

FILED

<p style="text-align: center;"><b>WEST VIRGINIA SECRETARY OF STATE KEN HECHLER ADMINISTRATIVE LAW DIVISION</b></p> <p>Form #2</p>	<p>Do Not Mark In This Box</p> <p>APR 8 11 43 AM '96</p> <p>OFFICE OF WEST VIRGINIA SECRETARY OF STATE</p>
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**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: Environmental Quality Board TITLE NUMBER: 46

RULE TYPE: Procedural; CITE AUTHORITY WV Code §§22B-3-4 and 29A-3-3

AMENDMENT TO AN EXISTING RULE: YES X NO         

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Procedural Rules Governing Site-Specific Revisions to Water Quality Standards

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:         

TITLE OF RULE BEING PROPOSED:         

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES.

THIS COMMENT PERIOD WILL END ON May 10, 1996 AT 4:00 PM

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Environmental Quality Board

1615 Washington St. East

Charleston, West Virginia 25311

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

*Alison Crankle*

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

5.00

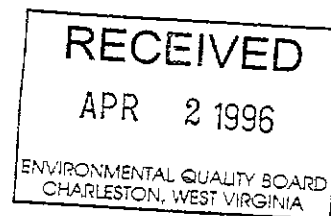


BUREAU OF ENVIRONMENT  
10 McJunkin Road  
Nitro, WV 25143-2506

GASTON CAPERTON  
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.  
COMMISSIONER

April 1, 1996



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

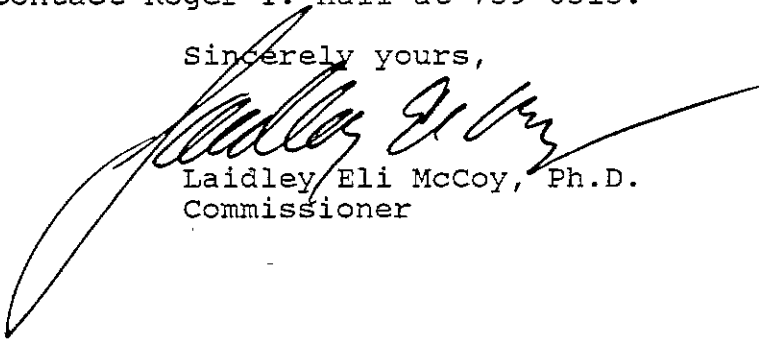
RE: 46-CSR-6 - "Procedural Rules Governing Site-  
Specific Revisions to Water Quality  
Standards"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing of the above-captioned rule as a modification to an existing procedural rule with your Office.

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:cc

Attachment

### Summary of Proposed Changes to 46 CSR 6

- Add the following language at the end of section 3.1(f): "and a statement regarding whether the flow of the stream is ephemeral, intermittent or perennial;"
- Change the words "removal of a designated use" to "reclassification of a designated use" throughout the rule.
- Add the following as section 4.2(d): "Any other information required in order to comply with the requirements of 40 CFR 131.10 (j), regarding conducting a Use Attainability Analysis."
- Add language to section 5.2 indicating that need for existing variances must be resupported every three years.
- Change the words "iron, manganese and pH" to "iron, manganese or pH" throughout the rule.
- Removal the word "clearly" from section 6.2(c).
- Include in section 6.3(h) a requirement to provide supporting information to show why the method adopted is the best available technology economically achievable.
- In section 6.11, change the word "shall" to "may" to be consistent with West Virginia Code section 22B-3-4(c).
- Add to section 7.1 a provision making clear that the Board must approve any testing protocol for a site-specific numeric criterion before it is employed.
- Add the following at the end of section 7.3(b): "or any other method for which the applicant has obtained prior approval from the Board including USEPAs Recalculation Procedure;"
- Correction of several typographical errors in the rule.

### Statement of Circumstances Which Require Amendments to 46 CSR 6

On June 15, 1995, the Board proposed a new version of 46 CSR 6 to replace the existing rule which had been in place since 1982. The Board provided the required statutory notice of the proposed rule and held a public comment period and public hearing on the rule in accordance with the requirements of West Virginia Code section 29A, et seq. On January 19, 1996, the Board submitted a final version of this rule to the Office of the Secretary of State along with a rationale document which indicated that several changes had been made to the proposed rule based on comments received during the hearing and public comment period.

In the version of the rule which was filed with the Office of the Secretary of State on January 19, 1996, the changes that the Board intended to make to the proposed rule were inadvertently omitted from the text of the rule. At this time the Board is proposing amendments to the rule which correct the omissions and make the text of the rule consistent with the Board's intent as stated in the rationale document.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 46 CSR 6. Procedural Rules Governing Site-specific Revisions to Water Quality Standards

Type of Rule:  Legislative  Interpretive  Procedural

Agency Environmental Quality Board

Address 1615 Washington Street East  
Charleston, West Virginia 25311

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ 00	\$ 00	\$ 00	\$ 00	\$ 00
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

The proposed amendments to the rule make corrections and clarifications which will have no anticipated fiscal impact.

3. Objectives of these rules:

The rule establishes procedures for seeking revisions to applicable state Water Quality Standards. The amendments proposed include revisions which clarify the intent of the rule but which will not have a fiscal impact when implemented.

Rule Title: 46 CSR 6. Procedural Rules Governing Site-specific Revisions to Water Quality Standards

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

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

None

C. Economic Impact on Citizens/Public at Large.

None

Date: April 8, 1996

Signature of Agency Head or Authorized Representative

*Tibby Chaffed*

Technical Advisor

TITLE 46  
PROCEDURAL RULES  
ENVIRONMENTAL QUALITY BOARD

FILED

APR 8 11 43 AM '96

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 reclassifying 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.

**§ 46-6-2 Revision of Legislative Rules**

2.1. Statutory requirements. Except as provided in section 5 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 §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 reclassification 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 segments 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 and a statement regarding whether the flow of the stream is ephemeral, intermittent or perennial;
- 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 Reclassification of a designated use.**

4.1. Circumstances allowing removal reclassification of a designated use. The Board may propose the removal reclassification 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 than 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 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.

4.2. Application. Any person seeking the reclassification 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.

d. Any other information required in order to comply with the requirements of 40 CFR 131.10(j), regarding conducting a Use Attainability Analysis.

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~~ reclassification is warranted, the Board shall propose the use ~~removal~~ reclassification 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. Each variance must be resupported upon review by the Board by a demonstration that the circumstances which lead to the original issuance still apply.

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

g. The alternative numeric water quality criteria for iron, manganese and or pH in the receiving stream 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, and supporting information explaining why the chosen abatement action is the best available technology economically achievable.

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 reming variance is warranted.

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

6.6. Public hearing on reming variance. Upon a decision by the Board that the requested reming 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 less 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 remining variance application in one hearing.

6.10. Decision on remining variance application. Upon review and deliberation of all of the information available on a remining 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~~ may 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 existing 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. Applicants for site-specific numeric criteria must contact the Board to receive approval for the use of any plan for a Water Effect Ratio, Recalculation Procedure or any other method for developing a site-specific numeric criterion, prior to carrying out any provisions of such plan.

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-Effect Ratios for Metals" or any other method for which the applicant has obtained prior approval from the Board including USEPA's Recalculation Procedure; 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.

46-6-96.WPD