

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Do Not Mark In This Box

FILED

Nov 7 4 07 PM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Form #5

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

AGENCY: Environmental Quality Board TITLE NUMBER: 46

CITE AUTHORITY WV Code §§22B-3-4 & 29A-3A-9

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW _____

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: _____

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

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE.

THE EFFECTIVE DATE OF THIS RULE IS _____, 1996

Dec. 9, 1996

Elizabeth M. Chappell

Authorized Signature

Technical Advisor

280



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

GASTON CAPERTON
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

October 23, 1996

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

RE: 46CSR6 - "Procedural Rules Governing Site-
Specific Revisions to Water Quality
Standards"

Dear Ms. Cooper:

This is to advise you that I am giving approval for final filing and adoption of the above-referenced procedural rule with your agency.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Libby Chatfield at 558-4002.

Sincerely yours,

Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

RECEIVED
OCT 23 1996
ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA
OCT 24 1996
RECEIVED
ENVIRONMENTAL QUALITY BOARD

FILED

Nov 7 4 07 PM '95

TITLE 46
PROCEDURAL RULES
ENVIRONMENTAL QUALITY BOARD

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 reclassifying designated uses, granting variances from water quality standards, granting variances for remining 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. November 6, 1996

1.5. Effective Date. November 18, 1996

§ 46-6-2 Revision of Legislative Rules

2.1. Statutory requirements. 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 §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 or 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. Reclassification of a designated use.

4.1. Circumstances allowing reclassification of a designated use. The Board may propose the 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 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, requested in writing by the Board that is 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 reclassification is warranted, the Board shall propose the use 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 criteria 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.

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. At the time of the Board's review the discharger must either meet the standard or make a new demonstration of unattainability.

5.3. Application. Any person seeking a variance from numeric water quality criteria 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 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 or pH;
- b. the remining activity cannot be carried out in compliance with the numeric water quality standards for iron, manganese or pH; and
- c. the coal remining operation will 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, manganese or pH 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 or pH;
- g. The alternative numeric water quality criteria for iron, manganese 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 remining 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 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 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 remaining 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 may not grant a variance from water quality standards for remaining 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 Effect Ratio study conducted pursuant to the procedures outlined in the February 1994 version of EPA's "Interim Guidance on the Determination and Use of Water-Effect Ratios for Metals" (or any subsequent version of that guidance in effect at the time of the proposal) or any other method for which the applicant has obtained prior approval from the Board including USEPAs Recalculation Procedure; and

c. An explanation of how the results of the Water Effect 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.

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

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

APR 1 1996

Dear Ms. Chatfield:

The U.S. Environmental Protection Agency (EPA) has reviewed the amendment to "Procedural Regulations for the revision of Water Quality Standards", Series Number 6, adopted on February 2, 1996. As a result of our review, we have the following comments:

Comments:

§46-6-3

- 3) 3.1.b.
It would be useful to more fully define minimum data requirements for discharges seeking use and criteria changes. EPA would be pleased to work with West Virginia on any general guidance or on specific cases.

§ 46-6-5

- 1) 5.1 & 5.3
Change "numeric water quality standards" to "numeric water quality criteria". The applicant would receive a variance for the water quality criteria, not a variance for the Water Quality Standard.
- 2) The State does not seem to require the following conditions necessary for approval by 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 the 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. We request that you clarify how these procedures relate to the September 29, 1993, Division of Environmental Protection Policy Memorandum on compliance Limits for Water Quality on Remining Operations and identify the authority that the State has to implement and enforce the policy.
2. We would like an explanation of the process and timing that West Virginia will use to meet the public review requirements for the coal remining variance and the associated NPDES permit.
3. This subsection does not include a section entitled "Amendment of 46 CSR 1." Are remining variances considered as revisions to 46 CSR 1, Requirements Governing Water Quality Standards? EPA Region III would consider each coal remining variances as a change to West Virginia's Water Quality Standards, subject to EPA's review and approval.
4. Somewhere (the NPDES application requirements would be appropriate) the State should ask for certification that the proposed coal remining area will be confined to the remining area. The State should also assure that they have the authority to request the extension Baseline Sampling Data that is described in the September 29, 1993 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).
- 5) Other information that may be helpful to the State when making a determination that a discharge 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.

6) 6.1

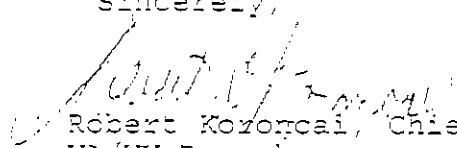
Change "Federal Water Pollution Control Act" to the
citation "§301(p) of the Clean Water Act."

§46-6-7

In section 7.2.b., the State should either specify that
this is the February 1994 version of the Water Effect
Ratio (WER) interim guidance, or somehow certify that
any subsequent versions of this document would also be
valid for use.

If you should have any questions concerning these comments,
please contact Carol Ann Gross at (215) 597-6539 and after May
20th at (215) 566-5738.

Sincerely,


Robert Koronca, Chief
VA/WV Branch
Office of Watersheds

May 9, 1996

Ms. Libby Chatfield
Environmental Quality Board
1615 Washington St. East
Charleston, West Virginia 25311



VIRGINIA POWER

RE: PROCEDURAL RULES GOVERNING SITE-SPECIFIC REVISIONS TO WATER
QUALITY STANDARDS (46 CSR 6) - COMMENTS ON PROPOSED AMENDMENTS

Dear Ms. Chatfield:

West Virginia's geography, geology and climate result in a variety of surface water types, each with its own unique chemical and physical characteristics. Similarly, wastewaters discharged by many of West Virginia's industrial and municipal facilities also vary significantly in their chemical and physical composition. Consequently, the water quality standards necessary to protect a stream segment or water body may vary significantly on a local, regional, and state basis, and regulations designed to protect water quality must allow for the consideration of such variation.

Virginia Power, therefore, strongly supports the Environmental Quality Board's (EQB) decision to allow for the derivation of site-specific numeric standards through the use of a Water Effects Ratio as proposed in §46-6-7.1. In addition, the language proposed for inclusion in §46-6-7.2.b. does not restrict a WER study design to that specified in the EPA's Interim Guidance on the Determination and Use of Water-Effect Ratios for Metals (Interim Guidance). We support this approach since the science is evolving, and it is likely that existing methodologies will change in the near future.

We are concerned, however, that the EQB has decided to address each site-specific standard derived through the use of a WER as an individual amendment to 46 CSR 6, Requirements Governing Water Quality Standards. The EPA's Interim Guidance very clearly offers the alternative procedure of handling each WER as a case decision through the public participation process required by the NPDES permit regulations. This alternative approach, which was recently proposed for use in Virginia's Water Quality Standards Regulation (see attachment), avoids the burdensome and unwieldy process of modifying a regulation each time a site-specific standard is determined, and helps to make use of the WER approach a viable and practicable option for both the permittee and state regulatory staff.

RECEIVED

ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

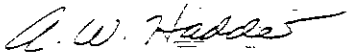
Ms. Libby Chatfield
May 9, 1996
Page 3

To address our concern we propose the following changes to the proposed regulatory language:

1. In §46-6-7.4. following "the Board shall propose the site-specific numeric criterion as an amendment to 46 CSR 1, Requirements Governing Water Quality Standard" insert the words "except as provided in 7.4.a. below."
2. Add a new section, §46-6-7.4.a., that contains language similar to that proposed by Virginia (see section F.2. attached).

Virginia Power appreciates the opportunity to provide you with these comments. Should you have any questions concerning their content, please contact Ken Roller of my staff at (804) 273-3494.

Sincerely,



A. W. Hadder
Manager
Environmental Policy and Compliance

Attachments :

KWR/jmk

↓

F. Water Effect Ratio1. Description

a. A Water Effects Ratio (WER) shall be determined by measuring the effect of receiving water (as it is or will be affected by any discharges) on the bioavailability or toxicity of a metal by using standard test organisms and a metal salt to conduct toxicity tests simultaneously in receiving water and laboratory water. The ratio of toxicities of the metal(s) in the two waters is the WER (toxicity in receiving water divided by toxicity in laboratory water = WER). Once an acceptable WER for a metal is established, the numerical value for the metal in VR680-21-01.14.B is multiplied by the WER to produce an instream concentration that will protect designated uses. This instream concentration shall be utilized in permitting decisions.

b. The WER shall be assigned a value of 1.0 unless the applicant or permittee demonstrates to the Board's satisfaction in a permit proceeding that another value is appropriate, or unless available data allow the Board to compute a WER for the receiving waters. The applicant or permittee is responsible for proposing and conducting the study to develop a WER. An appropriate study will require multiple testing over several seasons. The applicant or permittee shall obtain the Board's approval of the study protocol prior to beginning any study.

c. The Permit Regulation at VR680-14-01.2.6.C requires that permit limits for metals be expressed as total recoverable measurements. To that end, the study used to establish the WER may be based on total recoverable measurements of the metal(s).

2. WER is a Site Specific Standard

The Environmental Protection Agency views the WER in any particular case as a site specific standard. Nonetheless, the WER is established in a permit proceeding, and applies only to the applicant or permittee in that proceeding. The Board's action to approve or disapprove a WER thus is a case decision, not an amendment to the present regulation. The decision to approve or disapprove a WER shall be subject to the public participation requirements of the Permit Regulation, VR680-14-01.

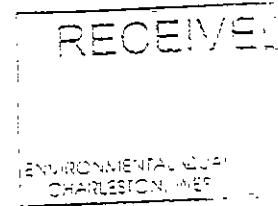
West Virginia Mining & Reclamation Association

1624 Kanawha Boulevard, East,
 (304) 346-5318

Charleston, West Virginia 25311
 FAX 346-5310



May 3, 1996



Dr. Charles Jenkins
 Chairman
 Environmental Quality Board
 1615 Washington Street, East
 Charleston, West Virginia 25311

Dear Dr. Jenkins:

In response to a notice of comment to be filed on or before May 10, 1996 to the proposed Procedural Rules Governing Site-Specific Revisions to Water Quality Standards, please consider these comments as being submitted by both the West Virginia Mining & Reclamation Association and the West Virginia Coal Association. Our combined membership accounts for most of the coal produced in West Virginia and also includes approximately 300 companies that are involved with the coal industry.

Our industry supported Senate Bill 287, which passed the West Virginia Legislature on March 11, 1995 and were encouraged that the Board would now have statutory authority to provide site specific variances for water quality for areas of coal remining. As the Board is no doubt aware, there is a long history of water quality improvements where current technology and modern day reclamation standards are carried out when remining previously abandoned areas. We generally endorse the procedural rule, but would offer the following suggested changes for efficiency.

1. The NPDES permit application is presently being revised with a recommendation that a remining module be included to meet the needs of the Environmental Quality Board.

OFFICERS

Benjamin C. Greene President	K. Donald Nicewander - Bristol VA Chairman	Wayne H. Stanley - Bridgeport Secretary
K.D. Damron Vice President	Markus J. Leed - Wheeling First Vice Chairman	William E. Broshears - Charleston Treasurer
James C. Justice, II - Beckley Second Vice Chairman	Daniel T. Pochirok - Bluefield Chairman - Associate Division	

DIRECTORS

J. W. Anderson - Princeton	D. E. Huffman - Bridgeport	K. G. Woodring - Huntington
K. J. Bealko - Clarksburg	P. F. Hutchins - Columbus OH	S. R. Young, III - Logan
D. L. Blankenship - Richmond VA	T. W. Hyton - Beckley	
R. B. Bolen - Beaver	P. A. Laskody, Jr. - Morgantown	HONORARY DIRECTORS
J. R. Bryan - Lebanon VA	R. L. Raines - Bluefield	C. E. Compton - Bridgeport
J. I. Campbell - Lebanon VA	G. W. Ramsburg - Morgantown	L. W. Hamilton, Jr. - Hansford
R. D. Cussins - Bayard	J. K. Skomare - Mt. Storm	J. C. Justice, Sr. - 1924-1993
B. E. Dearth, Jr. - Charleston	J. C. Smith - Charleston	F. B. Kutter, Sr. - Belle
D. R. Donell - Weirton	J. H. Wellford - Charleston	L. A. Streets - Mt. Storm
J. H. Harless - Gilbert	M. A. White - Logan	
D. R. Hibbs - South Charleston	J. C. Williamson - Charleston	

Dr. Charles Jenkins
Page 2
May 3, 1996

2. At the time the NPDES application is originally filed, the remaining module could, with all information required by the Board, automatically be forwarded for your consideration.
3. After permit review and a draft NPDES permit has been completed by the DEP regulatory permit writers, a joint public notice be given to the general public which would include the draft permit and the variance request satisfying the code requirements for both.
4. As a last step after the advertising time period has expired, the remaining NPDES permit would be issued with the Environmental Quality Board variance approval included.

I might note that when this legislation was first proposed, there was a general understanding that an efficient and accelerated permitting process would be included with the above-mentioned recommendations being made to reach that goal.

Should the Board wish to discuss this matter further or we can assist in any way to provide an accelerated permit and variance procedure, please feel free to be in touch.

Sincerely,



Benjamin C. Greene
President

CC: William Raney
Eli McCoy
Ken Politan
John Ailes

COMMENTS OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION
REGARDING 46 C.S.R. 6 PROCEDURAL RULES GOVERNING
SITE-SPECIFIC REVISIONS TO WATER QUALITY STANDARDS

I. Introduction

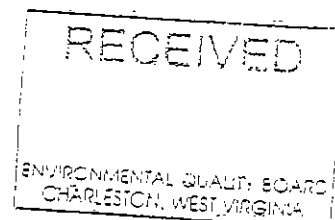
The West Virginia Manufacturers Association (WVMA) is an organization composed of over 200 businesses and organizations. The WVMA has a long history of commenting on environmental regulations, as such regulations have great effect on its members. Accordingly, WVMA offers the following comments on the procedural rules governing site-specific revisions of water quality standards, which were filed with the Secretary of State's Office on April 8, 1996.

II. Comments and Capital A Reclassification/Removal of a Designated Use.

A. Section IV - Removal/Reclassification of a Designated Use.

The Environmental Quality Board ("Board") is changing the reference from "removal of a designated use" to a "reclassification of a designated use." No explanation is given for the change, which does not appear to be driven by any similar change to water quality regulations at the federal level. This raises a question as to what the Board intends by the change. The term "reclassification" implies that the use remains, but is being categorized differently; this term is inconsistent with the concept of a use. Waterbodies may be reclassified based upon the water quality, the types of uses to which they are put, watershed, etc., but uses are different because they apply or do not apply to a waterbody. A stream is either used for agriculture or it is not; if it is not, the use can be removed.

The WVMA urges the Board to retain the reference to removal of designated uses, rather than referring to reclassifications of uses. In the alternative, the WVMA urges the Board to clarify what it intends by the term "reclassification."



B. Section 4.2.d Information Required For Removal/Reclassification of a Designated Use.

The Board will be requiring that an applicant for a use removal supply "any other information required in order to comply with the requirements of 40 C.F.R. 131.10(j), regarding conducting a Use Attainability Analysis." This is a reasonable request insofar as the applicant is aware of what information the State may be called upon to supply. However, because the Environmental Quality Board is in the best position to know what the State requires for purposes of its Use Attainability Analysis, the Board should have the burden of specifying information the application must contain rather than have the applicant speculate as to what the State requires.

The WVMA suggests that the Section 4.2.d be revised to read as follows: "any other information requested in writing by the Board that is required in order to comply with the requirements of 40 C.F.R. 131.10(j) regarding conducting Use Attainability Analysis."

C. Variances from Water Quality Standards.

Section 5.2 requires that each variance be reviewed by the Board at least once every three years, at which time it must be rejustified by the applicant. The proposed change to 5.2 would require that the variance be resupported "by a demonstration that the circumstances which led to the original issuance still apply." While the original circumstances may still apply, there might be other reasons equally or more compelling for continuing the variance. Consequently, the WVMA urges the Board to add the following phrase to the last sentence of Section 5.2: ". . . or other information sufficient to justify a variance under this section."

D. Section 7 - Justification for Site-Specific Numeric Criteria.

The language proposed for Section 7.1 would require an applicant who seeks to establish site-specific criteria to obtain approval for a water effect ratio, recalculation procedure, or other method

prior to carrying out that justification. The WVMA agrees that it would be helpful to have the Board review the applicants' site-specific criteria justification plan before it is implemented and effort wasted. Requiring approval by the Board before beginning the study, however, presents three problems. First, it raises the possibility that the Board could reject even those plans that fully meet the water effects ratio requirements set out in the Water Quality Standards Handbook and other EPA guidance. (Are there any due process protections that would apply to this action?) Second, in some cases, a justification for site-specific criteria will have been performed to determine whether such a proposal is feasible, before any formal application is made to the Board. In that event, the fact that the study was done prior to filing an application should not disqualify the applicant from using the results from that study. Third, this approach raises the potential for delays that would affect the timely filing of the permit application and issuance of the permit. Some protections would need to be incorporated into the procedure to ensure that these delays do not occur.

The WVMA urges the Board to change Section 7.1 to allow applicants to submit plans to the Board for its approval prior to implementation. This would allow applicants to use standardized water effect ratios, recalculation procedures, or other methods that have met with approval by U.S. EPA, and the Board could not disapprove the use of such procedures. The suggested change would not prevent anyone from submitting a plan in advance to the Board, where someone performing a demonstration supporting a site-specific criterion would want to verify that the information developed would be sufficient before undertaking the justification.

III. Conclusion.

The WVMA appreciates this opportunity to supply comments to the Board, and hopes that they will be given careful consideration.

West Virginia Manufacturers Association
Karen M. Price, President

**Responses to Public Comments
46 CSR 6
Procedural Rules Governing Site-Specific Water Quality Standards
Environmental Quality Board
November 7, 1996**

The following is a summary of the public comments received on amendments to 46 CSR 6, Procedural Rules Governing Site-Specific Water Quality Standards, filed with the Office of the Secretary of State on April 8, 1996.

SECTION 3.1

Existing Rule

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

Proposed Change

The Board proposed an amendment to 46-6-3.1(f) which would require an applicant to provide "a statement regarding whether the flow of the stream is ephemeral, intermittent or perennial" in addition to other flow information in an application for site-specific revisions of water quality standards.

Comments Received

No comments were received on the proposed amendment.

Regarding section 3.1 generally, the US Environmental Protection Agency, Region III ("EPA") suggested more fully defined minimum data requirements for applicants for use and criteria changes. They indicated that they would be willing to work with the Board on general guidance or on specific cases

Board Response

The Board feels that the application requirements provided in this section provide sufficient information for decisions on most site-specific revisions. Section 3(h) allows the Board to request additional information where necessary. We will work with EPA on a case-by-case basis to ensure that sufficient information is available for each request.

Board Action

Proposed amendment adopted.

SECTION 4

Existing Rule

This section describes requirements for removal of designated uses.

Proposed Amendment

4.1. The Board proposed changing the term "removal of designated use" to "reclassification of designated use" throughout this section and wherever it occurs in the rule.

4.2.d. The Board proposed, as an additional requirement in the application section, the following: "Any other information required in order to comply with the requirements of 40 CFR 131.10(j), regarding conducting a Use Attainability Analysis." The purpose of this change is to clarify that federal regulations require that a Use Attainability Analysis be prepared by the State before a designated use can be removed from a stream and that information in addition to that required in subsections a - c might be required by the Board prior to reclassification of a designated use.

Comments Received

4.1. One commenter suggested retaining the term "removal" of a designated use rather than adopt the term "reclassification" of a designated use; or alternatively, clarify what "reclassification" means.

4.2.d. One commenter suggested amending 4.2.d to read "any other information **requested in writing by the Board** that is required in order to comply with the requirements of 40 CFR 131.10(j) regarding conducting Use Attainability Analyses." Their concern is that the information needed for a UAA may not be known by a person requesting one, this language places the burden on the Board to inform the parties about the information needed.

Board Response

4.1. The Board proposed this change based on EPA's recommendation. The intent is to clarify that all uses cannot be removed from a stream, some use must remain. This change will ensure that all waters of the state are protected by the most protective use designation that is applicable or may be applicable to it. The Board believes that this explanation adequately addresses the commenters concern.

4.2.d. The Board agrees with the commenter that a written request from the Board for

more information would be appropriate in this section.

Board Action

4.2. Proposed amendment adopted

4.2.d. Proposed amendment with commenters suggestion adopted.

SECTION 5

Existing Rule

This section outlines the scope and review provisions for variances sought pursuant to 46 CSR 1, section 8.3.

Proposed amendments

The Board proposed adding a provision to section 5.2 which would require that "Each variance must be resupported upon review by the Board by a demonstration that the circumstances which lead to the original variance still apply."

Comments Received

5.1 and 5.3: The EPA suggested changing the term "numeric water quality standards" to "numeric water quality criteria."

5.2: One commenter suggested amending section 5.2 to add the following phrase to the last sentence "or other information sufficient to justify a variance under this section."

5.3: The EPA outlined 5 additional requirements for granting variances.

Board Response

5.1. and 5.3. Although no changes were proposed for these sections, the comments made by the EPA do clarify the Board's intent with regard to the scope of variances under section 8.3. Additionally, the suggested changes are consistent with the Federal Clean Water Act and its corresponding regulations.

5.2. Upon review of this section and the commenters suggestion, the Board believes that amendment of the section is warranted. The last sentence of section 5.2 will therefore be changed to read as follows:

At the time of the Board's review, the discharger either must meet the standard or

must make a new demonstration of "unattainability."

This language comes from EPA's Water Quality Standards Handbook, section 5.3, Variances from Water Quality Standards.

5.3. Regarding EPA's additional provisions, the Board intends to work with EPA as we process each variance application and intends that any variance granted will be in full compliance with all applicable federal requirements. Therefore, we believe that no further amendments are necessary in this section.

Board Action

5.1 and 5.3. Board adopts commenters proposal to change "numeric water quality standards" to "numeric water quality criteria" in these two sections.

5.2. Board adopts the amended version of its proposed language.

SECTION 6

Existing rule

This section outlines requirements for applications for remaining variances.

Proposed Amendment

6.1, 6.2 and 6.3. The Board proposed changing the language "numeric water quality standards for iron, manganese **and** pH" to "numeric water quality standards for iron, manganese **or** pH" throughout the rule.

6.2.c. The Board proposed deleting the word "clearly" in this section.

6.3.g. The Board proposed adding "in the receiving stream" after the word "pH" in this section.

6.3.h. The Board proposed adding at the end of this section a requirement for applicants to provide "supporting information explaining why the chosen abatement action is the best available technology economically achievable."

6.6. The Board proposed correction of an error in this section by changing the second sentence to read as follows:

Such notice shall be filed with the Office of the Secretary of State for publication in the state register not less than thirty nor more than sixty days before the date of

the public hearing."

6.11. The Board proposed changing the word "shall" to "may" to be consistent with West Virginia Code section 22B-3-4(c).

Comments Received

No comments were received on the proposed amendments.

EPA provided a number of general comments on this section, some of which go beyond the scope of this rule. Those comments and the Board's responses will be included in this section.

EPA requested clarification on how these procedures relate to the September 29, 1993 DEP Policy Memorandum on compliance limits for Water Quality on Remining Operations and identify the authority that the State has to implement and enforce the policy. **Response:** This procedural rule establishes requirements to be met by a party seeking a variance from water quality standards for remining activities. While a variance is required before a permittee can discharge in excess of the water quality standards, the variance process is separate from the actual permitting process, which is implemented by the West Virginia Division of Environmental Protection ("DEP"). As to the authority for the implementation of the Policy Memorandum, the Board suggests that EPA seek that information directly from the DEP.

EPA seeks an explanation of the process and timing that the Board will use to meet the public review requirements for the coal remining variance and the associated National Pollution Discharge Elimination System (NPDES) permit. **Response:** The Board and DEP have discussed this matter and are in the process of working out a time line to coordinate the variance request with the permitting process. We anticipate that the Board will receive a copy of the draft permit as quickly as possible after its issuance, and that we will review the variance application along with the draft permit. We intend to make every effort to coordinate the public hearing on the variance with the public comment period and hearing on the permit. We will be happy to provide further details as we begin to review applications and make decisions on variances.

EPA seeks explanation of whether remining variances are considered as revisions to 46 CSR 1 and indicates that Region III would consider each variance as a change to the rule and subject to EPA's review and approval. **Response:** While generally the Board is required to promulgate changes to the Water Quality Standards through the State's legislative rulemaking procedures, amendments to the WV Code made in 1995 provide that the Board may grant variances for remining activities through alternative procedures. This rule outlines those procedures. The Board remains willing to work with EPA in the implementation of these variances and in engaging in further discussions about the review and approval process.

EPA indicates that the State should seek certification that a proposed coal remining area

be confined to the remining area and that the State assure their authority to request certain information pursuant to the Policy Memorandum. **Response:** This comment is more appropriately directed to the DEP, which implements the remining permit program.

EPA provides a list of additional information that the Board may find helpful in determining whether a discharge is eligible for a coal remining variance. **Response:** The Board understands that much of the information included in EPAs list will be provided by the applicant in their application for a permit, and that that information will be provided to the Board as part of the remining variance application. We will keep this list in mind as we begin the process of reviewing variance applications.

In addition to EPAs comments on this section, WV Mining and Reclamation Association provides suggestions for the coordination of the variance application with the NPDES permit. None of their suggestions would require a change to the proposed rule and none address the changes to this rule proposed by the Board.

Board Response

No comments on the proposed amendments were received.

Board Action

The Board adopts the amendments to this section as proposed.

SECTION 7

Existing rule

This section outlines requirements for requesting site-specific numeric criteria.

Proposed Amendments

7.1. The Board proposed the addition of the following sentence at the end of section 7.1:

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.

7.3.b. The Board proposed the addition of the following language at the end of section 7.3.b:

. . . or any other method for which the applicant has obtained prior approval from

the Board, including EPAs Recalculation Procedure

Comments Received

One commenter expressed three concerns about this provision, indicating first that preapproval of such procedures could result in rejection by the Board of plans that fully meet EPA guidance, second, that justification for site-specific criteria may at times have been performed to determine whether such a proposal is feasible, and may occur before a formal application is made to the Board and third that this approach raises the potential for delays.

Another commenter indicated that the State of Virginia allows site-specific numeric criteria to be set in the permitting process rather than as an amendment to the standards rule and suggests that the Board change the language of section 7 to mirror Virginia's policy.

One commenter suggested that the Board specify that the current version of EPAs Water Effect Ratio interim guidance be identified or certify that subsequent versions of the guidance are appropriate.

Board Response

While the Board recognizes that approval of a specific procedure prior to its implementation may present some effort early on by a permittee in the process of making a determination about whether to pursue an application for a site-specific numeric criterion, we believe that it is the most responsible way of reviewing such requests. Rather than inhibiting the process, the Board believes that there is value in allowing the Board to have input regarding any potential changes or corrections that are necessary prior to the implementation of the plan rather than waiting for the completion of the data collection only to find out that changes may be necessary, which could result in the applicant having to repeat the study. Preapproval, we believe, will result in a better study plan and less chance of rejection by the Board when the formal application is submitted, and will therefore streamline the application process. The suggestion that the Board could reject a study plan that otherwise meets federal requirements is without basis.

Regarding the comment suggesting that site-specific numeric criteria should be developed in the permitting process rather than through rulemaking, the Board disagrees with this proposal. It is the Board's position that all site-specific amendments to the Water Quality Standards rule, with the exception of those identified in WV Code Section 22B-3-4(c), must be promulgated through the State's rulemaking procedures.

The Board agrees that the rule should clarify that versions of both EPAs Water Effect Ratio and Recalculation Procedure guidance documents in place at the time that an application is filed may appropriately be relied upon for the purposes of this section.

Board Action

7.1. The Board adopts the amendment as proposed.

7.3.b. The Board adopts the following language:

The results of a Water Effect Ratio study conducted pursuant to the procedures outlined in the February 1994 version of EPA's "Interim Guidance on the Determination and Use of Water Effect Ratios for Metals" (**or any subsequent version of that guidance in effect at the time of the proposal**), or any other method for which the applicant has obtained prior approval from the Board including EPA's Recalculation Procedure; and

7.3. The Board adopts corrections to all references to EPA's Water Effect Ratio.

46-GRAT.WPD



RECEIVED
 NOV 19 1996
 ENVIRONMENTAL QUALITY BOARD
 CHARLESTON, WEST VIRGINIA

KEN HECHLER
 Secretary of State

WILLIAM H. HARRINGTON
 Chief of Staff

MARY P. RATLIFF
 Deputy Secretary of State

JUDY COOPER
 Director, Administrative Law

STEPHEN N. REED
 Deputy Secretary of State

PENNEY BARKER
 Supervisor, Corporations

CATHERINE FREROTTE
 Executive Assistant

(Plus all the volunteer
 help we can get)

Telephone: (304) 558-6000
 Corporations: (304) 558-8000
 FAX: (304) 558-0900

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
 1900 Kanawha Blvd., East
 Charleston, WV 25305-0770

TO: Libby Chatfield

AGENCY: Environmental Quality Board

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: November 18, 1996

OFFICE OF THE SECRETARY OF STATE
 NOV 21 9 10 AM '96
 FILED

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 Environmental Quality Board

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: Elizabeth M. Chatfield
 TITLE OF PERSON SIGNING: Technical Advisor
 DATE: November 20, 1996

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

SIGNED: _____
 TITLE OF PERSON SIGNING: _____
 DATE: _____

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