requested for over a year. In almost every written comment submitted in July 1998 regarding the Antidegradation Implementation Procedure, it was suggested that the Board put together a broadly representative stakeholder group in order to develop an appropriate and effective antidegradation implementation procedure. The Board has known of such requests for over a year. Specifically, on July 21, 1998, July 30, 1998, October 22, 1998, and March 25, 1999, the Chamber submitted to the Board written requests seeking the creation of a stakeholder group; in addition, at almost each and every Environmental Quality Board public meeting since July 1998, the Chamber has orally urged the Board to convene a stakeholder group. After months of assurances that the Board would promptly convene such

group, such stakeholder group has finally been organized, although the group has yet to be convened by the Board - either formally or informally - to begin the arduous task of assessing the Antidegradation Implementation Procedure.

B. The Board Should Withdraw the Antidegradation Implementation Procedure from Consideration by the Legislature and Press Forward with the Stakeholder Process

The Board itself has expressed concern over this proposed rule and suggested that it should only be a placeholder for another rule if one were developed by the stakeholder group. Proposing a regulation that is known to be a problem seriously undermines the process for developing good public policy. The Chamber urges the Board to withdraw this proposed rule in favor of gathering together the expertise of the various stakeholders who have already volunteered to serve and direct them to provide it with a well-documented and scientifically supportable alternative antidegradation implementation policy. A policy designed under such a process will result in a policy that reflects the thoughts and ideas of representatives of the public, as well as of the administrative branch of government. The development and implementation of a West Virginia antidegradation implementation policy will result in significant impacts on water quality for waters of the state and significant impacts on the citizens of the state. This is an issue that warrants careful and measured development. The Chamber, the West Virginia Coal Association, and the West Virginia Manufacturers Association all support Mike Brown of American Electric Power as a representative in the stakeholder process. Mike Brown will bring to this discussion his water quality-related technical skills and his knowledge of other state antidegradation implementation policies and the function of those policies. In addition to Mr. Brown's efforts, the Chamber stands ready to assist in assuring that the stakeholder process is a

beneficial one.

By submitting a knowingly flawed rule to the Legislature, the Environmental Quality Board would be forwarding very poor public policy, as well as establishing a very dangerous precedent. Accordingly, the Chamber urges the Board to withdraw the proposal and allow the shareholder process to properly function.

II GENERAL COMMENTS¹

A. The Proposed Antidegradation Implementation Policy Should Be Withdrawn Pending EPA's National Proposal

On February 14, 1998 the Administrator of USEPA and the Secretary of the United States Department of Agriculture announced the "Clean Water Action Plan." Part of that plan addressed the commitment on the part of both agencies to develop additional guidance on Antidegradation. Although it is clear that West Virginia is required to identify antidegradation implementation procedures, it is equally clear that the lack of federal guidance on the issue has facilitated delay by many states in fashioning appropriate procedures. In fact, USEPA Region III does not have implementation procedures it can recommend to its states. The Chamber urges the Board to proceed with measured caution and withdraw this proposal and allow the stakeholder's to assess other EPA regions' guidance and other states policies prior to adopting a policy for West Virginia.

In the July 7, 1998 "Advanced Notice of Proposed Rulemaking" ("ANPR"), USEPA announced that it seeks to provoke "a structured national debate on antidegradation." *See* 63 Fed. Reg. 36741-3680C (July 7, 1998). In the ANPR, USEPA reviewed the existing

¹Some of the following comments were submitted in the Chamber's July 21, 1998 Comments to the Board's Proposed Antidegradation Implementation Procedures.

three-tiered antidegradation approach currently embodied in both Federal and West Virginia regulations. *See* 40 C.F.R. §§ 131.12(a)(1) through (2) and WVCSR §46-1-4. In the ANPR, USEPA has expressed concern over the wide disparity in the implementation procedures of the states. Accordingly, USEPA has solicited comment on whether antidegradation implementation procedures should be nationalized. Specifically, USEPA has raised the following questions:

1. What changes or clarifications could be made to the current tiered approach to protecting waters under anti-degradation that would streamline and enhance anti-degradation implementation?
2. Should the [federal] regulations be amended to identify the basic elements that must be included in an anti-degradation implementation method . . . ?
3. Is national guidance on anti-degradation implementation methods needed . . . ?

63 Fed. Reg. at 36781. In light of these statements from USEPA, and in light of the fact that its ANPR will almost certainly result in a federal rulemaking, the Chamber urges the Board to move forward with the development of a policy with a view toward the fact that national guidance may force revision to any antidegradation policy that will be developed.

It should be noted that although the ANPR was filed over a year ago, USEPA is in the process of proposing and finalizing revisions to the Water Quality Standards Regulation and guidance. In the January 27, 1999 "Guidance to States, Tribes, and Regions on Priorities for the Water Quality Standards Program for FY 2000-2002", USEPA again expresses its commitment to preparing guidance to the states through the proposition and finalization of revisions to the Water Quality Standards Regulation and guidance, as provided in the ANPR.

B. Current Law Does Not Require Implementation Regulations for Anti-Degradation Procedures It only Requires “Identification” of Anti-Degradation Procedures

Federal law currently requires that States “adopt, as part of [their] water quality standards, an antidegradation policy consistent with 40 C.F.R. § 131.12 and identify implementation methods for such a policy.” *See* 63 Fed. Reg. at 36780. (Emphasis added.) There is, however, no express requirement that such implementation methods be embodied in the water quality standards or that they be submitted to USEPA for its approval. In the March 25, 1999 Summary of Comments Received on Antidegradation Implementation Procedures², the inter-agency committee which drafted the proposal specifically rejected such suggestion that the Board was simply required to “identify” rather than “develop” implementation procedures. *See* Response #4, page 2. In response to several comments that West Virginia need only “identify” implementation methods, the committee which drafted the proposal criticized such comments. However, as previously mentioned in Section I.A.1., USEPA, in the June 25, 1999 public meeting, has specifically stated that West Virginia need only identify implementation procedures and that West Virginia does not have to in fact develop such implementation procedures.

The Board is urged not to promulgate this legislative rule which will become governing law. It is most appropriate for the Board to delay action on this matter until all

²The timing of the preparation and release of the March 25, 1999 Summary of Comments Received on Antidegradation Implementation Procedures has caused some concern on the part of the Chamber. Although the document is dated March 25, 1999, the Chamber, one of the commenters in the July 1998 public comment period, never received a copy of such March 25, 1999 document until July 1999, and at that it was only in response to a Freedom of Information Act request. Careful and appropriate consideration should be given to distribution of such documents to the public.

stakeholders have developed a clearer understanding of the intent of the Clean Water Act and the guidance of USEPA on the implementation of the antidegradation procedures and has recommended action for the Board to consider.

D. The Board Has Not Adequately Considered the Economic Consequences of its Actions.

The West Virginia Code, §29A-3-5 provides that “when an agency proposes to promulgate a rule other than an emergency rule it shall file in the state register a notice of its action, including a text of the rule proposed, a fiscal note.” Such fiscal note shall itemize “the cost of implementing the rules as they relate to this State and to persons affected by the rules and regulations.” W. Va. Code §29A-3-4(b) (emphasis added.) The Board’s fiscal note which accompanies the proposed Antidegradation Implementation Procedure fails to address the significant increased costs that will be incurred by the regulated community and the public with the implementation of this rule. In the fiscal notes submitted by the Board in both 1998 and 1999, the Board simply stated that none of the financial impacts can be accurately quantified.

It simply is not sufficient to state that the costs are unknown at this point. If anything at all, such a statement raises significant concerns that the true impact of this rule is so broad that the Board does not fully understand its scope. The public has the legal right to be informed of fiscal impacts and the Board must acknowledge that. Further, according to the West Virginia Administrative Procedure Act, the Board has a legal obligation to provide such itemized list of economic impacts. The Chamber urges the Board to engage in a thorough assessment of the fiscal impacts of this proposal.

III. SPECIFIC COMMENTS³

A. March 25, 1999 Summary of Comments Received on Antidegradation Implementation Procedures

When requested to develop a response to comments summary, discussion during the Board hearings focused upon the usefulness of such a document for the stakeholder process. A review of the response to comments document indicated that many issues raised by various industry commenters were not included. In addition, the response to comment document fails to provide a thorough assessment of the comments filed by the administrative agencies. With such a limited focus, the Chamber questions the usefulness of this document as a means to summarize or frame the issues concerning development of an antidegradation policy.

Also of note is the fact that there are numerous places where the Board agrees with a certain commenter, but fails to revise the proposed Antidegradation Implementation Agreement to reflect such agreement. No doubt this is in part due to the fact that this proposed rule has been pulled off the shelf and thrown into the rulemaking process. This failure to revise the proposed Antidegradation Implementation Procedure to reflect the Board's own agreement with certain comments is yet another example of why the Board should withdraw the proposed rule and allow the stakeholder process to effectively perform its duties. The inconsistencies in the record and the response to comments with this proposed rule do not reflect the careful consideration that this issue warrants.

³ The Chamber specifically support the technical comments proposed and submitted by the West Virginia Manufacturers Association and American Electric Power.

B. § 46-1-4.1.b.2. As written, this provision of the proposed water quality standards would create a presumption that all waters will be considered “high quality” or “Tier 2” waters “unless it can be demonstrated that the water quality is not better than necessary to attain both fishable (Category C) and swimmable (Category C) uses. The Chamber offers the following comments:

- a. Fishable waters fall within Category B, not Category C waters. *See* WVCSR §§ 46-1-6.3 & 6.4.
- b. The Board has provided no explanation for creating this presumption. In a Draft dated June 4, 1998 of the current proposed Antidegradation Implementation Procedures, the Board created two similar presumptions. First, that “the designated uses outlined in section 6.2 are all assumed to apply to all waters . . .” In a telephonic hearing convened by the Board on June 17, 1998, the Board members assured the public that this presumption would be deleted. Second, the June 4 Draft Implementation Guidelines contained the same language which the Board now proposed to move from a procedural guideline directly into the water quality standards. The Board fails to explain why it is not only proposing procedural guidelines, but why it is proposing a major substantive change to its water quality standards which creates a presumption requiring dischargers to prove a negative. The Chamber is not aware of any federal requirement for such a presumption and notes that in the July 7, 1998 ANPR, USEPA observed that the existing approaches by the States for identifying high quality waters fall into two broad categories: (i) pollutant-by-pollutant approaches; and (ii) water body-by-water body

approaches. In the pollutant-by-pollutant approach, a State determines whether the existing water quality of a stream is better than that set by the water quality standard. If so, then the allowable assimilative capacity of the stream for proposals to discharge particular pollutants is subject to Tier 2 anti-degradation protection. These determinations are made during the permit process and do not require intensive use of state resources to determine overall water quality in advance of permitting decisions. The second approach weights a variety of factors to determine a water body's overall quality and may be made prior to or during anti-degradation review. *See* 63 Fed. Reg. at 36782-36783. Significantly, in neither case does USEPA discuss or mandate a State approach which relies on a presumption that all waters are high-quality waters. The Chamber urges that this presumption be significantly modified.

- c. The presumption that all waters are high-quality waters unless proven otherwise subjects new or modified discharges to the detailed evaluation of alternatives set out in proposed WVCSR §§ 46-1-4C.4.a. This is an unreasonable and unnecessary requirement that will impose substantial costs on industry either to prove that water quality is not better than that required (i.e. proving a negative) or to make the evaluation demonstration. In either case, the Board has failed adequately to consider the costs of such a presumption as required by W.Va. Code § 29A-3-5.

C. § 46-1-4A: Applicability.

Section 4A.1 proposes that the antidegradation procedures would apply to "all activities that require a permit or water quality certification pursuant to state or federal law,

including Clean Water Act § 402 NPDES permits, CWA § 404 dredge and fill permits and any activities requiring a CWA § 401 certificate.” (Emphasis added.) This section should, at the least, be limited to NPDES permits and activities requiring CWA § 401 certification (which already includes CWA § 404 permits, so that the references to § 404 is redundant and confusing). There is no justification for applying it to “all permits.” The extension of the anti-degradation policy to “all permits” is a substantive extension of the water quality standards that should not be set out in a procedural document and is uncalled for under the Federal Clean Water Act.

D. Section 46-1-4B Tier 1 Protection Review Procedures

The existing State and Federal water quality standards require that “existing uses and the level of water quality necessary to protect the existing uses shall be maintained . . .” A Tier 1 review requires no more than a determination that existing uses will be maintained irrespective of any diminution in water quality due to a new permitted activity. In this light, the “Trading” provision in Section 4B.4 is confusing and implies that effluent trading can be required as part of a Tier 1 review and that only upstream controls can be utilized in effluent trading. It appears that the regulation is intended to address only the situation where the proposed activity would, without the upstream project, interfere with maintenance of an existing use, but this is not entirely clear. The Chamber joins the regulated community in urging the Board to clarify this section.

E. Section 46-1-4C Tier 2 Review Procedures (High-Quality Waters)

§ 4C.1.c.:

This subsection creates a presumption that all waters are “high quality.” As discussed above, this should be deleted.

§4C.2.a.1.A: Significant Degradation Test:

This regulation seemingly requires an anti-degradation analysis, with an accompanying “alternatives” analysis, whenever any parameters will be increased more than 5% even if there is not a numeric water quality standard for the parameter. This is unduly restrictive and is at odds with the entire purpose of water quality standards which is to establish numeric criteria to protect recognizable stream uses.

The Board recently took steps to delete the aquatic life criterion for manganese. This “procedural” section must be limited to parameters for which there are numeric criterion, otherwise new discharges not subject numeric criterion will have to undergo the extensive Tier 2 analysis simply because of predateable discharges, even though the Board has previously determined that these discharges will not impair an aquatic life use and therefore have not been assigned a numeric water quality standard. Accordingly, this procedure must be limited to those pollutants for which there are numeric criteria.

Further, the Chamber specifically supports American Electric Power’s comments regarding this subsection.

F. § 4C.2.a.2.F.: Trading:

It appears that the intent of this subsection is to allow a mitigation project located upstream or downstream of a proposed permitted activity to offset the impact of the proposed permitted activity for the purpose of determining if the activity will cause significant degradation. The Chamber supports the ability to use mitigation projects to avoid Tier 2 review and suggests that its use be expanded to allow trading across watersheds.

The proposed rule also requires that effluent trading be documented in a TMDL or other appropriate measure. The Chamber joins others in the regulated community in requesting that the Board clarify that the use of a trade to avail Tier 2 review not be held up pending a TMDL as TMDL development is a time consuming process. Moreover, given that TMDLs are required only for non-compliant waters, and Tier 2 review is limited to “high quality waters,” it is difficult to image why a TMDL would be done to document a trade for a high quality water.

G. § 4C.4,5 & .6: Less Degrading and Non-Degrading Alternatives:

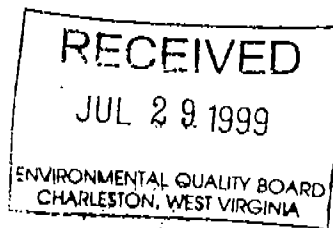
This section relates to the analyses of less degrading or non-degrading alternatives. The subsections 4C.4 & 4C.5 do not contain any criteria for evaluating the reasonableness or cost-effectiveness of less degrading alternatives. A less degrading alternative for almost any activity, without a simultaneous review of important economic or social development, will almost always exist, including the “no-activity” option. Because of this, the provisions of subsections 4C.5 and 4C.6 must be integrated so that anti-degradation review evaluates less degrading alternatives simultaneously with the economic effect of imposing these alternatives. As drafted, this regulation would allow a permit writer to insist on a less degrading alternative without any consideration of its cost or economic impact and to deny the permit absent an agreement by the applicant to utilize that alternative. Such a result would be contrary to the provisions of CSR § 46-1-4.1.b, which requires that the anti-degradation analysis involve an assessment of whether the activity is necessary to accommodate important economic or social development.

H. Antidegradation Reviews

Throughout the proposed Antidegradation Implementation Procedures, the Board refers to various antidegradation reviews which must be completed. However, the proposed rule provides no guidance on (1) how such reviews must be prepared, (2) who is required to conduct such reviews, and (3) who or what agency is responsible for analyzing and evaluating the sufficiency and results of such review. The Chamber urges the Board to clarify the language regarding the preparation and evaluation of the antidegradation review.

ADDITIONAL COMMENT

The Chamber generally supports the comments submitted and proposed by the West Virginia Manufacturers Association and by American Electric Power. In addition, the Chamber supports the comments submitted and proposed by the West Virginia Coal Association and the West Virginia Mining and Reclamation Association.



July 29, 1999

Edward M. Snyder, Ph.D.
Chairman, Environmental Quality Board
1615 Washington Street, East
Charleston, WV 25311

Re: **Proposed Revisions to Water Quality Standards,
46 CSR 1**

Dear Dr. Snyder:

Weirton Steel Corporation provides these comments in support of the Environmental Quality Board's proposed changes to subsection 7.2.d.16.2 of the surface water quality standards, 46 CSR 1. The proposed change extends a water quality variance previously granted by the Board for a small segment of Harmon Creek, a tributary of the Ohio River. Weirton Steel discharges treated wastewater into Harmon Creek through Outlet 004, 2.2 miles upstream from the point where Harmon Creek flows into the Ohio River.

In 1997, the Board granted a socio-economic variance for this stretch of Harmon Creek on the basis of various studies and reports submitted by Weirton Steel. The variance required Weirton Steel to make regular reports to the Office of Water Resources concerning the quality of its discharge from Outlet 004 and to address alternatives to be considered for making appropriate reductions in pollutant concentrations in the discharge. These submittals have all been made in accordance with the Board's requirements.

Under the extension of the variance, Weirton Steel will be required to: (1) continue its study of alternatives for further improvement in the water quality of the discharge; (2) assess the water quality of Harmon Creek upstream and downstream of Outlet 004; and (3) reduce the discharge concentrations for free cyanide, fluoride and zinc.

Weirton Steel believes that the Board's proposal satisfies all requirements of the Board's regulations and the guidance received from the U. S. Environmental Protection Agency. Therefore, Weirton Steel urges the Board to adopt the changes to Subsection 7.2.d.16.2 as proposed.



Edward M. Snyder, Ph.D.

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July 29, 1999

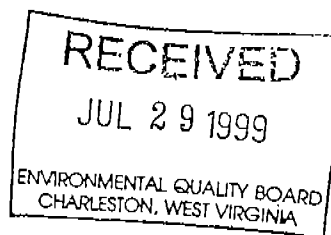
We appreciate the opportunity to provide these comments and to work with the Board, the Office of Water Resources and the U. S. Environmental Protection Agency with regard to this issue. As always, please do not hesitate to contact me at (304) 797-4276 if you desire additional information.

Very truly yours,



Mark Vignovic
Manager, Environmental Control

cc: Gene P. Current
Dulcie McCutcheon
Donald C. Bluedorn
Ann Bradley



July 29, 1999

Edward M. Snyder, Ph.D.
Chairman, Environmental Quality Board
1615 Washington Street, E.
Charleston, WV 25311

Re: Comments Regarding Proposed Changes to
Water Quality Standards Rule – Antidegradation Requirements

Dear Dr. Snyder:

The following comments are provided on behalf of Weirton Steel Corporation with regard to the adoption of antidegradation implementation procedures amending the water quality standard regulations, 46 CSR 1. Weirton Steel supports the stakeholders' process which has been initiated by the Board for the development of the antidegradation policy. We believe, however, that the stakeholder process should be pursued in lieu of the current rulemaking activity. At a minimum, it is inconsistent and counterproductive to pursue the rulemaking procedure and the stakeholder process simultaneously, and the existence of each procedure causes the other to be unnecessary. Therefore, Weirton Steel offers the overall comment that the Board should not pursue the current rulemaking, but rather should await completion of the stakeholder process and, thereafter, upon consideration of the recommendations of the stakeholder group, propose an antidegradation policy or rule as the Board deems appropriate.

With respect to the specific provisions of the proposed antidegradation rule, Weirton Steel offers the following comments:

1. Definition of High Quality Waters – Sec. 4C.1.a provides a default assumption that all waters that are not specifically identified as Tier 2.5 (Waters of Special Concern) or Tier 3 (Outstanding Natural Resource Waters), will be deemed high-quality waters. This default classification is objectionable because it applies without regard to the actual conditions which exist in the streams covered by the default classification. Furthermore, the proposed rule goes on to state that “[i]f either the fishable or swimmable use is attained, the water is a high quality water.” This approach of allowing only one of these uses to trigger the “high quality” classification is inconsistent with the definition of high quality waters contained in the current rule, i.e., those waters whose quality is equal to or better than the minimum levels necessary to achieve the “national water quality goal uses.” As the Board is aware, the “national water quality goal uses” as established in the Clean Water Act are that all streams be fishable **and** swimmable. Therefore, the provision in the proposed § 4C.1.a allowing either of the national water quality goal uses to be a basis for a high quality designation should be deleted.



2. Significant Degradation – For a Tier 2 stream, the antidegradation provisions are triggered in the event that any discharge will “result in significant degradation of water quality” (§ 4C.2). For chemicals in discharges, the proposed rule defines “significant degradation” as an increase in “the ambient concentration of any parameter more than five percent at critical low flow conditions.” The criteria of a five percent increase in ambient concentration appears arbitrary, and we are not aware of any scientific basis for this figure. This criterion appears to be more stringent than surrounding states, e.g. Ohio, Virginia, without any justification for this increased stringency.

We are also concerned that the proposed provision relating to “significant degradation” would apply to a five percent increase in the concentration of “any parameter,” regardless of whether a water quality criterion has been established for that particular pollutant. Because it is the intent of the antidegradation policy to protect water quality standards, it makes no sense to apply the policy to those parameters for which no standard has been established. We, therefore, recommend that § 4C.2.a.1.A be revised by inserting the phrase “for which a water quality criterion has been established in 46 CSR 1,” after the phrase “any parameter.”

As an additional point with respect to the “significant degradation” threshold, we question whether it will be possible to determine the “ambient concentration” of all parameters at “critical low flow conditions” for every location. There is uncertainty as to how ambient pollutant concentrations at critical low flow conditions would be determined. Furthermore, in comments filed in 1998 on the previously proposed antidegradation policy, the U. S. Environmental Protection Agency recommended the use of assimilative capacity in determining whether significant degradation has occurred. See, Enclosure 1 to EPA Region III Letter to Ms. Elizabeth Chatfield dated July 20, 1998, Comments on 46-1-4C, third bullet. This change would also be consistent with the current antidegradation strategies of neighboring states. As EPA points out, by basing the significant tests on the remaining assimilative capacity, rather than ambient concentrations, the effect will be to allow larger loads to be deemed insignificant in cleaner water while progressively reducing the amount that will be deemed insignificant as assimilative capacity is used up. We therefore urge that the concept of “ambient concentrations” in the proposed rule be replaced with that of “assimilative capacity,” wherever it appears.

Finally, the use of the inflexible criterion of five percent of the ambient concentration as a threshold triggering antidegradation restrictions ignores the fact that, for certain pollutants, increases can be beneficial to the environment. For example, allowing increases in dissolved oxygen or hardness in waters can improve water quality. We recommend that the proposed rule be revised to exempt “environmentally beneficial” substances from coverage.

3. Ohio River as High Quality Stream – The proposed rule would still reference the 1986 “West Virginia High Quality Streams” document as one basis for determining whether a stream constitutes a “high quality water.” We believe this reference is unnecessary and is particularly unreliable given its age. We therefore recommend that this reference and § 4.1.b.2.B be deleted from the regulation. Additionally, we believe that the Ohio River, which receives the discharge from Weirton Steel’s facility, would qualify as a high quality stream under the antidegradation policy because it appears in the 1986 document even though it has been listed in the state’s §

303(d) list as a stream where water quality criteria standards not being achieved. As a general rule, we believe it is inconsistent for any stream which has been included on the § 303(d) list to qualify as "high quality water." This anomaly should be eliminated. We recommend the statement be included in § 4C.1.a at the end of the first paragraph to read as follows:

No stream that appears on the state's § 303(d) list submitted pursuant to the Clean Water Act may qualify as a high quality water for purposes of the application of this policy.

4. Increases in Water Treatment Chemicals – Weirton Steel concurs with the comments made by several other regulated entities to the effect that certain increases in concentrations of water treatment chemicals, because of the benefit to the environment which results, should not be subjected to the antidegradation rule. Examples would be new or increased discharges of substances used to treat zebra mussels, Asiatic clams, or other nuisance species in an intake water pipe or structure. We recommend that such an exclusion be added to the applicability section under § 46-1-4A.

5. Await Further Action by EPA – Several commenters have noted previously that EPA is in the process of evaluating its antidegradation regulations in an effort to address inconsistencies among the states in the application of antidegradation policies. EPA has requested comments on several issues that will affect its regulations with respect to antidegradation and policies that it will approve among the states. We recommend that the antidegradation stakeholder group be charged with determining the current status of EPA's reevaluation of antidegradation requirements before recommending a specific policy for West Virginia.

6. Intake Water Exception – The applicability section of the proposed rule should be revised to exclude from coverage any new or increased discharges attributable to intake water. Because such pollutant concentrations do not represent any increase in pollutants attributable to the discharger, they should not trigger antidegradation requirements. To do otherwise would be to penalize the discharger for increases in pollutant concentrations for which it has no responsibility or control.

Weirton Steel appreciates the opportunity to provide these comments on the proposed antidegradation rule. Should you have any questions concerning these comments, please contact me at (304) 797-4276.

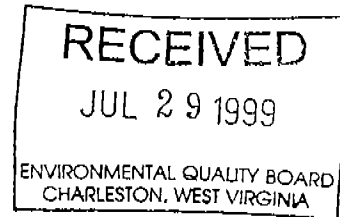
Very truly yours,



Mark Vignovic
Manager, Environmental Control



Dr. Edward M. Snyder
Chairman
West Virginia Environmental Quality Board
1615 Washington Street, East
Charleston, West Virginia 25311



July 29, 1999

Re: **Proposed antidegradation implementation procedures under 46CSR1.**

Dear Dr. Snyder,

In comments filed by American Electric Power in July of 1998, we outlined that the daunting task of developing antidegradation implementing procedures to comply with the goals of the Clean Water Act has been a difficult one for many state regulatory agencies.

Two of the many reasons states struggle with developing an antidegradation implementation policy include the fact that the Federal intent for antidegradation implementation procedures is not clear; and that initial attempts to develop implementation strategies failed to adequately take into consideration the full impact that such a policy can have on activities beyond the normal jurisdiction and authority of the state agency responsible for water quality standards. As a result, many antidegradation implementation policies have been subject to legislative and judicial challenges.

One example that we referenced in our comments last year was a case in Ohio from a few years ago where the Ohio Supreme Court overturned an Ohio EPA action applying its old antidegradation implementation policy to two discharge permits. In this case, the courts forced the agency to rewrite its antidegradation implementation regulations.

While we commend the EQB for beginning the arduous task of crafting a state antidegradation implementation strategy to comply with the mandates of 40 CFR Part 131; we are troubled by the Board's sudden decision to consider abandoning its prior commitment on how to complete this effort.

Specifically, we are disheartened that the EQB is considering resubmitting a clearly flawed implementation policy with the 2000 legislature. It is our understanding that this policy may be resubmitted despite the fact that the Board has already agreed to defer action on introducing a revised antidegradation policy to the legislature until after a broad-based stakeholder group is convened to continue the crafting of the

antidegradation policy. The Board agreed to this expanded stakeholder process and subsequently outlined a path forward with target dates to complete various tasks - the first of which was the completion of a responsiveness summary to the plethora of public comments received in 1998, and the final one was the resubmission of a revised stakeholder influenced antidegradation policy to the 2001 legislature. We believe an expanded stakeholder process will also afford the Board an opportunity to further study the actions taken by other neighboring states, thereby ensuring that the terminology and final policy adopted by West Virginia is equitable.

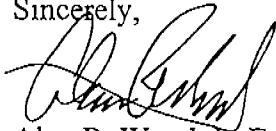
In addition, the current draft policy falls short of providing a clear focus on implementation strategies, and it proposes an antidegradation review triggering criterion for "significant degradation" which is markedly different and more stringent than the criterion used by many neighboring states.

We believe that these issues could, and should, be addressed through an expanded stakeholder process prior to the Board taking final action. In fact, the EQB's own responsiveness summary outlines several sections of the proposed policy that have been assigned to the stakeholder committee because the sections needed clarification and revision. Thus, we ask the Board not to break their prior commitment. Instead, we ask that they defer action on this rulemaking until the broadly represented stakeholder group is afforded the opportunity to complete its work.

In deference to the above, AEP has prepared the enclosed technical comments on the Board's proposed Antidegradation Implementation Procedures. We believe that these comments will further support our request for a deferral on this key initiative until the expanded stakeholder process completes its deliberations.

Should you have any questions on these comments, please contact Mike Brown at (614) 223-1286.

Sincerely,



Alan R. Wood, P. E.
Manager, Water Quality Section

ARW/JMB

c: Ms. Libby Chatfield, Technical Advisor
West Virginia Environmental Quality Board
1615 Washington Street, East
Charleston, West Virginia 25311

BEFORE THE ENVIRONMENTAL QUALITY BOARD
COMMENTS BY AMERICAN ELECTRIC POWER
REGARDING THE PROPOSED ADOPTION OF
ANTIDEGRADATION IMPLEMENTATION PROCEDURES
WITHIN 46 CSR 1.

Comments on Requirements Governing Water Quality Standards (46 CSR 1):

1. **Section 46-1-2.** A definition for **Reasonable Non-degrading or Less-degrading Pollution Control Alternatives** should be added to Section 46-1-2. We suggest using the definition provided by EPA Region VIII antidegradation guidance outlined below.

“Reasonable alternatives shall be identified based on case-specific information. Generally speaking, non-degrading or less-degrading pollution-control alternatives shall be considered reasonable where the costs of such alternatives are less than 110% of the costs of the pollution control measures associated with the proposed activity.”

2. **Sections 46-1-4.1.d and 46-1-4.1.f** - Both sections need to be revised to change the reference to the proposed antidegradation implementation policy from Appendix G to Appendix F.

Comments on Appendix F of 46 CSR 1 (proposed antidegradation implementation policy):

46-1-4A

1. **Section 4A.1** This section needs to be clarified to state that antidegradation implementation procedures will apply to new or expanded activities. Language should also be provided to ensure that an existing discharger who is simply going through a

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permit renewal where no new or expanded discharges are being requested will not be subject to antidegradation review. As currently written, this section could be misinterpreted to even apply to simple NPDES permit renewals where no new or expanded processes have occurred.

Section 4A.1 should also define who is responsible for implementing the antidegradation implementation procedures.

2. **Section 4A.3.a.** The language in this section appears to be subjective and will be difficult to implement. For example, the term "increased surface water impacts" would need to be defined, and then a mechanism or procedure would need to be developed to quantify "increased surface water impacts" before the intent and application of these paragraphs can be clearly understood. If the intent of this language is to have the same meaning as "significant degradation," then the language should be changed to state such. Absent such clarification, the actions taken by the state regulatory agency in applying such language could be considered arbitrary and capricious.

Suggested language change to clarify the section intent: **"Where remediation efforts are being proposed for existing contaminated sites with point source discharges, where the contaminant source or plume poses a threat of a point or non-point source discharge of pollutants to surface waters, the treatment of the groundwater will not be subject to antidegradation review if the applicant can show that the treatment will provide a net long-term water quality benefit to the stream segment."**

3. **Section 4A.3.b.** Why require an automatic antidegradation review if remediation of contaminated groundwater is going to take place, particularly if the remediation efforts will not result in the degradation of the stream use and are not anticipated to last for an extended period of time?

If the remediation efforts will not result in the degradation of the stream use, and the contaminant plume could otherwise discharge directly to the receiving stream untreated, it would appear that a potential for greater stream impairment exists without remediation. This possibility could easily be demonstrated without going through an antidegradation process. Thus, the language of Section 4A.3.b. should be modified to provide some flexibility to the state agency to forgo an antidegradation review in all cases.

We suggest changing the language in this sentence to read as follows:

Where remediation efforts are being proposed for existing contaminated sites where the contaminant source or plume poses a threat of a point or non-point source discharge of pollutants to surface waters, the treatment of the groundwater will not be subject to antidegradation review if the applicant can show that the treatment will provide a net long-term water quality benefit to the stream segment.”

46-1-4B

1. **Section 4B1.c.** Is this public notice separate from the public notice required for the permitting action? If so, this does nothing but add an additional administrative burden to the process with little or no known value.
2. **Section 4B.2.** The language in this section is redundant with the language in Section 4-1-4B and should be removed.
3. **Section 4B.2.b.** If the determination outlined in this section is made, it should trigger a proposal to change the use designation.
4. **Section 4B.2.b.1.** Who determines if it is necessary to establish new criteria to protect an existing use? Does this mean establishing new numeric or narrative criteria, or is the intent of this section to simply require a fresh antidegradation review if an applicable existing use was not originally identified?
5. **Section 4B.3.** Who is responsible for conducting the antidegradation reviews? Who is responsible for documenting the review findings? Where will they be documented?

46-1-4C

1. **Section 4C.2.** A definition for the term “significant degradation” should be provided along with a definition for what constitutes “de minimus” activities that are not subject to antidegradation review.

threshold based on “5% of ambient background concentration.” In support of this, we provide the following:

In US EPA, Region III’s July 20, 1998 comment package from Bob Koroncai, to Libby Chatfield of the EQB, the EPA stated, “**EPA recommends WV consider basing the “de minimus” calculation on the remaining assimilative capacity.**” This EPA Region III position was reaffirmed in a June 22, 1999 letter from W. Michael McCabe, EPA Region III Administrator to Dr. Edward M. Snyder, Chairman of the EQB. AEP supports this EPA Region III recommendation. Further, we urge the EQB to adopt a “de minimus” threshold based upon 10% of available assimilative capacity.

We also note that the EQB received comments from the Chamber of Commerce, the Manufacturer’s Association and others during the previous comment period urging use of assimilative capacity in place of using a significance threshold based on “ambient background concentrations”. Given the broad-based and overwhelming support for using available assimilative capacity as a tool for determining what activities constitute significant degradation (and the lack of support for using ambient concentrations), we urge the EQB to change this section prior to filing the policy to the legislature.

2. **Section 4C.1.a.** This section currently states that all waters not included in Tiers 2.5 and 3 will be considered “high quality waters” **unless it can be demonstrated that** the water quality is not better than necessary to attain both fishable (Category B) and swimmable (Category C) uses. It further states that, “**If either the fishable or swimmable use is attained, the water is a high quality water**” (emphasis added). Who carries the burden of demonstrating that water quality is not better than necessary to attain both fishable and swimmable uses? Further, what criteria are to be used to make this determination?

Normally, if a stream cannot meet its use designation, it is classified as “impaired” and placed on the state’s 303(d) list. Was it the Board’s intent that streams that are classified as “impaired” under one set of rules be classified as “high quality water” for purposes of antidegradation review? If so, why? Can a stream be classified as Tier 2 for one pollutant and Tier 1 for another pollutant?

3. **Section 4C2.a.1.A.** This section states that, “any proposed activity that would increase the **ambient concentration of any parameter more than 5% at critical flow conditions** shall be considered significant degradation” (emphasis added).

There are two significant issues with the language in this section that must be addressed by the EQB. The first issue relates to the use of “any parameter” when assessing the potential of “significant degradation.”

The assumption that the addition of “any parameter” should be considered “significant degradation” is overly restrictive and inconsistent with the implementation strategy of neighboring states and the EPA Region 8 guidance that was apparently used to develop this language. As currently drafted, this section could be interpreted to imply that an increase of hardness, alkalinity or an increase of **any parameter**, regardless of whether it has a numeric water quality standard, or is listed as a priority pollutant within 307(a)(1) of the Clean Water Act, could be considered “significant degradation” and trigger an antidegradation review.

We submit that it should not be the intent of the antidegradation policy to apply to **any parameter** regardless of its potential to cause use impairment. Instead, the language in this section should be clarified such that only those regulated parameters with water quality standards adopted within 46CSR1 are considered during an antidegradation review process.

EPA Region 8’s guidance document does suggest that the scope could be expanded to cover other “**parameters of concern**,” but it does not extend this recommendation carte blanche to any parameter.

The second concern with the language in Section 4C2.a.1.A. is the use of an, “**ambient concentration of ... more than 5% at critical flow conditions**” for the determination of “significant degradation” thresholds.

How will the “ambient concentration” at “critical flow conditions” of each individual parameter be determined at each location? If a measurement of ambient pollution concentrations at 7Q10 flow conditions is required, how is this to be performed? It appears that the wording of this section could require a huge undertaking requiring years of data collection at an unwarranted and prohibitive expense just to document ambient stream conditions at critical flow conditions. Arguably, no decisions could even be made regarding antidegradation until this data is collected. Without the background data at

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critical flow conditions; how will decisions be made regarding what pollutant additions could cause an increase in ambient concentrations of more than 5%?

The EQB should amend this section to be more consistent with the current antidegradation implementation strategies of neighboring states including Ohio, Indiana, and Virginia. Specifically, the EQB should establish a criterion for "significant degradation" based upon the assimilative capacity of the stream - not on an arbitrary determination of ambient pollutant concentrations at critical flow conditions.

Further, we suggest that available assimilative capacity be defined by the definition provided in the EPA Region 8 guidance. This definition is as follows:

"The remaining assimilative capacity is the increment of water quality between that required by the minimum standards of the waterbody's classification and a reasonable estimate of existing water quality conditions during 7Q10 stream flow conditions."

General criteria used by several neighboring states also support the use of assimilative capacity to define what constitutes "significant degradation." Several examples are summarized below and we ask that the EQB carefully review these criteria and adopt similar language within the EQB's proposed rule.

Ohio – Ohio's antidegradation rule bases "significant degradation" thresholds for a "high quality" stream on assimilative capacity, not ambient concentrations. In general, streams with a category approximating West Virginia's Tier 2 "high quality" designation are exempt from an antidegradation review unless the activity would individually result in the assignment of 10% or more of the available assimilative capacity of the receiving stream.

Indiana - Indiana is currently undergoing triennial review and has draft antidegradation language that is undergoing "public notice." Within Indiana's draft rule, they also define "significant degradation" based on assimilative capacity. One threshold that must be exceeded to be considered "significant" in a comparable "Tier 2" stream includes the following:

a) a proposed increase in mass discharged that is more than ten percent (10%) of the unused loading capacity for a priority pollutant,

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b) a proposed increase in mass discharged that is more than fifteen percent (15%) of the unused loading capacity for a non-conservative pollutant.

Indiana also defines “**unused loading capacity**” as that amount of the total loading capacity not utilized by point source and non-point source discharges, determined at the time that the proposed increase is considered.

The term “**total loading capacity**” is defined as the product of the applicable water quality criterion times the sum of the existing effluent flow and the applicable mixing volume or the stream design flow for the waterbody in the area where the proposed increase is to occur, expressed as a mass loading rate.

Virginia - The Virginia DEQ also bases antidegradation review on assimilative capacity. The DEQ looks at the predicted change in the instream concentration of the parameter (or other measure specified by the standard) for the parameters for aquatic life protection defined within their water quality standards regulations. If the predicted change is not greater than 25% of the difference between the existing quality and that allowed by the standards, no antidegradation review is required. The change allowed prior to antidegradation review for human health criteria is 10%. In summary, establishing a de minimus threshold based upon a percentage of the assimilative capacity would clearly be a more equitable and easily calculated value than would ambient pollutant concentrations at critical flow conditions. Procedures for calculating total and available assimilative capacity can then be determined using standard wasteload allocation procedures (or other approved procedures).

As currently drafted, the language in Section 4C2.a.1.A. penalizes dischargers to streams with low ambient pollutant concentrations and favors dischargers to streams with high ambient pollutant concentrations (see Appendix 1). This places an unfair bias on dischargers to streams with low “ambient” pollutant concentrations at critical flow conditions; while at the same time allowing the same discharger to a stream with higher “ambient” pollutant concentrations to avoid antidegradation review.

The above-referenced imbalance could have the unfortunate effect of creating a disincentive for dischargers to optimize treatment effectiveness because they could be rewarded with more stringent permit limits, loss of an operating cushion for compliance, and loss of reserve capacity for growth. This could also discourage or delay voluntary

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pollution prevention efforts because facilities that implement such measures would improve effluent quality and, potentially face more stringent effluent limits.

Finally, it is unclear how this section could effectively be applied with parameters that have ambient concentrations below analytical detection or quantification. How will the 5% criterion be applied in this case? Would it constitute "degradation" if the concentration of any parameter in an existing discharge is simply detectable, regardless of how far below the actual water quality standard the parameter may be?

EPA Region III comments on the same issue supports the adoption of a strategy that is based on assimilative capacity. If not, the state will need to:

"...establish a binding procedure that describes the methods that will be used to establish natural background concentrations. These procedures need to be specific enough to establish natural background concentrations accurately and reproducibly."

The EPA Region 8 antidegradation guidance also provides the following flexibility in determining what activities constitute "significant degradation" (see page 16 of this guidance document):

"Because determinations of significant degradation are most appropriately made based on case-specific information, these procedures do not provide rigid decision criteria, for judging significant changes in water quality. Rather, significant degradation may be demonstrated with respect to any one (or a combination) of the following factors:

- a) percent change in ambient concentrations predicted at the appropriate critical condition(s);*
- b) the difference, if any, between existing ambient quality and ambient quality that would exist if all point sources were discharging at permitted loading rates;*
- c) percent change in loadings (i.e., the new or expanded loadings compared to total existing loadings to the segment or, for existing facilities only, the proposed permitted loadings compared to the existing permitted loadings);*
- d) percent reduction in assimilative capacity;*
- e) nature, persistence, and potential effects of the parameter;*
- f) potential for cumulative effects;*
- g) predicted impacts to aquatic biota;*

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- h) degree of confidence in any modeling techniques utilized, and
- i) the difference, if any, between permitted and existing effluent quality.

The guidance also states that, "... determinations of significance need not be complicated, data-intensive, or resource intensive. It is not the intent of these procedures to require detailed analyses to address each of the factors identified above. Where appropriate, determinations of significance may be based on simple analyses. For example, proposed activities may be judged as not significant where: a) available dilution exceeds 100:1, b) the proposed activity would not result in a significant increase of loadings for any parameter, or c) there is substantial potential for the proposed activity to result in a net long-term water quality benefit to the segment."

The merits of either including portions or all of the flexible language referenced above within the antidegradation rule should be taken up in the stakeholder group.

4. **Section 4C2.a.2.** defines circumstances that shall not be considered to cause "significant degradation." As AEP outlined in its previous comment package on the proposed West Virginia antidegradation policy, this section should be expanded to include a variety of other de minimus activities that do not result in a significant lowering of water quality. Many of West Virginia's neighboring states have recognized a variety of additional de minimus activities that qualify for an exclusion or waiver from antidegradation review. The following bullet items are a compilation of activities exempted in other neighboring state's antidegradation implementation programs. The value of including these exemptions in West Virginia's antidegradation implementation policy include the resultant savings in valuable agency resources, and the saving of time by avoiding lengthy staff antidegradation reviews for inconsequential permitting activities. We urge the Environmental Quality Board to add language to Section 4C2.a.2. that provides an antidegradation review exclusion for the following de minimus activities:
 - The term "significant degradation" shall not include changes in loadings of a pollutant or pollutant parameter within the existing capacity and processes that are covered by an existing applicable permit, which include, but are not limited to the following:
 - a) Normal operational variability, including, but not limited to intermittent increased discharges due to wet-weather conditions;
 - b) changes in intake water pollutants not added by the discharger;

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- c) changes that result from increasing the production hours of the facility, for example, by adding a second shift; or
 - d) changes that result from increasing the rate of production.
-
- New limits for an existing permitted discharger that **are not** the result of changes in pollutant loading, including but not limited to new limits that are the result of the following:
 - new or improved monitoring data,
 - new or improved analytical data,
 - new or modified water quality criteria or values; or
 - new or modified effluent limitations guidelines, pretreatment standards, or control requirements for POTWs.
 - Bypasses that are not prohibited pursuant to 40 CFR 122.41(m) and applicable state NPDES rules.
 - A new or increased discharge of a substance used to treat zebra mussels or other nuisance species in an intake water pipe or structure if the new or increased discharge will not cause adverse effects on human health and aquatic life.
 - New or increased discharges of a substance that will result only in a short term, temporary lowering of water quality (12 months or less).
 - Any source discharging to limited quality waters, and any source that discharges to Tier 1 waters.
 - Any net increase in the discharge of a regulated pollutant resulting from a change of fuel used by the discharger, provided the discharger was capable of accommodating the new fuel on the effective date of the policy.
 - New or increased discharges of a substance, when the facility withdraws intake water containing the pollutant from the same body of water, and the new or increased discharge of the pollutant is due solely to the presence of the pollutant in the intake.

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- A new or increased discharge of a parameter, if the new or increased discharge is necessary to accomplish a reduction in the discharge of another pollutant or pollutant parameter and the director/chief determines that the action will result in a net improvement of water quality in the waterbody, if the following requirements are met:
 - a) the new or increased pollutant or pollutant parameter is determined to be significantly less toxic than the decreased pollutant or pollutant parameter; and
 - b) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken.

- A new or increased discharge of a pollutant if the increase is necessary to accomplish a reduction in the discharge of an air pollutant and the director/chief determines that the action will result in a net environmental improvement, if the following requirements are satisfied:
 - a) the reduction in the discharge of the air pollutant is necessary to meet State or Federal air quality standards or will substantially reduce human exposure to hazardous air pollutants; and
 - b) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken.

- Those applicants seeking coverage under a Nationwide Corps of Engineers General Permit for which 401 water quality certification has been waived. (**Note:** If a project is covered by a Section 404, Nationwide General Permit currently authorized in West Virginia, then the permittee should not have to go through an antidegradation review process when the project being initiated satisfies the terms of coverage under the approved Nationwide permit. The Nationwide permit will undergo antidegradation review every five (5) years; thus, if the WVDEP grants 401 water quality certification to the various Corps of Engineers Nationwide Permits, the antidegradation review process can be satisfied. Antidegradation reviews for individual 401 water quality certification of Section 404 permits should only be required where an individual permit is being requested).

- Any application approved pursuant to the authorization for storm water discharges associated with **construction** activity under the WV/NPDES General Permit No. WV0115100, or any subsequent reissuance of the same permit.

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- Any application approved pursuant to the authorization of storm water discharges associated with **industrial** activity (including applicable coal mining general permits) under the applicable WV/NPDES General Permit, or any subsequent reissuance of the same permit. (**Note:** Individuals applying for coverage under applicable WV/NPDES Storm Water General Permits are seeking coverage under a previously approved NPDES permit that has already gone through public notice procedures and antidegradation review. Any applicant seeking coverage under this or any other NPDES general permit must not be forced to go through a potentially lengthy and onerous antidegradation review process to receive permit coverage. A possible antidegradation review should only be triggered when an applicant is either denied coverage under one of the available General Permits, or where the applicant voluntarily elects to seek coverage under an individual WV/NPDES storm water permit for discharges associated with construction or industrial activity).
 - Waiver allowing the chief/director to approve activities that lower water quality on a temporary basis whenever the chief/director determines that an emergency exists requiring immediate action to protect public health and welfare.
 - A proposed new discharge from a sanitary wastewater treatment plant constructed to alleviate a public health concern, for example, a connection of existing residences currently on septic systems.
 - New or increased discharges of a substance due to water body segment dredging pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as amended, corrective actions pursuant to the Resource Conservation and Recovery Act (RCRA), as amended, or similar federal or state authorities, undertaken to alleviate a release into the environment of hazardous substances, pollutants or contaminants.
5. **Section 4C2.a.2.** The sentence is poorly written. Suggest changing it to read as follows: "The following activities, conditions and/or discharges are not considered significant degradation and will not be subject to antidegradation review:"

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6. **Section 4C2.a.2.A.** This section currently reads, "Temperature: Provided that the temperature of a discharge complies with the temperature criteria in Section 46-1-8.28 (Appendix E of this rule)."

As AEP outlined in previous comments, this section is not consistent with federal antidegradation provisions at 40 CFR 131.12(4). It should be amended to recognize that permittees which either currently have or successfully apply for a variance in accordance with Section 316 of the CWA are also exempt from antidegradation review. To ensure this language is consistent with 40 CFR 131.12(4), we ask that the sentence be amended to read as follows:

"Temperature: Provided that the temperature of a discharge complies with the temperature criteria in Section 46-1-8.28 (Appendix E of this rule), or is otherwise consistent with Section 316(a) of the Clean Water Act."

Power plants frequently alter thermal loadings within the constraints of 316(a) variances that are incorporated into NPDES permits. The West Virginia Environmental Quality Board needs to acknowledge that increases or decreases in thermal loadings within the constraints of 316(a) of the Clean Water Act (CWA) are exempt from applicability under the antidegradation rule because federal regulations prohibit a state's antidegradation policy from taking precedence over Section 316(a) of the CWA. Although clarification of this position can be found in numerous locations, one source that can be referenced is EPA's August 1985 document entitled, "Questions & Answers on: Antidegradation." Within this document, EPA states that, "**The statutory scheme and legislative history indicate that limitations developed under Section 316 take precedence over other requirements of the Act.**" This precedence clearly includes antidegradation provisions, and any attempts by the Board to use the elements of its antidegradation policy (or any future modifications to the rule) to deny an applicant's 316(a) variance request if the 316(a) biological demonstrations have otherwise been satisfied.

7. **Section 4C5.** All references to non-degrading and less degrading alternatives throughout this section should be preceded by the phrase "reasonable and cost-effective." Who makes this determination that alternatives to proposed activities have been adequately evaluated?

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8. **Section 4C.5.a. and b.** This section of the draft policy relates exclusively to the merits of less degrading or non-degrading alternatives that are examined during the antidegradation review process.

As this section is currently drafted, a proposed activity could be denied under the terms of 4C.5.b. before any consideration is even given regarding the accommodation of important economic or social development. We submit that it is beyond the DEP's or any other state agency's regulatory authority to deny an activity on a Tier 2 stream exclusively because, "mutually acceptable resolutions are not reached."

AEP pointed out this same issue in its previous comments filed in 1998, and suggested that the EQB correct this possible legal quandary by integrating Sections 4C.5 and 4C.6 into one section so the antidegradation review considers the alternatives and the economic/social importance of the activity simultaneously, not independently.

We also suggested that the policy should specify that any nondegradation alternative, a minimal degradation alternative, or a mitigative degradation alternative to offset all or part of the proposed lowering of water quality, be evaluated based, at a minimum, upon the following three criteria:

- Magnitude of the water quality impacts,
 - The availability, reliability, and cost effectiveness of any non-degradation, minimal degradation or mitigative technique alternative, and
 - The reliability of the preferred alternative including but not limited to the possibility of recurring operational and maintenance difficulties that could lead to an increased degradation condition.
9. **Section 4.C.7.** We are unable to determine what the intent of this sentence is. The language should be clarified.
10. **Section 4.C.8.a.** Change references to Appendix G1 in the first and second sentences of this section to **Appendix F1**.
11. **Section 4C8.c.1.** The sentence in this section references a need to "comply with the antidegradation rule." For clarity and consistency, we suggest defining what we will

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actually call the rule and use that name consistently throughout the document. We suggest calling it "Antidegradation Implementation Procedures".

12. **Section 4C.8.c.2.D.** The phrase "reasonable and cost effective" should be inserted in the sentence so it reads as follows: "A determination regarding existence of **reasonable and cost effective** non-degrading or less degrading alternatives."

46-1-4D

1. **Section 4D2.a.** - This section, which applies to Tier 2.5 streams, states that, "If a determination is made that the activity will result in the lowering of water quality conditions, the activity shall not be allowed." What is/are "water quality conditions"? This term needs to be clearly defined before the intent of this section can be determined.

The language in this section also appears to provide a higher level of protection than that afforded to Tier 3 stream (Outstanding National Resource Waters) under Section 4E.2. At a minimum, some consideration for short-term projects and de minimus activities in Tier 2.5 streams must be provided. Incorporating language similar to that found in 4E.2.a. through 4E.2.f. should also be added to Section 4D.2.

2. **Section 4D.2.c.** There are two sections identified as "Section 4.D.2.c." The second one, which addresses trading, should be renumbered as, "4.D.2.d."

46-1-4E

1. **Section 46-1-4E.** The second sentence in this section currently states, "See §46-4.1.c for a description of outstanding national resource waters." This sentence appears to contain an incorrect reference. The reference to §46-4.1.c. should be changed to **§46-1-4.1.d.**
2. **Section 4E.3.** The first sentence in this section states that, "If a determination is made that the criteria in Section 4D2 a-f will be met, the activity may be authorized." There are two corrections that should be made to this sentence. First, the citation for Section 4D2 a-f appears to be incorrect. We believe the appropriate citation should be

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Section "4E.2. a-f." The second suggested correction is to change the word "may" to either "will" or "shall."

3. **Section 4E.7.** This section currently states that, "All upstream segments of a ONRWs shall be considered ONRWs."

This language should be modified to state that no discharge upstream of an ONRW shall cause a measurable impact to the water quality of streams designated as ONRWs.

Appendix F-1:

1. Appendix F-1 should be revised to include Local Governments and Land Use Planning Authorities, these types of agencies are the ones that are likely to provide the most relevant comments on the potential social and/or economic impacts for the county or city that would be impacted by the proposed activity.

Appendix 1

The following example demonstrates the unfair bias the proposed antidegradation implementation guidance (**Section 4C2.a.1.A.**) places on dischargers to streams with low “ambient” pollutant concentrations at critical flow conditions. The example also shows how the same discharger to a stream with higher “ambient” pollutant concentrations can avoid antidegradation review.

Example Discharge Situation applying the proposed “ambient concentration” threshold:

Stream XYZ has a 7Q10 flow of 10 MGD and an instream hardness of 100. Municipal ABC has an existing sanitary wastewater discharge of 100,000 gallons per day on the stream. The municipality is now receiving pretreated effluent from an industrial discharger and is currently discharging 100 parts per billion (ug/l) of nickel within their treatment plant effluent. The incremental increase from the municipality’s new industrial customer does not require the NPDES permit to be modified.

Current “ambient concentration” of nickel in the receiving stream at critical (7Q10) flow conditions is 1 part per billion (ug/l).

Using the Appendix E equations from 46CSR1, the chronic instream numeric aquatic life criterion for nickel is 154 ug/l, the acute criterion is 1,414 ug/l and the stream’s approximate assimilative capacity at critical flow conditions is:

Chronic Nickel Loading:	$0.154 \text{ mg/l} \times 10 \text{ MGD} \times 8.3453 \text{ lb/gal.} =$	12.85 kg/d
Acute Nickel Loading:	$1.414 \text{ mg/l} \times 10 \text{ MGD} \times 8.3453 \text{ lb/gal.} =$	118.0 kg/d
Nickel Loading from STP:	$0.100 \text{ mg/l} \times 0.100 \text{ MGD} \times 8.3453 \text{ lb/gal.} =$	0.08 kg/d

In this example, the nickel loading from the STP uses less than 1% of the available assimilative capacity in the stream at critical flow conditions; however, the discharge concentration results in an increase of the “ambient concentration” in the receiving stream by more than 5% at critical

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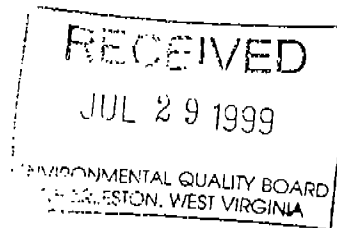
flow conditions which would mandate an antidegradation review under the proposed rule. (In the above example, the increase in the "ambient concentration" is actually a full 50% - from 1 ug/l to 2 ug/l).

Such an insignificant change in the in-stream water quality may not even be able to be accurately demonstrated due to normal statistical variability associated with the analytical procedures used to measure nickel.

In contrast, if the same receiving stream had an ambient nickel concentration of 50 ug/l, the 1 ug/l increase from the STP would only be a 2% increase over "ambient concentrations" and would not be subject to an antidegradation review. This example demonstrates how the proposed language at **Section 4C2.a.1.A.** appears to conflict with federal antidegradation provisions, the best use of science, and the best use of limited state resources. It also calls into question how analytical variability will be considered when water column pollutant concentrations approach the level of analytical quantification.

July 29, 1999

Dr. Edward M. Snyder, Chair
West Virginia Environmental Quality Board
1615 Washington Street, East
Charleston, West Virginia 25311



Re: 46 CSR § 1, Appendix F
Antidegradation Implementation Procedures

Dear Dr. Snyder:

Century Aluminum of West Virginia, Inc., ("CAWV") submits the following comments on the Antidegradation Implementation Procedures (the "Procedures") proposed by the Environmental Quality Board (the "Board") to be added as Appendix F to 46 CSR § 1, Requirements Governing Water Quality Standards. The Procedures previously were offered by the Board for public comment in June 1998. Based on the public comments received regarding significant weaknesses in the Procedures, the Board decided not to adopt the Procedures in 1998. CAWV understands that the Board has again proposed the adoption of the Procedures in response to threatened actions by the United States Environmental Protection Agency ("EPA") and citizens groups regarding West Virginia's failure to adopt an antidegradation implementation policy.

However, the weaknesses in the Procedures which prompted the Board to reject the Procedures in 1998 continue to exist. If the Procedures are adopted in their current form, the implementation of the Procedures likely will result in significant difficulties for both the West Virginia Division of Environmental Protection ("DEP") and the regulated community, often without benefit to the environment.

Century Aluminum of West Virginia, Inc.
Post Office Box 98
Ravenswood, WV 26164

(304) 273-6000 Phone

A Century Aluminum Company

Dr. Edward Snyder, Chair
July 29, 1999
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Under the Procedures, a lengthy, expensive, and cumbersome process must be completed simply to determine whether an antidegradation review must be conducted. The Procedures assume that all waters of the State are at least Tier 2 high quality waters. Under § 4C.2.a.1.A, "any proposed activity that would increase the ambient concentration of any parameter more than 5% at critical flow conditions shall be considered significant degradation" and therefore subject to antidegradation review. Accordingly, the decision of whether an antidegradation review is required hinges on a determination of ambient instream concentrations at critical flow conditions for all parameters which may be discharged by the proposed activity.

As the Procedures are currently written, any entity proposing a new or modified activity must establish what constitutes ambient conditions in the receiving stream, regardless of the scope or magnitude of the proposed activity. For activities which will have only minimal discharges, this is necessary to demonstrate that the proposed activity will increase ambient concentrations by less than 5%. In effect, the Procedures will require DEP to review the parameters for which a determination of ambient concentrations is required, the proposed method for determining the ambient concentrations, and the results of the determination of ambient concentrations for *all* new or modified activities on any stream in the State. All this is necessary simply to determine whether an antidegradation review is required. Clearly, this is overly cumbersome and virtually impossible to implement.

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Dr. Edward Snyder, Chair
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This is merely an example of the many problems associated with the Procedures. CAWV supports the comments filed by the West Virginia Manufacturers Association and the West Virginia Chamber of Commerce both in 1998 and during the current comment period on the specific provisions of the Procedures. Because the comments filed by these organizations and other industries are extensive, CAWV will not recite these comments herein.

CAWV requests that the Board reject the adoption of the Procedures and continue forward with its planned stakeholder process to establish appropriate antidegradation implementation procedures. With only a few months delay, the stakeholders can work to prepare an implementation policy which will resolve the weaknesses and problems with the Procedures.

Thank you for the opportunity to comment on the Procedures. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

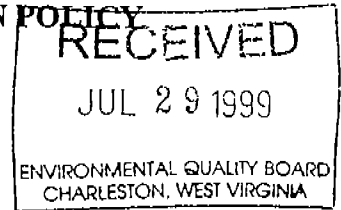


Gail Graban

**STATEMENT OF THE
INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA
REGARDING
PROPOSED ANTIDegradation IMPLEMENTATION POLICY**

46 C.S.R. 1

July 29, 1999



The Independent Oil & Gas Association of West Virginia (IOGA) is an organization of oil and gas producers and affiliated businesses dedicated to the advancement of responsible energy development in West Virginia. As an organization subject to extensive environmental controls, IOGA supports reasonable environmental regulation that is directed toward improving the health and safety of individuals and stewardship of the environment. However, IOGA opposes regulation that would stymie economic development when alternatives are readily available that could accomplish the same objectives. For that reason, we oppose the antidegradation implementation policy proposed by the Environmental Quality Board, and join with other businesses in the State in urging the Board to withdraw the proposed policy and to develop a more workable approach through the stakeholder process that it began this Spring.

The oil and gas industry is in a particular position to be impacted by the more stringent aspects of the policy that apply to Tier 2.5. Tier 2.5 consists of waters of special concern, including all naturally reproducing trout streams and all streams and lakes in state and national forests. Oil and gas exploration and production activities occur in these areas, and would be subject to unnecessarily stringent regulation if the antidegradation implementation policy were to apply as presently proposed. More thought is needed before legitimate energy development activity is restricted in this fashion.

IOPA joins in the comments of other organizations here tonight, who have identified specific technical problems with the rule. We urge the Board to withdraw the proposed policy and to push ahead with the stakeholder process that would put all stakeholders on an even footing. Proceeding in that fashion would allow development of a reasonable antidegradation implementation policy that would be more acceptable to all participants.

Michael Herron, Executive Director
Independent Oil & Gas Association

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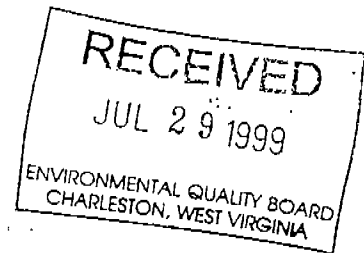


WEST VIRGINIA COAL ASSOCIATION

July 29, 1999

VIA HAND DELIVERY

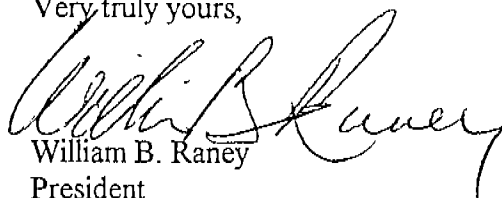
Dr. Edward M. Snyder
Chairman
Environmental Quality Board
1615 Washington Street, East
Charleston, West Virginia 25311



Dear Chairman Snyder and Members of the Environmental Quality Board:

Thank you for the opportunity to comment on your recently proposed water quality standards and Antidegradation Implementation Procedures. Attached are the comments of both the West Virginia Coal Association and the West Virginia Mining and Reclamation Association.

Very truly yours,


William B. Raney
President
West Virginia Coal Association

**COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION
AND THE WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION
ON THE ENVIRONMENTAL QUALITY BOARD'S PROPOSED
ANTIDegradation IMPLEMENTATION PROCEDURES**

July 29, 1999

GENERAL COMMENTS

1. **Nothing has Changed Since July 1998 when this Board Rejected Almost the Exact Same Antidegradation Implementation Procedures**

In July 1998, the West Virginia Environmental Quality Board, with the cooperation of several state governmental officials, proposed revisions to the State Water Quality Standards which included adoption of Antidegradation Implementation Procedures. After accepting public input through both written and oral comments, the Board decided to reject adoption of such Antidegradation Implementation Procedures. Now, exactly one year later, the Environmental Quality Board again proposes adoption of almost the exact same Antidegradation Implementation Procedures even though the Board has not addressed the concerns that were raised in July 1998 which prompted the Board to withhold adoption of the Antidegradation Implementation Procedures. Although the Board has slightly modified the 1998 implementation procedures, the modifications were extremely minor and essentially inconsequential. Nothing has changed that should cause this Board to reconsider its July 1998 decision. In July 1998, the Environmental Quality Board considered the numerous comments and objections to the Antidegradation Implementation procedures and properly decided to reject sending it to the Legislative Rulemaking Committee.

2. **USEPA has *not* required West Virginia to Adopt an Antidegradation Implementation Procedure by April 1, 2000**

Apparently, the only rationale that the Board has offered for adoption of these Antidegradation Implementation Procedures is that the United States Environmental

Protection Agency (“USEPA”) has allegedly demanded the Board to adopt such implementation procedures by April 1, 2000. However, USEPA has made no such demand. In USEPA’s June 22, 1999 letter to Dr. Edward M. Snyder, USEPA notified West Virginia to “promptly develop[] and adopt[] antidegradation methods that adequately support its antidegradation policy.” Attached to the June 22, 1999 letter, USEPA made an “Administrative Finding” that if West Virginia does not “promptly develop[] and adopt[]” implementation procedures regarding its antidegradation policy, USEPA will develop its own implementation procedures for West Virginia. In the June 22, 1999 letter, USEPA offered no deadline by which West Virginia must adopt such implementation procedures other than to do so “promptly.” It is important to note that USEPA did not demand that West Virginia take such action by a certain date. Such failure to demand a deadline is significant because USEPA has yet to adopt or implement its own antidegradation implementation policy. That is, USEPA is in the process of developing a nationwide antidegradation implementation policy; but until such policy is developed, USEPA is requiring each individual state to develop its own policy (*see July 1998 Comments of Coal Association at 1-2, copy attached as Tab1*). Although USEPA is requiring states such as West Virginia to “promptly” develop and adopt an implementation procedure for its antidegradation policy, USEPA is also cognizant of both a lack of federal guidance available to states and the development of a national implementation plan. Accordingly, USEPA did not provide a firm and strict deadline to West Virginia in its June 22, 1999 letter by which West Virginia must adopt an Antidegradation Implementation Procedure.

Although the June 22, 1999 letter did not include a date by which an implementation procedure must be adopted, USEPA previously sent a letter to Dr. Snyder regarding alleged

inconsistencies between West Virginia's water quality standards and the federal Clean Water Act. This June 8, 1999 letter specifies that it is "EPA's goal . . . to resolve" West Virginia's inconsistencies by April 1, 2000. During the Environmental Quality Board's June 25, 1999 public meeting, USEPA clarified its positions outlined in its June 8 and June 22, 1999 letters to Dr. Snyder. Specifically, Robert A. Koroncai and Mary A. Kuo, USEPA, Region III, participated in the Board's June 25, 1999 public meeting. At the June 25, 1999 meeting, Ms. Betsy Dulin, West Virginia Environmental Quality Board, asked Mr. Koroncai if West Virginia had to submit an Antidegradation Implementation Procedure to the West Virginia Legislature by April 1, 2000, and Mr. Koroncai replied that West Virginia did not have to submit a proposed policy to the Legislature by April 1, 2000. Mr. Koroncai simply stated that West Virginia needs to identify an implementation procedure by April 1, 2000 and that West Virginia does not have to complete a rulemaking by such date. Further, Mr. Koroncai stated that USEPA has never federally promulgated antidegradation implementation procedures for a state. Accordingly, USEPA simply wants West Virginia to move forward with identifying Antidegradation Implementation Procedures by April 1, 2000. That is, USEPA "will be watching" what West Virginia does by April 1, 2000.

Nowhere has USEPA suggested, requested, or demanded that the West Virginia Environmental Quality Board take such extreme action as submitting the proposed Antidegradation Implementation Procedures to the West Virginia Legislative Rulemaking Committee.

3. **The Objections which Convinced the Board to Withhold Adoption of the Antidegradation Implementation Procedure in July 1998 Still Remain and Have Not Been Adequately Addressed**

During the comment period last year regarding the Environmental Quality Board's development of Antidegradation Implementation Procedures, the Board considered comments on the proposed implementation procedures. In response to the large number of comments received criticizing the proposal, the Environmental Quality Board decided to withdraw the proposed Antidegradation Implementation Procedure from legislative consideration. Since this Board's withdrawal of the proposed implementation procedures, the Environmental Quality Board has done nothing to address the concerns raised in the July 1998 public comment period. Save for a few minor typographical changes, the Antidegradation Implementation Procedure which the Board is again proposing to adopt is almost the exact same Antidegradation Implementation Procedure which the Board refused to adopt in July 1998. That is, the Board is intending to forward the same rule which it withdrew from consideration in 1998.

4. **It is Poor Public Policy to Submit a Proposed Rule to the Legislature that the Submitting Agency KNOWS Contains Numerous Flaws and that the Agency Intends to Further Modify**

The Environmental Quality Board is submitting a flawed rule to the legislature simply to "beat" the Legislative Rulemaking's ninety day deadline. The Board has acknowledged that the proposed Antidegradation Implementation Procedure needs substantial modification. At the June 25, 1999 public meeting, Libby Chatfield, technical advisor, Environmental Quality Board, suggested the following course of action: (1) immediately go to public notice with the 1998 Antidegradation Implementation Procedure in order to be considered by the 2000 Legislature; (2) empanel a stakeholder group to recommend changes to the 1998 Antidegradation Implementation Procedure; and (3) propose that the stakeholder group's recommendations be adopted by the 2000 Legislature in order to correct and modify the

Antidegradation Implementation Procedure as submitted. In other words, the Board has suggested the following plan of action: (1) knowingly send a fatally flawed rule to the Legislature in order to complete rulemaking by April 1, 2000, even though USEPA does not require a rulemaking to be complete by such date; (2) empanel a stakeholder group to fix the fatal flaws to the proposed rule; and (3) suggest - and hope - that the Legislature considers the stakeholder group's recommendations. (The Board must hope that this Legislature considers the recommendations because there is no guarantee that the Legislature will accept such recommendation.) It is simply poor public policy to submit a rule to the Legislature that the Board knows and acknowledges requires substantial modification before becoming an effective and efficient policy.

Rather than take the time and effort to develop reasonable and conscientious procedures through a broadly represented stakeholder process before submitting proposed rules to the Legislature, the Board is instead "putting the cart before the horse."

The general public should not be forced to accept substandard antidegradation implementation regulations until the Board finally does what numerous entities have requested for over a year. In almost every written comment submitted in July 1998 regarding the Antidegradation Implementation Procedure, it was suggested that the Board put together a broadly represented stakeholder group in order to develop an appropriate and effective antidegradation implementation procedure. The Board has known of such requests for over a year. After months of assurances that the Board would promptly convene such group, such stakeholder group has finally been organized, although the group has yet to be convened by the Board - either formally or informally - to begin the arduous task of assessing the Antidegradation Implementation Procedure which was filed on June 29, 1999.

5. **Current Law Only Requires “Identification” of Antidegradation Procedures.**

Federal law currently requires that States “adopt, as part of [their] water quality standards, an antidegradation policy consistent with 40 CFR § 131.12 and identify implementation methods for such a policy.” 63 Fed. Reg. at 36780; *see* 40 C.F.R. § 131.12. There is, however, no express requirement that such implementation methods be embodied in the water quality standards or that they be submitted to EPA for its approval. In fact, in the July 7, 1998 ANPR, EPA conceded this point, stating that “EPA’s longstanding policy is that the implementation procedure should also be submitted to EPA for review. Often, however, implementation procedures are not submitted to EPA. EPA’s current thinking is that an important change to the regulation would be to clarify . . . that antidegradation implementation procedures (in addition to the policy) must be included in the submittal of State’s . . . water quality standards.” 63 Fed. Reg. at 36781.

In light of this fact and that EPA has intentionally provoked a national debate on just what antidegradation procedures are appropriate, the Board’s proposed rule is simply premature and should be withdrawn pending EPA’s national debate.

6. **The Board Has Not Adequately Considered the Economic Consequences of its Actions.**

The proposed rules also violate the State Administrative Procedures Act (“APA”). That Act provides in W.Va. Code § 29A-3-5 that proposed rules must contain a fiscal note as defined in W.Va. Code § 29A-5-4(b):

When an agency proposes to promulgate a rule other than an emergency rule, it shall file in the state register a notice of its action, including a text of the rule proposed, a fiscal note as defined in subsection (b) of section 4 [§ 29A-3-4(b)], and any requests for the submission of evidence to be presented on any

factual determinations or inquires as required by law to promulgate such rule.

W.Va. Code § 29A-3-5. Importantly, the fiscal note defined in W.Va. Code § 29-3-4(b) must include “a statement of the economic impact of the rule on the state or its residents.”

W.Va. Code § 29A-3-4. The rule proposed by the Environmental Quality Board, however, does not meet this requirement.

In its fiscal note, the Board merely explains the economic impact of its proposed rule as follows:

A. Economic Impact on State Government.

NEW ANTIDegradation PROVISIONS MAY REQUIRE ADDITIONAL TRAINING FOR STAFF OF AGENCIES IMPLEMENTING THE RULE. COST OF SUCH TRAINING IS UNKNOWN AT THIS TIME. ONLY MINOR IMPACT EXPECTED.

B. Economic Impact of Political Subdivisions; Specific Industries; Specific groups of Citizens.

CHANGES TO THE METALS PROVISIONS ARE EXPECTED TO RESULT IN CHANGES IN EFFLUENT LIMITS RESULTING IN COST SAVINGS TO AFFECTED DISCHARGERS. ANTIDegradation PROVISIONS MAY RESULT IN ADDITIONAL REQUIREMENTS FOR NPDES PERMITTEES - COSTS UNCERTAIN AT THE TIME.

C. Economic Impact on Citizens/Public at Large.

NONE ANTICIPATED.

Fiscal note at ¶ 4 (emphasis added). These statements do nothing more than explain that the Board does not know what the economic impacts of their proposed rule will be. Certainly, this confession of ignorance does not satisfy the requirement to provide a statement of economic impact. Indeed, if such statements were satisfactory, an agency could satisfy its duty to provide an economic impact statement by conducting no analysis and simply

reporting that it didn't know anything. It is difficult to imagine that this is what the Legislature intended in enacting W.Va. Code §§ 29A-3-4 and -5.

These deficiencies were pointed out in the Comments of the Association to last year's proposal. On March 25, 1999, the committee which drafted the proposal responded by simply stating that "[a] detailed assessment of the fiscal impact of the implementation of the antidegradation policy would be difficult to prepare accurately." *Response* at 2. Such a perceived "difficulty" does not warrant the complete failure to comply with W.Va. Code §§29A-3-4 and 5.

SPECIFIC COMMENTS

1. § 46-1-4.1.b.2 (a provision of the water quality standards themselves).

As written, this provision of the proposed water quality standards would create a presumption that all waters will be considered "high quality" or "Tier 2" waters "unless it can be demonstrated that the water quality is not better than necessary to attain both fishable (Category B) and swimmable (Category C) uses." We have two comments:

- a. The Board has provided no explanation for creating this presumption. In a Draft dated June 4, 1998 of the currently proposed Antidegradation Implementation Procedures, the Board created two similar presumptions. First, that "the designated uses outlined in section 6.2 are all assumed to apply to all waters" In a telephonic hearing convened by the Board on June 17, 1998, the Board members assured the public that this presumption would be deleted. Second, the June 4 Draft Implementation Guidelines contained the

same language which the Board now proposes to move from a procedural guideline directly into the water quality standards.

Having recently completed a triennial review of its standards, the Board fails to explain why it is now not only proposing procedural guidelines, but a major substantive change to its water quality standards which creates a presumption requiring dischargers to prove a negative. The Associations know of no federal requirement for such a presumption and note that in its July 7, 1998 ANPR, EPA observed that the existing approaches by the States for identifying high quality waters fall into two broad categories: (in) pollutant-by-pollutant approaches; and (ii) water body-by-water body approaches. In the pollutant-by-pollutant approach, a State determines whether the existing water quality of a stream is better than that set by the water quality standard. If so, then the allowable assimilative capacity of the stream for proposals to discharge particular pollutants is subject to Tier 2 antidegradation protection. These determinations are made during the permit process and do not require intensive use of state reserves to determine overall water quality in advance of permitting decisions. The second approach weighs a variety of factors to determine a water body's overall quality and may be made prior to or during antidegradation review. *See* 63 Fed. Reg. at 36782-36783. Significantly, in neither case does EPA discuss or mandate a State approach which relies on a presumption that all waters are high-quality waters.

- b. Most importantly, the presumption that all waters are high-quality waters unless proven not to be seemingly automatically subjects new or modified

discharges to the detailed evaluation of alternatives set out in proposed § 46-1-4C.4.a. This is an unreasonable and unnecessary requirement that will impose substantial costs on industry either to prove that water quality is not better than that required or to make the evaluation demonstration. In either case, the Board has failed adequately to consider the costs of such a presumption.

2. **§ 46-1-4A: Applicability.**

- a. Section 4A.1 proposes that the antidegradation procedures would apply to “all activities that require a permit or water quality certification pursuant to state or federal law, including Clean Water Act § 402 NPDES permits, CWA § 404 dredge and fill permits and any activities requiring a CWA § 401 certificate.” This section should not embrace “all permits,” many of which are unrelated to water. Instead, because the antidegradation policy is a creation originally of Federal Clean Water Act law, its applicability should be limited to CWA-required permits. It should be limited to NPDES permits and activities requiring CWA § 401 certification (which already includes CWA § 404 permits, so that the references to § 404 is redundant and confusing). There is no justification for applying it to “all permits.” The extension of the antidegradation policy to “all permits” is a substantive extension of the water quality standards that should not be set out in a procedural document and is uncalled for under the Federal Clean Water Act.

In response to the Association’s comments in this regard last year, the committee that drafted the proposal has simply responded that “[t]he

committee disagrees," with no real explanation for its position. The Board should refuse to extend the water quality standards as proposed without any justification.

- b. The Associations further note, and request that the Board make clear, that extension of the antidegradation policy to valley fills and refuse disposal facilities does not prohibit the placement of such structures in the headwaters of streams. The West Virginia Highlands Conservancy last year filed an action in the United States District Court in Charleston, alleging that placement of valley fills, refuse impoundments and treatment ponds in the headwaters of streams, as is frequently required in West Virginia, is flatly prohibited by Federal and State water quality standards and antidegradation policies. *See Bragg v. Colonel Dana Robertson*, C.A. No. 2:98-6-636 (S.D. W.Va.). Their claim is that the very act of filling waters of the State is illegal because the antidegradation policy requires the protection of existing uses and water quality for all segments of a stream.

Specifically, in a Complaint filed in July 1998, Plaintiffs stated that:

82. The Clean Water Act requires each state to develop an anti-degradation policy for its waters. 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12. Pursuant to this requirement, West Virginia water quality standards provide that "existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 46 C.S.R. § 1-4.1.a.

* * *

84. By burying waters of the State beneath millions of tons of rock and dirt, valley fills from surface mines necessarily kill aquatic life in the buried part of the stream and make water contact recreation impossible.

These fills therefore violate West Virginia's anti-degradation standard

Complaint at ¶¶ 82, 84. (attached as Tab 2).

Such an approach conflicts with EPA's interpretation of the relationship between the Federal antidegradation policy at 40 C.F.R. § 131.12 and the dredge and fill program under § 404 of the Clean Water Act. In interpreting these two parts of the Clean Water Act, EPA has clearly stated that the antidegradation policy does not prohibit fill activities despite the fact that the policy, if read alone, would seemingly prohibit them. EPA's current guidance on antidegradation states:

4.4.3 Existing Uses and Physical Modifications

A literal interpretation of 40 C.F.R. 130.12(a)(1) [antidegradation policy] could prevent certain physical modifications to a water body that are clearly allowed by the Clean Water Act, such as wetland filling operations under section 404 of the Clean Water Act. EPA interprets section 131.12(a)(1) of the antidegradation policy to be satisfied with respect to fills . . . if the discharge did not result in "significant degradation" to the aquatic ecosystem as defined under . . . the [CWA] section 404(b)(1) Guidelines.

EPA WATER QUALITY STANDARD HANDBOOK: Second Edition, August 1994.

To ensure the continued viability of not only the mining industry, but also of every project that fills a stream segment or wetland, as has the project to construct a new automobile engine plant in Putnam County, the Board must make a statement that the State water quality standards and antidegradation policy are to be construed as consistent with EPA's guidance and do not prohibit valley fills, in-stream ponds, refuse disposal or other filling activities which are otherwise covered by § 404 CWA permits.

Notably in response to comments in this regard made by the Associations last year, the committee that drafted the proposal stated that: "[t]he committee believes that antidegradation should apply to all activities, and recognizes no basis for the exemption described by the commenter." *3/25/99 Response* at 11. The committee misses the point. EPA's Guidance in the Water Quality Standards Handbook does not "exempt" filling activities from the antidegradation policy. Instead, as EPA has stated, it simply "allows a slightly different interpretation of existing uses under the antidegradation policy." *Water Quality Standards Handbook* at §5.1. Associations request that the Board expressly recognize this approach in its rules.

3. Section 46-1-4C Tier 2 Review Procedures (High-Quality Waters)

§ 4C.1.c.:

This subsection creates a presumption that all waters are "high quality." As discussed above, this should be deleted.

§ 4C.2.a.1.A: Significant Degradation Test:

This regulation seemingly requires an antidegradation analysis, with an accompanying "alternatives" analysis whenever the ambient concentration of any parameter will be increased more than 5% even if there is not a numeric water quality standard for the parameter. This is unduly restrictive and is at odds with the entire purpose of water quality standards in the first place: to establish numeric criteria to protect recognizable stream uses.

For example, the Board last year took steps to delete the aquatic life criterion for manganese, a chemical commonly released by coal mines. Unless this "procedural" section is limited to parameters for which there are numeric criterion, then most new discharges associated with coal mining will have to undergo the extensive Tier 2 analysis simply

because of predictable manganese discharges, even though the Board has previously determined that these discharges will not impair an aquatic life use. Thus, an increase of a substance is not necessarily a “degradation.” To subject such dischargers to antidegradation review would be a needless waste of time and resources for dischargers and the State alike. Accordingly, this procedure must be limited to those pollutants for which there are numeric criteria.

Further, while the 5% more-than-ambient-quality proposal is purportedly adopted from Region VIII’s guidance, the Associations note that Region VIII provides that such a test is only a “*non-binding* rule-of-thumb.” *Region VIII Guidance* at 18 (emphasis in original). The Associations do not understand why the flexibility found in the Region VIII proposal is not found in West Virginia’s proposed rule.

Finally, the Associations believe that the Board should, with a stakeholder group, determine whether significant degradation should be determined with reference to assimilative capacity as suggested by Region III and as done in other States, such as Virginia. (see *Virginia Anti-Degradation Guidance*, attached as Tab 3).

4. § 4C.2.a.2.F.: Trading

It appears that the intent of this subsection is to allow a mitigation project located upstream or downstream of a proposed permitted activity to offset the impact of the proposed permitted activity for the purpose of determining if the activity will cause significant degradation. The Associations wholeheartedly support the ability to use mitigation projects to avoid Tier 2 review and suggest that it use be expanded to allow trading across watersheds.

The proposed rule also requires that effluent trading be documented in a TMDL or other appropriate measure. The Associations simply ask that the Board make clear that the use of a trade to avoid Tier 2 review not be held up pending a TMDL as TMDL development is a time consuming process. Moreover, given that TMDLs are required only for non-compliant waters, and Tier 2 review is limited to "high quality waters," it is difficult to imagine why a TMDL would be done to document a trade for a high quality water.

5. **§ 4C.4 & .5: Less Degrading and Non-Degrading Alternatives**

These sections relate to the analyses of less degrading or non-degrading alternatives. The subsections 4C.4 & 4C.5 do not contain any criteria for evaluating the reasonableness or cost-effectiveness of less degrading alternatives. Importantly, Region VIII's antidegradation guidance provides that "reasonable alternatives shall be based on case-specific information. Generally speaking, non-degrading or less-degrading pollution control alternatives are less than 110% of the costs of the pollution control measures associated with the proposed activity." *Region III Guidance* at 6. The Board should institute similar guidance.

Further, the provisions of subsections 4C.5 and 4C.6 must be integrated so that antidegradation review evaluates less degrading alternatives simultaneously with the economic effect of imposing these alternatives. As drafted, this regulation would allow a permit writer to insist on a less degrading alternative without any consideration of its cost or economic impact and to deny the permit absent an agreement by the applicant to utilize that alternative. Such a result would be contrary to the provisions of CSR § 46-1-4.1.b, which requires that the antidegradation analysis involve an assessment of whether the activity is necessary to accommodate important economic or social development.

6. **§4.C.6: Economic and Social Development**

In §4.C.6.c., the proposed rule provides that "[i]n evaluating the applicant's demonstration of socio-economic importance, the agency may use EPA's *Interim Economic Guidance for Water Quality Standards for Water Quality Standards Workbook*." The Associations believe that the use of this guidance by the agency is both unwise and unnecessary.

EPA's *Interim Economic Guidance Workbook* is extremely complicated and could easily be misapplied by persons trained in environmental and not economic sciences. It requires analyses of changes in: "median household income; community unemployment rate; overall net debt as a full market value of taxable property; percent of households below poverty line; impact on community development potential; and impact on property values." *Guidance* at 5.3.b. The Associations do not believe the agency is staffed to address these issues appropriately or timely.

Much simpler approaches have been adopted by other states. For instance, Wyoming's Draft Implementation policy of May 1999 provides simply that:

A determination shall be made on a case-by-case basis whether the proposed activity is important [to] economic or social development. If the applicant submits evidence that the activity is important [to] development, it shall be presumed important unless information to the contrary is submitted in the public review process. The determination shall take into account information received during the public comment period and shall give substantial weight to any applicable determinations by local governments or land use planning authorities.

(relevant pages attached as Tab 4). This approach is not only easier to apply, but appropriately focuses on the views of local interests. As Region VIII's guidance provides:

Because the socio-economic importance of a proposed activity is a question best addressed by local interests, the Division will give particular weight to the comments submitted by local governments, land use planning authorities and other local interests . . .

Region VIII Guidance at 22.

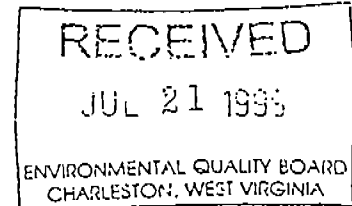
The Associations suggest that the Board focus on local interests, as suggested by Region VIII, and adopt a simpler test like that proposed in Wyoming.

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COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION
AND THE WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION
ON THE ENVIRONMENTAL QUALITY BOARD'S PROPOSED
WATER QUALITY STANDARDS AND PROPOSED
ANTIDegradation IMPLEMENTATION PROCEDURES

July 21, 1998

GENERAL COMMENTS



1. Dissolved vs. Total Metals.

The Associations wholeheartedly support the cooperative effort that has resulted in the Board's proposal to express aquatic life criteria for metals in terms of the dissolved fraction.

2. The Board's Remining Proposed Rules are Premature.

In an "advanced notice of proposed rulemaking" ("ANPR") issued on July 7, 1998, U.S. EPA announced that it seeks to provoke "a structured national debate on antidegradation." *See* 63 Fed. Reg. 36741-3680C (July 7, 1998) (portions attached at Tab 1). In that ANPR, EPA reviewed the existing three-tiered antidegradation approach currently embodied in both Federal and West Virginia regulations. It concluded that there is wide disparity in the implementation procedures of the States and specifically asked whether implementation procedures should be nationalized.

Other observations and other questions for which EPA had no answers were:

1. What changes or clarifications could be made to the current tiered approach to protecting waters under antidegradation that would streamline and enhance antidegradation implementation?
2. Should the [federal] regulations be amended to identify the basic elements that must be included in an antidegradation implementation method . . . ?
3. Is national guidance on antidegradation implementation methods needed . . . ?

63 Fed. Reg. at 36781. In light of these statements from EPA, and in light of the fact that its ANPR will almost certainly result in a federal rulemaking, the Association urges the Board to await the outcome of the national debate before it adopts procedures that are virtually certain to result in substantial permit delays.

3. Current Law Only Requires “Identification” of Antidegradation Procedures.

Federal law currently requires that States “adopt, as part of [their] water quality standards, an antidegradation policy consistent with 40 CFR § 131.12 and identify implementation methods for such a policy.” 63 Fed. Reg. at 36780; see 40 C.F.R. § 131.12. There is, however, no express requirement that such implementation methods be embodied in the water quality standards or that they be submitted to EPA for its approval. In fact, in the July 7, 1998 ANPR, EPA conceded this point, stating that “EPA’s longstanding policy is that the implementation procedure should also be submitted to EPA for review. Often, however, implementation procedures are not submitted to EPA. EPA’s current thinking is that an important change to the regulation would be to clarify . . . that antidegradation implementation procedures (in addition to the policy) must be included in the submittal of State’s . . . water quality standards.” 63 Fed. Reg. at 36781.

In light of this fact and that EPA has, just two weeks ago, intentionally provoked a national debate on just what antidegradation procedures are appropriate, the Board’s proposed rule is simply premature and should be withdrawn pending EPA’s national debate.



areas disturbed by surface mining shall not . . . cause a violation of applicable water quality standards.” 38 C.S.R. § 2-14.5.b. Applicants for surface mining permits must also submit a hydrologic reclamation plan that contains the steps that will be taken during mining and reclamation “to meet applicable Federal and State water quality laws and regulations.” *Id.*, § 2-3.22.f. In addition, no surface mining activities may be conducted within 100 feet of intermittent or perennial streams if such activities would “cause or contribute to violations of applicable State or Federal water quality standards.” *Id.*, § 2-5.2(a).

79. Section 303 of the Clean Water Act, 33 U.S.C. § 1313, requires each state to develop water quality standards for its waters. These standards must consist of the designated uses of such waters and the water quality criteria for such waters based on such uses. 33 U.S.C. § 1313(2)(A).

80. West Virginia statutes define the waters of the state as “any and all water on or beneath the surface of the ground,” including rivers, streams, creeks and branches. W.Va. Code § 22-11-4(23).

81. West Virginia water quality standards provide that, “at a minimum, all waters of the State are designated for the Propagation and maintenance of Fish and Other Aquatic Life (Category B) and for Water Contact Recreation (Category C) consistent with Clean Water Act goals.” 46 C.S.R. § 1-6.1.

82. The Clean Water Act requires each state to develop an anti-degradation policy for its waters. 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12. Pursuant to this requirement, West Virginia water quality standards provide that “existing water uses and the level of water

quality necessary to protect the existing uses shall be maintained and protected.” 46 C.S.R. § 1-4.1.a.

83. West Virginia water quality standards also provide that “waste assimilation and transport are not recognized as designated uses.” 46 C.S.R. § 1-6.1.a. No “industrial wastes or other wastes present in any of the waters of the State shall cause therein or materially contribute to “deposits . . . on the bottom” or “any other condition which adversely alters the integrity of the waters of the State.” *Id.*, § 1-3.2. In addition, “no significant adverse impact to the chemical, physical, hydrologic or biologic components of aquatic ecosystems shall be allowed.” *Id.*, § 1-3.2.i. Industrial wastes are defined to include any solid waste substance “incidental to the development, processing or recovery of any natural resources,” which includes wastes from surface mining activities. W.Va. Code § 22-11-3(11).

84. By burying waters of the State beneath millions of tons of rock and dirt, valley fills from surface mines necessarily kill aquatic life in the buried part of the stream and make water contact recreation impossible. These fills therefore violate West Virginia’s anti-degradation standard.

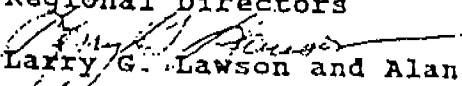
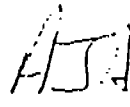
85. Valley fills that cover streams, creeks and branches use such waters for waste assimilation, cause deposits of materials on the bottom of such waters, and adversely and significantly alter the integrity of such waters, including the physical, hydrologic and biologic components of their aquatic ecosystems.


86. Defendant Miano is engaged in a pattern and practice of approving applications for surface mining permits that cause or contribute to violations of state water quality standards. Specifically, Defendant Miano has approved permits which authorize the filling

M E M O R A N D U M
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER
OFFICE OF WATER RESOURCES MANAGEMENT

SUBJECT: OWRM GUIDANCE MEMO NO. 93 - 021
Antidegradation Implementation Guidance for Surface Waters

TO: Regional Directors

FROM:  Larry G. Lawson and Alan J. Anthony 

DATE: July 27, 1993 

COPIES: Bob Burnley, John Roland, Dave Paylor, Martin Ferguson, Jean Gregory, Regional Office Water Resource Managers, Ron Gregory

INTRODUCTION

These antidegradation procedures provide guidance to the Water Division of the Department of Environmental Quality (DEQ) for implementing the State antidegradation policy for surface waters found in Section VR680-21-01.3 of the water quality standards regulation.

Antidegradation requirements are triggered whenever a regulated activity is proposed that may have some effect on surface water quality. Such activities are reviewed to determine, based on the level of antidegradation protection afforded to the affected waterbody segment, how the proposed activity should be addressed.

Regulated activity means activities that require a DEQ Water Division permit. Dischargers covered by General Permits, individual VPDES permits for corrective action plans, individual storm water permits for existing dischargers not covered by storm water general permits, and existing point source discharges to surface waters not previously issued a VPDES permit have been determined to achieve the intent of the antidegradation policy. Thus, these dischargers are not considered as regulated activities for purposes of this guidance. For the purpose of this guidance, the term "proposed activity" means a proposed activity that is also a regulated activity.

All state surface waters are provided one of three different levels of antidegradation protection. At a minimum, all waters are subject to a base level of protection (known as tier 1 or existing use protection); some waters may qualify only for this level of protection. In these Tier 1 waters, existing uses of water bodies, and water quality to protect those uses, must be maintained. In water bodies where the quality of the waters is better than the standards (sometimes referred to as Tier 2 or high quality waters), a significant lowering of water quality of these high quality waters cannot be allowed without an evaluation of the economic and social impacts. Waterbodies in the third level of protection (Tier 3) are designated by regulatory amendment to the standards to be exceptional waters due to environmental settings and aquatic communities or recreational opportunities.

Separate guidance is provided in this document for each of the three types of surface waters protected. The source documents for this guidance are: the 1989 draft revised economic (Section 5.5) and antidegradation (Chapter 4) chapters in the EPA Water Quality Standards Handbook, EPA's 1985 Questions on Antidegradation, EPA's draft Economic Guidance Workbook for Water Quality Standards, and the antidegradation section of the December, 1991 draft of the EPA/States Great Lakes Initiative.

DETERMINATION OF APPROPRIATE ANTIDEGRADATION CATEGORIES FOR WATERBODIES

The sequence of steps to be completed by the Water Division in conducting an antidegradation review is presented in Figure 1. The first task that will be addressed by the Water Division is to determine to which tier the waters belong.

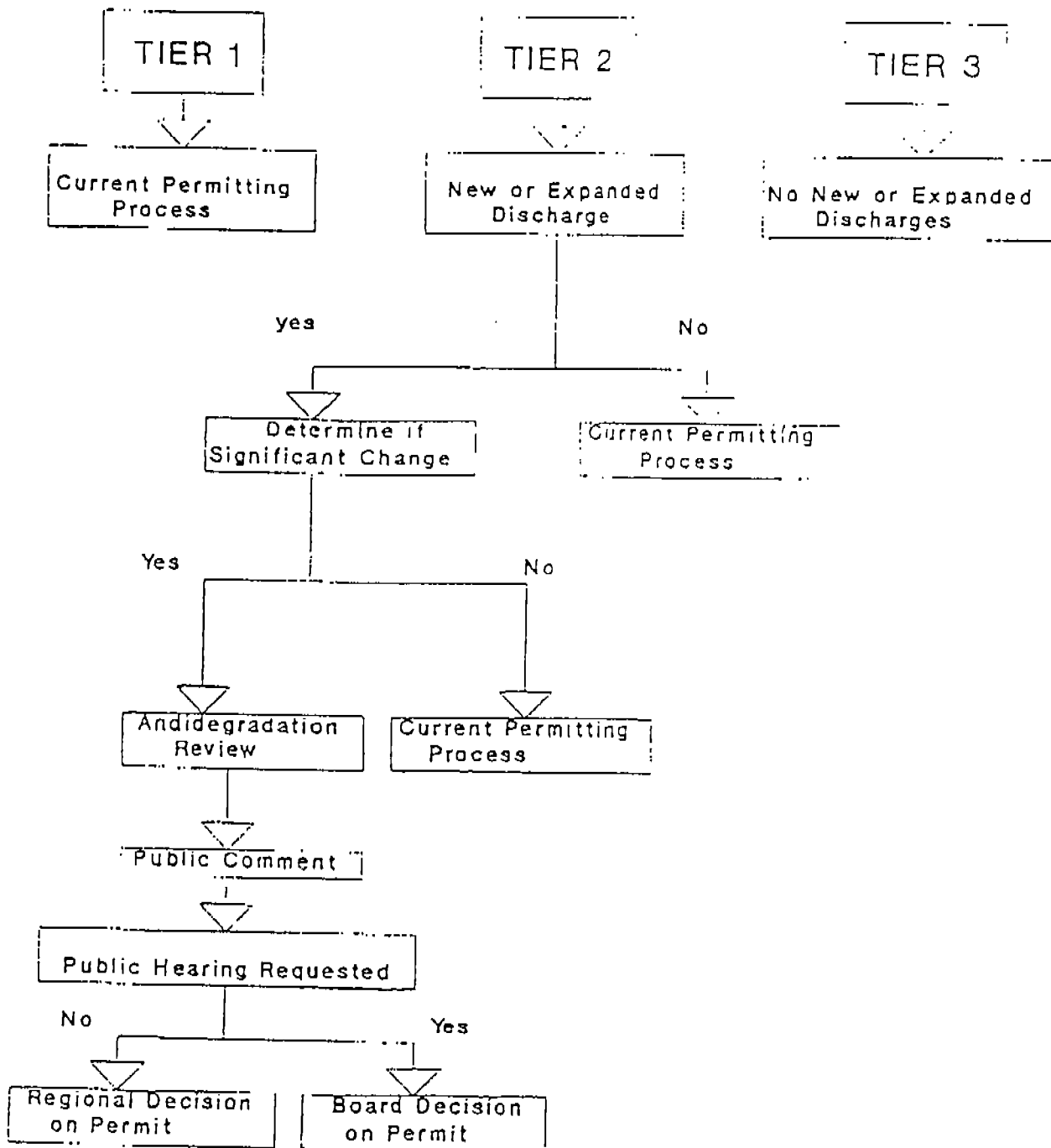
Tier 3

Staff should check VR680-21-01.3.C.3 to determine whether the water body in question is listed in this category. If it is not listed then it is not a tier 3 water.

Tier 2

If the waterbody is not listed in VR680-21-01.3.C.3, then staff must determine whether the waterbody is either a Tier 1 or Tier 2 category. This determination is based on a comparison of the available receiving stream data (collected in the stream outside of any mixing zones) to the table of numerical standards in VR680-21-01.14.B. If available water quality data indicate that all of the parameters measured in the water body are better than the standards in the table of numerical standards in VR680-21-01.14.B, then the waterbody falls into the Tier 2

IMPACT OF ANTIDegradation WATERBODY
CATEGORY ON REGULATED ACTIVITIES
REQUIRING PERMITS



category. Violation of the fecal coliform standard is not to be sufficient justification to lower the water to tier 1. If accurate and technically sound receiving stream data are not available, the applicant/permittee may be required by DEQ staff to provide sufficient information for a determination of the appropriate tier to be made. If real in stream data are not available at the time of the Division's antidegradation review of the water body, engineering judgment of DEQ staff may be substituted. Receiving stream information that may be used as a basis for this judgement include:

1. Modeling predictions (existing discharges and mixing zones) for the waters being considered.
2. Existing permit limits that were designed to just barely meet the standard in the waters being considered.
3. Biological data that demonstrate in stream toxicity. This is true even if the numerical standards are met due to the independent application of biological and numerical criteria and standards.
4. Judgement based on the absence or presence of definitely identified sources of pollutants or a demonstrated use impairment. Such judgement must be completely justified and documented.

If sufficient information is not available, the default is to impose high quality VR680-21-01.3.B (Tier 2) waters requirements.

Unless there are actual in stream data to indicate otherwise, a water body also falls into this category if the water is located within an area classified in VR680-21-08 as a public water supply or the water is subclassified as i or ii natural trout waters in VR680-21-08.

Tier 1

If available water quality information indicate that one or more of the water quality parameters violate or just barely meet the numerical standards in the table, the waterbody is considered VR680-21-01.3.A (Tier 1). All surface waters of the Commonwealth must be afforded at least Tier 1 protection. Violation of the fecal coliform standard is not to be sufficient justification to lower the water to tier 1.

IMPLEMENTATION OF ANTIDegradation FOR TIER 1, 2, AND 3 WATERS

Tier 3

If the water body is classified as tier 3, no new, additional or increased discharge of sewage, industrial wastes or other pollution shall be allowed to these waters. Mixing zones from upstream or tributary discharges shall not extend into the exceptional waters designated area. Only temporary, short term impacts shall be allowed on a case by case basis.

Tier 1

If a water is classified as tier 1 then no additional staff antidegradation review or public participation over that currently required for permit issuance or modification is required.

Tier 2

The existing water quality shall be maintained and protected with no significant lowering of water quality from the allowance of new or increased discharges of pollutants unless the State finds, after full satisfaction of intergovernmental coordination and public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

Once it is determined that tier 2 protection applies to a waterbody, the next step in the review process is to determine whether the proposed activity will result in significant degradation to the Tier 2 waters.

If the draft permit for a new or increased discharge to a Tier 2 waterbody is written to comply with the following guidelines, the change in water quality conditions will be considered to be insignificant and no further antidegradation review is required as specified in Section VR 680-21-01.3.B. If the draft permit for a new or increased discharge to a Tier 2 waterbody results in one or more of the in stream parameters exceeding any of the following conditions, the change in water quality conditions will be considered significant and an antidegradation review is required as specified in Section VR 680-21-01.3.B.

1. The BOD limit is based on a predicted dissolved oxygen concentration that is no more than 0.2 mg/l below that currently existing in the stream under 7Q10 flow conditions.
2. The temperature limit is predicted to comply with the standard.

3. The fecal coliform limit is in conformance with the standards.
4. The pH limit is predicted to comply with the standard.
5. The predicted change in the concentration (or other measure specified by the standard) for the parameters for aquatic life protection in the table in VR680-21-01.14 is not more than twenty five percent of the difference between the existing quality and that allowed by the standards.
6. The predicted change in the concentration (or other measure specified by the standard) of the parameters for human health protection in the table in VR680-21-01.14 is not greater than ten percent of the difference between the existing quality and that allowed by the standards.

In multiple discharge situations, the assimilative capacity available must be allocated among the dischargers. The aggregate predicted lowering of water quality must be within the bounds set forth in 1 through 6 above.

Repeated or multiple small changes in water quality can result in significant water quality degradation. Therefore, when it is determined that a water is tier 2, a water quality baseline that is equal to the existing quality plus the insignificant changes allowed in 1 through 6 above should be established and maintained for future reference. The baseline should remain fixed unless some action improves water quality. If water quality improves, then the baseline should be adjusted accordingly. Both the current and all subsequent proposed discharge increases are then evaluated against the baseline rather than the standard. This procedure ensures that multiple small water quality changes will not inadvertently add up to significant water quality degradation without adequate water quality and economic impact analyses.

Additional review for a significant lowering of water quality:

If the proposed regulated activity would significantly lower water quality, a letter must be sent to the director of the Division of Soil and Water of the Department of Conservation and Recreation notifying them of this designation and requesting that they undertake the appropriate non point source control activities to maintain water quality. The Division of Soil and Water will be asked to provide comments back to the DEQ by the close of the public notice comment period for the proposed VPDES permit. This action will be made part of the file and considered in the final permit process.

Any entity seeking to significantly lower water quality through a new or increased discharge of pollutants must first, as required by VR 680-21-01.3.B. submit an antidegradation socioeconomic demonstration for consideration by the regional office. Any discharger seeking such an action should first submit a proposed study workplan to the regional office for review, comment and/or approval before undertaking such a demonstration. (The same rationale for application or collection of data provided in the guidance for antidegradation category determination applies for this demonstration).

The antidegradation demonstration shall identify the important social or economic developments to the area in which the waters are located that will not occur if the significant lowering of water quality is not allowed. Developments considered, should, as a minimum, fall into one or more of the following categories:

1. Increase in the number of jobs.
2. Increase in personal income or wages.
3. Reduction in the unemployment rate or other social service expenses.
4. Increase in tax revenues.
5. Provision of necessary social services.

Prior approval from DEQ staff shall be required for use of any alternative economic indicators.

In conducting the analysis of social or economic development, the applicant should follow Section 5.5 of the EPA Water Quality Standards Handbook and the EPA draft Economic Guidance Workbook for Water Quality Standards. The EPA workbook provides worksheets to assist applicants in their evaluation of socioeconomic impacts but the applicants should feel free to use anecdotal information to describe any current community characteristics or anticipated impacts that are not listed in the worksheets. The workbook provides few useful economic ratios and tests for evaluating socioeconomic impacts, so the applicant's demonstration will primarily consist of a narrative evaluation of the relative magnitude of indicators such as increases in unemployment, losses to the local economy, decreases in tax revenues, and indirect effects on other businesses. Bureau of Economic Analysis multipliers can also be used by the applicant to estimate the effect of reduced economic activity on output (sales), earnings, and employment. Since EPA does not have standardized tests and benchmarks with which to measure these socioeconomic impacts, the regional office may exercise case specific flexibility in their requirements for a discharger socioeconomic antidegradation review.

AGENCY ANTIDegradation DECISION

Upon receipt and review of the applicant antidegradation socioeconomic demonstration, the regional office may either determine that the significant change in water quality is not necessary to provide important economic or social development and recommend denial of the proposed new or increased discharge, or tentatively accept the demonstration and provide the opportunity for public comment on agency program actions that may lower water quality in the Tier 2 waterbody. The public participation requirement will be met by providing the public with the opportunity to comment and the opportunity to request a public hearing. Activities that may affect several waterbodies in a basin or subbasin may be considered in the same public notice or hearing. In addition, antidegradation issues may be combined with appropriate hearings on environmental impact statements, water management plans, or permits. However, if this is done, the public must be clearly informed that changes to the water quality are being considered along with the other activities.

The following is a summary of the elements that shall be made available to the public in order to meet the public notification requirements of the antidegradation provisions of the water quality standards regulation. The following items need not be included in detail in the public notice. However, the public must be made aware of their existence, given sufficient information to determine their applicability and informed of how they may be obtained.

1. Statement that the action will comply with the States' antidegradation policy.
2. A determination that existing uses will be maintained and protected. This determination will be attached to the fact sheet along with a description of which parameters are included in the proposed degradation.
3. A summary of other known actions, if any, that have lowered water quality since November 28, 1975.
4. The estimate of the impact, if any, that the action will have on the physical, chemical, and biological integrity of the waterbody.
5. A determination that the lower water quality is necessary to accommodate important economic or social development. (The socioeconomic antidegradation review provided by the applicant must be included as part of the fact sheet for public comment.)

6. A description how the intergovernmental coordination process has occurred.
7. A determination that the highest statutory and regulatory requirements for all new and existing point sources have been achieved.
8. Notification letter to Department of Conservation and Recreation and their response regarding their undertaking non point source control activities to maintain water quality.

Draft

Wyoming
Surface Water Quality Standards

Implementation Policies

Second Draft
May, 1999

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This is the second draft of the Implementation Procedures Document. Strikeout and text shading formats have been used to highlight changes made from the first draft, published on August 4, 1998. They do not represent modifications to any currently adopted document.

ANTIDEGRADATION
IMPLEMENTATION POLICY

I. Purpose

Section 8 of Quality Standards for Wyoming Surface Waters (Water Quality Division Rules and Regulations, Chapter 1) establishes a regulatory policy concerning antidegradation. That regulation provides...

Water uses in existence on November 28, 1975 and the level of water quality necessary to protect those uses

shall be maintained and protected. Those surface waters not designated as Class 1, but whose quality is better

than these standards, shall be maintained at that higher quality. However, after full intergovernmental

coordination and public participation the Wyoming Department of Environmental Quality may issue a permit

for or allow any project or development which would constitute a new source of pollution, or an increased

source of pollution, to these waters as long as the following conditions are met:

(a) The quality is not lowered below these standards;

(b) All existing water uses are fully maintained and protected;

(c) The highest statutory and regulatory requirements for all new and existing point sources and all cost

effective and reasonable best management practices for nonpoint sources have been achieved; and

(d) The lowered water quality is necessary to accommodate important economic or social development in

the area in which the waters are located.

(e) Determinations made by the department relative to (bc) and (cd) above shall be based upon a

reasonable level of analysis by the project proponent, consistent with accepted engineering practice, and

any information submitted by the public or which is otherwise available to the administrator. Where

appropriate, the administrator shall require an applicant to submit necessary information including but

not limited to an analysis of alternatives to any proposed discharge and relevant economic information.

Antidegradation protection is one of the essential elements of the state water quality standards program and is required under Section 303(d)(4)(B) of the federal Clean Water Act. The purpose of this implementation procedure is to disclose the decision-making and public participation processes that will be employed by the Water Quality Division in order to assure compliance with the requirements of Section 8.

A secondary purpose of this implementation plan is to assure federal approval of the State's surface water quality standards. Though the State has the primary authority to establish standards, the U.S. EPA has a responsibility to make a determination of whether such standards will achieve the goals and requirements of the federal Act. To a large extent, approval of the standards relies upon approval of an antidegradation implementation procedure.

II. Concepts

The water quality standards designate the uses which are protected on waters of the state and establish criteria that describe maximum pollutant concentrations and other water quality conditions that are necessary to maintain those uses. Many waters in the state have an existing level of water quality which is better than the criteria established to support designated uses. The antidegradation requirements are designed to maintain water quality at the higher levels unless there are good reasons for lowering the water quality.

The federal regulations (40 CFR 131.12) require state standards programs to address 3 levels or "tiers" of antidegradation protection. "Tier 1" is the basic level of protection which applies to all waters. Waters which are afforded tier 1 protection only are generally waters which are not designated for aquatic life support, or are not currently supporting designated uses, or where assimilative capacity does not exist for parameters that would be affected by a proposed activity.

"Tier 2" protections apply to high quality waters. These are waters which have an existing quality that is better than the established use-support criteria and where an assimilative capacity exists for parameters that would be affected by a proposed activity. Under tier 2, a lowering of water quality may be allowed if it is determined that the amount of degradation is insignificant or if the lowered water quality is necessary to accommodate important economic or social development in the area. Under no circumstances, however, may water quality be lowered below the criteria established in

the standards.

"Tier 3" protections apply to waters that constitute "outstanding national resource waters" (ONRWs). {The Wyoming water quality protection program has no provision for designating waters that have "national" significance, however, waters designated as Class 1 under the surface water standards are considered to be outstanding resources. Though not designated as ONRWs, Class 1 waters are afforded a level of antidegradation protection which is a functional equivalent of EPA's tier 3 concept.} Tier 3 requires maintenance of existing quality with no consideration of assimilative capacity or economic or social development. In certain circumstances, temporary lowering of water quality is allowable, however the general rule is that no new point sources or increased pollutant loading from existing point sources is allowable.

The antidegradation implementation procedures that follow shall apply to the review of regulated activities involving new or increased discharges of pollution. Regulated activities include individual NPDES effluent discharge permits, NPDES stormwater permits for industrial and construction activities and Section 401 water quality certifications. The procedure is organized starting with the highest level of protection applied to Class 1 waters to the basic minimum level applicable to all waters.

III. Class 1 Waters (Outstanding Aquatic Resources)

The qualification requirements for Class 1 waters are listed in Chapter 1, Water Quality Rules and Regulations, Section 34. In addition, the general categories of waters (e.g., waters in national parks, etc.) and specific waters designated as Class 1 are listed in Appendix A of Chapter 1.

Class 1 waters are designated by the Environmental Quality Council in rulemaking hearings. Both the Wyoming Administrative Procedures Act and the Department's Continuing Planning Process (CPP) provide for public input during regulatory and planning processes. Any interested person may nominate a water for Class 1 designation through the procedures outlined in those documents.

A. Point Source Discharges.

The Wyoming surface water quality standards prohibit new or increased "end-of-the-pipe",

effluent discharges of

pollution to Class 1 waters but allow limited discharges associated with stormwater runoff and construction activities.

Permits issued by the Department of Environmental Quality (DEQ) for stormwater or construction-related discharges

will contain the following safeguards: (1) changes in water quality will be limited to temporary increases in turbidity; (2)

turbidity increases will be limited to those allowed in Section 23 of Chapter 1; and (3) necessary controls and monitoring

will be required to ensure existing water quality and uses are maintained and protected.

Furthermore, the Department

will impose whatever controls are necessary on regulated point source discharges to tributaries of Class 1 waters to the

extent that the existing quality and uses of the downstream Class 1 segment will be protected and maintained. It is the

Department's interpretation that "tributary" means any waters feeding the mainstem and any upstream mainstem

segments.

The following procedures and decision-making processes will be used for each of the Water Quality Division's discharge

permitting authorizations on Class 1 waters:

1. NPDES, "end-of-the-pipe" permits:

Permits for new or increased effluent discharges to Class 1 waters will not be issued. This prohibition is not

intended to include industrial stormwater permits for which effluent limits have been established where there is no

reasonable potential for a discharge of the associated effluent limitations.

2. NPDES Stormwater Permits (Industrial Activities):

a. Stormwater permits for industrial activities may be issued with appropriate conditions and monitoring

requirements on an individual case-by-case basis on Class 1 waters. An application for an industrial

stormwater permit must contain:

(1) a list of all pollutants which can reasonably be expected to occur on-site and be exposed to

runoff events;

(2) a map showing the location of the industrial facility in relation to the Class 1 receiving water

and/or tributaries;

(3) water quality data which characterizes the existing quality of the receiving Class 1 water and/or its tributaries in relation to the potential on-site pollutants;

(4) a stormwater pollution prevention plan that provides:

(a) runoff from the industrial site resulting from up to a 100 year storm event will not discharge to a Class 1 water; or

(b) runoff which may discharge to a Class 1 water as the result of any storm event will be of equal or better quality than the receiving water; and

(5) a monitoring plan designed to assure compliance with item (4).

b. Prior to issuing an industrial stormwater permit, the Department will make a determination based upon the information submitted in the application that the potential effects on the Class 1 receiving stream, if any, will be temporary in nature and limited to discharges of clean sediment and turbidity. The Department may also include any additional construction practices, treatment processes, monitoring and reporting requirements or other special conditions as may be necessary to achieve and demonstrate that existing water quality and uses will be maintained.

c. The Department will conduct a 30-day public notice and comment period prior to the issuance of any industrial stormwater permit on Class 1 waters disclosing its intent to issue a permit for industrial stormwater discharges. Information received as a result of the public notice will be considered by DEQ and may affect the final determination regarding permit approval.

d. Existing general stormwater permits for industrial activities will remain in effect for the remainder of their terms. The reauthorization of these permits, however, is not guaranteed and will be subject to the provisions of the revised rule and the implementation policy described above.

3. NPDES Stormwater Permits (Construction Activities):

a. General stormwater permits for construction activities may be issued with appropriate conditions and monitoring requirements on Class 1 waters. An application for a construction stormwater permit must contain a Notice of Intent (NOI) to discharge stormwater prepared according to the provisions of Appendix B of the Wyoming General Stormwater Permit for Construction Activities. The applicant must submit along with the NOI, a detailed pollution prevention plan which includes sufficient controls on all potential sources of pollution. The pollution prevention plan must demonstrate that the only types of pollution that could reasonably be expected to reach a Class 1 water during a runoff event are limited to turbidity and sediment.

b. Runoff from ancillary, construction-related facilities such as borrow areas, gravel processing areas, asphalt processing plants, concrete mixing, fuel & solvent storage areas, equipment staging and maintenance areas, and any area which may be a source of pollutants other than turbidity and sediment must be controlled so as not to discharge to any Class 1 water. This provision applies to runoff resulting from up to a 100 year storm event.

c. The Department shall conduct an in-house review of the NOI and pollution control plan prior to approving coverage under the general stormwater permit. The Department may also include any additional construction practices, monitoring and reporting requirements or other special conditions as may be necessary to achieve and demonstrate that existing water quality and uses will be maintained. The DEQ will not normally conduct a public notice and comment period prior to authorizing specific activities under the stormwater general permit. Public comment was solicited prior to the establishment of the general permit and public notice will be provided at each subsequent renewal (at least once every five years). Upon review of any application for a construction stormwater permit, the Department deny authorization under the general permit and require an individual permit. In such instances, a 30-day public notice will be conducted.

4. 401 Water Quality Certifications.

The Department adopted a policy on October 11, 1996 regarding the issuance of 401 certifications for activities on Class 1 waters. This policy was specifically designed to ensure the protection of existing quality and uses of Class 1 waters and serves as the antidegradation implementation procedure for activities subject to 401 certification on Class 1 waters.

a. The following classes of construction activities are examples of what may be authorized on Class 1 waters:

- (1) Habitat Restoration and Enhancement;
- (2) Repair and Maintenance of Existing Structures;
- (3) Road Construction and Maintenance;
- (4) Utility Construction and Maintenance;
- (5) Streambank Stabilization and Flood Control;
- (6) Minor Recreational Facilities (boat docks, fishing piers, hiking trails etc.);
- (7) Environmental Cleanup Activities; and
- (8) Miscellaneous Development on Isolated Wetlands

b. Pursuant to the regulations, Chapter 1, Section 7, Certification must be denied on Class 1 waters for the following types of activities: if

(1) the construction or operation of any new facilities that will involve a point source effluent discharge or if the expansion of any existing facility that will result in an increase of pollution from an existing discharge. Examples of facilities and activities that commonly involve discharges include wastewater treatment plants, power plants, food processing facilities, gravel processing operations, mining, oil production and refining, fish hatcheries, aquaculture, feedlots etc.

c. Construction activities can be certified by DEQ if they are designed to meet the

following general and activity-specific requirements:

(1) No long-term degradation occurs Any resultant degradation shall be temporary and all potential negative effects cease at the end of the construction period;

(2) Potential contaminants are limited to turbidity and sediment. Increases in downstream turbidity are limited to 10 NTUs above the upstream condition at all times on streams that support fisheries or drinking water supplies. Sediment cannot be discharged in amounts that will adversely affect beneficial uses as described in Chapter 1, Section 15;

(3) Stream channel integrity and habitat is preserved and maintained. Written concurrence from the Wyoming Game & Fish Dept. that aquatic habitat will not be degraded will be solicited;

(4) All beneficial existing uses are fully protected and maintained;

(5) Existing ambient conditions i.e. dissolved oxygen, pH or temperature are not degraded; and

(6) All construction activities must be designed and operated in such a manner that water from dewatering activities, hydrostatic testing of pipelines, gravel washing etc. is not allowed to so as not to allow a surface discharge directly to a Class 1 surface water.

d. 401 Certification shall be denied on Class 1 waters if any of the following applies:

(1) The project results in degradation of water chemistry, loss of aquatic habitat or a reduction in beneficial use;

(2) The application does not contain nor can the certification be conditioned to provide reasonable assurance that turbidity can be controlled within the 10 NTU limit. Sediment will be discharged in amounts that settle to form sludge, bank or bottom deposits;

(3) Project may result in channel instability or significant loss of aquatic habitat. Written concurrence

from the Game & Fish Dept. is not obtained;

(4) Project may result in a loss or reduction of beneficial uses;

(5) Existing ambient conditions will be degraded by the activity; or

(6) Any surface discharge of process water to a Class 1 water will occur.

e. In addition to the general requirements above, the following measures apply on an activity-specific basis

on Class 1 waters:

(1) Habitat Improvement Activities:

(a) All projects must be supported by the Wyoming Game & Fish Department;

use for

excavated

nursery

(b) Habitat improvement projects should not be designed to trade one beneficial another but all uses must be fully maintained, e.g. existing wetlands should not be or inundated to create deep water areas for fish, or stream segments that serve as areas or food sources should not be converted to holding areas for adult fish;

watershed

(c) Special consideration can be given for projects that are part of an approved restoration plan or wetland conservation plan;

determining whether

effects.

(d) The department must use discretion and professional judgement in beneficial uses will be impaired in light of the overall project purposes and desired

(2) Repair/Maintenance Activities:

that the

structure is

The repair, rehabilitation or replacement of currently serviceable structures provided proposed work does not deviate from the original plans, purpose, or use of the acceptable if the general requirements for certification on Class 1 waters are met.

(3) Streambank Stabilization and Flood Control Activities:

Riprap, revetments, jetties and other similar structures can be approved if the purpose of the project

is to reduce existing environmental degradation, is necessary to protect human health and safety or to prevent substantial loss of private property and does not significantly and adversely affect beneficial uses.

(4) Roads, Utilities and Minor Recreational Activities:

Existing facilities may be maintained and new facilities constructed either as part of a public project or private development as long as the general requirements for construction on Class 1 waters are met.

f. Individual 401 certifications are issued on all section 404 permits including the U.S. Army Corps of Engineers' nationwide and statewide general permits on Class 1 waters, and hydropower licences issued by the Federal Energy Regulatory Commission (FERC). A joint DEQ/Corps of Engineers public notice is issued by the Corps prior to the issuance of all individual 404 permits. There is no public notice prior to the authorization of any activity under a Section 404 nationwide or statewide general permit on Class 1 waters. The DEQ does not have a joint permitting agreement with FERC, therefore, DEQ shall conduct a separate public notice and comment period prior to issuing 401 certification for FERC licenses and permits on Class 1 waters.

B. Nonpoint Sources.

Nonpoint sources of pollution are not regulated by permits issued by the Department, but are controlled by the voluntary application of cost effective and reasonable best management practices. For Class 1 waters, best management practices will maintain existing quality and water uses.

IV. High Quality Waters - Classes 2A, 2B and 2C

A. The antidegradation procedure under this part applies to the issuance of NPDES Effluent Permits, Stormwater Permits (Industrial & Construction Activities) and Section 401 Certifications of Activities Regulated by the Federal Energy Regulatory Commission (FERC).

Waters classified as 2A, 2B or 2C are known to support populations of fish and/or drinking water supplies and are considered to be high quality waters. The Water Quality Division may issue a permit or certification for new or increased discharges to these waters upon making a finding that the amount of resultant degradation is insignificant or that the discharge is necessary to accommodate important economic or social development in the area where the waters are located. The Department must also assure that the highest statutory and regulatory requirements for all new and existing point sources and all cost effective and reasonable best management practices for nonpoint sources have been achieved. For purposes of antidegradation implementation these may be referred to as "reviewable waters".

Where there are existing regulated point or nonpoint sources located in the area, the Water Quality Division will assure that compliance with the required controls has been or will be achieved prior to authorizing the proposed regulated activity. This requirement is primarily intended to ensure that proposed activities that will result in water quality degradation for a particular parameter will not be authorized where there are existing unresolved compliance problems involving the same parameter in the zone of influence of the proposed activity. The "zone of influence" is determined as appropriate for the parameter of concern, the characteristics of the receiving water (e.g. lake versus river, etc.), and other relevant factors. Where available, a Total Maximum Daily Load (TMDL) analysis or other watershed-scale plan will be the basis for identifying the appropriate zone of influence. The Division may conclude that such compliance has not been assured where existing sources are violating their NPDES permit requirements. However, the existence of schedules of compliance for purposes of NPDES permit requirements may be taken into consideration in such cases. In other words, required controls on existing regulated sources need not be finally achieved prior to authorizing a proposed activity provided there is reasonable assurance of future compliance.

The antidegradation review under this part consists of three sequential evaluations, 1. Determination of significance; 2. Economic evaluation; and 3. Examination of alternatives.

1. Determination of Significance:

a. Based upon information submitted in an application for a water quality permit or certification, the

Administrator shall make a determination of whether the proposed discharge will result in a significant

lowering of water quality with respect to adopted numeric water quality criteria. The significance

determination will be based on the chronic numeric standard and flow for the pollutant of concern except

for those pollutants which have only acute numeric standards in which case the acute standard and flow will

be used. This significance determination shall be made with respect to the net effect of the new or increased

water quality impacts of the proposed activity, taking into account any environmental benefits resulting from

the activity and any water quality-enhancing mitigation measures impacting the segment or segments under

review, if such measures are incorporated with the proposed activity. The activity shall be considered not

to result in significant degradation, if:

(1) The activity may be permitted under a general permit established by the state for discharges

regulated under section 402 or by the Corps of Engineers for discharges regulated under Section

404 of the Clean Water Act.

(2) The flow rate or volume of a new or increased discharge under review is small enough that it will

be diluted by 100 to 1 or more at low flow, as defined in Chapter 1, section 11(a), by water in the

receiving stream; or

(3) The new or increased loading from the source under review is less than 10 percent of the existing

total load to that segment for critical constituents (e.g. those for which there are stream standards set

and which are present in the discharge); provided, that the cumulative impact of increased loadings

from all sources shall does not exceed 10 percent of the baseline total load established for the

segment (the baseline total load shall be determined at the time of the first proposed new or

increased water quality impacts to the reviewable waters.); or

(4) The new or increased loading from the source under review will consume, after

mixing, less than

20 percent of the available increment between low flow pollutant concentrations and the relevant standards (assimilative capacity), for critical constituents; or

(5) The activity will result in only temporary or short term changes in water quality.

b. If an activity is considered not to result in significant degradation, no further review will be conducted.

General NPDES permits and 401 certifications of general 404 permits will be issued at this point. In the

case of individual permits, the Water Quality Division shall prepare a draft permit and provide opportunity

for public comment before the NPDES permit is issued. Such public notices shall contain a statement

describing the rationale for the determination of non-significance. If the permit is issued, the determination

may be appealed to the Environmental Quality Council under the provisions of the Wyoming Administrative Procedures Act.

c. If a determination is made that a proposed activity is likely to result in significant degradation of

reviewable waters, an evaluation shall be made as to whether the degradation is necessary to

accommodate important economic or social development in the area in which the waters are located.

2. Economic Evaluation: The following provisions shall apply to this determination:

a. The "area in which the waters are located" shall be determined from the facts on a case-by-case basis.

The area shall include all areas directly impacted by the proposed activity.

b. A determination shall be made on the facts on a case-by-case basis whether the proposed activity is

important economic or social development. If the applicant submits evidence that the activity is important

development, it shall be presumed important unless information to the contrary is submitted in the public

review process. The determination shall take into account information received during the public comment

period and shall give substantial weight to any applicable determinations by local governments or land use

planning authorities.

c. If the proposed activity is determined not to be important for economic or social development, authorization for the associated discharge(s) will be denied.

d. If the proposed activity is determined to be important economic or social development, a determination shall be made whether the degradation that would result from such activity is necessary to accommodate that development.

3. Examination of Alternatives. The degradation shall be considered acceptable if there are no other water quality control alternatives available that:

- a. would result in no degradation or less degradation of the state waters; and
- b. are determined to be economically, environmentally, and technologically reasonable.

WV Environmental Quality Board

July 29, 1999

7:00 p.m.

Sign-In Sheet

Name	Speaking Yes/No
✓ WAYNE APPLETON	Yes
✓ Mark Vignovic	Yes
Wendy Radcliff	No
SCOTT D. GOLDMAN	No
✓ David Yaussey	Yes
Ben Greene	No
✓ Kathy G. Beckert	Yes
✓ BOB KORONCAK	Yes
Ann Bradley	No
Jim ASHBY	No
FRANK A. BORSUK, JR.	No
James B. (Jim-Bob) Williams	No
✓ Mandy Yeager	No
✓ Lennie Henthorn	Yes
✓ Shane Harvey	Yes

Scott STEPHENSON	No
Liz Appel	NO
✓ DON GARVIN	Yes
✓ ERNIE NESTER	YES
MAX ROBERTSON	No
Randall Lewis	NO
Don Ramsey	NO
✓ MIKE BROWN	YES
Tim Mallon	NO
✓ Paul Noel Meritt	Yes
✓ Joe Lovett	yes
✓ Cindy Rank	yes
BARBARA TAYLOR	NO
Kick Hood	NO
✓ Sam Lockwood Farm	Yes
I. Allet	NO
✓ Bob McKinley	yes