

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #1

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2002 SEP 20 P 3:12

WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: WV Environmental Quality Board TITLE NUMBER: 46

RULE TYPE: Procedural Rule CITE AUTHORITY: 22B-3-4

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: Seven

TITLE OF RULE BEING PROPOSED: Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply

DATE OF PUBLIC HEARING: October 23, 2002 TIME: 7:00 p.m.

LOCATION OF PUBLIC HEARING: 1615 Washington Street, E.
2nd Floor Hearing Room
Charleston, WV 25311


COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH X
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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


Authorized Signature

SCANNED

14.40

46 CSR 7

Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply

September 17, 2002

Summary of Proposed Rule

This proposed rule addresses the implementation of the Public Water Supply designated use category ("Category A") established in section 6.2 of the state Water Quality Standards (46 CSR 1 – Requirements Governing Water Quality Standards). The purpose of the rule is to establish procedures for applicants requesting the removal of the Public Water Supply designated use from a water of the state or segment thereof, and for the Board to follow in considering such requests. The rule provides an alternative to the existing procedures for removing the Public Water Supply designated use, as established in WV Code section 22B-3-4(b), WV Code section 29A-3-1 et seq, 46 CSR 1 "Requirements Governing Water Quality Standards", and 46 CSR 6 "Procedural Rules Governing Site-Specific Revisions to Water Quality Standards."

46 CSR 7

**Procedural Rules Governing Reclassification of Waters Designated for Public
Water Supply
September 17, 2002**

Statement of Circumstances Requiring Proposed Rule

This proposed rule addresses the implementation of the Public Water Supply designated use category ("Category A") established in section 6.2 of the state Water Quality Standards (46 CSR 1 – Requirements Governing Water Quality Standards). The current implementation of Category A by the Division of Water Resources of the Department of Environmental Protection in the National Pollutant Discharge Elimination System (NPDES) permitting program is that the designated use applies to all waters of the state, unless it has been removed specifically by the Board. The Board supports this interpretation of the application of the Public Water Supply Use.

The Board acknowledges that circumstances may arise where the application of the Category A use may be determined to be inappropriate, and may result in instream permit limits that are unduly burdensome to an NPDES permit holder. In that case, the Category A use can be, and in fact has historically been, removed by amending the Water Quality Standards rule through the legislative process. The Board has heard a number of regulated industries express concern about the length of time required to remove the Category A designated use through the legislative rulemaking process. Because of the late July/early August filing requirement for revisions to legislative rules, it can take anywhere from a year to 18 months, or even longer to accomplish a use designation change.

The Board is proposing this procedural rule in order to address this concern. This rule establishes a process for removing the Category A use which, while retaining the substance and safeguards offered by the current procedures, results in a shorter time period from the date the application is filed to the final decision by the Board.

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply

Type of Rule: Legislative Interpretive Procedural

Agency: WV Environmental Quality Board

Address: 1615 Washington St., E.

Suite 301

Charleston, WV 25311-2126

1. Effect of Proposed rule:

N/A

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST					
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates:

N/A

3. Objectives of These Rules:

To establish an alternate procedure for removing the Public Water Supply designated use from waters of the state on a site-specific basis.

Rule Title: Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

Because this is an alternative to an existing procedure, no additional fiscal impact is anticipated.

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

See A, above

C. Economic Impact on Citizens/Public at Large.

See A, above

Date: Sept 20 02

Signature of Agency Head or Authorized Representative:



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TITLE 46

2002 SEP 20 P 3: 12

PROCEDURAL RULES
ENVIRONMENTAL QUALITY BOARD

THE WEST VIRGINIA
SECRETARY OF STATE

SERIES 7

PROCEDURAL RULES GOVERNING
RECLASSIFICATION OF WATERS DESIGNATED FOR
PUBLIC WATER SUPPLY

§46-7-1. General.

1.1. Scope. The procedures herein apply to the removal of the public water supply designated use category ("Category A") described in 46 CSR 1.6.2, from waters of the state. (see West Virginia Legislative Rule 46 CSR 1, "Requirements Governing Water Quality Standards" §6 for a description of all designated use categories).

1.2. Purpose. The purpose of this rule is to establish procedures for applicants requesting the removal of the public water supply designated use from a water of the state or segment thereof, and for the Board to follow in considering such requests. This rule provides an alternative to the existing procedures for removing the public water supply designated use, as established in W. Va. Code §22B-3-4(b), W. Va. Code §29A-3-1 et seq., 46 CSR 1, "Requirements Governing Water Quality Standards", and 46 CSR 6, "Procedural Rules Governing Site-Specific Revisions to Water Quality Standards".

1.3. Authority. W. Va. Code §22B-3-4(d) and §29A-3-3.

1.4. Filing Date.

1.5. Effective Date.

§46-7-2. Compliance with State Law.

Any decision to remove the public water supply designated use from a water of the state according to these procedures shall be conducted in accordance with the requirements for procedural rulemaking outlined in the State Administrative Procedures Act (W. Va. Code Chapter 29A, Article 3.). In addition to those provisions, the Board shall hold a public hearing as part of the public notice and comment period and shall provide notice of such hearing consistent with the provisions of W. Va. Code §29-3-7. All deliberations and decisions by the Board in addressing an application shall be conducted in accordance with the Open Governmental Proceedings Act (W. Va. Code Chapter 6, Article 9A).

§46-7-3. Applicability.

3.1. This rule applies to the removal of the public water supply designated use category described in the water quality standards rule (46 CSR §1.6.2), from a water of the state. The Board will consider the removal of the public water supply designated use according to the requirements outlined in this rule on a case-by-case basis, upon receipt of an application incorporating the provisions outlined in §46-7-4, herein. This rule shall not apply to the removal or reclassification of any other designated use category established in 46 CSR §1.6.2; all other reclassifications of designated uses shall be conducted according to W. Va. Code §22B-3-4(b); and 46 CSR 6. The procedure outlined herein is an alternate mechanism for removing the public water supply designated use; that designated use may also be removed by revising the water quality standards rule through the legislative rulemaking process (see W. Va. Code §22B-3-4(b) and W. Va. Code §29A-3-1 et seq.).

3.2. Applications for the removal of the public water supply designated use may be submitted to the Board by any interested party, including, but not limited to: National Pollution Discharge Elimination System (“NPDES”) permit holders, NPDES permit applicants, the WV Department of Environmental Protection (“DEP”) and other state agencies.

§46-7-4. Application Requirements.

4.1. A party seeking removal of the public water supply designated use from a water of the state or segment thereof may file an application with the Board at the following address: West Virginia Environmental Quality Board, 1615 Washington Street East, Suite 301, Charleston, West Virginia 25311-2126. The application shall include all of the following information:

4.1.a. The name, alphanumeric code, and length of the affected stream, and a U.S.G.S. 7.5 minute map showing the stream or portion of the stream from which the public water supply designated use is requested to be removed. Where an applicant is a NPDES permit holder or NPDES permit applicant, the applicant’s existing and/or proposed discharge points should be noted on the submitted map;

4.1.b. A description of the activity proposed which is the basis for the request for the designated use removal, including an explanation of the specific circumstances in the stream and/or in the applicant’s discharge or other discharges which support the removal of the public water supply designated use for the entire segment. This explanation shall include identification of the pollutants being discharged or proposed to be discharged which have effluent limits based on the public water supply designated use, and current data on the instream concentrations of those pollutants;

4.1.c. Existing water quality data for the stream or stream segment, including an aquatic life assessment. Where adequate data are unavailable, additional studies may be required by the Board;

4.1.d. Description of general land uses (e.g. mining, agricultural, recreation, residential, commercial, industrial, etc.) as well as specific land uses adjacent to the water for the length of the segment proposed to be removed;

4.1.e. All existing uses (as defined in 46 CSR 1 §2.11) and designated uses (as defined in 46 CSR 1 §2.8) of the receiving waters into which the segment in question discharges and the location where those downstream uses begin to occur;

4.1.f. Description of the general physical characteristics of the stream segment, including, but not limited to, width, depth, bottom composition, and slope;

4.1.g. The average flow rate in the segment and a statement regarding whether the flow of the stream is ephemeral, intermittent or perennial; and

4.1.h. Demonstration that the water from which the public water supply designated use is proposed to be removed is not used as a source of drinking water. This demonstration shall include documentation of the following:

4.1.h.1. Contact with the West Virginia Bureau for Public Health and the County Health Department in the county where the action is contemplated to determine the existence/location of public drinking water intakes in the stream or segment subject to the application and to gather other relevant information about the receiving stream; and

4.1.h.2. The results of a physical survey of the stream, or portion thereof, from which the public water supply designated use is proposed to be removed, to determine the existence of drinking water intake pipes and other evidence of use of the stream as a source of drinking water. Where homes/domiciles occur adjacent to the affected portion of the stream, contact with the residents to determine the source of their drinking water should be attempted, and such information should be included in the application;

4.1.h.3. A determination regarding the potential for the water to be used as a public water supply in the future; and

4.1.h.4. Results of research to determine the presence or absence of drinking water wells in the vicinity of the stream or stream segment from which the public water supply designated use is proposed to be removed. If drinking water wells are found in the vicinity, the applicant shall make a determination of the potential for a hydrogeologic connection between the wells and the surface water in question.

4.1.i. A demonstration that attaining the public water supply designated use is not feasible because of one or more of the factors outlined in §5.1.c herein.

4.1.i.1. If the applicant relies on §5.1.c.1, herein, to establish that attaining

the public water supply designated use is not feasible, the applicant shall provide an analysis to support the position that substantial and widespread adverse economic and social impact is anticipated from the application of the effluent limits described in that section. The applicant is encouraged to use the US Environmental Protection Agency's ("USEPA") "Interim Economic Guidance Document for Water Quality Standards" (EPA-823-B-95-002, March 1995) in preparing such analysis.

4.1.j. Information sufficient to ensure that upon removal of the public water supply designated use from the water or segment thereof, the applicable water quality standards will provide for the attainment and maintenance of the water quality standards of the downstream waters.

§46-7-5. Criteria for Assessing Removal of the Public Water Supply Designated Use.

5.1. The Board may grant a request for removal of the public water supply designated use from a water or segment thereof, if it finds the following:

5.1.a. That the water or segment is not being used as a drinking water source; and

5.1.b. That the water or segment is not likely to be used as a drinking water source in the future; and

5.1.c. That attainment of the public water supply designated use is not feasible in the water or segment because of any of the following factors:

5.1.c.1. Application of effluent limitations for existing sources more stringent than those required pursuant to §301(b) and §306 of the federal Clean Water Act in order to attain the currently applicable designated use would result in substantial and widespread adverse economic and social impact; or

5.1.c.2. Naturally-occurring pollutant concentrations prevent the attainment of the use; or

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

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

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

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

5.1.d. That, upon removal of the public water supply designated use from the water or segment thereof, the applicable water quality standards would provide for the attainment and maintenance of the water quality standards of the downstream waters.

5.2. Prohibitions. The public water supply designated use may not be removed from a water of the state or a segment thereof if:

5.2.a. It is an existing use as defined in 46 CSR 1, unless a use requiring more stringent criteria is added; or

5.2.b. Such use will be attained by implementing effluent limits required under §§301(b) and 306 of the federal Clean Water Act and by implementing cost-effective and reasonable best management practices for nonpoint source control, unless a successful demonstration is made under §5.1.b.1, herein.

§46-7-6. Board Procedures.

6.1. Completeness Review. Upon receipt of an application for removal of the public water supply designated use subject to this rule, the Board shall conduct a review to determine that the application is complete. Such review shall be completed no later than 30 days from the date of receipt of the application in the Board Office.

6.1.a. Upon a determination that the application is complete, the Board shall notify the applicant to that effect and begin a substantive review of the application. The Board shall then forward the application to the WV Bureau for Public Health, the WV Division of Environmental Protection, the WV Department of Agriculture and the US Environmental Protection Agency, Region 3.

6.1.b. If the Board determines that the application is incomplete, it shall notify the applicant and provide a list of the information necessary to make the application complete.

6.2. Substantive Review. Upon making a determination that the application is complete, the Board shall conduct a review of the application to determine whether the proposed removal of the public water supply designated use is warranted. In doing so, the Board shall:

6.2.a. Consult with the West Virginia Bureau for Public Health, the West Virginia Department of Environmental Protection and the West Virginia Department of Agriculture regarding the impacts of the requested removal of the public water supply designated use; and

6.2.b. Prepare a draft information sheet, which shall include the following:

6.2.b.1. A summary of the information provided in the application, and;

6.2.b.2. An initial assessment regarding whether the criteria outlined in §5 have been met; and

6.2.c. Forward the draft information sheet to USEPA, Region 3.

6.3. Preliminary decision on application.

6.3.a. Upon completion of the review outlined in §6.2, the Board shall make a preliminary decision regarding whether the removal of the public water supply designated use is warranted.

6.3.b. If the Board finds that removal of the use complies with the criteria and prohibitions outlined in §5 herein, it shall make a preliminary decision that the use removal is warranted. Once doing so, the Board shall:

6.3.b.1. Finalize the information sheet outlined in §6.2.b, which shall include the basis of its decision; and

6.3.b.2. Propose to revise §8 herein to remove the public water supply designated use from the water subject to the application. In doing so, the Board shall publish notice of the proposed revision in compliance with the requirements for procedural rulemaking in W. Va. Code §29A-3-1 et seq, and shall forward such notice to the agencies outlined in §6.2.a herein and to USEPA Region 3. The Board shall also hold a public hearing regarding the proposal to remove the use, notice of which shall be published consistent with the provisions of WV Code §29-3-7.

6.3.c. If the Board finds that the removal of the use does not comply with the criteria and prohibitions outlined in §5 herein, it shall make a preliminary decision that the proposal is not warranted, and shall contact the applicant to advise them of the decision, and the basis for the decision.

6.4. Final decision on application.

6.4.a. Upon completion of the public hearing and close of the public comment period required in §6.3.b.2, the Board shall review all of the comments and information received during that period and make a final determination regarding the removal of the public water supply use designation.

6.4.b. If, upon completing the review outlined in §6.4.a, the Board determines

that the preliminary decision to remove the public water supply use designation is consistent with the requirements outlined in §5, herein, the Board shall make a final decision to that effect, and adopt the proposed revision according to §29A-3-8 of the State Administrative Procedures Act. Such revision shall include an amendment to §8 of this rule, which shall identify the name of the stream and the portion of the stream from which the public water supply use designation is removed.

6.4.c. If upon completion of the review outlined in §6.4.a herein, the Board finds that the requirements outlined in §5 have not been met, the Board shall deny the application and contact the applicant in writing to advise them of the denial and the basis for the denial.

§46-7-7. Submission to the US Environmental Protection Agency.

Each time a revision is made to this rule to remove the public water supply designated use from a water of the state or segment thereof, the Board shall submit the final revised procedural rule to the US Environmental Protection Agency according to the requirements of 40 CFR 131.20(c).

§46-7-8. Streams From Which the Public Water Supply Designated Use Has Been Removed.

(This section RESERVED pending decisions on applications received according to this rule.)