

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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JAN 19 2 01 PM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: Bureau of the Environment
Environmental Quality Board TITLE NUMBER: 46

CITE AUTHORITY: W. Va. Code §22-B-3-4 and 29A-3-3

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Procedural Regulations for the Revision
of Water Quality Standards

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

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS February 18, 1996

Ann W. Lipton

10-40



BUREAU OF ENVIRONMENT
10 McJunkin Road
Nitro, WV 25143-2506

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

January 18, 1996

Ms. Judy Cooper
Director, Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

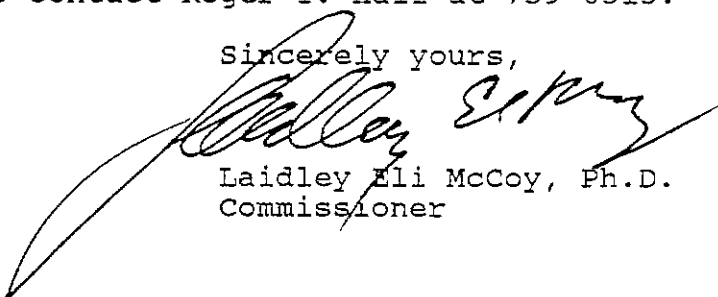
RE: 46-CSR-6 - "Procedural Rule for the Revision of
Water Quality Standards"

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned rule as a FINAL rule with your office and Legislative Rule-Making.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,



Laidley Eli McCoy, Ph.D.
Commissioner

LEM:jrb

Attachment

FILED

TITLE 46
PROCEDURAL RULES
ENVIRONMENTAL QUALITY BOARD

JAN 19 2 01 PM '86

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 6
PROCEDURAL RULES GOVERNING
SITE-SPECIFIC REVISIONS TO WATER QUALITY STANDARDS

§46-6-1. General

1.1. Scope. This series establishes procedures which govern the promulgation of legislative rules by the Environmental Quality Board and establishes procedures to be followed by the Board in removing designated uses, granting variances from water quality standards, granting variances for remaining activities and establishing site-specific numeric criteria as authorized in 46 CSR 1, Requirements Governing Water Quality Standards and W.V. Code §22B-3-4. (Note: the Environmental Quality Board was formerly known as the State Water Resources Board).

1.2. Purpose. The purpose of these rules is to establish general procedures the board must follow in promulgating legislative rules and to establish procedures for requests for site specific revisions to 46 CSR 1, Requirements Governing Water Quality Standards, which can be requested by application to the Board.

1.3. Authority. West Virginia Code §22B-3-4 and §29A-3-3.

1.4. Filing Date.

1.5. Effective Date.

1.6. Repeal of Former Rule. This procedural rule repeals and replaces 46 CSR 6, "Procedural Regulations for the Revision of Water Quality Standards", which became effective on September 8, 1984.

§ 46-6-2 Revision of Legislative Rules

2.1. Statutory requirements. Except as provided in section 5 herein, all revisions to the Board's legislative rules (46 CSR 1 and 46 CSR 12) shall be made in accordance with the provisions of W. Va. Code §29A-3-1 et seq..

2.2. Public hearing. In addition to the requirements outlined in W. V. Code §29A-3-1, the Board shall hold at least one public hearing in conjunction with any revision to the Board's legislative rules. Such hearing shall be held prior to the expiration of the public comment period for

a proposed legislative rule.

2.3. Additional public notice requirements. In addition to filing notice of the proposed rule in the State Register, the Board shall publish notice of a public hearing on the proposed rule revisions as a Class I legal advertisement in a publication area determined by the Board. Such notice of public hearing shall include the following information:

- a. Time and location of hearing;
- b. Hearing agenda;
- c. Notification of the availability of an information sheet as required in section 3.3 herein; and
- d. The location where reports, documents, and data pertaining to the hearing agenda are available for public inspection.

§46-6-3. Requirements for site-specific revisions to 46 CSR 1, Requirements Governing Water Quality Standards.

3.1. Application. Any person seeking removal of a designated use, a variance from numeric water quality criteria or a site-specific numeric criterion shall file an application with the Board containing the following information, and any other information required in this rule:

- a. A U.S.G.S. 7.5 minute map showing those stream segment to be affected and showing all existing and proposed discharge points. In addition, the alphanumeric code of the affected stream, if known;
- b. Existing water quality data for the stream or stream segment. Where adequate data are unavailable, additional studies may be required by the Board;
- c. General land uses (e.g. mining, agricultural, recreation, residential, commercial, industrial, etc.) as well as specific land uses adjacent to the waters for the length of the segment proposed to be revised;
- d. The existing and designated uses of the receiving waters into which the segment in question discharges and the location where those downstream uses begin to occur;
- e. General physical characteristics of the stream segment, including, but not limited to, width, depth, bottom composition and slope;
- f. The average flow rate in the segment and the amount of flow at a designated

control point;

g. An assessment of aquatic life in the stream segment in question and in the adjacent upstream and downstream segments; and

h. Any additional information or data that the Board deems necessary to make a decision on the application.

3.2. Consultation with the Chief. In reviewing an application filed pursuant to this section, the Board shall consult with the Chief of the Office of Water Resources of the Division of Environmental Protection.

3.3. Preparation of an information sheet. If, after review of an application filed pursuant to this section and consultation with the Chief, the Board determines that the requested change is warranted, the Board shall prepare an information sheet which summarizes the information in the application which is pertinent to the Board's decision on each application. The information sheet shall contain at least the following where applicable:

- a. The name and address of the applicant;
- b. The name and description of the waters for which a change is proposed, including the location of existing and proposed discharge points and the Alphanumeric designation;
- c. All existing and designated uses of the water;
- d. The proposed change being requested for the stream or stream segment;
- e. A brief abstract of the supportive documentation which demonstrates that the revision is appropriate;
- f. A summary of the implications of such revision for the community and other users of potential users of the waters in question;
- g. Any recommendations made by the Chief of the Office of Water Resources of the Division of Environmental Protection; and
- h. Any other information deemed pertinent to the Board's decision.

§46-6-4. Removal of a designated use.

4.1. Circumstances allowing removal of a designated use. The Board may propose the removal of a designated use outlined in 46 CSR 6, which is not an existing use, from a stream or

stream segment, or the establishment of subcategories of a use for a stream or stream segment if it can be demonstrated that attaining the designated use is not feasible because:

a. 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 result in substantial and widespread adverse economic and social impact; or

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

c. 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

d. 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 that to leave in place; or

e. 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

f. Physical conditions related to the natural feature 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.

4.2. Application. Any person seeking the removal of a designated use from a stream shall file an application with the Board which shall include the information outlined in section 3.1 (a-h) herein, and shall further include the following:

a. The designated use category or categories outlined in 47 C.S.R. 1 which apply to the stream and the alternate designated use category desired by the applicant;

b. Identification of the criterion outlined in section 4.1 (a - f) herein which render the current designated use category unattainable; and

c. An explanation of the specific circumstances on the stream and/or in the applicant's discharge or other discharges which render the designated use category unattainable.

4.3. Amendment of 46 CSR 1. If, upon review of an application and consultation with the Chief pursuant to §3.2 herein, the Board determines that the requested designated use removal is warranted, the Board shall propose the use removal as an amendment to 46 CSR 1, Requirements Governing Water Quality Standards. In doing so, the Board shall follow all of the requirements for

legislative rulemaking in W. Va. Code §29A-3-1 et seq. and in sections 2 and 3.3 of this rule.

§46-6-5. Variances from water quality standards requested pursuant to 46 CSR 1, section 8.3.

5.1. Circumstances allowing a variance. Upon receipt of an application the Board may approve a variance from numeric water quality standards if it the Board determines that the conditions outlined in section 4.1 a-f above limit the attainment of one or more specific water quality criteria.

5.2. Scope and review of variance. Each variance proposed by the Board and approved by the legislature shall apply only to the discharger requesting the variance and shall be reviewed by the Board at least once every three years.

5.3. Application. Any person seeking a variance from numeric water quality standards shall file an application with the Board which shall include all of the information outlined in section 3.1 a-h above, as well as the following:

- a. The designated use categories outlined in 46 CSR 1 which apply to the stream;
- b. The existing numeric water quality criterion which applies to the stream and for which the applicant seeks a variance, and the alternative numeric water quality criterion desired by the applicant;
- c. Identification of the criterion outlined in section 3.1 a-f above which render the existing numeric water quality criterion unattainable; and
- d. Identification of the specific circumstances which render the discharger unable to meet the existing numeric water quality criteria which apply to the stream.

5.4. Amendment of 46 CSR 1. If, upon review of an application and consultation with the Chief, the Board determines that a requested variance is warranted, the Board shall propose such variance as a revision to 46 CSR 1, Requirements Governing Water Quality Standards. In doing so, the Board shall follow all of the requirements for legislative rulemaking outlined in W. Va. Code §29A-3-1 and in sections 2 and 3.3 of this rule.

§46 CSR 6. Variances from numeric water quality standards for remining activities.

6.1. Authority to grant a remining variance. Pursuant to the authority provided in West Virginia Code §22B-3-4(c) the Board may grant a site-specific variance for remined areas of coal remining operations from standards of water quality set forth in 46-CSR-1, et seq, setting standards for iron, manganese and pH prior to the issuance of a national pollutant discharge elimination system (NPDES) permit by the division of environmental protection in accordance with 33 USC Section 1311(p) of the federal Water Pollution Control Act.

6.2. Circumstances allowing issuance of a variance from water quality standards for remining activities. The Board may grant such variance if, after review of the variance application, the NPDES remining permit application and any other pertinent information, it finds that all of the requirements in this rule and in W. V. Code §22B-3-4 and Coal Remining Policy issued by the West Virginia Division of Environmental Protection on September 30, 1993, have been met and that a variance from water quality standards is warranted. The Board may grant the variance if it finds the following:

- a. the stream does not currently meet the applicable numeric water quality criteria for iron, manganese and pH;
- b. the remining activity cannot be carried out in compliance with the numeric water quality standards for iron, manganese and pH; and
- c. the coal remining operation will clearly result in the potential for improved water quality.

6.3. Application. Any person seeking a variance from water quality standards for remining activity shall file with the Board a copy of the NPDES remining permit application filed with the Division of Environmental Protection, as well as a remining variance application containing the following:

- a. A demonstration that the coal remining operation is located on a site on which coal mining was conducted prior to August 3, 1977;
- b. The name and location of the stream, and the alphanumeric code of the stream, if known;
- c. The use designation of the stream;
- d. All baseline water quality data collected in the stream;
- e. All available data and information regarding the levels of iron, pH and manganese in the existing discharge into the receiving stream;
- f. A demonstration that the water quality of the stream does not meet current numeric water quality criteria for iron, manganese and pH;
- g. The alternative numeric water quality criteria for iron, manganese and pH requested by the applicant; and
- h. A description of the abatement action which will be carried out on site and how such action will result in improved water quality in the receiving stream. In addition, the applicant

shall provide information about other abatement actions considered and why the chosen abatement action is preferred.

6.4. The Board shall review any application prepared and submitted pursuant to the requirements in 6.3 herein, and shall make a preliminary decision regarding whether the requested remaining variance is warranted.

6.5. Upon a decision by the Board that the remaining variance is warranted, it shall prepare an information sheet which includes the information outlined in section 3.3 herein.

6.6. Public hearing on remaining variance. Upon a decision by the Board that the requested remaining variance is warranted and the preparation of a information sheet, the Board shall provide notice of a public hearing on its decision. Such notice shall be filed with the Office of the Secretary of State for publication in the state register not more than thirty nor more than sixty days before the date of the public hearing. In addition, the Board shall publish the notice of public hearing as a Class I legal advertisement in a publication area to be determined by the Board.

The notice of public hearing shall include the following information:

- a. Time and location of hearing;
- b. Hearing agenda;
- c. Notification of the availability of an information sheet as required under §6.5 herein; and
- d. The location where reports, documents, and data pertaining to the hearing agenda are available for public inspection.

6.7. Continuance of hearing. Any hearing scheduled pursuant to the provisions above may be continued from time to time and place to place by the Board, which shall have the effect of extending the last day for receipt of public comments. Notice of such continuance shall be promptly filed in the state register.

6.8. Hearing Transcript. The Board shall cause to be prepared a transcript of any public hearing held pursuant to these rules and shall make such transcript available for public inspection.

6.9. Multiple applications. In consideration of limited time and resources, the Board may, within its discretion, consider more than one remaining variance application in one hearing.

6.10. Decision on remaining variance application. Upon review and deliberation of all of the information available on a remaining variance application, including the comments received during the public hearing and public comment period, the Board shall issue an order either granting or

denying the remining variance request.

Such order shall be forwarded to the applicant and to the Director of the Division of Environmental Protection.

6.11. Prohibitions. The Board shall not grant a variance from water quality standards for remining activities under the following circumstances:

a. Without requiring the applicant to improve the instream water quality as much as is reasonably possible by applying best available technology economically achievable using best professional judgment which requirement will be included as a permit condition;

b. Without a demonstration by the applicant that the coal remining operation will result in the potential for improved instream water quality as a result of the remining operation; and

c. In the event that the Board determines that degradation of the instream water quality will result from the remining operation.

§46-6-7. Site-specific numeric criteria requested pursuant to 46 CSR 1, section 8.4.

7.1. Circumstances allowing a site-specific numeric criterion. A site-specific numeric criterion may be established for a stream or stream segment upon a demonstration that the existing numeric criterion in 46 CSR 1, Appendix E, is 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 by the Board 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.

7.2. Application. Any person seeking a site specific numeric criterion may submit to the Board an application which includes the information outlined in section 3.1 a-i of this rule, as well as the following information:

a. the existing numeric water quality criterion which applies to the stream and the alternative numeric criterion desired by the applicant;

b. The results of a Water Effects Ratio study conducted pursuant to the procedures outlined in EPA's Interim Guidance on the Determination and Use of Water -Effects Ratios for Metals"; or any other method for which the applicant has obtained prior approval from the Board; and

c. An explanation of how the results of the Water Effects Ratio study demonstrate that the alternative numeric water quality criterion proposed by the applicant is warranted.

7.4. Amendment of 46 CSR 1. If upon review of the application and consultation with the

Chief pursuant to section 3.2 herein, the Board determines that a site-specific numeric criterion is warranted, the Board shall propose the site-specific numeric criterion as an amendment to 46 CSR 1, Requirements Governing Water Quality Standards. In doing so, the Board shall follow all of the requirements for legislative rulemaking outlined in W. Va. Code §29A-3-1 and in sections 2 and 3.3 of this rule.

Appalachian Power Company
PO Box 1000
Roanoke, VA 24002-1000
703 985 1300

RECEIVED



OVERNIGHT

ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

Re: Comments of American Electric Power and
Appalachian Power Company on
Proposed Amendment to 46 CSR 1:
Requirements Governing Water Quality Standards
Proposed Amendment to 46 CSR 6:
Procedural Regulations for the Revision of
Water Quality Standards

July 17, 1995

Dear Ms. Chatfield:

On behalf of American Electric Power Service Corporation and Appalachian Power Company, I offer the attached comments on the West Virginia Division of Environmental Protection's Proposed Amendment to the Requirements Governing Water Quality Standards and the Proposed Amendment to the Procedural Regulations for the Revision of Water Quality Standards. I would like to offer our appreciation for the opportunity to submit these comments and I look forward to a continued good relationship between our companies and the DEP.

If you have any questions concerning our comments, please contact Mr. Timothy P. Mallan of my staff at (540) 985-2367.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Robinson".

Robert J. Robinson
Environmental Affairs Director

RJR:d
Attachments

RECEIVED

COMMENTS OF AMERICAN ELECTRIC POWER ON
THE PROPOSED AMENDMENTS TO 46 CSR 1:
REQUIREMENTS GOVERNING WATER QUALITY STANDARDS

Introduction

The American Electric Power Corporation, a holding company for the Appalachian Power Company, presents the following comments to the proposed amendments to West Virginia Division of Environmental Protection's Requirement Governing Water Quality Standards.

General Comments

The Company has reviewed the proposed amendments to Sections 5.2, 6.2 and 7.2 of the rule and concurs with the changes to the current language of the "five mile rule," including deleting requirements which apply in the zone five miles above a drinking water intake, and adding new language which describes requirements for mixing zones for human health criteria.

Conclusion

The Company appreciates this opportunity to comment on this proposal and looks forward to the continuance of a good working relationship with the Division.

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WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
MARTINSBURG, WEST VIRGINIA

COMMENTS OF AMERICAN ELECTRIC POWER ON
THE PROPOSED AMENDMENTS TO 46 CSR 6
PROCEDURAL REGULATIONS FOR THE REVISION OF
WATER QUALITY STANDARDS

Introduction

The American Electric Power Corporation, a holding company for the Appalachian Power Company, presents the following comments to the proposed amendments to West Virginia Division of Environmental Protection's Procedural Regulations for the Revision of Water Quality Standards.

General Comments

The Company has reviewed the proposed amendments to the rule that outline circumstances allowing site-specific revisions to water quality standards, application requirements for dischargers seeking site-specific water quality standards, and criteria to be considered by the Board in reviewing applications, as well as procedures to be followed by the Board once a decision is made on an application. With the possible exception that the Company feels that there is extended emphasis on the Section 7.2 requirements for a Water Effects Ratio study and its correlation to acceptance of alternative site-specific numeric water quality criterion, the Company concurs with the proposed amendments.

Conclusion

The Company appreciates this opportunity to comment on this proposal and looks forward to the continuance of a good working relationship with the Division.



OVEC

RECEIVED
ENVIRONMENTAL QUALITY BOARD
CHARLESTON WEST VIRGINIA

Ohio Valley Environmental Coalition

1101 Sixth Avenue, Rm. 225
Huntington, WV 25701

Comments by Ohio Valley Environmental Coalition (OVEC) on proposed rule changes to 46 CSR 1 and 46 CSR 6, WV Code:
July 20, 1995

General comments:

*Public interest groups (OVEC, League of Women Voters, et al) and even state agency offices in Department of Health & Human Resources (DHHR) and Division of Environmental Protection (DEP) were not properly informed of proposed rules. Some groups and offices were not notified until the final days of the comment period.

*DEP has not provided a summary discussion of mixing zone implementation needs (i.e. use of GIS technology, statistically significant sampling of mixing zone margins, etc.). DEP has not issued to the public any maps or lists of existing mixing zones and their proximity to water intakes in order to provide for informed comment on the proposed rules.

*DEP has not issued to the public a map and list of stream segments which do not now meet water quality standards. In fact, DEP has failed to establish Total Maximum Daily Loads (TMDLs) for such stream segments, as required by US EPA under the Clean Water Act.

*DEP's proposed rules do not specifically provide for the Chief of Water Resources to coordinate site-specific variances from the water quality standards or the establishment of mixing zones with a TMDL program. The proposed rules do not even acknowledge TMDLs.

*Proper management of the state's resources would require coordination of these various requirements, as well as coordination with DHHR's Environmental Engineering Division to be protective of public water intakes.

*Adverse economic impacts were not listed. The rules changes have the potential to increase costs for treatment of public drinking water supplies or industrial process water. The rules changes have the potential to adversely impact recreational uses, including fishing and swimming, as well as pleasure boating (riverboat tourism is currently a valuable growth industry). There was no adverse economic impact listed regarding public health effects caused by exposure to water pollution which directly impact a family's economic resources.

*Paragraph 6.6 page 7, the sentence should read "Such notice shall be filed with the Office of the Secretary of State for publication in the state register not ~~more~~ less than thirty nor more than sixty days before the date of the public hearing."

* Paragraph 6.7, append to the last sentence to read "Notice of such continuance shall be promptly filed in the state register and should be published as a Class I legal advertisement in a widely circulated publication nearest the affected stream."

Closing comments:

In addition, OVEC requests an extension of the comment period for both these rules. Also, OVEC requests that WV-DEP prepare a report for the West Virginia legislature and the U.S. Environmental Protection Agency which would summarize the effects of the rule changes, including efforts to coordinate water quality standard variances, establishment of mixing zones, enforcement of TMDL requirements and especially protection of public drinking water supplies and recreational uses of the state's waters. Such a report would include lists of all the outfalls and intakes as well as maps that indicate locations of currently established and proposed mixing zones. OVEC believes that WV-DEP should be able to accomplish this using their GIS (Geographic Information System) technology.

Respectfully,



Lewis Baker, Chair
OVEC Board of Directors



Janet Fout, Project coordinator

- c: Mark Scott, Deputy Director, WV-DEP
- Barbara Taylor, Chief of Office of Water Resources
- Alvin R. Morris, Director of Water Management, Region III, US EPA

RECEIVED
July 26 1997
ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

The
**West Virginia Mining and
Reclamation Association**

1624 Kanawha Blvd., E. Charleston, WV 25311

and the
**West Virginia Coal
Association**

1301 Laidley Tower, Charleston, WV 25301

comments in response to
The Proposed Legislative Rule
(Water Quality - Remining)
46 CSR Series 6,
Division of Environmental Protection,
Environmental Quality Board

I. ABOUT THE PUBLIC COMMENT OPPORTUNITY:

A. OUR REPRESENTATION:

The West Virginia Mining and Reclamation Association and the West Virginia Coal Association represent over 400 coal producing companies and associate member companies who provide products and services to the coal industry. Our comments on this proposed regulation are on behalf of all of the members of the WVMRA and the WVCA.

B. OUR APPRECIATION FOR THIS OPPORTUNITY:

We are grateful for the opportunity to offer comments on this proposed legislative rule.

II. BACKGROUND ON THE WEST VIRGINIA COAL INDUSTRY:

The coal mining industry in West Virginia produces hundreds of millions of tons of high quality coal for domestic and foreign use as an energy source for the production of electricity, steel and a host of other applications. Employment directly in West Virginia mines and indirectly in the mining support trades and the hundreds of millions of dollars of taxes generated by coal related sources are the **economic backbone** of the Mountain State.

A recent study found that one out of every ten payroll dollars in West Virginia comes from the coal industry. It was further revealed that one of every three business tax dollars being collected by the State comes directly from the coal industry.

Every influence which alters the production of West Virginia coal changes the fragile **competitive balance** between coal mines here and coal mines in other coal producing states and other nations. Therefore, changes in the governmental regulations affecting this industry must be made with the potential negative impacts of those changes foremost in the minds of those considering such changes.

III. ABOUT REMINING:

"Remining" is often misunderstood. Remining is the process of revisiting the same property that was previously mined. This is made more practicable today because of advances in mining equipment, new mining techniques and improved coal preparation technology. There have been several legislative initiatives, both state and federal, over the past 12 years promoting remining. They include: The Colombo Amendment (WV Legislature, 1983, see attachment C); Rahall Amendment (Congress, 1987, see attachment D); OSM legislation (Congress, 1990); and the National Energy Act (Congress, 1992, see attachment A). These acts included incentives to remine and recognized the benefits to the environment brought about by remining.

In many parts of Northern West Virginia and some parts of Southern West Virginia, there is over 100 years of mining history and several degraded watersheds from a water quality point of view. During modern remining the pyritic material that is inherent in the coal is removed, while other toxic materials in the spoil or overburden can be selectively handled to avoid extensive contact with water.

Beaver Creek in Tucker County and Simpson Creek and Elk Creek in Central West Virginia are all excellent examples of watersheds that have benefited with improved water quality as a direct result of remining.

It is a consensus view that the watershed where remining takes place is "always" improved by the process. Therefore, remining is good for West Virginia and good for the Nation and every effort should be made to encourage it.

Senate Bill 287, passed by the West Virginia Legislature and signed by the Governor earlier this year, follows the legislative history noted above by again encouraging the practice of remining by simplifying the process of obtaining a "variance". The note found following the last paragraph in SB 287 while it was being considered stated:

“NOTE: The purpose of this bill is to authorize the environmental quality board to grant site specific variances for coal remining operations from the current water quality standards. Currently each variance is promulgated as a new legislative rule. This delays the permit process for one year.”

The Legislature clearly understood the value of remining to the environment and to the economy of the state. Therefore, the spirit and intent of SB 287 (see attachment B) was to establish a variance process which would be friendly to those coal operators who seek new permits on previously mined lands.

IV. OUR COMMENTS ABOUT THE PROPOSED LEGISLATIVE RULE:

On page 5, section 46-6-5.1:

Typographical error: In the middle of the paragraph the rule drafter accidentally placed the word “it”. This should be deleted.

On page 5, section 46-6-5.2:

Since one of the major purposes of SB 287 was to remove the Legislature from the routine process of granting variances, the words “and approved by the legislature” should be deleted.

On page 6, section 46-6-6.2.a. & b.:

Remining is encouraged any time any portion of the water quality can be improved. There is no language in the law requiring iron, manganese and pH to all be out of compliance with established water quality standards in order to get a remining variance. This should be an “or” test, not an “and” test requiring all three elements. There are certainly some locations where

the pH and iron are in compliance, but the manganese is not. Other sites might have pH and iron out of compliance, but manganese in compliance. Even the federal Clean Water Act fails to link the three individual standards to a single combined standard, as noted by the use of the word "or) in the Rahall Amendment to the federal Water Quality Act of 1987 (attachment D).

Therefore, 6.2.a & b. should read:

"a. the stream does not currently meet the applicable numeric water quality criteria for iron, manganese or pH;

"b. the remaining activity cannot be carried out in compliance with the numeric water quality standards for iron, manganese or pH; and"

On page 6, section 46-6-6.2c.:

The word "clearly" does not appear in SB 287. This is a new higher standard being imposed by the drafter of this rule. The word "clearly" must be deleted.

On page 7, section 46-6-6.3.h.:

The last sentence in the paragraph, beginning with the words "In addition...", is unfounded and unnecessary. The coal operator should not be required to provide the Board a cafeteria list of options for the Board to choose the option they like best. Usually all of the alternatives have been explored by the applicant while working with the NPDES permitting staff on the final form of the draft permit. The operator is actually only obligated to simply propose an abatement action plan that meets the standards and improves the water quality. Therefore that last sentence must be deleted.

On page 7, section 46-6-6.6:

In the sentence beginning "Such notice shall..." the drafter apparently intended to say "not less than thirty nor more than 60 days". Regardless, that period of time delays the permitting process. Remember, the Legislature wanted to avoid delays in remining permits. Therefore, the publication of such notices in the state register should be made:

"not less than ten days nor more than twenty days before the date of the public hearing."

And the language in the last paragraph should read"

"in a publication area in the same area where the proposed mine is located."

Also, it should be noted that the advertisement period should be configured to run concurrent with the NPDES Draft Permit announcements.

On page 8, section 46-6-6.10.:

Why is there a reference in this paragraph to the issuance of an "order"? The Board simply grants a variance and sends a written correspondence to the coal operator and the NPDES staff at DEP announcing the decision.

On page 8, section 46-6-6.11.:

The drafter has again imposed a higher standard than that imposed by the Legislature. SB 287 says "The board may not grant". The proposed rule says "The Board shall not grant". Any English student or legislative drafter knows that "may" is permissive and "shall" is mandatory. The Legislature established guidelines in SB 287, not hard and fast rules as written by this drafter. Therefore, we recommend "**may**" be inserted in lieu of "shall", just like it reads in SB 287.

U. SUMMARY:

Legislative intent was clear: ENCOURAGE THE PRACTICE OF REMINING COAL. This proposed legislative rule was not drafted to be as simple and encouraging as SB 287. We therefore recommend the amendments noted above be included in the final draft.

Remining's value has been clearly proven by the projects completed in the past and by the numerous permits where remining is currently taking place. The results of remining have been excellent.

We urge the Board to revisit the language of the proposed rule and improve it towards encouraging remining and making the application process simple.

(end of comments)



ATTACHMENTS THAT FOLLOW:

- A National Energy Act of 1992 (3 page excerpt)
- B SB 287 (3 pages)
- C Colombo Amendment, WV Code, 1983 (4 pages)
- D Water Quality Act of 1987 (Rahall Amendment , 2 page excerpt)
- E Buffalo Coal Company's current NPDES remining permit (14 pages)

BUFFALO COAL COMPANY, INC.

Main Office Phone
(304) 693-7642
Fax (304) 693-7374

P.O. Box 182
BAYARD, WEST VIRGINIA 26707



July 11, 1995

Ms. Libby Chatfield
Environmental Quality Board
1615 Washington Street, East
Charleston, WV 25311-2126

Dear Ms. Chatfield:

On behalf of Buffalo Coal Company, I wish to take this opportunity to submit certain comments to the proposed rule with respect to Title 46, Series 6, Procedural Regulations for the Revision of Water Quality Standards. It is my understanding this rule is intended to complement SB 287 - Remining; Buffalo is currently operating a Remining permit in Tucker County.

Our comments involve items found within Section 5 wherein the Board has the authority to grant a variance. These include:

- 6.1(a). - This item reads "...the stream does not currently meet the applicable numeric water quality criteria for iron, manganese, and pH". My interpretation of this leads me to believe the Board may not grant a variance if one of the three parameters does meet standards. There will be instances where a stream may not meet applicable criteria for iron and pH, but will meet criteria for manganese (or vice versa). Would such a situation preclude issuance of a variance? If so, the rule will not be much help with respect to remining.
- 6.3 - In this section, there are several items requested in the variance document which are duplicative of the NPDES Remining application. Specifically, items (a), (d), (e), (f), (g) & (h).
- 6.6 - - Not sure about the statement "...not more (?) than thirty days nor more than sixty days...". Also, could it not be arranged to advertise the variance application along with the NPDES application?

Buffalo appreciates the effort of the Board to arrive at a means to grant the variance as well as the opportunity to comment on this proposed rule. Should there be any questions concerning this brief submittal, feel free to call.

Sincerely,

Steve Shaffer
Steve Shaffer



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

FACSIMILE COVER SHEET

TO

Name: Libby Chatfield

Office:

Phone#: 304/558-4002

FAX#: 304/558-~~0899~~

4116

FROM

Name: Denise Penn Hakowski

Office:

Phone#: 215/597-6746

FAX#: 215/597-3359

ADDITIONAL COMMENTS:

This cover sheet is followed by a 5 page transmission

Vertical barcode or tracking information on the right edge of the page.

EPA Comments on
"Title 46 \ Procedural Rules \ Environmental Quality Board"
"Series 6 \ Procedural Rules Governing Site-Specific Revisions to
Water Quality Standards"

General Questions & Comments:

- (1) Is removing designated uses, granting variance from water quality standards, granting remaining variances and established site-specific numeric criteria considered promulgations/revisions of legislative rules?
- (2) §46-6-3 (3.1) & §46-6-4 (4.1) (4.2) (4.3), consider revising "removal of a designated use" to read "reclassification of a designated use" since when removing a designated use, some use must remain or be established.
- (3) Is W. Va. Code §29A-3-1 West Virginia's public notice requirements?
- (4) How do these procedures relate to the September 29, 1993, Division of Environmental Protection Policy Memorandum on Compliance Limits for Water Quality on Remaining Operations? What authority does the State have to implement a policy?
- (5) Will West Virginia be taking us up on the offer to meet the public review requirements for the coal remaining variance through the public notice of the permit?

§46-6-3

- (1) 3.1.b. ...
The use of "adequate" is vague.
- (2) 3.1.d. ...
How does West Virginia determine that a use is existing?
- (3) 3.1.f. ...
In addition to determining the average flow rate in a segment, the application should indicate if it is a flowing water segment, whether the stream is ephemeral, intermittent or perennial; and, if perennial, determine the appropriate design flow for aquatic life protection and for human health protection.
- (4) 3.1.g. ...
How will the aquatic life in the stream be assayed: benthos, water column, etc.?
- (5) 3.3.c. ...
How will the existing use be determined?

(6) 3.3.e.

Since the requested revision could also be denied, this section should be revised to read: "A brief abstract of the supportive documentation which demonstrates that the revision is appropriate, or inappropriate."

§46-6-4

- (1) 4.1
Will reclassification of designated used apply only to streams?
- (2) 4.2.a.
Should "criterion" be pluralized (criteria)?
- (3) There does not appear to be any requirement for the State to conduct a Use Attainability Analyses (UAA) when removing a designated use as is required in 40 CFR §131.10(j). The "information sheet" could serve the purposes of a UAA, but a section should be added to §46-6-4 which specifically states that the information sheet will include the physical, chemical and biological factors that, in the State's assessment, affect the attainment of the designated use.
- (4) Is there any particular reason why the State did not include the phrase "without violating State water conservation requirements" in §46-6-4, 4.1.c.? 40 CFR §131.10(g) (2) reads, "Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met."
- (5) The State should include the prohibitions for removing a designated use found in 40 CFR 131.10(h).

§46-6-5

- (1) 5.1 & 5.3
Change "numeric water quality standards" to "numeric water quality criteria".
- (2) The State does not seem to require the following conditions that will make a variance acceptable to EPA: (1) Documentation that treatment more advanced than that required by Clean Water Act Sections 303(c) (2) (A) and (B) has been carefully considered, and that alternative effluent control strategies have been evaluated; (2) The discharger who is given a variance for one particular constituent is required to meet the applicable criteria for other constituents; (3) The discharger either must meet the

standard upon the expiration of the variance, or must make a new demonstration of "unattainability"; (4) Reasonable progress is being made toward meeting the standards; and (5) The public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.

§46 CSR 6

- (1) 6.1
"(R)emined areas of coal remining operations" seems redundant. Also, capitalize "division of environmental protection" and "Federal Water Pollution Control Act", although, the Federal citation "§301(p) of the Clean Water Act" is more appropriate.
- (2) 6.2.a. and 6.3.f.
These conditions infer that all three parameters (iron, manganese, pH) must not be meeting water quality criteria in order to be eligible for a variance. It is possible that a good potential remining site may have only iron and pH problems and that the manganese does meet criteria. Perhaps the condition should be reworded by changing "and" to "or."
- (3) 6.2.b.
This section is ambiguous. As written, we assume that this condition means that the remining activity can not be carried out without causing or contributing to a water quality standards violation of the receiving stream. Please provide the State's interpretation.
- (4) 6.3.g.
Is the alternative water quality criteria requested by the applicant:
 - remining discharge criteria,
 - the instream criteria after mixing, or
 - one in the same?
- (5) This subsection does not include a section entitled "Amendment of 46 CSR 1". They are considering remining variances as revisions to 46 CSR 1, Requirements Governing Water Quality Standards, aren't they? (From our April 7, 1995 draft letter: "Based on this regulation, EPA Region III would consider each coal remining variance as a change to West Virginia's water quality standards, subject to EPA's review and approval.")
- (6) To Section 6.11.c., I would add "In the event that the Board determines that degradation of the existing instream water quality will result from the remining operation."
- (7) Somewhere (the NPDES application requirements would be appropriate) the State should ask for certification that the

proposed coal remining operation will be confined to the remining area. The State should also assure that they have the authority to request the extensive Baseline Sampling Data that is described in the 9/29/93 Policy (the Baseline Sampling Data will be needed to support 6.3.g. "The alternative numeric water quality criteria for iron, manganese and pH requested by the applicant").

(8) Other information that may be helpful to the State when making a determination that a discharger is eligible for a coal remining variance:

(a) Plans, cross-sections, and schematic drawings describing the techniques for handling acid-forming materials to reduce the discharge of acidity, iron and manganese.

(b) A description of the range of abatement levels that probably can be achieved, costs, and each step proposed to reduce the discharge of acidity, iron, and manganese.

(c) A description of the spoil handling practices necessary to reduce the discharge of acidity, iron, and manganese.

(d) A detailed topographic map of the proposed coal remining operation, including the locations of the preexisting and proposed discharges.

(9) In Section 6.2, it states that the Board may grant variance if it finds that all of the requirements of "this rule" have been met. Would this include a determination that one of the conditions outlined in section 4.1 -f apply, and that that condition would be identified in the public notice?

§46-6-7

- (1) 7.1
Is this limited to only streams or stream segments?
- (2) 7.2.b. & 7.2.c
Change "Water Effects Ratio" to "Water Effect Ratio", in all instances.
- (3) In section 7.2.b., the State should either specify that this is the February 1994 version of the Water Effects Ratio interim guidance, or somehow certify that any subsequent versions of this document would also be valid for use.
- (4) The procedures should indicate whether or not a discharger could also use the Recalculation Procedure, and whether or not a discharger could use a Recalculation in combination with a WER.

- (5) Considering the relative expense of preparing a WER, shouldn't a discharger contact the Board prior to beginning the WER process, to assure the Board agrees with how they plan to go about the process?

Typographical Errors:

\$46-6-4, 4.1.d., should read, "...cause more environmental damage to correct than to leave in place;"

\$46-6-4, 4.1.f., should read, "Physical conditions related to the natural features of the..."

\$46-6-5, 5.3.c., should read, "Identification of the criterion outlined in section 4.1 a-f above which render..."

\$46-6-7, 7.2.b., add quotation marks to read, "...the procedures outlined in EPA's "Interim Guidance on the Determination..."



LEAGUE OF WOMEN VOTERS OF WEST VIRGINIA

6128 GIDEON RD • HUNTINGTON, WV 25705 • TELEPHONE 304-736-3287

July 11, 1995

To: Environmental Quality Board
Attention: Libby Chatfield

From: Helen Gibbins, League of Women Voters

Re: Series 6, Procedural Rules Governing Site-Specific Revisions
to Water Quality Standards

The League of Women Voters of West Virginia wishes to make a comment on the procedural rules.

1) Under 46-6-2.2, the public hearing should be held well in advance of the expiration of the public comment period. Persons can thus hear questions and comments at the hearing to help formulate their official comments.

2) Under 46-6-2.3, if the rule a has strong bearing on a certain locality, documents should be available for examination at a local library or courthouse.

3) Under 46-6-3, 4, 5, 6, 7, information (application, information sheet, reports, documents, and data) pertaining to removal of a designated use, a variance, or a site-specific numeric criterion, should be available for examination at the local library or courthouse, nearest to the affected water body. Any hearing which affects mainly a certain location, should be held in that area.

To ensure public participation, it is most important that public documents and hearings be easily available to those who live in the affected community. Interested persons should not have to drive long distances to review documents or to attend public hearings.

Helen Gibbins

RECEIVED

ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA



west
virginia
highlands
conservancy

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

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

Handwritten notes and signatures in the top right corner, including a signature that appears to be "D. Jenkins" and some illegible text.

July 20, 1995

Charles R. Jenkins, Chairman
Environmental Quality Board
1615 Washington Street, East
Charleston, WV 25311-2126

RE: Proposed 46 CSR 6-6
(Remining Variances)

Dr. Jenkins and Board Members,

As Mining Chair of the W.V. Highlands Conservancy (WVHC), I submit the following summary of my oral presentation at the public hearing July 18, 1995 with regard to the proposed rules governing the Board's authority to grant variances from numeric water quality standards for remining activities (46 CSR 6-6).

As I stated at the public hearing, WVHC considered the Board's existing variance procedures sufficient for the purposes of the coal industry in applying for remining permits. However, the WV Legislature saw fit to enact S.B. 287 which created an abbreviated process for allowing variances for a specific set of mining permits (WV CODE 22B-3-4(c)).

WVHC is pleased that during the legislative session the Board insisted that any remining legislation affecting the Board's responsibilities for setting water quality standards remain limited in scope and consistent with the intent of the remining provisions of 301(p) of the Clean Water Act (CWA), better known as the RAHALL AMENDMENT (33 USC Section 1311(p)).

In keeping with the Board's desire to allow industry and the DEP permitting agency the flexibility they requested and still remain consistent with the CWA, WVHC recommends the following changes to the proposed rule to better reflect RAHALL.

1. 46 CSR 6-6.2 correctly allows the Board to grant a variance only after finding the application meets all the requirements of this rule, WV CODE 22B-3-4, and the Coal Remining Policy issued by WV on 9/30/93. However, the list should also include reference to the requirements of the RAHALL AMENDMENT as well. State Code, and even more readily, state policies may be changed in spite of the existence of Section 301(p) of the Clean Water Act. To avoid confusion in such circumstances, reference to the appropriate section of the CWA is a must.

2. 46 CSR 6-6.2.a. The Board correctly assumes its variance authority is limited to in stream water quality standards rather than effluent limits, but in this section it is appropriate and necessary for the Board to evaluate the quality of the discharge as well as the stream before granting instream variances.

The problem arises when the stream IS NOT currently meeting the specific applicable water quality criteria (due, say, to some other upstream influence) but the pre-existing discharge from the old mined area IS NOT BAD. RAHALL does not allow for any special consideration in that instance; the proposed rule, however, does. Adding the words "pre-existing discharge and" before the word "stream" would, I think, eliminate this problem.

On the other hand if the stream IS meeting applicable criteria and the discharge IS BAD, a variance to water quality standards is not necessary, and in fact not allowable. I am presuming Section 6.11.c. of the Prohibitions Provisions satisfies RAHALL and precludes variances in that circumstance.

The remaining scenario is a stream that IS NOT meeting standards, and the pre-existing discharge IS BAD as well. In that instance a variance can be granted (hence the additional words suggested previously) but only if it satisfies three basic conditions: 1) the stream cannot be made any worse by the discharge (6.11.c.), 2) there is a potential for the remining operation to improve instream water quality (6.11.b.), and 3) the operation will improve stream quality as much as possible using the BEST available technology economically achievable (6.11.a.).

3. 46 CSR 6-6.3.f. The demonstration by the applicant should also include the quality of the pre-existing discharge as well as to the water quality of the stream. (See rationale for 2, above.)

4. 46 CSR 6-6.3.g. The application should contain not only the alternative numeric water quality criteria requested, but also some showing that those criteria will neither degrade the stream, nor allow discharge levels of pollutants to exceed those of the pre-existing discharge.

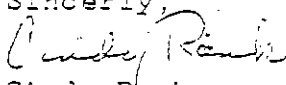
5. 46 CSR 6-6.3.h. The proposed language is good as far as it goes, but should go even further. The applicant should not only be required to provide information about other abatement actions considered, but should also provide some sort of showing of why the chosen action is not just preferred, but is indeed the BEST available technology economically achievable. Perhaps reference to EPA or other reliable guidance documents about BAT's etc. would be appropriate.

6. 46 CSR 6-6.10 Decisions on remining variance applications should also be forwarded to interested members of the public, e.g. those who commented on the applications, or those who previously asked to be notified about specific applications, or about all applications for remining variances, etc.

7. 46 CSR 6.11 If changes outlined above in comments 4. and 5. above are not deemed appropriate for inclusion in Section 6.3 g. and h., then similar provisions should be spelled out in 6.11 to flesh out the language S.B. 287, i.e. WV CODE 22B-3-4(c).

8. 46 CSR 6.11.c. The Board should not be required to determine that the instream water quality WILL be degraded by a proposed operation in order to deny an application. The applicant must demonstrate to the satisfaction of the Board that the operation will not degrade the stream. If the Board is in doubt, it should be able to deny the application. i.e. If the Board determines that degradation MAY result, it is prohibited from granting the variance. The word "will" should be changed to "may" in 6.11.c.

Thank you for your interest in our comments and for the opportunity to discuss these issues further if you have any questions or wish any additional information or clarification. I can be reached at the address and phone numbers listed below.

Sincerely,

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

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

Response Summary
46 CSR 6
Procedural Regulations for the Revision of Water Quality Standards

Introduction

The Environmental Quality Board filed a notice of public hearing and comment period on proposed changes to this rule on June 16, 1995. A public hearing was held on July 18, 1995 at 7:00 p.m. and the public comment period was closed on July 20, 1995. Comments were filed by US Environmental Protection Agency, Region III, West Virginia Highlands Conservancy, Buffalo Coal Company, Ohio Valley Environmental Coalition Appalachian Power Company, West Virginia Manufacturers Association, West Virginia League of Women Voters and West Virginia Mining and Reclamation Association. The following is a summary of the proposed rule, the comments received on the proposed changes and the Board's responses to those comments.

GENERAL COMMENTS

This rule was first promulgated in 1982 to establish procedures for persons seeking variances from or revisions to the numeric water quality standards found in 46 CSR 1, Requirements Governing Water Quality Standards, which are promulgated by this Board. During the Board's most recent triennial review of the water quality standards, several amendments were made regarding the categories of "variances". Site specific numeric criteria, variances and use designation changes are three ways that an interested party may seek a waiver from the application of numeric standards. The majority of the amendments in this procedural rule are proposed to provide consistency with the new provisions in the water quality standards.

In addition the 1995 legislature passed an amendment to the WV Code 22 (HB287) which establishes alternative procedures for granting variances from water quality standards for iron, manganese and pH for remaining activities.

SECTION 46-6-1. General

This section includes provisions outlining the scope and purpose of the rule and the statutory authority for establishing the rule. The purpose of the rule is to establish procedures to be followed by the Board and applicants for site-specific water quality standards, which include variances, remaining variances, site-specific numeric criteria and removal of designated uses.

Comments and Responses

No comments received.

Board Action

Section adopted as proposed.

SECTION 2

This section establishes requirements for the Board for all revisions of the legislative rules it is authorized to promulgate. These requirements apply to amendments proposed as a result of an application for a variance, with the exception of remaining variances, or those proposed as a result of the triennial review.

This section incorporates by reference the requirements for rulemaking found in the State Administrative Procedures Act ("APA") (WV Code section 29A-3-1). In addition the provisions in the APA, the rule provides for a mandatory public hearing to be held on proposed changes prior to the expiration of the public comment period established by the Board.

Comments Received.

One comment was received on this section, requesting that the public hearing be held well in advance of the expiration of the public comment period to provide ample time to respond to issues discussed at the hearing.

46-2-3. One commenter suggested that if a rule has a strong bearing on a certain locality, documents should be available for examination at a local library or courthouse. This comment was extended to other sections of the rule, including applications, information sheets, reports and other data that might be available for review.

In addition to the comments received, the Board identified a typographical error in section 2.1. The first sentence of that section should be changed to read as follows: "Except as provided in section 6 herein, all revisions to the Board's legislative rules (46 CSR 1 and 46 CSR 12) shall be made in accordance with the provisions of W. Va. Code section 29A-3-1 et seq."

Board Response.

The Board recognizes the benefits of having the public hearing in advance of the close of the comment period, to provide those who attend the hearing an opportunity to review and respond to issues raised at the hearing. We agree with the commenter that there is value in such scheduling and will make every effort to do so in the future. However, because of the difficulty of coordinating the schedules of five citizen members to ensure that a quorum is available for a meeting the Board declines at this time to include such a scheduling requirement in this rule.

The Board agrees that making the documents available to a broad audience is of great value. We will begin such an effort at the next possible opportunity. The Board will review the

success of such a program and will consider amending the rule at a later time to a requirement for such distribution.

Board Action

The Board amended the rule to correct the typographical error identified in section 2.1.

SECTION 3

This section provides general requirements for site-specific revisions to 46 CSR 1.

Comments Received.

US EPA Region III provided a number of comments on this section. Regarding section 3.1, they provided a reminder that each reclassification of a designated use or granting of a variance must be supported by a Use Attainability Analysis (UAA), which must be submitted to EPA for review because such reclassification is considered an amendment to water quality standards. On section 3.1.b. EPA suggested that the minimum data requirement for applicants seeking use removals and criteria changes, and offered to work with us on general guidance in that area.

Concerning sections 3.1.d. and 3.3.c. EPA requested clarification on how existing uses are defined. On section 3.1.f. EPA suggested that more flow information is necessary; ie: whether there is flowing water in a segment and whether the stream is perennial or ephemeral. And finally, regarding section 3.3.e. EPA suggested revising the section to read "a brief abstract of the supportive documentation which demonstrates that the revision is appropriate or inappropriate"

Board Response

The Board agrees with EPA's comment regarding the requirement for a Use Attainability Analysis to be prepared when reclassifying a designated use and issuing a variance. To address the comment, the Board will amend sections 4 and 5 to include the reference to the federal requirement for the UAA.

As EPA suggests, clarification for how existing uses will be defined will be included in the guidance on antidegradation implementation that is currently under development, rather than this rule.

The Board agrees with EPA's comment on section 3.1.f. regarding information on providing information regarding whether a stream is perennial, ephemeral or intermittent and will amend the rule to reflect that requirement.

Board Action

The Board proposes the following amendments to respond to the comments above:

Amend section 3.1.f to read as follows: "The average flow rate in the segment, the amount of flow at a designated control point and a statement regarding whether the flow of the stream is ephemeral, intermittent, or perennial."

See sections 4 and 5 for amendments regarding the UAA requirement.

SECTION 4.

This section describes the requirements and procedures for removal of a designated use.

Comments received

EPA questioned the fact that the language in 4.1.c. does not include the bold language in the following sentence: "Natural, ephemeral intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges **without violating State water conservation requirements** to enable uses to be met." They indicate that the missing language in our rule is in the federal rule at 40 CFR 131.10(g)(2).

The EPA also identified a typographical error in section 4.1.d and suggested correcting it by amending that section to read "...cause more environmental damage to correct than to leave in place". Regarding an additional typographical error, EPA suggested amending section 4.1.f to read as follows: "Physical conditions related to the natural features of the ..."

EPA also suggested that "removal" be changed to "reclassification".

Board Response

This rule was drafted using the language in the States Water Quality Standards Rule (46 CSR 1). While the language in that rule closely mirrors the federal rule cited above, the bold language is not included in the WQS rule. The Board will review that language in the upcoming triennial review of 46 CSR 1, and if appropriate, will update the state rule to be consistent with the federal rule. At that time, a change in this rule will also be considered.

The Board agrees with EPA's suggestion regarding the use of the term "reclassification" rather than "removal" of a designated use.

Board Action

The Board will amend the rule to correct the typographical error in sections 4.1.d and 4.1.f and will change "removal" to "reclassification" wherever it occurs in this section.

SECTION 5

This section provides requirements for variances from water quality standards requested pursuant to 46 CSR 1 section 8.3.

Comments received.

Several commenters identified typographical error in section 5.1.

Regarding section 5.2, one commenter suggested deleting the words "approved by the legislature" in this section because the remaining bill obviates the need for legislative review.

EPA suggested including a requirement that upon the expiration of a variance, that each variance must be resupported by a demonstration that the circumstances which lead to the original issuance still apply.

Board Response

Regarding the comment on section 5.2 regarding the need for legislative review, this section deals only with "non-remaining" variances, which are reviewed by the legislature, therefore is appropriate in this section.

The Board agrees with EPA's comment and will amend the rule to include their suggestion.

Board Action

Amend section 5.1 to read "Upon receipt of an application the Board may approve a variance from numeric water quality standards if it determines that the conditions outlined in section 4.1 a-f above, limit the attainment of one or more specific water quality criteria."

Amend Section 5.2 by adding the following sentence at the end of that section: "Each variance must be resupported upon review by the Board by a demonstration that the circumstances which lead to the original issuance still apply."

SECTION 6

This section provides requirements for variances from numeric water quality standards for remaining activities.

Comments received.

One comment received on sections 6.2 a and b suggested changing "iron, manganese and pH" to "iron, manganese or pH". EPA suggested amending section a to read "the stream does not currently meet the applicable numeric water quality criteria for iron, manganese or pH due to abandoned mine drainage".

Regarding section 6.2.c., one commenter indicated that the word "clearly" is not in the language of SB 287, and therefore should be deleted in this section, which is a reiteration of the language of the bill.

Regarding section 6.3.f., one commenter requests that the demonstration by the applicant should also include the quality of the pre-existing discharge as well as the preexisting water quality of the stream.

Regarding section 6.3.g., one commenter suggested that the application should contain not only the alternative numeric water quality criteria, but also a showing that those criteria will neither degrade the stream, nor allow discharge levels of pollutants to exceed those of the pre-existing discharge. EPA suggested changing the wording of this section to "The alternative numeric water quality criteria for iron, manganese or pH **in the receiving stream** requested by the applicant"

Regarding section 6.3.h., one commenter requests deletion of the requirement that the applicant provide information about other abatement actions considered and why the chosen abatement action is preferred. Another commenter indicated that in addition to the requirement for justification for the chosen abatement action, that the applicant should demonstrate that the chosen abatement action is not only preferred, but that it is the best available technology economically achievable. That commenter suggests reference to EPA guidance documents on BAT's.

On section 6.6. commenters noted that the language in this section regarding the public notice required of the public hearing should read "not less than 30 nor more than sixty days". That commenter also suggested a shorter time period of "not less than 10 nor more than 20 days before the date of the public hearing.

A comment received on section 6.10. questioned the need for the issuance of an order granting the variance and suggests that the "Board simply grants a variance and sends a written correspondence to the coal operator and the NPDES staff at DEP announcing the decision."

Another commenter suggested that decisions on remining variance applications should also be forwarded to interested members of the public, including those commenting during the public comment period and anyone previously requesting to be notified of such decisions.

Regarding section 6.11.c., one commenter indicated that the Board should not be required to determine that the instream water quality will be degraded by a proposed operation in order to deny an application. The applicant must demonstrate to the satisfaction of the Board that the operation will not degrade the stream; if the Board is in doubt they should be able to deny the application. Another commenter indicated that the language of this section should read the Board "may not grant" rather than "shall not grant". EPA suggested amending this section to read "In the event that the Board determines that degradation of the **existing** instream water quality will result from the remining operation."

Board Response

The Board agrees with the suggestions that "iron, manganese and pH", be changed to "iron, manganese or pH" in all sections of the rule.

Regarding section 6.2.c, the Board agrees that the word "clearly" should be deleted because it is not in the language of SB 287.

Regarding the comment on section 6.3.f, there is a requirement for providing information on existing levels of iron, manganese and pH in section 6.3.e, therefore that requirement is unnecessary in section 6.3.f.

Regarding the comment on section 6.3.g., the Board feels that that information is covered in section 6.3.h, and that there is no need to add it in this section. The Board agrees with EPA's suggested change in section 6.3.g..

Regarding section 6.3.h, the Board agrees that the applicant should provide information indicating that the chosen abatement action is the best available technology economically achievable; this requirement is specifically identified in SB 287.

The Board agrees with the amendment suggesting correction of the typographical error in section 6.6. and will change the section to read: "not less than 30 nor more than 60 days." The Board does not agree with the suggestion that the time period for public comment be shortened.

On section 6.10, it is the Boards position that the decision on the variance must be communicated in a clear and relatively formal manner. The Board believes that the issuance of an order serves this purpose. Regarding the comment that the order should be forwarded to other interested members of the public, the Board agrees, and will amend the rule to reflect that anyone requesting a copy of an order on a remining variance will be provided a copy.

On section 6.11.c, the Board agrees that the wording in should be "may", rather than "shall" to be consistent with the language of the SB 287. Regarding the comment that the Board should not be required to determined that the instream water quality will be degraded by a proposed operation in order to deny an application, the language in the rule reflects the language adopted in SB 287. This is not intended to be the only basis for denial of a variance, and it is included in the rule as written in the bill.

Board Action

The Board has amend the rule to reflect the changes identified in each section above.

SECTION 7

This section provides requirements for application for a site-specific numeric criterion.

Comments Received

EPA provided several comments on this section. They suggested that the term "Water Effects Ratio" should be "Water Effect Ratio"; and they identified an additional typographical error in section 7.2.b.

They also indicated that the rule should indicate whether or not a discharger could also use the Recalculation Procedure or a combination of that procedure with a Water Effect Ratio. Finally, they suggested a statement indicating that anyone seeking a site-specific numeric criterion should contact the Board and EPA prior to beginning the WER process, so that both agencies would have the opportunity to provide input into the development of the WER.

Board Response

The Board agrees with all of the suggestions provided by EPA.

Board Action

The Board will amend this section by correcting the typographical errors identified above. Further the Board will amend section 7.2.b. to read: "...or any other method for which the applicant has obtained prior approval from the Board, including EPAs Recalculation Procedure;"

The Board also will amend section 7.1 by adding the following sentence at the end of that section "Applicants for site-specific numeric criteria must contact the Board to receive approval of any Water Effect Ratio plan or plans for any other method for developing a site-specific criterion prior to implementing any such plan."



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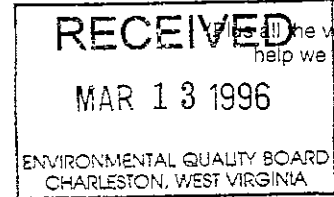
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Please all the volunteer help we can get)

TO: Libby Chatfield

AGENCY: Enviromental Quality Board

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: March 11, 1996

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 6 TITLE: 46 Enviromental Quality Board

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: Libby Chatfield

TITLE OF PERSON SIGNING: Technical Advisor, EQB

DATE: March 27, 1996

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.