

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

Form #5

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2003 JAN -8 P 3:42

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: WV Environmental Quality Board TITLE NUMBER: 46

CITE AUTHORITY: 22B-3-4

RULE TYPE: PROCEDURAL  INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

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

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS February 7, 2003

  
Authorized Signature

SCANNED

TITLE 46  
PROCEDURAL RULES  
ENVIRONMENTAL QUALITY BOARD

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. January 8, 2003.

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 it's 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.)

# ORIGINAL

## ENVIRONMENTAL QUALITY BOARD

IN RE: PROPOSED PROCEDURAL RULE GOVERNING RECLASSIFICATION  
OF WATERS DESIGNATED FOR PUBLIC WATER SUPPLY

OCTOBER 23, 2002  
PUBLIC HEARING

CHARLESTON, WEST VIRGINIA



Transcript of the proceedings had in the above-styled matter before the said Environmental Quality Board on the 23rd day of October, 2002, commencing at 7:09 p.m., at 1615 Washington Street, East, Charleston, West Virginia, and reported by Karen R. Meyers, Certified Court Reporter.

BEFORE:

EDWARD SNYDER, Chairman  
EDWARD C. ARMBRECHT, JR.  
CAMERON HACKNEY  
CHARLES JENKINS  
DAVID SCOTT SIMONTON

ALSO PRESENT:

REBECCA CHARLES, ESQUIRE, Board Attorney  
ELIZABETH M. CHATFIELD, ESQUIRE,  
Technical Advisor  
KATHY COLEMAN

P.O. Box 1928  
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COURT REPORTING

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**PRESENTERS:**

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**ALSO PRESENT:** JENNIE HENTHORN  
 KEN WARD, JR.  
 DAVID V. LINOK  
 THOMAS W. HOLBROOK  
 JULIE WOTRING  
 ANN BRADLEY  
 CHARLIE ARMSTEAD

Reporter's Certificate Page 44

1           CHAIRMAN SNYDER: Good evening. It's nice to see so  
2 many people here.

3           What we're going to be dealing with tonight will be the  
4 Procedural Rules Governing Reclassification of Waters  
5 Designated for Public Water Supplies, went out to notice for  
6 this on September 20th and this is the public hearing that  
7 was noticed, and that's why you're here and we're going to  
8 have a chance to hear from many people tonight and I'm  
9 really pleased.

10          Before we get started, I'd like to introduce the Board,  
11 as we have a new member and it's always a great opportunity  
12 to introduce a new member as well as the old.

13          To my far right, your far left, is Ted Ambrecht, an  
14 esteemed businessman from Charleston, West Virginia.  
15 Immediately to his left is Dr. Cameron Hackney; Dean Hackney  
16 is from West Virginia University. Bob Jenkins, Emeritus,  
17 West Virginia University. Our new Board member, Scott  
18 Simonton, from Marshall University and he comes in with good  
19 credentials; he is two doors down from Betsy Dulin. It's  
20 nice to have Scott here and he can always go back and say hi  
21 to Betsy for us.

22          MR. SIMONTON: Absolutely.

23          CHAIRMAN SNYDER: Good having you onboard. Kathy  
24 Coleman is the secretary - administrative secretary - and

1 keeps track of our budget. Rebecca Charles, the attorney  
2 for the Board. And, of course, Libby Chatfield is our  
3 technical person, and I'm Ed Snyder; I literally flew in  
4 from Shepherdstown. I left at 2:30 and had to stop for gas,  
5 but anyway, it's nice being here.

6 What I'd like to do then is get started, and we'll just  
7 go down the list and have people who want to speak tonight  
8 speak. We will give five minutes and exactly five minutes.  
9 We have quite a few people who wanted to speak, so we wanted  
10 to have -- give everyone a chance to be heard.

11 Jennie Henthorn, you didn't check either side; are you  
12 okay.

13 MS. HENTHORN: Sorry, I was the first one in. No, I  
14 don't want to speak.

15 CHAIRMAN SNYDER: Richard Thomas would like to speak;  
16 Mr. Thomas. Please come to the podium.

17 MR. RICHARD THOMAS: First off, I'm Richard Thomas.  
18 I'm here today representing the West Virginia Manufacturers  
19 Association as part of their water team.

20 Essentially the West Virginia Manufacturers  
21 Association, directly and indirectly, represents about 200  
22 industries, some of them the larger employers within the  
23 state, and we're very interested in the water issues as they  
24 develop in the state.

1           Basically, what we want to come in to state about the  
2 Category A implementation is that we feel that it is  
3 unreasonable to try to expand the scope of Category A to  
4 include all the streams in West Virginia. We feel that it  
5 imposes an additional cost and does not really offer  
6 improvements to public health.

7           Basically, Category A, any type of public water supply  
8 that there is in the state already has a very adequate  
9 protection; it is covered by many state regulations.

10           The DEP has taken a position that they do interpret  
11 Category A when they review permits and we feel that they do  
12 on a lot of permits, streams where they feel -- and segments  
13 of streams where they feel it is important to review. But  
14 we don't feel that they've always applied Category A to  
15 streams or that they should in all cases, because not in all  
16 cases we feel it's going to be necessary.

17           We believe, additionally, that -- essentially that  
18 Category A determination across the state would require that  
19 there be a legislation or rulemaking to be -- to go forward  
20 for it to be applied throughout the state; that the  
21 interpretations being applied, while they may be protective  
22 in cases, do not really make it an accepted rule or  
23 regulation in the state as it is.

24           We believe that there are sufficient water quality

1 standards in the state to provide for protection of the water  
2 quality.

3 Category A applies whenever there is a water supply and  
4 upstream of any water supply is protected. It applies to  
5 any discharger. They cannot emit any pollutant that would  
6 cause Category A criteria to be exceeded at any water  
7 intake.

8 The Board's defining the Category, in the way that they  
9 are proposing to do, will really not protect the waters any  
10 more than they are protected right now.

11 A person cannot really go out into a mountain stream  
12 and drink out of it and be any more protected, once this  
13 designation is made, than they are currently.

14 NPDES permit writers have the right to require a  
15 company to go through and do a review of what they are  
16 discharging of any public sources that are downstream of  
17 them. They have a right to require, and they often do,  
18 modeling of what is in the discharge and how we're impacting  
19 a downstream water supplier source.

20 The WVMA agrees that protecting the water quality is  
21 important. Water is a very important resource in the state.  
22 However, we don't agree that this category is necessary. We  
23 feel that there are additional regs out there, such as the  
24 anti-deg provisions, which would protect it. There cannot

1 be an increase in any pollution without public notifications  
2 and intergovernmental coordinations as it is.

3 And, additionally, we have strong feelings about the  
4 fact that once all the waters are determined Category A, and  
5 a person has to go through the use removal process, that the  
6 EPA will be a hindrance in any type of speedy use removal.  
7 We found this to be true, I think, in just reviewing what  
8 EPA's memorandum of agreement has been with the EQB. It has  
9 not been too successful, and I don't think that an  
10 individual industry trying to work with them would be any  
11 more successful. Yet we find that EPA does -- I mean, on  
12 NPDES permits they find important, can review those within a  
13 30-day time period.

14 Without a commitment from EPA for a designated approval  
15 time, and a time limit, we do not feel that they will do a  
16 good job of review -- speedy review.

17 Essentially, we believe that there are an abundance of  
18 applications, in the rules, to protect the water and to  
19 determine a use for any type of water segment, and we feel  
20 that with the current regulations, that water supplies are  
21 protected.

22 CHAIRMAN SNYDER: Thank you very much. If you have  
23 written documentation and --

24 MR. RICHARD THOMAS: We've already submitted it.

1 CHAIRMAN SNYDER: Submitted it?

2 MR. RICHARD THOMAS: Yes.

3 CHAIRMAN SNYDER: The next speaker, Randy Maggard.

4 MR. RANDY MAGGARD: My name's Randy Maggard and I  
5 represent Pen Coal Corporation. I had a couple of  
6 questions.

7 I was wondering, can Libby or can the Board answer any  
8 questions if I have any, for a clarification on --

9 CHAIRMAN SNYDER: For a clarification? Typically we  
10 have things presented and then, after we review, then we'll  
11 go forward and we can provide clarification -- written  
12 clarification or response after. Typically this is how  
13 these are handled.

14 MR. RANDY MAGGARD: Okay. Well, I sort of agree with  
15 the last speaker. I think the Category A designation,  
16 overall, for all the streams in the state, was done  
17 inappropriately and I don't feel that -- I think it is  
18 extremely burdensome for industry to have to deal with all  
19 these situations, and it's also burdensome for the aquatic  
20 systems out there, because the Category A designation, in  
21 regard to what it's done to the mining industry, and our  
22 operation in general, is the manganese issue, and that's the  
23 one -- I think the manganese issue could be done in a whole  
24 lot better way than what this method here is trying to deal

1 with.

2 And, you know, I don't know if -- the questions I have  
3 is that, you know, for instance, is the same thing that he  
4 brought up earlier is that if we have to go through EPA  
5 approval. We've been waiting on EPA approval for the last  
6 year-and-a-half or two years on the five-mile rule request  
7 over the manganese issue in the Category A.

8 And what it does is it takes -- in the mining industry,  
9 we used to have technology-based limits, the 2 mg/l - 4  
10 mg/l. Well, once you put everything into Category A and you  
11 have a public Category A drinking water standard for  
12 manganese of one part per million. Well, that ends up  
13 putting operations which you were discharging a 1.5 or 1.8  
14 before you're in compliance.

15 Well, then we actually have NPDES permits that are  
16 coming up for renewal where we're getting limits changed  
17 from two-four limits down to one. And we have ponds that  
18 used to discharge off our operations that were in  
19 compliance, that didn't require treatment, that now are  
20 going to require treatment just through these renewal  
21 processes. And I think this is extremely burdensome and the  
22 problem that was created when you all designated all the  
23 streams Category A, even including first and second order  
24 watersheds, and that could be, you know, something up to a

1 75 or 100 acre watershed, where we all know, really, is  
2 never used for a public drinking water supply, but yet it's  
3 being required to be protected for that use.

4 Well, in regard to being protected for that use, it  
5 requires unnecessary treatment where, in a lot of cases,  
6 you're actually degrading the true use of that stream, which  
7 is aquatic resources, and that's where I think that the  
8 Board has erred in that -- in the placement of making all  
9 streams Category A and it needs to be corrected and I don't  
10 feel that this is the adequate method to correct it.

11 CHAIRMAN SNYDER: Thank you. Again, any written  
12 comments. Charlie Burd.

13 MR. CHARLIE BURD: Thank you. Yes, my name is Charlie  
14 Burd. I am here representing the Independent Oil and Gas  
15 Association of West Virginia.

16 It is my pleasure to say tonight that the Independent  
17 Oil and Gas Association of West Virginia is comprised of  
18 members who are involved in the exploration, production and  
19 development of oil and gas resources within our state.

20 Many of our members hold water pollution discharge  
21 permits, which require compliance with the state water  
22 quality standards or are otherwise affected by the  
23 application of these standards to their operations. Thus,  
24 rulemakings by the EQB with regard to water quality

1 standards are important to our members.

2 IOGA, Independent Oil and Gas Association, has a number  
3 of concerns with respect to these proposed -- to this  
4 proposed procedural rule.

5 In October of 1999, the EQB filed an emergency rule  
6 that would have designated all waters of the state as public  
7 water supplies. This rule was rejected by the legislature.

8 The current proposed rule is based on the underlying  
9 assumption that all waters of the state be designated a  
10 public water supply, and thus sets forth out a procedure for  
11 removing this designation. As such, this rule attempts to  
12 circumvent the procedures established under state law for  
13 review of legislative rules. There is no legislative rule  
14 which designates all water as -- waters of the state as  
15 public water supplies, and until such a rule has been  
16 properly adopted, no rule issued by the Board should include  
17 such an assumption.

18 IOGA urges the Board to assume that action -- to assure  
19 that action taken with respect to the proposed rule complies  
20 with all legislative rule-making requirements applicable to  
21 legislative rules under the State Administrative Procedures  
22 Act.

23 Under that statute, any rule which is determinative of  
24 issues affecting private rights, privileges or interest is a

1 legislative rule and must go through public notice and  
2 comment, as well as review and approval by the West Virginia  
3 Legislature. Although the proposed rule is captioned as  
4 procedural, we believe that it is, in fact, legislative.

5       The proposed rule sets forth the criteria by which a  
6 water body will be determined to fall within the public  
7 water supply category. Once a water body has been  
8 determined to be within or outside this category,  
9 appropriate restrictions will be placed on discharges into  
10 that water body. As such, the rule is the determinative of  
11 an issuance affecting private rights, privileges and  
12 interests and meets the standard for a legislative rule.  
13 Therefore, if the Board elects to pursue this rule, it  
14 should not be finalized until all applicable rule-making  
15 requirements have been satisfied.

16       The implication of the proposed rule, that is, that all  
17 waters of the state are or could be public water supplies,  
18 will have profound impacts on the regulated community in  
19 West Virginia. Any discharger on a stream that is  
20 designated as public water supply must discharge water which  
21 meets applicable standards.

22       In the case of streams with low flow, this means that  
23 any discharger must discharge water of drink -- excuse me,  
24 water of drinking water quality. This is an extreme

1 application of water quality requirements to dischargers in  
2 West Virginia. Such an approach should not be undertaken  
3 without the approval of the legislature. To-date, such  
4 approval has not been received from the legislature and, in  
5 contrast, the legislature has rejected this approach when  
6 proposed by EQB.

7 IOGA supports the comments of others -- other members  
8 of the regulated community who have indicated their  
9 opposition to the proposed rule. We urge, in lieu of the  
10 proposed rule, that the EQB indicate it will comply with the  
11 provisions of its current rules, which recognize that only  
12 certain identified areas of waters in the state will be  
13 approved as public water supplies.

14 I appreciate the opportunity to present these comments  
15 to you and we respectfully request that they be given  
16 consideration.

17 CHAIRMAN SNYDER: Thank you, Mr. Burd.

18 MR. CHARLIE BURD: Thank you.

19 CHAIRMAN SNYDER: The next speaker, Liz Garland.

20 MS. LIZ GARLAND: I am Liz Garland. I am with West  
21 Virginia Rivers Coalition.

22 Our membership is dedicated to the health of West  
23 Virginia streams and rivers, and so I am here to address the  
24 proposed rule at tonight's hearing because of its potential

1 | implications to our most fundamental measure of river  
2 | health, drinking water.

3 |         We heard it today at the West Virginia Water  
4 | Conference, for those that attended, and it has been said  
5 | many times before to this Board, DEP treats all the state's  
6 | waters, with few exceptions, to water quality standards for  
7 | drinking water. This, the Board has acknowledged and  
8 | accepted.

9 |         With that in mind, I'd like to revisit why we protect  
10 | our waters for Category A usage.

11 |         Number one, we're a headwater state. What we do to so  
12 | many of our river miles affects our population downstream,  
13 | our resources. This is true not only in West Virginia's  
14 | valleys but across our borders. We would be remiss to the  
15 | majority of our population and to our neighboring states if  
16 | we did not protect our headwaters to the highest level.

17 |         Drinking water standards would be a secondary  
18 | consideration. These must be protected for reasons of human  
19 | health.

20 |         EPA has expressed its concerns that Category A be  
21 | protected in cases where individuals use water directly from  
22 | the stream, and I'll quote Region III, "The human health of  
23 | those individuals, especially in rural areas would not be  
24 | protected if the drinking water supply we use were removed."

1           Surface water usage by individuals for drinking water  
2 does exist. I briefly canvassed six sanitarians that work in  
3 various corners of our state. All but one was able to cite  
4 recent residential drinking water examples from the past few  
5 years, despite the significant gains to distribute municipal  
6 water resources in this state.

7           Last year, in Nicholas County, two houses were pulling  
8 water directly from the Gauley River in Belva, and just  
9 recently the Fayette County sanitarian addressed a woman's  
10 concerns about storm water runoff from a construction site  
11 into a pond that served as her drinking water source. Two  
12 very simple examples.

13           It is not the job of sanitarians to inventory drinking  
14 water resources. As Barb Taylor reiterated at the  
15 conference today, we have no stats, there is no conclusive  
16 evidence, it can't be quantified, but we recognize the use  
17 of surface water as direct drinking water source.

18           Agencies, both private and public, that are certified  
19 by DHHR to test for drinking water, know that they may be  
20 testing periodically a private drinking water use from a  
21 river or a pond, but they do not acquire that information  
22 into a database form.

23           The sanitarian that I spoke to in Mid-Ohio Valley,  
24 which is a five-county district, told me that they have made

1 available pamphlets from a company that makes pond and  
2 cistern filtration systems. This acknowledges that citizens  
3 in that particular region use surface water as drinking  
4 water. That particular Marietta, Ohio based water  
5 filtration company is recognized for its alternative systems  
6 for drinking water, whether they be for residential or small  
7 community. These include both pond and cistern water  
8 systems and these includes sales in West Virginia.

9 I point out these random examples of drinking water  
10 from surface water in West Virginia because stats and  
11 quantification are not critical; acknowledgment of the use  
12 is what is important.

13 EPA says in segments where the stream has been used as  
14 drinking water source on or at any time since November 28,  
15 '75, the use would need to be retained. A use may not be  
16 removed if it is an existing use.

17 So, Category A protection is important, because of our  
18 neighbors downstream, because of human health to our  
19 individual citizens and, as much as I hate putting a value  
20 on health, because of our economy.

21 As a sanitarian I spoke to in Webster County pointed  
22 out, hunting season has begun. We have hunters in the state  
23 that are extracting water from surface water for drinking  
24 purposes.

1           The tourist industry is the state's strongest and  
2 Alicia Bailey's office will tell you that our resources, and  
3 our water resources specifically, have a lot to do with  
4 that, not just the appeal of whitewater but also the  
5 perceived view of our pristine water.

6           Backpackers, whitewater paddlers, lake floaters, you  
7 name it, they have not only contact with our waters, but  
8 they do drink from them.

9           I will tell you, in my days as a tourist to this state,  
10 before I became a resident, I pulled water from Otter Creek,  
11 I pulled water from the Cranberry, out of Williams, filtered  
12 it through my backpacking filter.

13           As a whitewater paddler, I have sat at the top of many  
14 rapids, been a little nervous, needed a little water, dipped  
15 right in. I'm a little bit judicious about it.

16           The sanitarian I spoke to in Webster Springs is a  
17 lifelong resident of West Virginia. As a native West  
18 Virginian, he has drunk from many rivers in the state while  
19 he's been hunting and he is a sanitarian.

20           I tell you these anecdotes because tourism is a big  
21 growth industry in West Virginia, it is the wave of our  
22 future; and, in 2001, via conference call, Region III not  
23 only reiterated protecting existing uses, but also gave  
24 consideration to future uses.

1           And so, today, I'd like to suggest to the Board that  
2 although it is hard for me to conceive of exemptions to the  
3 fundamental Category A protection, today's rule proposal  
4 will support procedures to allow exemptions that will give  
5 great care to human health, headwaters and downstream, to  
6 existing and future use and for our citizens and our  
7 visitors. Thank you.

8           CHAIRMAN SNYDER: That you, Ms. Garland. Jeremy Muller  
9 will go next.

10          MR. JEREMY MULLER: I'd like to say it's good to be  
11 here, it's a long drive from Elkins, but you know that as  
12 well.

13          I'm Jeremy Muller. I'm the Executive Director of the  
14 West Virginia Rivers Coalition; we're a statewide  
15 organization with over 3,000 members.

16          You just heard from Ms. Garland of our office; I will  
17 try not to repeat too much of what she said.

18          West Virginia Rivers Coalition is very supportive of  
19 the statewide designation Category A waters, but we're wary  
20 of where this procedural rule may lead.

21          The history in West Virginia is that all of our surface  
22 waters are considered drinking sources as such, and this  
23 really is a great comment upon the quality of the water that  
24 the state has. It's an asset and it should be kept in mind

1 that as we continue to go through drought after drought and  
2 we see our downstream neighbors, like D.C. pulling more out  
3 of the Potomac, that we in West Virginia need to be very  
4 concerned about the quality of our waters and making sure  
5 that it's good for our residents.

6 As we know and heard from Liz, but we'll also probably  
7 hear from Randy, West Virginia DEP's practice is to treat  
8 our surface waters as drinking sources.

9 The Department of Health and Human Resources, while  
10 they do not advocate people to drink from surface waters,  
11 they, nonetheless, know that it happens and believe that the  
12 resource should be protected and should not be degraded.

13 And another point that Liz raised, it's very important  
14 that we keep in mind that there is no data on this and this  
15 is probably where, as a state, we are failing most. We do  
16 have residents, believe it or not, in 2002, who need to  
17 drink from surface waters. It is very important that those  
18 residents of ours that are not in a municipality with  
19 treated water can still have potable water.

20 It should also be pointed out that in the 2000  
21 legislature our friends in industry tried to have this  
22 designation struck and the legislature summarily rejected  
23 that attempt.

24 Regarding the exemptions portion of this procedural

1 rule is where the concern does come in. We all want greater  
2 expediency from EPA. The Rivers Coalition filed a lawsuit  
3 on Friday against the EPA for failing to adhere to the 60-  
4 and 90-day timeframes that are required. We feel all of  
5 your pain, from a different angle, but we know the EPA is  
6 very, very delinquent. The Board knows that possibly better  
7 than anyone, you have to actually talk to them. It's not  
8 fun, but that should not be a reason to give polluters  
9 wholesale opportunities to pollute.

10 I believe that it is appropriate that an expert agency,  
11 such as the Environmental Quality Board, handle these  
12 matters. The legislature should not be expected to get into  
13 great detail in these kinds of matters. You folks are  
14 trained, lifelong experienced professionals. You are the  
15 appropriate people to make these kind of decisions and weigh  
16 these issues. However, we do not support efforts to make  
17 exemptions from law easier. This is particularly so with  
18 exemptions that pass the cost of treatment away from the  
19 polluter onto the residential customers, and this very true  
20 with manganese.

21 We've heard the coal industry speak about it, and they  
22 will continue to tonight. They have the technology to treat  
23 manganese. They have refused to do so because of the  
24 expense and so what happens? We get higher treatment costs

1 in our municipal facilities and that doesn't stay there,  
2 that comes down to you and me, the user, when we get our  
3 water bill.

4 Let me reiterate the Board's mission. I'm sorry to do  
5 this, I'm sure you guys have this memorized. However, the  
6 mission is to adjudicate environmental appeals in a fair,  
7 efficient and equitable manner for the people of West  
8 Virginia and to protect the waters of the state by  
9 promulgating water quality and ground water regulations;  
10 very important.

11 The streamlining of exemptions here is even of more  
12 concern and, frankly, it's a bit confusing when, over the  
13 past several decades, we have only had about a dozen or so  
14 requests for exemptions. So there is a serious concern that  
15 this really hasn't been needed all that much over the past  
16 and yet here we are going about doing it to make it easier.

17 Therefore, should this procedural rule pass, we do look  
18 to the Board to use its greatest vigilance when it's testing  
19 these exemptions, both now and in the future. And we  
20 caution the Board about granting too many exemptions too  
21 quickly. We need to see how these play out before we make  
22 this a practice and, while acknowledging it's very  
23 different, look at the mining variance for Freeport Mining  
24 and how much trouble that has caused. And so, when we start

1 exempting folks from existing law, we can get into trouble.

2 Those are my comments. I appreciate the Board for the  
3 opportunity and we will be submitting written comments  
4 before the deadline. Thank you.

5 CHAIRMAN SNYDER: Thank you, Mr. Muller. Chris  
6 Hamilton, please.

7 MR. CHRIS HAMILTON: My name's Chris Hamilton, with  
8 West Virginia Coal Association. I appreciate the  
9 opportunity to address the Board and its proposed rule.

10 We appreciate the fact that some EQB members may view  
11 the proposed procedural rule of supply an expedient way for  
12 dischargers to modify or avoid the application -- modify the  
13 application of water quality criteria applicable to public  
14 water supplies, stream uses, so-called Category A waters.

15 The reasons for the rule, as stated within the Board's  
16 Statement of Circumstances, is its current implementation of  
17 Category A by Division of Water Resources and the NPDES  
18 permitting program, is that the designated use of Category A  
19 applies to all the waters of the state unless it has been  
20 removed specifically by the Board.

21 Although the Board next states that it supports this  
22 interpretation of the application of the public water supply  
23 use, the fact is that the EQB's proposed rule presumes that  
24 DEP can designate all streams as Category A waters without

1 | ever determining whether any of them actually serve this  
2 | use.

3 |         The proposed rule further presumes that the only way a  
4 | discharger can avoid application of Category A criteria is  
5 | through a use change, which requires rulemaking and EPA  
6 | approval.

7 |         We maintain that this premise is faulty and that DEP  
8 | has no regulatory authority, under law or statute, within  
9 | the water quality standards, to designate all waters as  
10 | Category A without first making specific - and cite specific  
11 | - findings. Additionally, what EQB may believe it is  
12 | providing an expedient variant procedure.

13 |         We maintain that the rule offers only false hope and  
14 | maybe no hope at all of ever getting to the end of the  
15 | process.

16 |         It's abundantly clear, again, that no provision of West  
17 | Virginia's water quality standards designate all waters of  
18 | the state as serving a human consumption use, otherwise  
19 | known as Category A waters. Likewise, the standards neither  
20 | contain nor authorize DEP to administer a presumption that  
21 | all waters serve a category use. Instead the regulations do  
22 | expressly create a presumption that all streams serve  
23 | aquatic life, Category B, and water contact recreation,  
24 | Category C uses.

1           Except for this presumptive designation of all streams  
2 as serving these uses, only existing uses are protected.  
3 Importantly, existing uses consist of those uses actually  
4 attained in a waterbody on or before -- on or after November  
5 28, 1975.

6           Furthermore, the only manner in which a stream may be  
7 designated as serving a Category A use is if it is actually  
8 being used after conventional treatment for human  
9 consumption by showing it can and should be made during the  
10 NPDES permit process.

11           The Coal Association would not object to a process by  
12 which, during the permitting process itself, prospective  
13 dischargers are required to determine whether there are  
14 public water intakes in the vicinity and to demonstrate that  
15 their discharges will not violate the water quality  
16 standards for an actual existing use.

17           The EQB's proposed procedural rule, however, is  
18 premised on the notion that WV DEP permit writers have,  
19 through long-standing application of a presumption,  
20 effectively designated all waters as serving a Category A  
21 use.

22           It further presumes that such a designation has been  
23 made, permittees cannot simply rebut it during the permit  
24 process and instead must seek a use change through

1 rulemaking.

2 This approach thus presumes that DEP, which lacks rule-  
3 making authority over water quality standards can designate  
4 all waters as serving Category A uses without actually  
5 determining that they do. And the discharger's sole  
6 recourse is a use change, rather than a demonstration that a  
7 particular water does not actually serve a Category A use.

8 This approach, we believe, is fundamentally flawed,  
9 legally insupportable and places a near insurmountable  
10 burden on dischargers which, in the case of the coal  
11 industry, will likely cause unintended and adverse  
12 environmental impacts, especially with regard to manganese.

13 We believe some discussion or background concerning  
14 manganese is in order. We have previously submitted  
15 extensive comments with this Board. This Board, at one  
16 point in time, attempted to help relieve the burden on the  
17 coal industry by altering that limit. That limit was  
18 submitted to EPA for their approval, which must take place  
19 prior to the implementation of the rule, a little over two  
20 years ago and we're still waiting for the relief that was  
21 understood by this Board when it altered that standard.

22 That standard was forwarded to the state legislature,  
23 where it was approved, and it has been submitted to EPA and  
24 has been sitting on someone's desk in Philadelphia for over

1 two years awaiting approval.

2 We have no confidence whatsoever in the procedure  
3 outlined in this rule. Again, we don't believe anyone will  
4 ever get to the end of that process as long as the State of  
5 West Virginia, through the EQB Board, delegates part of its  
6 responsibility to EPA, where we will all, in our opinion, be  
7 held hostage.

8 That pretty much concludes -- we would also embrace  
9 comments made by some of the other speakers, particularly  
10 the fact that there is in place now an anti-degradation  
11 rule, which we believe must be looked at in concert with  
12 this rulemaking. It does set a safety net by which no  
13 degradation of any water stream can occur without first some  
14 rather rigorous and extensive economic findings.

15 So with that, I'll conclude and we will follow up with  
16 written comments as well.

17 CHAIRMAN SNYDER: Thank you, Mr. Hamilton. The next  
18 speaker, Bob Williams.

19 MR. BOB WILLIAMS: Thank you, Mr. Chairman. My name's  
20 Bob Williams. I am the Executive Secretary for the West  
21 Virginia Farm Bureau, an organization which represents more  
22 than 16,000 individuals statewide in West Virginia.

23 We are concerned over this rule and offer the following  
24 issues -- brief issues for comment:

*KRM*

1           This rule being proposed is a procedural rule. It  
2 appears that the process developed in the rule is a method  
3 to change the designated use of a stream. The process is  
4 one that has historically been done through the legislative  
5 process. The West Virginia Farm Bureau supports the  
6 development of a less burdensome method of removing the  
7 Category A use from streams where that designated use is  
8 inappropriate, but we do object to the use of a procedural  
9 rule to accomplish this task. It would be more appropriate  
10 to allow the legislative review of this matter through the  
11 use of the legislative rule-making review process.

12           Additionally, this effort seems to be an attempt to  
13 solve a problem that doesn't exist. We encourage the Board  
14 to work to solve the real water quality issues in West  
15 Virginia. Public water supply designation is neither a goal  
16 of the Clean Water Act or the Water Use Categories and Water  
17 Quality Standards of West Virginia, both of which reflect  
18 goals more aligned with Category B or Category C as a  
19 minimum standard.

20           The process established by this rule might prove to be  
21 no easier, no less time consuming to remove a stream from  
22 Category A than the current legislative process. This Board  
23 has commented, on several occasions, that unless USEPA would  
24 agree to a definitive time frame for a decision, you would

1 not proceed. It appears that USEPA has not agreed to that  
2 stipulation, leaving open to question whether the rule will  
3 be effective in reducing the time required for a change.

4 We hope that you'll reconsider your position on this  
5 procedural rule and I appreciate the opportunity to make  
6 comment.

7 CHAIRMAN SNYDER: Thank you, Mr. Williams. The next  
8 speaker, Cindy Rank.

9 MS. CINDY RANK: I appear here tonight wearing two  
10 hats, one as a member of my local community group, FOLK,  
11 Friends of the Little Kanawha -- the headwaters of the  
12 Little Kanawha above Wildcat; one as chair of the mining  
13 committee of the West Virginia Highlands Conservancy, a  
14 statewide conservation group working since 1967 for the  
15 protection of the special places in West Virginia and the  
16 specialness of place that West Virginia's land, water  
17 resources and air provide to those of us who are fortunate  
18 enough to live here.

19 In both roles, I'm here to reluctantly encourage the  
20 adoption of the proposed procedural rule governing the  
21 reclassification of waters designated as a public water  
22 supply.

23 My hesitation comes in knowing the fact that we have  
24 sufficient procedures already available through the variance

1 | procedures of the Board to achieve the change of the  
2 | designated use of all streams.

3 |         However, we do recognize the pressures on the Board to  
4 | relax its position on Category A use designation and have to  
5 | applaud the Board's attempt to placate the perceived needs  
6 | expressed by industry to shorten the time required to obtain  
7 | variance, while also maintaining the basically principles of  
8 | the Clean Water Act, which are to preserve, protect,  
9 | maintain and restore the waters of the state.

10 |         We would applaud the Board for maintaining the historic  
11 | application of Category A to all waters of the state,  
12 | especially to those headwaters where some of us, and myself  
13 | particularly, live and use the water.

14 |         FOLK and Highland Conservancy would oppose any  
15 | weakening amendments to the proposed rule, but we'd like to  
16 | suggest a couple of the following clarifying items that I  
17 | think would be helpful from our point of view, if it's  
18 | possible for you.

19 |         On page 3, in section 4.1.H, in the demonstration that  
20 | water under consideration for removal from Category A use is  
21 | not used as a source, the documentation referenced in H.4  
22 | that requires a determination of potential -- as a potential  
23 | for hydrologic connection between the drinking water wells  
24 | in the vicinity, if you find some. I think that they should

*KRM*

1 also -- you should also include reference to springs and  
2 cisterns in the area and also to find out if there's any  
3 hydrologic connection between those that might also be used  
4 for drinking water sources.

5 On Page 4 in 4.1.I.1, we believe that the applicant for  
6 a variance should not just be encouraged to use EPA's  
7 Interim Economic Guidance document for water quality  
8 standards in preparing analysis in demonstration of economic  
9 and social impact, but should be required to use that at  
10 least in any kind of more in-depth study, if at all  
11 available.

12 Page 6, 6.3.B.2, if possible we believe the notice for  
13 the variance and the public hearing should also be published  
14 in the newspaper of local circulation, if that would be at  
15 all possible by the Board. It would be helpful to those who  
16 perhaps wouldn't know that was going on, even though I know  
17 that the notification, I think, is the same that you do now  
18 for these meetings and that's through the Secretary of  
19 State's office and sent to anyone who happens to be on the  
20 list.

21 I would recommend, if it were possible, to put it also  
22 in the newspaper. There's no guarantee that anybody reads  
23 the newspaper, but at least that is one more opportunity.

24 And, finally, I would like to reaffirm our belief, both

1 the Conservancy and FOLK, that the historic position that  
2 public water sources include domestic, or household, use by  
3 individuals, as well as public service districts is, indeed,  
4 the right way to look at public water supply, especially in  
5 light of the fact that we don't have any documentation  
6 across the state for what is or isn't or has or hasn't been  
7 used as drinking water supply over the years.

8 Oftentimes in this room, as we did tonight, we come  
9 down to a point of how many people use drinking water -- or  
10 use stream water directly or how many don't and whether or  
11 not that should be or is healthy or whatever. I really  
12 don't think that, even though I happen to be one of those  
13 users, and I happen to consider that very important in my  
14 headwater's area, but I think that the real question is the  
15 basic premise of the Clean Water Act, that if it's clean,  
16 you keep it clean and if it's degraded, we try as best we  
17 can to clean it up.

18 And here in the state of West Virginia, I know that  
19 many waters are very clean and possible for future use by  
20 industries who need very clean water and by people who could  
21 use waters in the streams for future domestic use. I think  
22 it behooves us to do what we can to protect it at the levels  
23 most -- the highest levels possible so that we don't find  
24 ourselves 10, 20 years down the line looking for expensive

1 treatment technology so people can use the water and be  
2 desperately seeking that.

3 And perhaps a final note, just because it's been  
4 mentioned a couple of times on anti-deg and on manganese.  
5 Not everyone in this room would agree with me, although  
6 there might be a couple, I think the anti-deg -- we in FOLKS  
7 certainly have looked at the anti-degradation provisions of  
8 the water quality standards of the state of West Virginia as  
9 the strongest possible protection for our small headwaters  
10 where people really don't know the quality and quantity and  
11 all of the rest that go with it.

12 We've been disappointed over the past couple of years,  
13 through your all's working through a very difficult  
14 procedure to come up with an anti-degradation policy. And  
15 contrary to, I think what Chris said, or someone else, we  
16 certainly don't believe that what has come out, in terms of  
17 the anti-degradation implementation policy is anywhere near  
18 as protective as the policy itself.

19 And we feel that, in light of that, especially Public A  
20 is particularly important because it is the one last, final  
21 thread of more protection for those of us who live in  
22 headwaters area and smaller streams that we really don't  
23 know a whole lot of information about the quality and  
24 quantity.

1           Since manganese has been mentioned two or three times  
2 already, I would also have to point out to the Board that --  
3 a situation that I've brought to your all's attention many  
4 times over, practically every time we talk about manganese  
5 or Public A, but maybe not to the new members.

6           In applying technology-based deg limits at mine sites  
7 in the Buchannon River over the years, the city of Buchannon  
8 is now paying much more to treat their water, to expand it  
9 out throughout the area, because they've had to add  
10 potassium permanganate as a treatment to the waters because  
11 of the manganese, iron and aluminum coming downstream from  
12 some of the mine sites just 10 miles upstream.

13           That is an unfair passing of the burden of treatment,  
14 which could be avoided if, in the past, we had appropriately  
15 and adequately applied water quality standards where and  
16 when we should have in mining and in granting mining  
17 permits.

18           We constantly fight for that kind of application of  
19 water quality standards and water based effluent limits.  
20 That's one of the basic symbols to me, right across the hill  
21 from us, that stands out in my mind as one of the situations  
22 that could have been avoided, had we taken the stronger,  
23 more stringent path and required much more in the very  
24 beginning for operation.

1 I thank you for the opportunity to comment and we'll  
2 submit any additional comments once people are finished.

3 CHAIRMAN SNYDER: Thank you, Ms. Rank. The next  
4 speaker will be Sam Minardi.

5 MR. SAM MINARDI: Good evening. My name is Sam Minardi  
6 and I'm with Allegheny Energy. I appreciate the opportunity  
7 to speak to you tonight.

8 Allegheny Energy has a longstanding commitment to the  
9 state of West Virginia, its citizens and the natural  
10 environment. As the state's largest energy provider,  
11 Allegheny generates more than 5,000 megawatts of electricity  
12 in six West Virginia power stations. It provides more than  
13 700,000 West Virginia residents with electric and natural  
14 gas utility service.

15 Our unit takes pride in its dedicated effort to  
16 preserving the natural environment. As a leader in  
17 environmental stewardship, Allegheny is proud of the  
18 accomplishments it has made in recent years.

19 This proposed rule assumes that all state streams are  
20 public water supplies and classifies each as such. We  
21 believe that this is a far too broad approach and is an  
22 unworkable alternative to achieving the state's ultimate  
23 goal, a prospering business economy and a clean environment.  
24 It is also not reflective of the actual conditions of our

1 state streams.

2 Category A should be used to protect actual public  
3 water supply intakes and to apply this classification to all  
4 state streams is far too broad. We believe that if a  
5 discharger does not affect the public water supply at the  
6 point of intake, then Category A criteria should not apply.

7 We urge the Board to take this into consideration and  
8 reconsider the proposed rule. We also do not believe that  
9 this is a wise policy for the state to deviate from the  
10 federal requirements and institute a program that is more  
11 stringent than the federal requirements and other states  
12 competing for business. Thank you.

13 CHAIRMAN SNYDER: Thank you, Mr. Minardi. The next  
14 speaker, Randy Sovic.

15 MR. RANDY SOVIC: I apologize to the Board, I didn't  
16 have a chance to make any prepared presentation today, so I  
17 will be very brief.

18 I am here -- I'm Randy Sovic and I'm representing the  
19 Division of Water Resources, here representing the Director,  
20 Allyn Turner, really to offer our support for the Board's  
21 continued process of this procedural rule.

22 We feel that this rule will be an effective process to  
23 streamline the approach of removing designated uses where  
24 and when judged appropriate, yet still allow the agency its

1 | historical practice to apply Public A statewide.

2 |         Now, I would urge the Board to review a document that I  
3 | believe I presented about a year ago, maybe longer, maybe a  
4 | year-and-a-half ago, and I know some of you Board members  
5 | are relatively new since that period of time. And it was a  
6 | historical perspective on the whole Public A issue, going  
7 | back quite a number of years.

8 |         We feel that your predecessors had some great vision  
9 | back in the 1960s, at least that period of time, I think is  
10 | when my historical perspective started, in that the Board's  
11 | rules at that time were clearly codifying that -- it wasn't  
12 | called Public A that period of time, it was called something  
13 | else, but it was, in essence, Category A criteria that it's  
14 | applied statewide with very few exceptions.

15 |         We weren't even quite clear in what those exceptions or  
16 | why those exceptions were in at the time, but it was very  
17 | clear that your predecessors had established and had  
18 | foresight to foresee that this state's water quality, prior  
19 | to the Clean Water Act, which is now in its 30th anniversary  
20 | - you've all probably heard that recently. Prior to the  
21 | installation of the Clean Water Act your predecessors saw  
22 | that this state should take very close -- pay very close  
23 | attention to its own waters and apply Public A statewide,  
24 | because I believe that they felt that many people, probably

1 more so then than now, were using surface waters as public  
2 waters.

3 We heard Liz, and we heard Jeremy and others talk about  
4 how many people are still out there using those waters. The  
5 agency isn't aware of that. We don't have those type of  
6 records.

7 So, it is much more appropriate, we feel, to have, if  
8 you will, a default Public A criteria, where we can apply it  
9 and protect those users who are unknown at this point in  
10 time, or future users, potentially, and just have a process  
11 where we can essentially, and hopefully, streamline those  
12 recognized areas where it is not being used at this point in  
13 time. And I believe through that process we can also  
14 incorporate conditions that if it would be used in the  
15 future, that that recognized applicant would have to  
16 recognize that at the time and be aware of it, that could  
17 change in the future.

18 We believe this procedural rule is a step in the right  
19 direction. We applaud the Board for attempting to go this  
20 route. We are hopeful that EPA will approve these in an  
21 expedient timeframe. We recognize the processes the Board  
22 has gone through with EPA on other issues of approval, but  
23 we hope that will change in the future.

24 Again, that's pretty much the comments I think I'll

1 have at this time.

2 CHAIRMAN SNYDER: Thank you, Mr. Sovic. Dave Yaussy  
3 will be our final speaker this evening.

4 MR. DAVE YAussy: Thank you, Mr. Chairman. I'm here on  
5 behalf of the West Virginia Forestry Association this  
6 evening.

7 The proposed rule assumes that Category A applies  
8 throughout the state of West Virginia. It does not.  
9 Nowhere does the state's water quality standards say that  
10 Category A is a statewide use.

11 The rules do say that Categories B and C are statewide  
12 uses, which shows that the Board knows how to designate a  
13 statewide use if they intend to do so. DEP has not applied  
14 Category A as statewide use historically in all permits.

15 Until recently, coal permits and a good number of  
16 municipal permits did not have permit limits set using  
17 Category A criteria. They still don't in some situations,  
18 particularly with regard to chloroform.

19 The Board -- this Board tried to change the rule in  
20 1997 to apply Category A throughout the state. They were  
21 unable to do so. The legislature sent the issue back to the  
22 Board and asked them to reconsider it. After 18 months, the  
23 Board promulgated an emergency rule which would have had  
24 Category A applying throughout the state. The legislature

1 rejected that. The emergency rule was in October of '99,  
2 the legislature rejected it the 2000 legislature.

3 The Board, itself, in 1985, in response to comments to  
4 changes in the water quality standards, said that Category A  
5 does not apply throughout the state. The Board itself has  
6 made that determination.

7 Designating all the states waters as Category A is  
8 unnecessary. The rule presently requires protection of  
9 public water intakes and nobody disagrees with that. If  
10 anybody would affect the public water supply, even if  
11 they're 100 miles upstream, they can't do so. It's a use  
12 the Board's defined and anybody who's upstream has to  
13 protect that use.

14 We agree that a discharger should be required to show  
15 that he will not be affecting a public water supply, even if  
16 it's far downstream. That's a reasonable requirement. What  
17 we don't think is reasonable is a requirement that you have  
18 to protect a use which does not exist, for absolutely no  
19 gain either economically or to the environment.

20 The Board has never explained how its present rule does  
21 not protect public water supplies. We believe it does.

22 Anti-degradation provides protection for high quality  
23 waters. Expansion of Category A is not necessary to  
24 preserve the high quality of streams that people are

1 drinking out of. If a river is safe enough to drink out of  
2 now, as we've heard testimony about, although we don't  
3 believe it should be encouraged, it will continue to be and  
4 that water quality will not be reduced absent an opportunity  
5 for full public comments and public participation in the  
6 process.

7 When you apply Category A throughout the state, you  
8 remove the opportunity for there to be a public discourse  
9 and dialogue on whether, in any given situation, development  
10 should trump the application of Category A.

11 The rule itself is too complicated. Category A use  
12 removals have, in the past, been about four pages long.  
13 They've been done by showing that the use is not present and  
14 that's the only reasonable showing to be made, either it's  
15 there and people are using the stream as a water supply or  
16 they are not. You can do that by walking the stream,  
17 interviewing people nearby and talking to the public health  
18 agencies. You don't need to do it by garnering all the  
19 information, for example, with regard to aquatic life, that  
20 the rule requires -- that the proposed rule requires.

21 We urge the Board to continue to do Public A removals  
22 as it has in the past, which is just to show whether or not  
23 that use is present.

24 The Board's rule requires applicants to prove that the

1 area where the use will be removed can't be used as a public  
2 water supply. That's an impossibility. What should be the  
3 test is whether the segment in question is a public water  
4 supply.

5 We urge the Board to strongly reconsider the use of a  
6 procedural rule to change a legislative rule. We propose a  
7 procedural rule, water quality standards, including the use  
8 designations, are a legislative rule. I'm not quite sure  
9 how a procedural rule can be -- which does not go through  
10 legislative review, can be used to change a legislative rule  
11 which has universal application.

12 The EPA has to approve all these use removals before  
13 they become effective. We know that EPA has had before it,  
14 in many cases for two years or more, changes to water  
15 quality standards which it refuses to act on, and we are to  
16 believe -- although there's a memorandum of understanding  
17 being negotiation with EPA, in which EPA is not even willing  
18 to commit to honor the statutory requirements for action  
19 within 60 to 90 days. Why do believe they'll act any more  
20 promptly on these use removals is beyond me.

21 You've heard testimony from individual users. I would  
22 submit to the Board that those are not public water  
23 supplies, because they do not provide treatment prior to  
24 use.

1           Furthermore, Category A standards are set assuming a  
2 lifetime of use, particularly for carcinogens, not sporadic  
3 use when you take a drink out of a water. It assumes, in  
4 most cases, 70 years of regular, constant use, which is not  
5 the situation we're talking about for many of these -- for  
6 anyone who's hunting and is taking a drink out of a stream.

7           But even if they were public water supplies, why not  
8 allow them to identify it as such and protect it, but not  
9 require the protection every place where that is not  
10 present.

11           And we think the Board has an obligation to look at  
12 economic development as well as the interest in protecting  
13 human health and the environment. They're all equally  
14 important.

15           We urge the Board to drop the rule -- the proposed rule  
16 and change the water quality standards to clearly indicate,  
17 as has been, we believe, the practice in the past, that  
18 Category A does not apply statewide. Thank you.

19           CHAIRMAN SNYDER: Thank you, Mr. Yaussy. Thank you,  
20 everyone, for your comments. We will receive or accept  
21 written comments and, hopefully, receive some, too, through  
22 November 1st, 2002, if you get them to us by then.

23           MS. LIBBY CHATFIELD: 5 p.m.

24           CHAIRMAN SNYDER: 5 p.m., which is when our doors close

1 upstairs, although I frequently find people up there after  
2 that working. And, once again, I appreciate everyone coming  
3 and presenting this evening. I also want you to know that  
4 this is the first time any group has seen the full  
5 complement of the Board within a fair amount of time. I'm  
6 incredibly pleased, as a long-term Board member, to have a  
7 full group here. I think it well serves the state.

8           Anyway, thank you very much for coming.

9           (WHEREUPON, any written comments presented to this  
10 reporter are attached hereto and made a part hereof, and the  
11 hearing was adjourned at 8:08 p.m.)

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*KRM*

REPORTER'S CERTIFICATE

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, to-wit:

I, Karen R. Meyers, Certified Court Reporter and Notary Public within and for the State aforesaid, duly commissioned and qualified, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of the hearing held in the foregoing-styled matter on the 23rd day of October, 2002.

Given under my hand this 28th day of October, 2002.

*Karen R. Meyers*

KAREN R. MEYERS, CERTIFIED COURT REPORTER  
COMMISSIONER FOR STATE OF WEST VIRGINIA

My commission expires: April 15, 2012.



KRM

WV Environmental Quality Board  
OCTOBER 23, 2002  
7:00 P.M.  
Sign-In Sheet

NAME:

speaking tonight?  
Y      N

- |       |                   |   |   |
|-------|-------------------|---|---|
| 1)    | Jennie Henthorn   |   |   |
| • 2)  | Richard Thomas    | ✓ |   |
| • 3)  | Randy Maggard     | ✓ |   |
| • 4)  | Charlie BURD      | ✓ |   |
| • 5)  | LIZ GARLAND       | ✓ |   |
| • 6)  | JEREMY MULLEN     | ✓ |   |
| • 7)  | Chris Hamilton    | ✓ |   |
| • 8)  | Bob Williams      | x |   |
| 9)    | DAVID VANDER LIND |   | N |
| 10)   | Ker Ward Jr       |   | N |
| • 11) | Cindy Rank        | x |   |

speaking tonight ?

Y      N

- |     |                    |   |   |
|-----|--------------------|---|---|
| 12) | Thomas W. Holbrook |   | X |
| 13) | Sam Minardi        | X |   |
| 14) | JULIA WATSON       |   | X |
| 15) | Ann Bradley        |   | X |
| 16) | Charlie Armstrong  |   | X |
| 17) | Russq Eric         | X |   |
| 18) | Dave Yausy         | X |   |
| 19) |                    |   |   |
| 20) |                    |   |   |
| 21) |                    |   |   |
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| 28) |                    |   |   |
| 29) |                    |   |   |



Division of Water Resources  
1201 Greenbrier Street  
Charleston, WV 25311-1088  
Telephone Number: (304) 558-2107  
Fax Number: (304) 558-5905

## West Virginia Department of Environmental Protection

Bob Wise  
Governor

October 24, 2002

Environmental Quality Board  
1615 Washington Street, E.  
Charleston, West Virginia 25311-2126



**RE: Proposed Procedural Rule Governing Reclassification of Waters Designated for Public Water Supply**

Dear Board Members,

The West Virginia Department of Environmental Protection and the Division of Water Resources appreciates the opportunity to provide comments on the Board's proposed procedural rule. The Board's continued support of this Agency's historical practice in applying the Public A use designation has done much to enhance and protect the overall quality of our State's waters and this Procedural Rule is a positive step to attempt to streamline a process that will enable our continued implementation of Public A while providing relief from those requirements where judged appropriate.

The following Agency comments are offered to enhance the existing proposal:

### Section 4.1.a.

Although not a crucial concern to this Agency, the Board may seek to replace the term "stream" with "water" or "water or segment thereof" here and where elsewhere used throughout this rule since waters are more clearly defined and inclusive of "streams" in Chapter 22-11-2(23) of the WV Code.

We would also suggest that the applicant supply the Latitude/Longitude of each existing or proposed discharge in the inclusion of this required information.

### Section 4.1.b.

DWR suggests changing the phrase "the entire segment" to "the proposed or affected segment" in the 1<sup>st</sup> sentence of this section. We also suggest adding the phrase "or would require" prior to "effluent limits based on..." in the 2<sup>nd</sup> sentence and to further revise the end of the sentence to read "and current data on the concentrations of those pollutants in the affected waters."

### Section 4.1.c.

Although this Agency does not oppose the presentation of data regarding an assessment of aquatic life present, it questions the relevance of this data to this issue.

### Section 4.1.e.

Since the official Water Quality Standards (WQS) Rule (46 CSR1) applicable for Clean Water Act purposes remains the Board's 7/1/99 effective rule, DWR suggests either reflecting the appropriate references to this rule or otherwise clarify that the references to 2.11 and 2.8 are associated with the Board's effective rule of 5/17/01.



West Virginia Department  
of Environmental Protection

"Promoting a healthy environment."

Section 4.1.h.1.

DWR suggests clarification on what "other relevant information about the receiving stream" (water) the Board intends be submitted.

Section 4.1.h.2.

Has the Board contemplated any minimum length of water segment that must be surveyed or will this be left to the applicant or the Board's direction as a case by case analysis? The Agency recognizes the difficulties in attempting to define this limit, however, without some guidance in this area, it is suspected that this could be at issue in each application presented.

Further, the DWR suggests that contact with the residents "must be attempted" or preferably completed and such information "must be included in the application." Therefore, we request at least revising the terms "should" to "must."

Section 4.1.h.3.

This determination does not appear to appropriately fit in this "demonstration section" and for this reason we suggest removing this language as 4.1.h.3. and reinserting as 4.1.k. If this is done, you will then need to revise 4.1.h.4 to 4.1.h.3.

Section 5.2.b.

Reference to 5.1.b.1. we believe should be 5.1.c.1.

Section 46-7-6

DWR suggests some clarification is necessary in referring to the degree of application completeness. For example, Section 6.1 refers to "a review to determine that the application is complete" which shall be completed in 30 days. However, 6.1.a. refers to a further "substantive review."

To avoid confusion, the DWR suggests the use of the term "administratively complete" in 6.1 as well as in the 1<sup>st</sup> sentences of 6.1.a. and 6.2.

Section 6.3.c.

This section may require further explanation. It appears to this Agency that if the decision is made that the proposal is not warranted, it should be a "final" and not "preliminary decision." If "preliminary" was intended, after contact with the applicant and basis for the decision, what is any next step?

Again, the Agency appreciates this opportunity to comment on this proposal and the Board's efforts to lead to codifying longstanding understandings and practices by both of our Agencies.

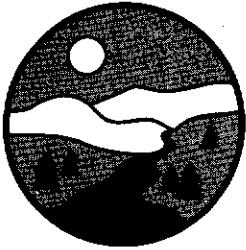
Sincerely,



Allyn G. Turner  
Director

AGT/rs/pw

cc: Michael O. Callaghan, Cabinet Secretary, WVDEP  
Randy Sovic, DWR, WVDEP  
Jerry Ray, DWR, WVDEP  
Ken Politan, M&R, WVDEP



# WEST VIRGINIA RIVERS COALITION

801 N. Randolph Avenue • Elkins, West Virginia 26241 • (304) 637-7201 • www.wvrivers.org

October 31, 2002

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



Dear Mr. Snyder,

West Virginia Rivers Coalition is submitting comments on Title 46, Series 7, "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply". West Virginia Rivers Coalition (WVRC) is a non-profit organization dedicated to the conservation and restoration of West Virginia's exceptional rivers and streams. Our 3,000 members and 48 affiliate organizations are concerned about the health of our rivers and the health of those using our rivers. The proposed procedural rules have broad implications to human and river health.

This rule addresses procedures for removing one of our most protective criteria of water quality, Category A. Over the past several decades only a handful of exemptions from Category A have been requested by industry. Although it does not fit the mission of WVRC to allow pollutants to diminish water quality, we recognize that, in rare circumstances, it may be necessary to allow provisions for removal of Category A on selected stream segments. We believe it imperative for those provisions to only be allowed under careful consideration such as may be afforded by this ruling. Any removal of Category A must be understood to have potential for long term environmental degradation, implications on human health and economic constraints.

Of course, if pollutants are allowed that do not meet Category A water quality criteria than the segment is degraded. It will be hard, if not impossible, to later improve that segment to drinking water standards. And, as EPA Region III has told the EQB Board in the past (reference Board meeting of September 27, 2001), there is a need to protect for future uses. Additionally, the removal of Category A from one segment can only have implication for downstream users, especially as future uses unfold.

At the October 23<sup>rd</sup> public hearing, WVRC provided several anecdotal examples of present applications of Category A by individuals throughout the state. Other examples have been brought to the Board's attention over the past couple years. In a February, 2000 letter from EPA Region III to the EQB, it is stated that "in segments where the stream has been used as a drinking water source on or at any time since November 28, 1975, the use would need to be retained. Region III is particularly concerned in cases where an individual uses water directly from the stream. The human health of those individuals, especially in rural areas, would not be protected if the drinking water supply use were removed."

Over the years the argument has been made that Category A should not be applied to our surface waters because drinking water use cannot be measured and therefore, should not be implied. Although human habit cannot be measured as easily as a pollutant in a water sample, sufficient data demonstrates drinking water usage exists throughout the state of West Virginia. Aside from specific examples of individual use of surface waters for drinking water use, such as the recent testimony of Ms. Cindy Rank, statistics do lend validity to broad use of surface water for drinking. The Water Filtration Company of Marietta, Ohio can document cases of West Virginians using pond water as source drinking water. And the 1990 US Census reports 26% of our state's households, roughly 463,000 people, gather drinking water from non-municipal sources including rivers, streams and ponds. The law requires the protection of existing uses, the statistics and anecdotes show a broad usage, therefore the protection should be applied as broadly.

In those rare cases when it might be deemed necessary to remove Category A protection, the long-term economic weight of such decisions should be given consideration. The process to remove Category A from any stream segment should recognize the potential clean-up costs of downstream users and future users. These costs include increased municipal treatment necessary to handle increased pollution--costs that are borne by West Virginia's citizens. The October 31, 2002 Charleston Gazette reports that our Department of Health and Human Resources is providing a \$2.3 million match to the \$7.8 million grant awarded by EPA "to improve and protect West Virginia's public drinking water systems". The EQB should support strong drinking water protections at this time when significant investment is being made by the state and nation for those same protections for West Virginian's.

Similarly, the Division of Tourism promotes West Virginia's "pristine" waters. Tourism is West Virginia's most stable and strongest economy sector. Every decision made that affects the natural resources of our state should be evaluated for its implication on our tourism promotion. Quality water is a significant economic factor in our state.

In West Virginia, regulated industries do not support Category A designation for the state's surface waters because Category A protection would continue to make industry responsible for treating the types and amounts of pollutants they release into our waters. In reality, industry must support the highest protections for our rivers if they are to be perceived as responsible to serving West Virginian's interests. Those who administer and implement our water quality protections are well served by this proposed rule in that it provides a procedure that offers some certainty of care in the Category A removal process. And industry is offered a process more efficient than the present system.

At the October 23<sup>rd</sup> hearing and the October 24<sup>th</sup> EQB meeting, industry presented weak objections to the proposed procedural rule, Title 46, Series 7. These are reviewed and addressed below:

Manganese:

WVRC does not support efforts to make exemptions from existing water quality law easier. This is particularly so with exemptions that pass the cost of water treatment away from those who pollute and on to West Virginia's residents. An example of this involves Manganese. Coal companies have the technology to treat water for manganese.

However, they would rather not pay for the treatment, as it is a cost they do not want to incur when compared to not treating for it. Instead, they claim it is not harmful and therefore should be allowed at higher levels than West Virginia's water quality standards allow.

Manganese, at high levels, introduces health risks including low energy, muscle malfunction, tremors and mental disorders including Parkinson's. At lower levels, manganese discolors water, leaves a stain upon dishes and laundry, and causes an odor and an off-taste in water. Because of this, municipal facilities must treat for manganese. These are qualities of water that no municipal provider would charge its customers for, so instead the municipality treats the water at a significant cost and bills the customer a higher price for its service. Coal is responsible for the additional Manganese in the water, yet industry wishes to have West Virginians pay for the clean up. For the City of Buchannon, there have been substantial problems and costs treating their municipal water for Manganese.

Anti-degradation:

There is no relationship between Category A public drinking water supply protections for water and the protections that West Virginia's anti-degradation implementation policy provides for water. First, anti-degradation allows for significant polluting of the water body before an anti-degradation review kicks in. This "de minimus" is set at 10% in West Virginia, and is allowable for each parameter. Using only anti-degradation, a public drinking water supply could therefore be polluted for parameters (pollutants) such as sediment, metals, acid mine drainage and others and still be classified as passing the anti-degradation review. Fill a drinking glass of water and add 10% of sediment and see how desirable and safe that is for a public drinking water supply.

Additionally, all non-point sources of pollution are exempt from the anti-degradation review. While WVRC realizes the absurdity in this, nonetheless it is the law. Non-point sources of pollution are the greatest polluter of waterbodies both nationally and in West Virginia. To say that West Virginia's anti-degradation policy protects public drinking water supplies while it allows unquantified amounts of nutrients and fertilizers to directly enter our waters from farming, acid mine drainage from active and abandoned coal mines, and sediment from timbering operations is ludicrous. This is even more the case when we look at non-point run-off from parking lots, highways and other development projects.

Anti-degradation and Category A public drinking water supply protections are not related. Anti-degradation, and specifically West Virginia's anti-degradation policy, cannot be considered to offer the drinking water protections of Category A.

NPDES Permitting:

Consideration of Category A through the NPDES permit process will not provide the insurance that is proposed with this rulemaking. The limitation to NPDES permit review does not address any other implementation of the Clean Water Act in which water quality criteria are a consideration. And procedurally, it is not clear that this addresses the procedures to removal of Category A. It was one of the goals of this rule to provide a more efficient mechanism for industry to request such removals.

In light of the lack of credibility of industry's assertions on these points and the strength of Category A protection to human health, water quality and economic parameters, West Virginia Rivers Coalition supports Title 46, Series 7, "Procedural Rules Governing Reclassification of Waters Designed for Public Water Supply" as it defends the role of DEP, EPA and EQB to protect the waters of West Virginia for use as public drinking supplies.

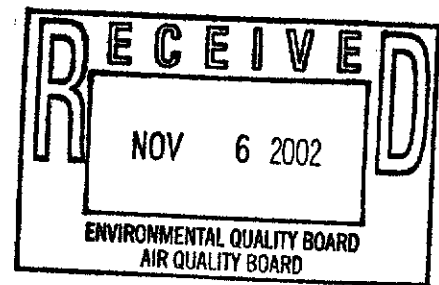
Sincerely,

A handwritten signature in black ink, appearing to read "Liz Garland", written over the typed name.

Liz Garland  
Issues Coordinator



Bryan K. Moore, Chair  
West Virginia Council of Trout Unlimited  
787 Twin Oaks Dr.  
Bridgeport, WV 26330-1645  
(304) 842-2779



West Virginia Environmental Quality Board  
1615 Washington Street East, Suite 301  
Charleston, WV 25311

Re: Title 46, Series 7, "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply"

October 31, 2002

To the Honorable Members of the Environmental Quality Board,

This letter is being sent today to officially record the position and comments of the West Virginia Council of Trout Unlimited (WVCTU). WVCTU represents approximately 2,000 members who recreate frequently on West Virginia's streams and lakes. The protection and integrity of clean water in West Virginia is the highest priority of WVCTU.

WVCTU supports and recommends Title 46, Series 7, "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply". It is WVCTU's position that the clean waters of West Virginia are perhaps our most valuable natural resource. West Virginia, through the Department of Environmental Protection, has historically chosen to recognize the outstanding value of the waters in our state and correctly afford them the highest level of protection available. It should be a very rare exception where there is consideration of lowering this level of protection in any way, and when an exception is considered it should be subjected to a demanding review and the full opportunity for public involvement. WVCTU strongly supports the adoption of this rule by the Environmental Quality Board.

WVCTU encourages the Board to retain Category A on every water throughout the State. We request that the Board clarify this designation in the rule to specifically state this application.

We are very concerned regarding the implications of removing Category A designation from large stream segments or entire streams. This would require a reconsideration of designated uses, and an endless process of looking at one stream at a time to determine if altering designated uses downward is in fact correct and justifiable. The

process of reevaluating designated uses would create a tremendous demand on the time and resources of all parties having an interest in stream designation.

We would like to see more information regarding the evidence of economic hardship to permit holders allegedly caused by Category A designation. We are unable to find any evidence of documented cost analysis by a permit holder or applicant that provides proof of economic hardship due to Category A designation. We seem to continually hear that Category A creates an economic hardship, but we have yet to see supportable documentation establishing this hardship. If this argument is to be used against Category A, we would request that a verifiable cost analysis be entered into the record to support that position.

Thank you for your time and consideration in this matter. The membership of WVCTU appreciates the opportunity to submit these comments.

Sincerely,

A handwritten signature in cursive script that reads "Bryan K. Moore". The signature is written in dark ink and is positioned above the printed name.

Bryan K. Moore

**AQBEQB CLERK - 46 CSR 7. Comments on proposed rule change**

**From:** Fred Liz <gsd01785@mail.wvnet.edu>  
**To:** <clerk@mail.dep.state.wv.us>  
**Date:** 10/31/2002 1:01 PM  
**Subject:** 46 CSR 7. Comments on proposed rule change



WV ENVIRONMENTAL QUALITY BOARD  
1615 Washington Street E.  
Suite 301  
Charleston, WV 25311-2126

Environmental Quality Board:

I protest the implementation of this Rule Change for the following reasons:

1-The Public Water supply is so important to the Health and welfare of the Citizens of W. Va. that I think this change, just to speed up the process to satisfy Industry desires, borders on arrogance on the part of the Board, even to consider such a request.

Water is so important to life that, in my opinion, any decision on this must not be rushed into. The old adage, "haste makes waste" I believe applies to these possible situations.

2-The present procedure, which works, places the burden of approval on our elected State Legislators, which is where I think it belongs. I believe that 132 Elected Legislators, who answer directly to the Public, can make a better determination on the subject of water, which is important to our very life, than the Governors appointees, who only answer to the Governor for their performance.

3- Removing the decision making process from the Legislative Branch of our State Government and placing it under the Executive Branch, places too much Power in the one person Governor, when the decision rightly belongs to the 132 elected Legislators.

I believe that this important decision should remain unchanged in order to provide the Citizens of W. Va. the best possible protection of our most important water resources. Degradation of our water will affect the very life of our future generations. NO change is in the best interests of W.Va. Citizens.

Thanks for the opportunity to comment.

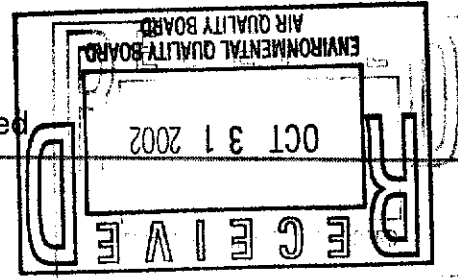
Fred Sampson  
HC-68, Box 25  
Ivydale, WV 25113  
Ph. 304-286-2204

**AQBEQB CLERK - Keep our surface waters from becoming polluted**

---

**From:** <Abbychapple@aol.com>  
**To:** <clerk@aqbeqb.state.wv.us>  
**Date:** 10/30/2002 3:06 PM  
**Subject:** Keep our surface waters from becoming polluted

---



West Virginia Environmental Quality Board  
1615 Washington Street East, suite 301  
Charleston, WV 25311

Sent via email 11/27/2002

Dear Sirs:

I am a resident of Hampshire County and I support Title 46, Series 7, "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply. The procedures to allow removing Category A, water supply designated use will insure careful consideration of the health of West Virginia waters.

I live in an area that uses surface waters for drinking. I believe that these water should continue to be protected under all circumstances and not be allowed to become polluted. There are too many streams and rivers, already in this state that have become polluted. Please put all protections possible for surface waters

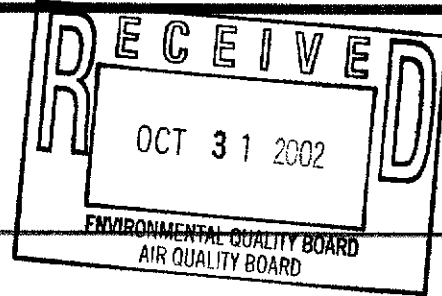
Abby Chapple, PO Box 370 Great Cacapon West Virginia 25422  
abbychapple@aol.com  
304/947-7590

**AQBEQB CLERK - Drinking water**

---

**From:** <Roartufty@aol.com>  
**To:** <clerk@aqbeqb.state.wv.us>  
**Date:** 10/31/2002 1:08 PM  
**Subject:** Drinking water

---



Safe drinking water is as essential to our well-being as learning our A-B-Cs!

West Virginia should begin setting standards for raising the quality of life.

Barbara Tufty  
Friends of the Cacapon River

**AQBEQB CLERK - Drinking water standards**

---

**From:** <Sears-Casey@msha.gov>  
**To:** <clerk@aqbeqb.state.wv.us>  
**Date:** 10/31/2002 1:01 PM  
**Subject:** Drinking water standards

---



Drinking water standards are important to me because:

I own property along the Greenbrier River near Renick WV and use the river for drinking water. This property has been in my family since 1956 and I stay there during the summer months.

I have had 3000 acres leased on Gauley River and I have a camp there. I use the water from the river for drinking and other uses. I have had this property since 1984.

My 2 sons and I kayak all over WV in numerous rivers and we drink the water from these rivers while on these trips. WV rivers are important to us for drinking, our health and our recreation. The way the upstream watersheds are protected directly affects our health and wellbeing.

I support Category A drinking water standards for WV surface waters.

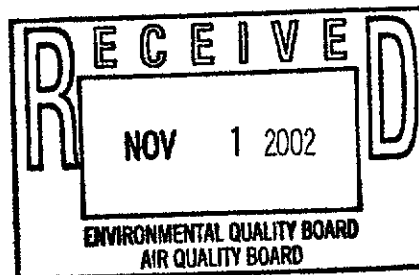


# West Virginia Rural Water Association

168 Midland Trail, Suite #2 • Hurricane, WV 25526 • 304/562-8585

November 1, 2002

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



Re: 46 CSR 7  
Procedural Rules Governing Reclassification of Waters  
Designated for Public Water Supply

Dear Ms. Chatfield:

This letter is to jointly express the concerns of the West Virginia Rural Water Association, West Virginia Municipal League, and the West Virginia Chapter of the American Water Works Association relating to the referenced rule change by the Environmental Quality Board ("EQB").

The EQB is supporting the current implementation of Category A by the Division of Water Resources of the Department of Environmental Protection. The interpretation and application of the Public Water Supply Use is extremely premature due to the fact that all waters of the state not previously removed by the EQB have not been segmented nor have base line water qualities been established.

As representatives of both potable water utilities and wastewater utilities we are of the opinion the EQB should not make such broad interpretations until such time that data has been made quantifying the designation of the stream segment as Category A. However, we do support retaining the Category A designation for all streams where existing water utility intakes are located.

As you know, there are presently a number of significant changes pending in West Virginia's water quality program. Given these challenges, and the amount of effort that they require (and controversy they create), we caution against any further change in our state's program at this time. An additional program change should be undertaken now only if justified as an integral and indispensable part of an ongoing effort, or as a circumstance or shortcoming that

Ms. Elizabeth Chatfield

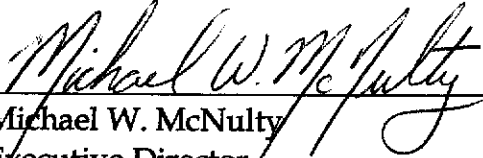
Page 2

November 1, 2002

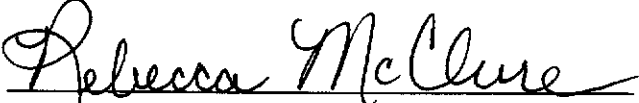
must be immediately addressed. We believe that this matter meets neither of these standards.

We appreciate the opportunity to submit our comments to the EQB and would be available to meet with you for further discussion.

Sincerely,

  
\_\_\_\_\_  
Michael W. McNulty  
Executive Director  
West Virginia Rural Water Association

  
\_\_\_\_\_  
Lisa Dooley  
Executive Director  
West Virginia Municipal League

  
\_\_\_\_\_  
Rebecca McClure  
West Virginia Section, American Water Works Association  
Water Utility Council

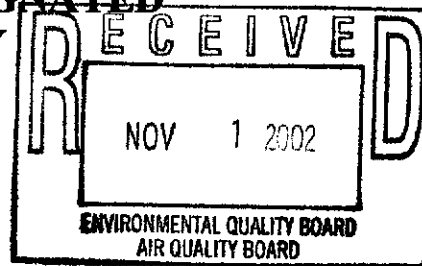


# WEST VIRGINIA MANUFACTURERS ASSOCIATION

2001 Quarrier Street, Charleston, WV 25311  
Telephone: (304) 342-2123  
FAX: (304) 342-4552  
wvma@wvma.com

## COMMENTS of the WEST VIRGINIA MANUFACTURERS ASSOCIATION regarding PROPOSED PROCEDURAL RULES GOVERNING CLASSIFICATION OF WATERS DESIGNATED FOR PUBLIC WATER SUPPLY 46 C.S.R. 7

October 29, 2002



### I Introduction.

The West Virginia Manufacturers Association (WVMA) is a trade organization composed of over 200 manufacturers and supporting businesses dedicated to the development and preservation of manufacturing in West Virginia. Its members are some of the largest employers in West Virginia, and many are subject to NPDES permits. Consequently, WVMA members closely follow developments of water quality standards.

The WVMA is concerned about the procedural rule the Environmental Quality Board (the Board) is offering for comment, because it presumes that all state streams will be designated as public water supplies. We believe that designation is not necessary to protect the health of West Virginia citizens. All public water intakes are presently protected under the state's water quality standards, and expanding the scope of the public water supply use (Category A) use to include streams that are not used as public water supplies is unreasonable. It imposes additional costs on businesses while not offering any improvement of public health. Furthermore, the rule as drafted is too complex to be useful.

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## **II. Comments.**

### **A. General Comment.**

**1. The Category A use has not been designated a statewide use, and therefore the use removal rule is not needed.** The use removal procedural rule that the Board has developed and offered for comment is only needed if Category A is applied on a statewide basis, rather than being limited to the areas where the use actually exists. The public water supply use has not been applied on a statewide basis, nor should it be. While the Department of Environmental Protection has taken the position that it has interpreted Category A as applying throughout the state, and has operated in that fashion when issuing some NPDES permits, we do not believe that has always been the case, particularly with regard to permits issued by the Division of Mining or the permits issued to municipalities. Furthermore, only the Board can designate uses, and the actions by the Department of Environmental Protection in misapplying the Category A use do not constitute a use designation.

We are aware of the fact that the Board issued a decision in a NPDES permit appeal in which it declared that all waters of the state were designated as Category A. However, the Board in that case was acting in its appellate jurisdiction, not as a standard-setting body. The Board would have to change the standards, which would mean going through rulemaking and getting approval of the Legislature, if it is to impose Category A on a statewide basis.

A review of the history of the state water quality standards establishes that the Board has never changed the water quality standards to designate every state stream as a public water supply. It has not included Category A among the uses that are designated state-wide (*see* 46 C.S.R. 1-6.1) and has expressly stated that Category A does not apply in every location. In its response to comments when amending the public water supply use description in 1985, the Environmental Quality Board “agreed that defining where the criteria are to apply as part of the definition might be improper. Above all, they agree that the category and the criteria for public water supplies should not be applied to streams or stream segments where no one is using the water for drinking.”

In 1998 the Legislature allowed the Board 18 months to study the issue of where to apply Category A. In an emergency rulemaking filed on October 18, 1999 the Board promulgated an emergency rule that would have designated all streams in the state as Category A. The Legislature, however, rejected that approach during the 2000 Legislative Session. *See W. Va. Code §64-3-2*. Consequently, the Board has never designated all state streams as Category A, and to the extent the DEP has been applying the standards as if they should be interpreted that way, it has been in error.

**2. The existing water quality standards adequately protect public water supplies.** We believe the water quality standards, as presently drafted, provide sufficient protection for public water supplies. The Category A use applies everywhere there is a public water supply, as that term is defined in the rule, and all upstream dischargers have to protect that use. Whether they are one-half mile, one mile, five miles or a hundred miles upstream, a discharger must control any pollutant that would cause a Category A criteria to be exceeded at a water intake.

The Board, having defined the public water supply use in the manner it has, need do nothing more to guarantee protection of public water supplies. The current designation gives the DEP the authority to issue permits that protect the uses the Board designates. NPDES permit writers can require a discharger to show, by modeling or other calculations, that its discharge would not cause a violation of Category A criteria at any downstream public water supply point of intake, even during low stream flows. In this fashion the Category A use is protected where it exists, without imposing unnecessary limits where it does not.

**3. Antidegradation protects drinking water supplies.** The EQB has said in the past that it wishes to protect the existing level of purity in state streams so that they can be used as drinking water supplies in the future. The WVMA agrees that the high quality of state waters is a resource to be carefully considered. However, the Board already protects high quality waters through the antidegradation provisions of the water quality standards. There can be no significant increase in pollution without public notification, an alternatives analysis, and intergovernmental coordination. The antidegradation review process allows all interested parties to weigh in on

whether the degradation of water is appropriate, and this review period would be the proper time to consider the future likelihood that the stream segment undergoing analysis would ever be used as a public water supply.

**4. The use of a procedural rule to amend a legislative rule is questionable.** We question whether a procedural rule can be used to remove a use designation. Use changes have previously been done by changes to a legislative rule, 46 C.S.R. 1. Furthermore, the Legislature appears to want water quality standards set as legislative rules, in light of *W. Va. Code* §22B-3-4(b).

The Board has expressed an intention to change the water quality standards to formally designate all state streams as Category A once it has a rule in place that will make it easier to remove the Category A designation. If the procedural rule cannot be used in the manner the Board intends, statewide Category A designation would not be appropriate.

**5. EPA review of use designation removals would not be completed in timely fashion.** Use removals would not become effective until approved by EPA, and we have great reservations about the promptness of EPA in acting upon the use removals that are approved under the proposed rule. We have waited years for Region III to advise whether they will approve changes to water quality standards, even though the Clean Water Act requires EPA to act within 60 to 90 days. Clean Water Act § 303(c)(3). The current memorandum of agreement being negotiated between the EQB and the EPA only requires EPA to use its best efforts to review proposed removals, and does not include a commitment to honor the time frame imposed by the statute. Without a commitment from EPA to approve or disapprove use changes within the statutory period, the Board's attempts to speed up the use removal process will be frustrated.

We would also note that the draft memorandum of agreement between the Board and EPA fails to mention what specifically must be demonstrated in order to obtain a use removal. Merely referencing the requirements of 40 C.S.R. §131.10(g) will not help expedite the use removal process.

**6. Public water supplies do not include individual users.** There has been some discussion about the need for state-wide application of the Category A use to protect users who draw water directly from streams for household use, and those hunters or boaters who occasionally drink from a stream. Such users are not public water supplies, as defined by the Board's own water quality standards, because they are not providing "conventional treatment," and therefore do not qualify for the Category A use. (Those individual users who are providing conventional treatment could be afforded the same protections as other public water supplies.)

Most Category A criteria, such as those for carcinogens, are set in accordance with certain premises. Those include the assumption that the water will be consumed on a regular basis for up to 70 years. An occasional drink of water by a boater or hunter does not come near to meeting this exposure assumption.

**B. Specific Comments.**

**1. Application requirements.** There are several application requirements in the proposed rule that are irrelevant to determining whether the stream segment in question is used as a public water supply. Why is an aquatic life assessment needed? *See* Section 4.7.c. Why is land use, or the general physical characteristics of a stream, relevant to the Board's decision? *See* Sections 4.1.d and 4.1.f. None of these appear related to whether a stream is actually used as a public water supply, which is the only relevant analysis.

The proposed application requirements are much more onerous than those that have been imposed in the past. We have reviewed past written justifications for Category A use removal that were accepted by the Board, and find them much more reasonable. The party wishing to remove the use walked along the affected stream and confirmed there were no public water intakes, and a meeting was held with local health departments to confirm that no drinking water removal occurred on that stretch of the stream. This allowed for the identification of any potential drinking water supplies that might have required protection; if there were none, there would be no need to protect the use.


We also object to the Board making a determination regarding the *potential* of a stream segment for serving as a public water supply. *See* Section 4.1.h.3. The issue in the use removal should be whether a stream is a current water supply source. If not, the use can be removed.

**2. Criteria for removal.** The Board requires a showing that a stream is not being used as a water supply, is not likely to be used as a water supply in the future, and that attainment of a public water supply use is not feasible. In most situations, the Category A use will be removed not because it isn't feasible, but because it isn't necessary, as there is no use to protect. What action will the Board take if the public water supply use is simply unneeded, but there is no condition that would prevent designation as a water supply? The fact is, many streams could qualify as a public water supply. The question is not whether a stream can be used in that fashion, but whether it is used in that fashion.

A review of the criteria for removing the use, found in Section 5 of the proposed rule, reveals that they are the use removal requirements found at 40 C.F.R. §131.10. They are more appropriate for removing the aquatic life use than the public water supply use. Aquatic life is found everywhere in a stream, but public water use is not as ubiquitous. The Category A use should be removed where it does not exist, even if it could exist in the future.

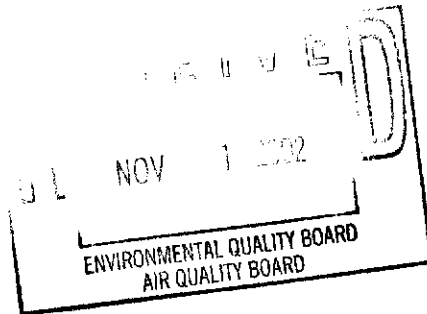
### **III. Conclusion.**

Thank you for the opportunity to offer these comments. We hope that they will be given careful consideration by the Board.

  
Richard Thomas  
Water Team Leader  
West Virginia Manufacturers Association



**AIRBORNE EXPRESS**  
Airbill #9134964473



**Union Carbide Corporation**  
A Subsidiary of The Dow Chemical Company  
P. O. Box 8004  
437 MacCorkle Avenue SW  
South Charleston, WV 25303  
U.S.A.

October 30, 2002

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

**SUBJECT: Comments on Proposed Category A Procedural Rule**

Dear Dr. Snyder:

Union Carbide Corporation appreciates the opportunity to comment on the Environmental Quality Board's proposed Category A Procedural Rule. We urge the Board to withdraw the proposal. Union Carbide took part in formulating the comments submitted by the West Virginia Manufacturers Association and agrees with those comments. However, additional comments are offered below for your consideration.

Several speakers at the public hearing held on October 23, 2002 stated that they feel they should be able to drink directly from any surface water in West Virginia. We also agree that, with portable style filtration systems that are currently available, you should be able to take an occasional drink from a stream. However, Category A risk-based criteria limits are not based on an occasional drink from a stream. These limits are based on a lifetime of use. Also, these criteria limits are based on public consumption only after conventional water treatment. We consider the use of the word "public" in the rule to be defined as groups or a community of people, not an individual person. Also, we consider the phrase "conventional treatment" to refer to a public water supply utility operation.

Commentary was made that the DEP has always considered all the waters of the State to be Category A. It appears that the DEP only began applying this concept to our permits in 1996. This created an additional burden for us as well as the permit writers. At that time, we were required to provide proof that we were not affecting water quality of the receiving stream. The receiving stream is not a public water supply, but is erroneously classified as a Category A stream. Numerous expensive studies have been completed or are underway to seek relief from the Category A based limits. This includes a Water Effects Ratio study, and a Site Specific Recalculation. To date, we have spent more than \$250,000 on this effort over the six-year period, and the project is still not complete. Our difficulty in meeting Category A standards is caused in part by the use of potable water that we purchase from the local water utility. The water directly from the tap is considered safe for drinking, but the same water cannot be discharged based on the Category A limits, which are intended to protect drinking water sources!

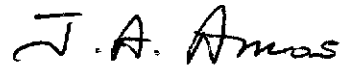
Dr. Edward Snyder, Chairman  
Page Two  
October 30, 2002

The proposed Procedural Rule specified numerous studies that would have to be conducted in order to remove a stream from the Category A based use designation. The proposed list of requirements to assist in re-designation seems helpful. However, many of the requirements are not within the scope of Category A. It seems the key criteria should be whether or not the stream is used for public water supply.

Union Carbide Corporation, a wholly owned subsidiary of The Dow Chemical Company, must compete globally in the marketplace to manufacture and sell products. The Site Management Team is attempting to make West Virginia Operations a preferred location for Dow businesses to invest. We must compete within our network of facilities to attract manufacturing and maintain the current manufacturing facilities, while maintaining compliance with all applicable regulations. The proposed Procedural Rule would place undue economic burden on West Virginia facilities; this would hamper our ability to effectively compete with other Dow sites.

If you have any questions regarding these comments please call me at 747-3623 or Charlie Armstead at 747-5455.

Respectfully,



J. A. Amos  
Regulatory Affairs Leader  
EH&S - West Virginia Operations

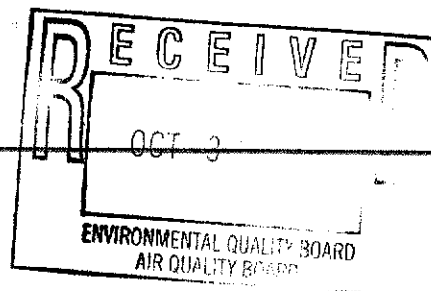
JAA:CWA/bsh

**AQBEQB CLERK - Please keep West Virginia water clean**

---

**From:** "Chris Harjes" <chrisharjes@hotmail.com>  
**To:** <clerk@aqbeqb.state.wv.us>  
**Date:** 10/30/2002 9:39 PM  
**Subject:** Please keep West Virginia water clean

---



Please oppose any industry attempt to weaken clean water protection. I speak for millions of hikers, fishermen and river runners when I say that clear, healthy streams make West Virginia an exceptionally appetizing tourist destination. Please preserve our remaining pristine streams. Thank you very much.

Chris Harjes  
RR 2 box 171  
Hendersonville,NC 28792

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**AQBEQB CLERK - Drinking water rules**

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**From:** "Bonni McKeown" <barrelhbonni@hotmail.com>  
**To:** <clerk@aqbeqb.state.wv.us>  
**Date:** 10/31/2002 3:45 PM  
**Subject:** Drinking water rules

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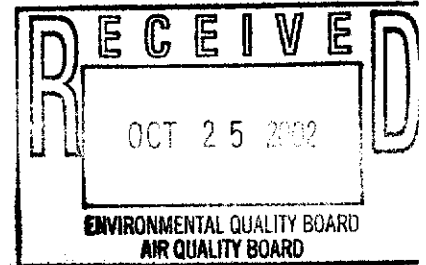
Protecting drinking water standards, Category A, is important to me. Clean water is still one of our state's greatest assets, and we should require industries and other users to keep it clean.

I support Title 46, Series 7, "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply". Rulemaking for procedures to allow removing Category A, water supply designated use, should be designed to insure careful consideration of the health of WestVirginia's waters.

Bonni McKeown, P.O. Box M, Capon Springs WV 26823  
Hampshire County

---

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STATE OF WEST VIRGINIA  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

Bob Wise  
Governor

October 23, 2002

Paul L. Nusbaum  
Secretary

Edward M. Snyder, Ph.D., Chair  
Environmental Quality Board  
1615 Washington Street, East, Suite 301  
Charleston, West Virginia 25311-2125

Dear Dr. Snyder:

Our staff appreciates the opportunity to respond to the proposed rule that 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 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. 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, **applies to all water of the state**, unless it has been removed specifically by the Board. The Department of Health and Human Resources supports current Category A application to protect water for Public Water Supply use. Relative to our role to assure that water is safe for human consumption, the following comments are provided:

1. Section 4.1.h.1. of the proposed rule states "to contact 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." Who will contact the private individual users of water directly from streams or from private wells that may be hydraulically connected to the surface water? Health of those individuals, especially in rural areas, may not be protected.
2. Section 4.1.h.3. of the proposed rule states "a determination regarding the potential for the water to be used as a public water supply in the future." All water sources currently designated for Category A have the potential to become used as a domestic water supply source. If the quality were to be compromised, what process would be used for re-designation of water bodies when new drinking water intakes are constructed on bodies of surface water not designated to meet the Category A designation?

---

**BUREAU FOR PUBLIC HEALTH**  
Office of Environmental Health Services

815 Quarrier Street, Suite 418

Charleston, West Virginia 25301-2616

Telephone: (606) 550-2004 FAX: (606) 550-2004

Environmental Quality Board  
October 23, 2002  
Page Two

3. How will a stream segment be defined?
4. New federal Environmental Protection Agency (EPA) drinking water rules are consistently becoming more restrictive, requiring an ever-higher quality for source water so that treatment will produce finished water meeting regulatory requirements. EPA is always in the process of reviewing and expanding the regulated contaminant listing and treatment procedures. Each new regulated contamination impacts source water acceptability. Discharges tend to degrade water quality.

If additional information concerning this matter is needed, please contact me at (304) 558-2981.

Sincerely,

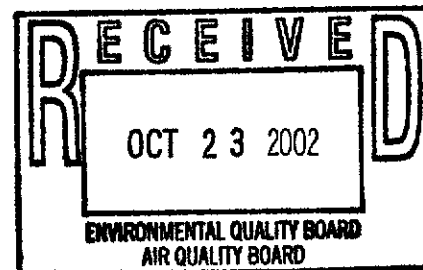


Barbara S. Taylor, Director  
Office of Environmental Health Services

BST/cjj

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Comments by  
The  
West Virginia Farm Bureau  
Regarding



Procedural Rules Governing Reclassification of Waters Designated for Public Water  
Supply

October 23, 2002

These comments are provided in response to the solicitation for comment on the draft procedural rule governing reclassification of waters designated for public water supply.

The West Virginia Farm Bureau opposes this rule and offers the following comments:

1: This rule is being proposed as a procedural rule. It appears that the process developed in the rule is a method to change the designated use of stream, a process that has historically been done through the legislative process. The West Virginia Farm Bureau supports the development of a less burdensome method of removing the Category A use from streams where that designated use is inappropriate, but we object to the use of a procedural rule to accomplish this task. It would be more appropriate to allow legislative review in this matter through the use of the legislative rule making process.

2: This effort seems to be a process of attempting to solve a problem that does not exist. We encourage the Board to work to solve the real water quality problems of West Virginia. Public water supply is neither a goal of the Clean Water Act or of the Water Use Categories and Water Quality Standards of West Virginia, both of which reflect goals more aligned with Category B or C as a minimum standard.

3: The process established by this rule might prove to be no easier or less time consuming to remove a stream from Category A designation than the current legislative process. The Board has commented that unless USEPA would agree to a definitive time frame for a decision you would not proceed. It appears that USEPA has not agreed to that stipulation leaving open to question as to whether the rule will be effective in reducing the time required for a change.

Thank you for the opportunity to comment on this proposed rule.

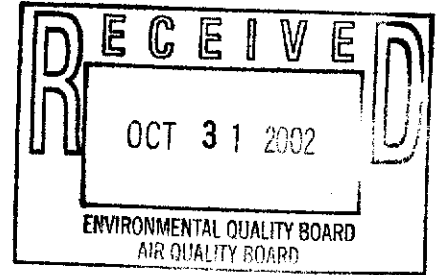
Submitted  
October 23, 2002

A handwritten signature in cursive script, appearing to read "Robert L. Williams".

Robert L. Williams  
Executive Secretary



# LEAGUE OF WOMEN VOTERS OF WEST VIRGINIA



October 20, 2002

Mr. Edward M. Snyder, PhD., Chair  
West Virginia Environmental Quality Board  
1615 Washington Street, East, Suite 301  
Charleston, WV 25311

Dear Mr. Snyder,

The League of Women Voters of West Virginia wishes to comment on the proposed Procedural Rules Governing Reclassification of Waters Designated for Public Drinking Water Supply.

Although the League recognizes there may be rare instances when it is necessary to remove Category A designation from a stream segment, we are wary that this provision could be overused.

The ultimate goal of the Clean Water Act is to clean up our waters. According to a recent US EPA report of United States' water quality, the United States' waterways are becoming more polluted; fifty four percent of the surveyed river miles in West Virginia fully support their designated uses while forty six percent are impaired. We believe West Virginia should not take the stance of allowing more pollution of our waters, which could happen whenever a removal of Category A is allowed. We urge the EQB to set up a system to evaluate how often the removal process is being used and the ensuing effects on our waters.

46-7-5 speaks to Public Water Supplies. We are concerned that not enough attention will be given to those whose drinking water supplies are from the streams or from wells or springs impacted by the surface water where Category A designation is to be removed. We hope that 4.1.h and 4.1.h.2 will govern the decisions made by the Environmental Quality Board.

We appreciate the opportunity for making comments on the Rule.

Sincerely,

SR/HG

*Helen Gibbins*

Sharon Rowe, President  
31 Poplar Grove Estates  
Princeton, WV 24740

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

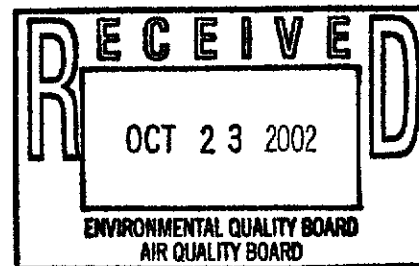
  
**JACKSON KELLY**  
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October 23, 2002

Dr. Ed Snyder, Chairman  
Environmental Quality Board  
1615 Washington Street, East  
Charleston, West Virginia 25311



Re: Public Drinking Water Supply.

Dear Chairman Snyder:

In response to the Board's solicitation for comment concerning the draft interpretive rule for implementation of the public drinking water supply use designation, the West Virginia Chamber of Commerce offers the following.

This is a topic with which the Board has struggled for many years. Although there has been reason for the Board to withdraw the proposal to apply the Category A-Public Drinking Water Supply use designation across all waters of the state each time it proposes such, there continues to be an initiative to renew this struggle. The Chamber has filed comments each and every time offering lengthy discussion of the problems created by such a proposal.

The Chamber supports the efforts on the part of the Board to establish a procedural rule for removing the Category A use once such a use has been designated. The Chamber, however, strongly urges the Board to focus its efforts upon an appropriate scientific justification and rulemaking establishing those waters to which the Public Drinking Water Supply use is to be designated, as has been suggested by EPA Region III. A state-wide application of the use has not been adequately justified and the Chamber strongly objects to any presumption that the Board has identified adequate justification for application of Category A across the state as appears to be suggested by the draft interpretive rule open for comment.

The Chamber appreciates this opportunity to provide initial input. Thank you for consideration of these comments.

Very truly yours,



David M. Flannery  
Chairman, Environmental Committee  
WV Chamber of Commerce

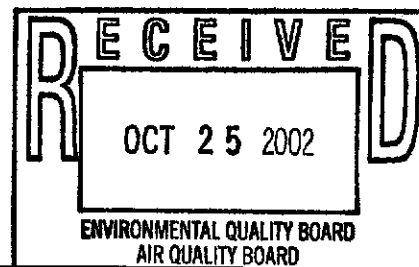


Ashland Specialty Chemical Company  
Division of Ashland Inc.

Petrochemical Division

Maleic Anhydride Plant  
Neal, West Virginia

October 23, 2002



Address Reply:  
Neal Plant  
P.O. Box 391  
Ashland, KY 41114  
Tel: (304) 453-6101  
Fax: (606) 921-6732

Mr. Edward Schneider, Chairman  
West Virginia Environmental Quality Board  
1615 Washington Street East, Suite 301  
Charleston, WV 25311-2126

Dear Mr. Schneider:

Ashland Specialty Chemical (Ashland) is concerned about the Environmental Quality Board's (the Board) proposed procedural rules governing classification of waters designated for public water supply for several reasons. It assumes that the Category A Public Water Supply Use applies throughout West Virginia, or that the Board intends to designate the use on a state-wide basis sometime in the future. The current water quality standards do not allow such an interpretation, and the Board should not amend the standard to do so. As presently written, the water quality standards require compliance with Category A criteria at the public water supply intake, but not in places where there is no public water supply to protect. Applying the Category A criteria to every river and stream in West Virginia provides no meaningful human health protection, but does impose significant costs to dischargers.

Furthermore, we are not confident that the rule proposed by the Board will allow prompt removal of the Category A use. It is a procedural rule, which we don't believe can be used to amend a legislative rule. Additionally, the rule sets forth criteria that will be difficult for dischargers to comply with; it requires showing that a stream is not capable of serving as a public water supply. To remove the use, the only showing should be that there is no current use of the stream segment as a public water supply.

The use removal process is only useful if it can be accomplished in a timely fashion. That requires prompt action by the EPA in approving changes to water quality standards. However, in the Memorandum of Agreement being negotiated between the Board and the EPA, EPA has refused to commit to any time period for acting on the use removals that are approved by the Board. Since EPA has taken years to approve or disapprove past changes to water quality standards, there is no reason to believe that use removals approved under the new procedural rule will be handled in any more effective fashion.

Ashland urges the Board to withdraw its proposed procedural rule, and to amend its water quality standards to clarify that the public water supply use applies only where a public water supply intake would be affected.

Sincerely yours,

Jeffrey McClung  
Technical Supervisor



Ashland's Commitment to  
Quality and Productivity

Headquarters:  
5200 Blazer Parkway  
Dublin, Ohio 43017

Tel: (614) 790-3333  
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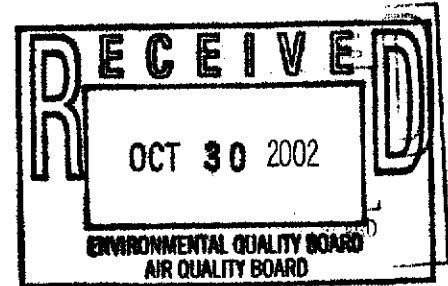


# West Virginia-American Water Company

P.O. Box 1906 • Charleston, WV 25327-1906 • (304) 353-6355

October 30, 2002

File No. 383.01



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

Re: 46 CSR 7 - Procedural Rules Governing Reclassification of Waters  
Designated for Public Water Supply

Dear Ms. Chatfield:

The West Virginia-American Water Company (WVAWC) is the largest water utility in West Virginia serving a population in excess of 375,000 throughout the state. The Company operates nine water treatment facilities and purchases water from six additional public water supplies within the State. WVAWC appreciates the opportunity to provide comments relative to the proposed Environmental Quality Board (EQB) procedural rule noted above. This ongoing spirit of collaborative effort is an effective approach to a consensus between water quality regulators and those impacted by the proposed procedures.

The WVAWC supports the use of Category A by the EQB as it provides the necessary source water protection for our existing water systems. The proposed rule attempts to establish an alternate procedure to minimize the data collection and the length of time necessary for applicants to seek removal or reclassification of a Category A stream or stream segment. Unfortunately, much of this required data does not exist for many streams and this places the burden upon the applicant to provide this data. In addition, EPA approval, if required, may not occur in a timely manner thereby delaying project action by the applicant.

Outwardly, it appears that application of Category A for all West Virginia streams may not be appropriate. However, WVAWC, at the very least, supports retaining the Category A designation for all waters where existing potable water utility intakes are located.

Please contact me at 304-353-6334 if you have any questions regarding these comments.

Sincerely,

Thomas W. Holbrook  
Director of Water Quality

TWH/ja



October 23, 2002



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

**Re: Proposed Procedural Rule Governing Reclassification  
of Waters Designated for Public Water Supply**

Dear Dr. Snyder:

On behalf of the Independent Oil & gas Association of West Virginia, Inc., I am submitting the attached **Comments on Proposed Procedural Rule Governing Reclassification of Waters Designated for Public Water Supply** for review by the Environmental Quality Board.

We greatly appreciate the opportunity to provide these comments and recommendations to the Board in this very important rulemaking.

Best Regards,

Charlie Burd  
Executive Director



**COMMENTS OF THE INDEPENDENT OIL & GAS  
ASSOCIATION OF WEST VIRGINIA ON PROPOSED  
PROCEDURAL RULE GOVERNING RECLASSIFICATION  
OF WATERS DESIGNATED FOR PUBLIC WATER SUPPLY**  
**October 23, 2002**

The Independent Oil & Gas Association of West Virginia, Inc. ("IOGA") is comprised of members who are involved in the exploration, production and development of oil and gas resources within the state. Many of our members hold water pollution discharge permits, which require compliance with the state water quality standards, or are otherwise affected by the application of these standards to their operations. Thus, rulemakings by the Environmental Quality Board with regard to water quality standards are important to our members. The Board has proposed for public comment a rule addressing "Reclassification of Waters Designated for Public Water Supply." IOGA has a number of concerns with respect to this proposed procedural rule.

1. In October 1999, the Environmental Quality Board filed an emergency rule that would have designated all waters of the state as public water supplies. That rule was rejected by the Legislature. The current proposed rule is based on the underlying assumption that all waters of the state are a public water supply, and sets out a procedure for removing this designation. As such, this rule attempts to circumvent the procedures established under state law for review of legislative rules. There is no legislative rule which designates all waters of the state as public

water supplies and until such a rule has been properly adopted, no rule issued by the Board should include such an assumption.

2. IOGA urges the Board to assure that action taken with respect to this proposed rule complies with all legislative rulemaking requirements applicable to "legislative" rules under the State Administrative Procedures Act. Under that statute, any rule which is "determinative on any issue affecting private rights, privileges or interests" is a legislative rule and must go through public notice and comment, as well as review and approval by the West Virginia Legislature. Although the proposed rule is captioned a "procedural" rule, we believe it is in fact a "legislative" rule. The proposed rule sets forth the criteria by which a water body will be determined to fall within the Public Water Supply category. Once a waterbody has been determined to be within or outside this category, appropriate restrictions will be placed on discharges into that waterbody. As such the rule is determinative of an "issue affecting private rights, privileges and interests" and meets the standard for a legislative rule. Therefore, if the Board elects to pursue this rule, it should not be finalized until all applicable rulemaking requirements have been satisfied.

3. The implication of the proposed rule, i.e., that all waters of the state are or could be public water supplies, will have profound impacts on the regulated community in West Virginia. Any discharger on a stream that is designated as public water supply must discharge water which meets applicable standards. In the case of streams with low flow, this means that any discharger must discharge water of drinking water quality. This is an extreme application of water quality requirements to dischargers in West Virginia. Such an approach should not be undertaken without the approval of the Legislature. To date, such approval has not been

received from the Legislature and, in contrast, the Legislature has rejected this approach when proposed by the Environmental Quality Board.

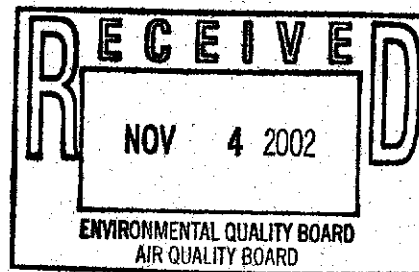
IOGA supports the comments of other members of the regulated community who have indicated their opposition to the proposed rule. We urge, in lieu of the proposed rule, that the Environmental Quality Board indicate that it will comply with the provisions of its current rules, which recognize that only certain identified areas of waters of the state will be approved as public water supplies.

IOGA appreciates the opportunity to present these comments to the Environmental Quality Board and respectfully requests that they be given full consideration.



West Virginia Oil and Natural Gas Association

October 30, 2002



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

Re: Proposed 46 C.S.R. 7, Procedural Rules  
Governing the Reclassification of Waters  
Designated for Public Water Supply

Dear Dr. Snyder:

On behalf of the West Virginia Oil & Natural Gas Association, please accept the following comments with regard to the Board's proposed adoption of 46 C.S.R. 7, Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply.

One fundamental flaw with the proposed rule is that it assumes that public water supply use (Category A) applies throughout the state. It does not. The water quality standards do not say that Category A is a statewide use; although they do say that use Categories B and C apply everywhere. See 46 C.S.R. 1-6.1. Where the Board wishes to designate a use category on a statewide basis it knows how to do so, and it has not done so with Category A.

We respectfully differ with the contention of the DEP that it has applied Category A use on a statewide basis in all NPDES permits. That is demonstrably untrue with regard to coal permits, at least until recently, and we believe it was frequently untrue for municipal permits in the past. It is only recently that the DEP has applied Category A on a consistent basis.

In 1998 the Legislature allowed the Board eighteen months to consider whether Category A should apply statewide. When the Board tried to adopt Category A on a statewide basis by filing an emergency change to the water quality standards in 1999, the Legislature rejected the rule during the 2000 legislative session. This shows that the Legislature does not believe that Category A should apply throughout the state.

Dr. Edward Snyder, Chairman

October 30, 2002

Page 2

It is also important to note that the Board itself, in a 1985 response to comments, said that Category A does not apply everywhere in the state. We would urge the Board to refrain from adopting a rule, which would run contrary to its own interpretation of the rule.

Designating all of the state's waters as Category A is unnecessary. The water quality standards presently require protection of public water supplies, wherever they are located. The DEP has sufficient authority under the current water quality standards to require dischargers to show that their discharge will not affect the public water supply, or to write NPDES permits with limits that protect water supplies. What the DEP does not have, and does not need, is authority to impose Category A permit limits on a discharger who has no effect on a drinking water intake.

Some people, who erroneously believe that Category A currently applies to all state streams, argue that removal of the Category A use will eliminate protections for drinking-quality waters. That is not true, because the antidegradation provisions adopted by this Board and the implementation procedures adopted by the Division of Environmental Protection provide protection for high quality streams. If a river is safe enough to drink from now, it will continue to be, and water quality will not be reduced without going through the full public comment process, where citizens' concerns can be raised. In short, high quality waters cannot be degraded below drinking quality, if they are already of such quality, without the Board's approval.

We are also concerned that the Board is using a procedural rule to amend a legislative rule. The Category A use is defined in 46 C.S.R. 1, a legislative rule, and its application is determined by that definition. The Board's proposed procedural rule would remove designated stream segments from the Category A description in the legislative rule. We would be interested in knowing whether a legislative rule has been changed by a procedural rule in the past in this fashion, as opposed to a procedural rule providing the means of changing a legislative rule.

The proposed rule itself is very complicated. The Category A use removals have in the past been done by showing that no one is using a stream segment as a public water supply. We urge the Board to continue to remove the use in this fashion, and to look at past Category A use removals that it has approved. Furthermore, the Board's rule requires applicants to prove that the area where the use will be removed cannot be used as a public water supply. That is not the test that should be applied. It should only be necessary to show that the segment is not currently a public water supply, and therefore there is no existing use to be removed.

Even if the Board's rule resulted in prompt removals of the Category A use, EPA is required to approve the use removals before they become effective. EPA is notoriously slow in responding to water quality standard changes. It has had changes to the rules pending before it for two years or more without taking action, despite the fact it has a statutory obligation to act in 60 to 90 days. We

Dr. Edward Snyder, Chairman

October 30, 2002

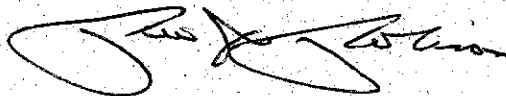
Page 3

have no reason to believe that EPA would be any quicker in acting on the proposed Category A use removals.

At the hearing on October 23<sup>rd</sup> there was testimony about individuals who take water directly from a stream or lake for drinking. These users are not public water supplies because they provide no "conventional treatment" as required in the water quality standards. Furthermore, Category A standards are set assuming long-term use (over a period of 70 years, in the case of carcinogens), not sporadic use such as that by hunters or boaters. The criteria are wildly over protective for those who drink a couple times a year out of a state stream.

We urge the Board to not adopt the proposed rule, and to acknowledge clearly that the Category A use exists where there is public water supply to be protected, but not on every stream, river and lake in the state of West Virginia.

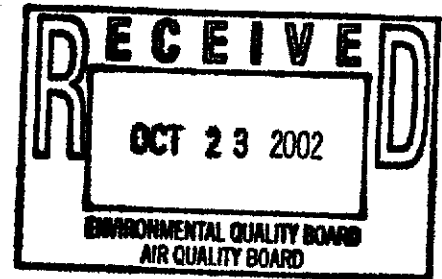
Sincerely yours,

A handwritten signature in black ink, appearing to read "Reed D. Robinson". The signature is fluid and cursive, with a large initial "R" and "D".

Reed D. Robinson

RR:beb

October 22, 2002



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

Re: 46 CSR § 7 – Proposed Procedural Rules Governing  
Classification of Waters Designated for Public Water Supply

Dear Chairman Snyder:

Century Aluminum of West Virginia, Inc., (“CAWV”) submits the following comments in response to the proposed procedural rule for the removal of the public water supply designated use category (“Category A”) from waters of the State. CAWV requests that the Environmental Quality Board (the “Board”) withdraw the proposed procedural rule for the following reasons: (1) it is not appropriate to designate all waters of the State as Category A, and (2) the proposed procedural rule will not provide a timely method of removal of the Category A use classification.

### **Designation of All Waters as Category A**

CAWV opposes the premise of the proposed procedural rule that all waters of the State should be designated as Category A. While CAWV understands and appreciates the Board’s quandary over this issue, the designation of all waters of the State as Category A exacerbates an existing problem instead of solving it. All waters of the State are not used for drinking water.

Century Aluminum of West Virginia, Inc.  
Post Office Box 98  
Ravenswood, WV 26164

(304) 273-6000 Phone

A Century Aluminum Company

Public water supplies are already protected by the existing Board rules at 46 CSR § 1. Those rules require that upstream dischargers protect the public water supplies in the State. Therefore, CAWV believes that the primary reason that the Board is considering the statewide adoption of Category A is to protect the private water users who are unknown to the West Virginia Division of Health and Human Resources.

However, 46 CSR 6.2.d already protects "all other surface water intakes where the water is used for human consumption. Therefore, *anyone*, whether private or public, who uses the waters of the State for drinking water is already assured protection. Further, the designation all waters of the State as Category does not make the waters safe to drink. The waters still must receive conventional treatment to remove harmful bacteria and other pollutants before they can be used for drinking water purposes. 46 CSR § 6.2.

The Board has also expressed its desire to maintain the waters of the State so that future dischargers will not impede the use of streams for drinking water purposes. First, any future drinking water uses of the streams must be afforded the same protection as existing drinking water uses, and this may require additional limitations on existing dischargers as necessary to ensure that protection. Second, new dischargers are not allowed to degrade existing water quality under the antidegradation provisions of the water quality standards. Accordingly, these concerns are also addressed under the existing water quality standards regulations.

West Virginia is not required by federal regulations to apply Category A to all waters of the State. In fact, most other states have regulations which are very similar to West Virginia's existing rules. DEP contends that it has acted as if Category A applies to all waters of the State when issuing NPDES permits. If this is true, then all existing NPDES permits already adequately protect the waters of the State for drinking water purposes. DEP can continue to do this in making permitting decisions without the Board making this change in the regulations. In other words, CAWV does not agree that there is adequate reason make the proposed change to the Category A criteria, and that the problems associated with adopting the statewide designation of Category A, primarily the need for use removals for permitting new discharges, outweigh any perceived benefits.

## The Timeliness of EPA Review

To date, the United States Environmental Protection Agency ("EPA") has been unwilling to commit to review proposed use designations in a timely manner. However, even if the Board were to adopt the proposed procedural rule with EPA's blessing, there is no guarantee that EPA will comply with its agreement with the Board, and the Board would have no mechanism to enforce the agreement with EPA.

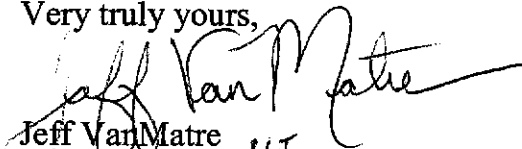
The Board is still waiting on EPA's response to several changes made in 2000 to the water quality standards, although EPA was required by law to respond within 60 to 90 days. Clean Water Act § 303(c)(3). Clearly, the Board should not adopt the proposed procedural rule without a firm commitment on the time period for EPA review and a provision allowing the Board to adopt use removals when EPA fails to respond within the specified time period.

### Conclusion

CAWV commends the Board's hard work on this issue over the past years. However, CAWV believes that the Board is moving in a direction which is counterproductive and CAWV requests that the Board maintain the current designation of Category A waters in the water quality standards and reject the proposed procedural rule.

CAWV looks forward to working with the Board as it reassesses this important issue in the future. Thank you for the opportunity to provide these comments. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

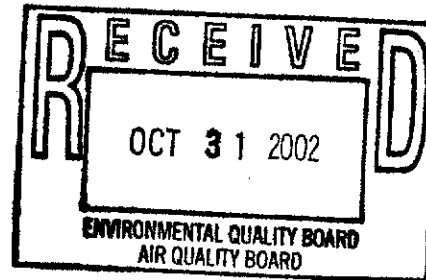
  
Jeff VanMatre ELT  
Manager, Environmental Affairs



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Charleston, WV 25339  
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FAX (304) 346-5310 or (304) 342-7651

October 28, 2002

Edward M. Snyder, Ph.D., Chairman  
Charles R. Jenkins, Ph.D., Vice-Chair  
Cameron R. Hackney, Ph.D., Member  
Edward G. Armbrrecht, Jr., Member  
Scott Simonton, P.E., Ph.D., Member  
Environmental Quality Board  
1615 Washington Street, East  
Charleston, WV 25311-2126



**Re: West Virginia Coal Association's Comments on EQB's Proposed  
"Procedural Rules Concerning Reclassification of Waters  
Designated for Public Water Supply"**

Dear Chairman Snyder and Members of the Board:

The West Virginia Coal Association ("WVCA") thanks you for this opportunity to comment on the Environmental Quality Board's ("EQB's") proposed "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply" dated September 17, 2002. The WVCA has no objections to the proposed rule itself, but vehemently objects to the premise on which the rule is based.

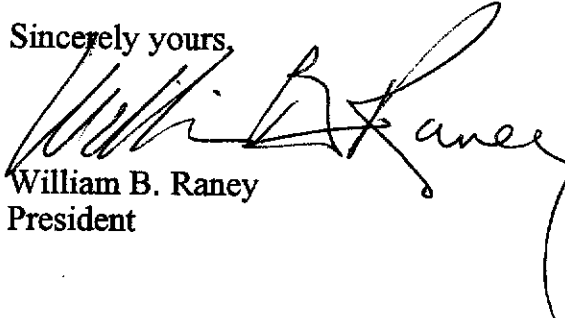
The EQB's procedural rule is premised on the notion that WVDEP NPDES permit writers can presume that all waters serve as Public Drinking water supplies (so-called Category 'A') waters without either a regulatory designation or an express finding that a particular water actually supports such a use. The rule is also premised on the further notion that such a presumption cannot be rebutted in the permitting process by a demonstration that an actual public drinking water source will not be impacted. Instead, the EQB seemingly believes that the only way to escape WVDEP's application of such a presumption is through a "use change." A use change, though, not only requires a lengthy rulemaking, but also shifts the inquiry from the appropriate question—whether a waterbody is serving as a public drinking water supply—to an inappropriate question—whether a waterbody can ever serve as a public drinking water supply. By shifting the inquiry, the EQB is offering only false hope that the procedural rule can provide any real relief to the coal industry.

The Legislature has rejected prior attempts by the EQB to designate all waters of the state as public drinking waters. Because of this fact, WVDEP can only apply water quality criteria applicable to public water supplies where it demonstrates that such a water

supply exists and needs to be protected by application of these criterion. There is sufficient information now available to ensure that such protection exists. The Department of Health has located the state's public drinking water systems and designated critical zones of protection for each of them.

Attached is a more detailed recitation of our comments. We thank you for your consideration.

Sincerely yours,



William B. Raney  
President

cc: Allyn Turner  
Ken Politan

**COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION TO  
SEPTEMBER 12, 2002 PROPOSED "PROCEDURAL RULES  
GOVERNING RECLASSIFICATION OF WATERS DESIGNATED  
FOR PUBLIC DRINKING WATER SUPPLY"**

**INTRODUCTION**

1. The West Virginia Coal Association appreciates that some EQB members may view the proposed procedural rule as supplying an expedited way for dischargers to avoid application of water quality criteria applicable to public water supplies stream uses (so-called Category A waters). The stated reason for rule is that:

The current implementation of Category A by the Division of Water Resources . . . in the . . . NPDES permitting program is that the designated use [of Category A] applies to all waters of the state, unless it has been removed specifically by the Board.

*See Statement of Circumstances Requiring Proposed Rule.* Although the Board next states that it "supports this interpretation of the application of the Public Water Supply Use," the fact is that the EQB's proposed rule presumes that DEP can designate all streams as Category A waters without ever determining whether any of them serve this use. The proposed rule further presumes that the only way a discharger can avoid application of Category A criteria is through a use change, which requires rulemaking and EPA approval. The premise, however, is faulty—DEP has no regulatory authority to designate all waters as Category A without making specific findings that they actually serve such a use. Additionally, while the EQB may believe it is providing an expedited "variance" procedure, in fact the rule offers only false hope.

2. No provision of West Virginia's water quality standards designates all waters of the State as serving a human consumption use (otherwise known as Category A waters). At its September 23, 2002 meeting, the EQB's counsel conceded that the EQB's

regulations do not designate all waters as serving a public water supply use, but that DEP's industrial NPDES permit writers have long issued permits based on an assumption that all waters serve a Category A use. However, the EQB's standards neither contain nor authorize DEP to administer a presumption that all waters serve a Category A use. Instead, the regulations do expressly create a presumption that all streams serve aquatic life (Category B) and water contact recreation (Category C) uses. See CSR § 46-1-6.1.<sup>1</sup> This express designation of all waters as serving Category B and C uses means that all waters are NOT designated as serving Category A uses.

3. Except for this presumptive designation of all streams as serving aquatic life and water contact recreation uses, only "existing uses" are protected. Importantly, "existing uses" consist only of those uses "actually attained" in a water body on or after November 28, 1975. . . ." CSR § 46-1-2.6. See also CSR § 46-1-4.1.1 (policy of State is to protect "existing" uses), -6.2 (Category A waters are limited to those "which, after conventional treatment, are used for human consumption) & -7.2a.A ("based on meeting [the definition of the particular 'uses' identified in Section 6], tributaries or stream segments may be classified for one or more Water Use Categories").<sup>2</sup>

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<sup>1</sup>CSR § 46-1-6.1 provides that:

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

<sup>2</sup>CSR § 46-1-7.2.a.A specifically provides that waters shall be classified based on whether they meet the definitions of the individual water uses set out in CSR § 46-1-6. It also provides that streams may be "classified for one or more Water Use Categories [and that [w]hen more than one use exists, they shall be protected by criteria for the use category requiring the most stringent protection." This language makes clear that not all stream segments are presumed to serve all uses. If they were, then this regulatory language would

4. The only manner in which a stream may be designated as serving a Category A use is if it is actually being used, after conventional treatment, for human consumption—a showing that can and should be made during the NPDES permit process. The WVCA would not object to a process by which, during the permitting process, prospective dischargers are required to determine whether there are public water intakes in the vicinity and to demonstrate that their discharges will not violate the water quality standards for an actually existing use. In a letter dated March 31, 2000, Allyn Turner, Chief of the Division of Water Resources, advised the EQB that DEP's practice "typically results in application of the B or A categories. . . ." She also asked the EQB to "clearly outline the process of how existing uses are to be confirmed, and clarify the Agency's latitude to evaluate and apply numeric criteria based on existing uses during permitting or water quality assessment processes. See Attachment A.

5. The EQB's proposed procedural rule, however, is premised on the notion that WVDEP permit writers have, through longstanding application of a presumption, effectively "designated" all waters as serving a Category A use. It further presumes that, such a designation having been made, permittees cannot simply rebut it during the permit process, and instead must seek a "use change" through rulemaking. This approach thus presumes that WVDEP, which lacks rulemaking authority over water quality standards, can designate all waters as serving Category A uses without actually determining that they do, and that dischargers' sole recourse is a "use change" rather than a demonstration that a particular water does not actually serve a Category A use. This approach is fundamentally flawed, legally insupportable and places a nearly insurmountable burden on dischargers

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be surplusage, and the law presumes that such language cannot be mere surplusage.

which, in the case of the coal industry, will likely cause unintended and adverse environmental impacts—especially with regard to manganese.

### **BACKGROUND CONCERNING MANGANESE**

6. Until the mid-1990s, the EQB maintained a water quality criterion of 1.0 mg/l for manganese in streams that served either Category A (public water supply or Category B (aquatic life) uses. There was no such federally-mandated standard to protect aquatic life. The coal industry demonstrated to the EQB that no manganese criterion was needed to protect aquatic life and that water treatment to meet a standard of 1.0 mg/l was likely to create a higher risk to aquatic life than was deleting the criterion altogether. Accordingly, in 1997, the EQB deleted the manganese criterion for Category B (aquatic life) uses. This solved industry's concerns for a very short time.

7. Soon after the EQB deleted the manganese Criterion for Category B, coal NPDES permit writers learned that the permit writers for industrial NPDES permits were treating all receiving waters as if they served a Category A use. Until this time, coal NPDES permit writers had not been applying such an assumption, but instead had treated all waters as meeting Category B and C uses in accordance with § 6.1 of the water quality standards.

8. Having learned of this disparate treatment, coal NPDES permit writers were informed to follow the steps of their industrial permit writing cohorts, and also started assuming that all streams were Category A waters. They also would not and will not currently allow permit applicants to rebut such an assumption during the permit process. By applying the Category A criterion for manganese, the coal industry again faced the prospect of having to meet a 1.0 mg/l criterion.

9. On March 21, 1999, the Legislature passed House Bill 2533 at W.Va. Code § 64-3-2. *See* Attachment B. That bill authorized the EQB's water quality standards to remain in place until October 1999, with the condition that the EQB issue "legislative rules to address the interpretive differences regarding the designation of category A waters and analyze the need for distance prohibitors for the policies of public drinking water intake." The EQB missed the 1999 deadline for issuing a legislative rule and submitting it to the Legislature for approval in the normal course of rulemaking. Instead, it issued an "emergency rule" in October 1999. *See* Attachment C. The emergency rule, which by law has effect only until and unless it is adopted in the next legislative session expressly provided that the Category A use "shall apply to all waters of the state unless specifically removed as indicated in section 7.2.d." *See* proposed § 6.2. The same emergency rule, to remove the coal industry from the dilemma of having needlessly to treat for manganese, contained a "carve-out" for the manganese health criteria "when the discharge point of the manganese is located more than five miles upstream from a known drinking water source." *See* § 6.2.d. The Legislature, in the 1999-2000 session, approved the manganese carve out, but rejected the designation of all waters as serving a Category A use. Thus, that provision does not today exist in the State water quality standards. By letter of August 31, 2000, the EQB submitted the rule change adopting the manganese carve out in its water quality standards to EPA Region III for approval. *See* Attachment D. EPA Region III has never acted upon it.

10. Because EPA Region III has not approved the manganese proviso adopted by the Board, DEP is not honoring it. However, despite the Legislature's rejection of a rule designating all waters as serving an aquatic life use, DEP is currently imposing the

water quality criteria for Category A waters, including the manganese criterion of 1.0 mg/l, on all coal NPDES permits. Indeed, DEP is doing so even on renewal of permits which were never previously subject to a water quality criterion for manganese. At some of these sites, the mining has been completed for years and there has never been any complaint that they were affecting public water supplies.

### **PROBLEMS WITH THE PROCEDURAL RULE**

11. Without formally designating all waters as Category A in a legislative rule, the procedural rule attempts to legitimize DEP's practice of treating all waters as if they are Category A that is: a) clearly a violation of the EQB's own legislative rules; and b) itself illegal rulemaking. That is, it assumes a "use change" is needed from a designation that has never been properly made in the first place. As importantly, the procedural rule provides no practical relief.

12. Again, the proper test is whether a water qualifies as Category A is whether it is actually being treated for drinking water. The EQB's proposed rule should require that the issue of actual use be resolved during the permit process. Instead, it wrongly presumes that DEP can designate a water as Category A water without any showing that it actually does, and further presumes that a discharger's only recourse is a use change, which imposes a nearly impossible standard on the discharger. The regulatory criteria for a use change require dischargers to show not only that the receiving water is not a drinking water source, but also either:

- a) that the receiving water can never be used for drinking water because of natural or irretrievable human-induced conditions; or
- b) that there would be "substantial and widespread adverse economic and social impact."

These are tests that few dischargers will be able to meet, and the EQB is offering a false hope to most who think they might escape application of Category A criteria through this procedure. Moreover, the demonstration must first be approved by the EQB in a rulemaking and then by EPA. Given that EPA still has not acted on the 2-year old manganese proviso in § 6.2.d, how likely is it that a discharge can wind its way through this process before it must either shut down or moot its challenge by spending the money needed to meet the lower manganese standards.



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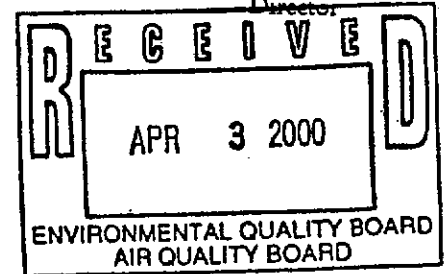
## West Virginia Division of Environmental Protection

Cecil H. Underwood  
Governor

Michael C. Castle  
Director

March 31, 2000

Environmental Quality Board  
1615 Washington Street, E.  
Suite 301  
Charleston, West Virginia 25311-2126



RE: Triennial Review of Water  
Quality Standards 46 CSR 1

Dear Board Members:

The West Virginia Division of Environmental Protection's Office of Water Resources ("OWR") appreciates the opportunity to comment on the Triennial Review of West Virginia's water quality standards. OWR's comments are based on the content of the Water Quality Standards rule, 46 CSR 1-1 et seq., effective as of July 1, 1999. Some of the comments, however, also reflect the content of the Environmental Quality Board's ("Board") Emergency Rule filed on 10/18/99, and several of the comments were previously raised by OWR during the last triennial review process.

The following comments are offered by OWR for the Board's consideration:

Reference Section 2.3. – In consideration of the Board's recent Emergency Rule reflecting revisions to § 6.2 and unless used elsewhere in the rule, removal of the terminology "conventional treatment" negates the need for the definition of this term unless the Board intends to re-include the term in 6.2. If re-included, further clarification of this definition is suggested.

Reference Section 2.12a & b – The Board should consider replacing the term "values" with "conditions." Also in 2-12.b., how can the influence of air pollutants be ruled out for any water? It appears very unlikely that any of the State's waters can truly be claimed as "unaffected" by any solid, liquid or particularly gaseous releases as a result of anthropogenic influences over time. Should the language be clarified to suggest "measurably" or "relatively" unaffected? Note that redefining this entire Section may depend on the outcome of the current EPA disapproval of 46 CSR 1 – 7.2.c.4.

Reference Section 2.18 – As testing procedures continue to be updated, referencing 40 CFR 136 as amended on a certain date could mandate the use of outdated procedures. If possible, we suggest consideration of language that provides for the use of the latest "EPA

5/1/24 "C"

approved" methods under 136. As an example, the definition could read in part "as referenced in 40 CFR 136 and amendments thereto or with any other test procedure approved by EPA and the Chief." At a minimum the reference to 6/15/90 may be incorrect as references in 40 CFR 136 reflect an August 15, 1990 date.

Reference Section 2.23 – Controversy periodically erupts between various applicants and OWR in the permitting process regarding what constitutes the bounds of a wet weather stream. Questions relate to whether or where a "ditch" that receives an otherwise defined "point source" discharge from an operation is subject to the definition of wet weather status. In other words, at what point does a ditch become a wet weather stream? The OWR has historically viewed the point at which any "point source", e.g., a pipe, lined channel, conduit, etc. enters a receiving area, be it a perennial, intermittent or wet weather "ditch", as the receiving stream. In many instances, this is a natural or otherwise previously constructed unlined ditch or depression that may carry the discharge within a facility's property boundary--in some instances over great distances prior to combining with an otherwise intermittent or perennial stream--or may directly receive the discharge outside of a facility property boundary.

As "numeric water quality standards" do not apply in wet weather streams (7.2.c.2.), pollutants in excess of water quality standards can potentially be discharged to these ditches after meeting technology-based requirements (providing existing and designated uses downstream are not adversely affected). Particularly at low volume discharges, however, pollutants can build up or collect either releasing during wet weather flows or releasing to the surrounding or underlying soils and groundwater creating, over long periods, either localized groundwater contamination and/or subsequent release to interconnected surface waters.

Current groundwater regulations (47-58-4.7.2) only prohibit ditches without appropriate liners to prevent groundwater contamination from being "installed", hence, any "existing" situation is not necessarily addressed.

Furthermore, "narrative standards" do apply in wet weather streams. Accordingly, situations have occurred where dischargers dispute that receiving "ditches" should be considered wet weather streams, and as a result, point source discharges to these ditches have released pollutants creating otherwise definable violations of 46-1-3.2.a, b, e, or f in the ditch itself.

OWR therefore recommends expanding and clarifying the definition of wet weather streams to include "unlined ditches" regardless of whether said ditches lie wholly or partially within or outside of a facility property boundary.

Additionally, Section 7.2.c.2. should be expanded by the inclusion of the phrase "and ground waters" after the word "waters".

Addition to Section 2 – The Board should consider including a definition for "aquatic life" since this term is used frequently throughout the rule.

Reference Section 3.2.b. – We suggest adding the phrase "or banks" as follows: Deposits or sludge banks on the bottom or banks. Periodically discharges create deposits that remain on the banks of stream channels, as opposed to stream bottoms during low flow periods

only to wash away during periods of high flows. Adding this language would assist in enforcement of this segment of the rule.

Reference Section 4.1.b.2. – This section may need to be revised as a result of upcoming recommendations of the Anti-degradation Stakeholder Workgroup (ASW). OWR urges a review of this language consistent with the ASW's consensus recommendations.

Reference Section 4.1.c. – All waters should be clearly delineated, possibly in an Appendix. OWR urges a review and consideration of this concept consistent with the ASW's consensus recommendations.

Reference Section 4.1.c.3. – This sentence could be construed to include all State Recreation Areas, although OWR does not believe that is the intent of § 4.1.c.3. Re-wording should specify State Forests and Parks and National Forests, Parks, and Recreation Areas. Further, OWR encourages revision of this language consistent with the ASW's consensus recommendations.

Reference Section 4.1.d. – OWR encourages revision of this section consistent with the ASW's consensus recommendations.

Reference Section 4.1.e. – Reference to 316(a) has been expressed by the ASW in the Anti-degradation Implementation Procedures. See § 4.C.2.a.2.A. of proposed Appendix F. The language in § 4.1.e. has always been awkwardly worded and should be revised to appropriately address the requirements of the CWA.

Reference Section 5.2.b. – Middle of paragraph reads, in part, "Where a zone of initial dilution is assigned... the zone shall be determined using one of the four alternatives outlined in Section 4.3.3 ... ." As the first of the four alternatives is not to use a zone of initial dilution, i.e., to prohibit concentrations in excess of the CMC in the pipe itself, should this more appropriately either read "In determining whether a zone of initial dilution should be assigned..." or "where a zone of initial dilution is assigned . . . use the three alternatives..."? The Board should consider revising this section as appropriate to address this concern.

Additionally, conflicting language currently exists between the allowance provided for a ZID in § 5.2.b. and the prohibition listed in § 5.2.h.3. This conflict could be resolved by adding a caveat in 5.2.b.3. that "except as provided for in § 5.2.b., the provisions of § 5.2.b.3. are applicable."

Reference Section 5.2.c. – OWR suggests that the correct reference should be "Bureau for Public Health" as opposed to "of."

Reference Section 5.2.j. – OWR suggests that the reference to "(h)(B)" should be corrected to read "h.2."

Reference Section 5.2.k. – Consideration should be given for incorporating the reference (f) in addition to (b), (c), (e), and (h) B. Also, OWR suggests that the reference to "(h)(B)" should be corrected to read "h.2."

Reference Section 6.1 – Although the wording "at a minimum" has always been included in this section, OWR suggests that the Board consider additional clarification, perhaps consistent with the Board's recently filed emergency rule, regarding application of Category 'A' criteria. Additionally, even though no current, specifically-promulgated criteria apply, consideration should also be given to inclusion of Category D3 use to the minimum designated uses as it is unrealistic to presume that wildlife will not have access to any and all waters at all times.

Further, it is somewhat unclear as to whether the Agency has any latitude and authority for the justification for assignment of a water use category.

Importantly, 46 CSR § 1-4 stipulates that "existing uses" should be protected and maintained, however, nowhere in the rule is it described how or who determines which "existing uses" apply to a given permit applicant's receiving water.

With FI the only parameter having criteria in a Use Category other than criteria in Categories A, B, or C, it is, as the Board is aware, OWR practice to apply the most protective applicable criteria. This practice typically results in application of the B or A categories depending upon a demonstration of reasonable potential to violate water quality criteria. The Board has, on a number of occasions, verbally or otherwise through appeal resolution acknowledged the Agency's views and actions in this regard. However, with upcoming emphasis on anti-degradation implementation, it becomes more important that the EQB fully clarify and acknowledge past application of the rule. If this is not possible, the EQB should at a minimum clearly outline the process of how existing uses are to be confirmed, and clarify the Agency's latitude to evaluate and apply numeric criteria based on existing uses during the permitting or water quality assessment processes. If this clarification and/or latitude is not clearly revealed, the requirements of 6.1.d. appears to suggest that only the EQB has the latitude to make these decisions through rulemaking which could, in essence, mandate that many permitting and/or water quality assessment decisions involve the rulemaking process.

Note that this is another issue being discussed by the ASW and will likely be addressed, at least to some degree, in the ASW's consensus recommendations to the Board.

Reference Section 6.1.a. – The first sentence in the first paragraph should be divorced from the remainder of this section. Additionally, the second sentence in the first paragraph should be separately included as new Section 6.1.e. Furthermore, should the word 'use' in the second sentence be preceded by the word 'future?' The intent of this language as written is unclear. Finally, clarification again needs to be incorporated regarding who has authority to classify waters.

Reference Section 6.1.b. – Use of the word "removed" should be changed to "reclassified" consistent with changes to 46-6 in January of 1996. Also, again it needs to be clarified what entity(s) has authority to reclassify a use.

Reference Section 6.1.c. – Is the reference to "State" the correct reference or should it more appropriately be the "EQB", "Chief" or "Agency?"

Reference Section 6.4. – Additional clarification of this Use Category is required, particularly as it relates to the terms "swimming" and "fishing" and how these uses are to be related to Appendix E criteria under the column "Human Health" considering the inclusion of "fish consumption" in stipulated footnotes 4 as well as 3. Is this Use Category only to apply to column 'C' criteria and if so, then how is the "fish consumption" reference inclusion in footnote 4 relating to Category 'A' criteria additionally not justified to be included in the protection of the Recreational Use Category?

The Board should be aware that there are a number of criteria listed in Category 'A' with no corresponding 'C' criteria. Importantly, a number of these criteria e.g. Barium, 1, 1, 1, - TCE, Phenol and Selenium additionally have no category B criteria protection levels. Since many other criteria have listed 'C' and 'A' values with many of these values equaling or closely approximating each other, OWR has been conservatively applying both columns toward Recreation Use, particularly since "fish consumption" is additionally included in footnote 4.

The Board's recent rule filing regarding Category 'A' appears to confirm past practice in this regard but OWR suggests that clarification may be warranted.

Serious consideration should be undertaken by the Board to further clarify and define this category similar to other States e.g. CA, CO, ID, and particularly KS. As a result, this Agency supports the Board's proposal to review and adopt recreational uses that more precisely define the uses to be protected. To this end, attached are excerpts from EPA document "Designated Uses – Water Quality Standards and Criteria Summaries: A compilation of State/Federal Criteria (9/88)" for the Board's evaluation.

Reference Section 6.6. – For consistency with language used in the description of Other Use Categories, OWR suggests adding the following underlined wording: "This category includes streams or stream segments used for cooling waters.... Category C." Further, with the recognition that this Category has historically been included in the rule, since there are no specific criteria applicable to this overall category, what is the relevance of continuing to reference the category? Is there some intended purpose for describing these use designations other than the (likely inadvertent) exclusion of this category for the Youghiogheny River (see also 7.2.d.14.1 below)?

Reference Section 7.1.b. – Since the major tributaries singled out in 7.1.b.1, 2, 3, & 4 are also tributaries of the Potomac River Basin itself, it appears inappropriate to use the word 'excluding' and hence, 'excluding' should be changed to the word 'including'. In addition to this correction, the word 'specifically' should precede the word 'designated' for clarity.

Consideration should also be given to including the 'main stem of the Potomac River' as WV waters dependent on the water level or delineation line established as a result of state boundary issues.

Reference Section 7.1.c. – Refer to issue raised in 7.1.b. above. In addition, remove the word "Basin" preceding the words "main stem".

Reference Section 7.1.c.1. – Delete word "except" and rephrase to "including those specifically listed below".

Reference Section 7.1.c.3. – Refer to issue raised in 7.1.c.1.

Reference Section 7.1.c.4. – Typo on "Youghiogheny".

Reference Section 7.1.d. – For consistency with the format for other "Basins", suggest the following revisions:

7.1.d. Ohio River Basin

7.1.d.1. 0 Zone 1 – Ohio River – main stem. The main stem...state line.

7.1.d.2. 0 Zone 2 – Ohio River – Tributaries. All tributaries of the Ohio River including the following specifically designated major tributaries.

7.1.d.2.A. LK – Little Kanawha River. The Little Kanawha...including the ... which is specifically designated as follows:

7.1.d.2.A.i. LKH – Hughes River and all its tributaries.

7.1.d.2.B. K – Kanawha River Zone 1. The main stem...West Virginia.

7.1.d.2.C. K – Kanawha River Zone 2 – The main stem...to the headwaters including the...which are specifically designated as follows:

7.1.d.2.C.i. KP – Pocatalico River...tributaries

7.1.d.2.C.ii. KC – Coal River...tributaries

7.1.d.2.C.iii. KE – Elk River...tributaries

7.1.d.2.C.iv. KG – Gauley River. The Gauley River...tributaries including the...are specifically designated as follows:

7.1.d.2.C.iv.1. KG-19 – Meadow River...tributaries

7.1.d.2.C.iv.2. KG-34 – Cherry River...tributaries

7.1.d.2.C.iv.3. KGC – Cranberry River...tributaries

7.1.d.2.C.iv.4. KGW – Williams River...tributaries

7.1.d.2.C.v. KN – New River. The New...tributaries including the...are specifically designated as follows:

7.1.d.2.C.v.1. KNG – Greenbrier...tributaries

7.1.d.2.C.v.2. KNB – Bluestone...tributaries

7.1.d.2.C.v.3. KN-60 East...tributaries

7.1.d.2.C.v.4. K(L)-81-(1) – Bluestone Lake

7.1.d.2.D. OG – Guyandotte River. The Guyandotte...tributaries including the...is specifically designated as follows:

7.1.d.2.D.i. OGM – Mud...tributaries

7.1.d.2.E. BS – Big Sandy River. The Big...West Virginia including the...is specifically designated as follows:

7.1.d.2.E.i. BST – Tug...tributaries

Reference Section 7.2.a.1. – This section again refers to classifying streams or stream segments for one or more Use Categories. No clarification is offered, however, relating to how or by whom this can be pursued. Clarification needs to be provided.

Reference Section 7.2.c.2. – See 2.23 above. OWR suggests revising the proviso to state that groundwater should also not be adversely affected.

Reference Section 7.2.c.5. – OWR suggests that the period after 7Q10 should be a comma. Also, why is this exception not more appropriately listed under 7.2.d.?

Reference Section 7.2.d.1. – Add the word "Basin" for consistency with the language in 7.1.

Reference Section 7.2.d.2. – See 7.2.d.1. above.

Reference Section 7.2.d.7.1. – See 7.2.d.1. above.

Reference Section 7.2.d.14.1. – Why are Categories A & E excluded? Note that it appears that an oversight likely occurred during the change from the 1987 regulation to the 1991 regulations. The 1987 regulations specified Agriculture and Wildlife as an excluded category, which was a carryover from the 1983 and 1981 regulations, originally excluded in the 1974 regulations. Along with Water Supply Industrial, Agriculture and Wildlife appear to have been excluded since 1974. In 1991, Water Supply Public appears to have inadvertently replaced the Agriculture & Wildlife exclusions and carried over in 1993 and 1995. It is suspected that this was not intended. Based on these observations, OWR suggests that the Board review the original exclusions in 1974 to determine whether any exclusions are currently valid.

Reference Section 7.2.d.16.2. – Should the need for the Total Phenolic Materials exception be revisited as a result of the Board's elimination of this parameter from Appendix E.?

Reference Section 7.2.d.32.1. – The basis for these exclusions should be evaluated.

Reference – Additional new Section 7.2.e. – OWR suggests the addition here or elsewhere, where appropriate in the rule, reference to the applicability of the use of the 1Q10 design flow for calculating acute criteria wasteload allocations (see excerpted pages from EPA's TSD attached and EPA's "Technical Guidance Manual for Performing Wasteload Allocations, Book VI, Design Conditions, Chapter 1, Stream Design Flow for Steady State Modeling (9196)). Changes may also be required to Section 7.2.c.1 if use of this design flow is accepted.

The Board is urged to contact other states, including particularly "shared water" states, in an effort to develop rules offering the greatest degree of consistency commensurate with an appropriate scientific basis to allow for application of consistent criteria in permitting. This

consistency is becoming paramount as implementing agencies are forced to apply Total Maximum Daily Loads (TMDLs) to streams and hence applicable allocations of these loads among affected point or non-point source activities. Failure to provide consistent approaches across state borders will likely fuel future appeals.

Reference Section 8.1.a. – 40 CFR § 136 has surely been amended since the referenced amendment of 6/15/90. The Board should endeavor to reflect the updated reference here and elsewhere where referenced in the rule. (See *a/so* § 2.18 above).

Reference Section 8.1.b.3. – Correct typographical error. The word "applications" should be applicants". Also, since applicants will additionally be addressed through other offices (e.g. Office of Mining and Reclamation) all references specifically addressing OWR should be eliminated.

Reference Section 8.1.d. – Revise as follows:

Charts of water quality...in accordance with ~~major stream use applications~~ Water Use Categories and West Virginia Waters, Sections 6 & 7, respectively

Reference Section 8.2.b. – For consistency in the development of effluent limitations, not only based upon EPA recommendations but particularly as this relates to facilities where receiving waters are shared waters with other states, the use of harmonic mean flow in the development of human health calculations for carcinogens should be considered. Attached are excerpts from EPA's Technical Support Document for Water Quality-Based Toxics Control (3/91) offering a basis for the harmonic mean use as well as methods used for delineation.

Additionally, attached are excerpted pages from recently developed ORSANCO guidance titled "Guidelines for Determining Instream Water Quality Conditions" (4/99) revealing the status regarding use of harmonic mean flow by other "Compact States". As you will note, all compact states except West Virginia use harmonic mean flow. The Board should further endeavor to contact the State of Maryland for comparison usage, relating to our shared Potomac Basin waters in an effort to seek agreement on a consistent application of design flows.

Reference Section 8.3. – Reference to 6.1.b.A-F needs to be corrected.

Reference Section 8.4. – OWR suspects that the use of a semicolon after (February 1994); should be a period, and then further capitalizing the following word "Other".

Reference Section 46-1-9 – There is no longer a reference to Category B.3., so this needs to be deleted.

Reference Section 9.4. – EPA reference needs to be updated from EPA/600/4-89/001 – March 1989 to EPA-600-4-91-002, July 1994.

Reference Appendix 'A' – OWR suggests that this list be reviewed and revised or updated as necessary.

Reference Appendix 'B' – In addition to being outdated, the recent clarification through the filing of the emergency rule makes this Appendix moot. OWR agrees with the recent decision to eliminate this Appendix. Otherwise, substantial revisions to this Appendix will be warranted.

Reference Appendix 'C' – OWR suggests that the Board consider eliminating this Appendix as unnecessary. Note that the previously established Anti-Degradation Implementation Agency Workgroup also recommended its elimination.

If this Appendix remains, at a minimum, the Board will need to correct the typo on "Kammer", change Appalachian Power Co. to American Electric Power and at least add the following:

M	Monongalia	Harrison Power Station	Monongahela Power Co.
M	Monongalia	Morgantown Energy Associates	Dominion Energy Service Co., Inc.
M	Monongalia	Grant Town Power Plant	American Bituminous Power Partners, LP
P	Grant	North Branch Power Station	Virginia Electric & Power Co.

It should also be noted that numerous industrial operations additionally maintain power production facilities, which may also need to be referenced if the Appendix remains.

Reference Appendix E:

Reference Section 8.1. – It is presumed that the standards are set for Total Recoverable Al. vs Total. This clarification is necessary. Additionally, a statement somewhere in the regulations or at least a footnote in Appendix E clarifying that any metal not otherwise specified as total dissolved or soluble shall be in the "total recoverable" form is warranted.

Further, the terminology 'not to exceed' (presumed to be an instantaneous grab sample) appears to conflict with the referenced footnotes '1' & '2'. Is the specified language 'not to exceed' intended to supersede the one hour and four day average concentration requirements? Based upon limited knowledge of the development of criteria, OWR suspects the phrase "not to exceed" is not intended since the hydrologically based design flows (particularly if 1Q10 and harmonic mean as well as the 7Q10 flows are used) "on the average" nearly equal the biologically based design flow method that used the averaging periods specified in footnote 1 and 2. (Refer to excerpts from EPAs "Technical Guidance Manual for Performing Wasteload Allocations Book VI Design Conditions Chapter I Stream Design Flow for Steady State Modeling (9/86) as well or the 3/91 TSD included). Note that this applies elsewhere in the rule to numerous other parameters throughout Appendix E. Clarification is warranted.

Also for consistency, either all parameters having exceptions granted should reference the appropriate exceptions as has been incorporated here (i.e., see reference to 7.2.d.B (b) which needs changed to 7.2.d.2.1 if kept) or preferably delete this specified reference altogether. OWR believes this is the only parameter so highlighted to a noted exception in the Appendix itself.

Reference Section 8.2. – The manner in which the table is depicted makes it appear that the 50 ug/l level established for Category A is calculated from or otherwise potentially conflicts with the referenced equation for Category B. As it is suspected the equation does not apply for the Category 'A' criteria, revision or clarification is needed here.

Reference Section 8.2.1. – Updated and corrected Tables dated 11/95, an Update of Ambient Water Quality Criteria for Ammonia (8/98) and a further 1999 update recently announced in a 12/22/99 Federal Register Notice are all available and should be reviewed by the Board for revisions to this criteria.

Reference Section 8.7.1. – OWR does not believe this criteria currently applies in ORSANCO standards. Unless there is some other basis, these criteria may need to be removed.

Reference Section 8.7.3. – Needs corrected to 8.7.2.

Reference Section 8.7.4. – Needs corrected to 8.7.3.

Reference Section 8.12. – "Primary" Contact Recreation is not defined. Strongly urge sub-categorization (see comment under Reference Section 6.4. above), otherwise will at least need to change to "Water" Contact Recreation consistent with 6.4. of the rule.

Further, the Agency supports the adoption of the 1986 EPA recommended bacteria requirements of E. Coli or interococci or any other more recent scientifically based values if available

Reference Section 8.13. – The Board should reconcile the Human Health criteria of 1.4 mg/l for all waters with ORSANCO's value of 1.0 mg/l for the Ohio River. Additionally this value should be reconciled with Health Department requirements for use in finished water supplies.

Reference Section 8.14 – Although not generally applicable to all states, current criteria for Hex Chrome listed in 40 CFR 131.36, supposedly based on EPA's 304(a) criteria, suggests levels of 15 and 10ug/l vs. the 16 and 11 levels noted for B.1. The Board may want to investigate whether the criteria should be revised.

Reference Section 8.17.1. – Use of the phrase "effluent limitations" is inappropriate and contrary to Federal law which requires that, where developed, necessary technology based effluent limitations are minimally required regardless of water quality standards or use category protections. Accordingly, this language should be removed.

Reference Section 8.18. – Requirement specifies 'any aquatic species'. Does this include species e.g. daphnia? Should the word be changed to 'appropriate aquatic species' or alternatively, should any aquatic species be further defined?

Reference Section 8.18.2. – 40 CFR 131.36(b)(1), Note 'p', suggests these values are to be expressed as total recoverable mercury. The Board should investigate this level further.

Reference Section 8.20. – Note there is no 'not to exceed' language incorporated here which is inconsistent with other referenced criteria in the rule. Need to re-clarify (see also comments in Reference Section 8.1 above).

Reference Section 8.22. – For ease of locating various organics, it is recommended that the various organics be grouped into categories e.g. the following:

- (1) All Chlorinated Benzenes (listed individually, but at one place)
- (2) All Chlorinated Ethanes (listed individually, but at one place)
- (3) Other Chlorinated Organics
- (4) Halomethanes
- (5) Phenols (other than chlorinated)
- (6) Phthalate Esters
- (7) Polynuclear Aromatic Hydrocarbons
- (8) Pesticides and Metabolites
- (9) DDT and Metabolites
- (10) Polychlorinated Biphenyls
- (11) Other Organics

Additionally the following expansions to criteria are necessary:

PCB – Clarification should be offered as to whether this includes all seven (7) or only certain of the specified Arochlors listed as priority pollutants. Additionally note, however, that a final Water Quality Standard rule was recently published in the 11/9/99 FR revising the Human Health criteria by eliminating criteria on individual Arochlors and setting a single value of 0.00017 ug/l for both Categories A and C. In either event, re-evaluation is warranted.

Halomethanes – Clarification should be offered as to the specified list of holomethanes intended. Various lists relating to priority pollutants range from as low as six (6) to at least as many as thirteen (13) individual constituents.

Polynuclear Aromatic Hydrocarbons (PAH) – A defined list of PAH must be provided. Various priority pollutant lists specify as few as thirteen (13) or as many as seventeen (17) individual constituents. A clearly defined list is essential.

Phthalate Esters – A defined list of phthalate esters should be provided. It is presumed that it at least includes bis (2-ethylhexyl), butyl benzyl, di-n-butyl, di-n octyl, diethyl, and dimethyl; however, specifying would be beneficial.

Further it is suggested that the EQB undertake an evaluation of all organics and certain other parameters in relation to the disparities between Category A criteria in 46-1 and the Groundwater Standards in 46-12. Of most particular interest are those 46-1 criteria that are more restrictive (and in some instances several orders of magnitude more restrictive) than the groundwater standards. Those most obvious include:

Parameters

46-1 Criteria

46-12 Standards

Endrin	2.3 ng/l	2000 ng/l
Toxaphene	0.73 ng/l	3000 ng/l
Dioxin	0.013 pg/l	5.0 pg/l
Methoxychlor	0.03 ug/l	40 ug/l
Hexachlorobenzene	0.72 ng/l	1000 ng/l
Beryllium	0.0077 ug/l	4.0 ug/l
Fluoride	1.4 mg/l	4.0 mg/l

Also, if the Board's criteria were presumably taken from EPA's recommended 304(a) criteria, an evaluation of the acute criteria for the parameters Aldrin, gamma - BHC, chlordane, DDT, Dieldrin, Endrin and Heptachlor may need reconsideration as the footnote in 131.36 refers to these values as final acute values (FAV) which typically are twice the value of what the acute criteria should be (see attached excerpt from the Water Quality Standard Academy) for the level of protection specified by footnote 1 in Appendix E. These values may need to be re-evaluated.

Additionally the footnotes to criteria e.g. Arsenic for the Human Health category in 131.36 reference applicability to the  $10^{-6}$  cancer risk level. The Board's value of 5 ug/l also references footnote "b" in Appendix E reflecting the same risk level yet the values are significantly higher than those listed in 131.36. Re-evaluation here also appears warranted. At a minimum, however, the units for at least Aldrin for the B Use Category appear incorrect (i.e. "ng/l" should be "ug/l").

Consideration by the Board should also be given to those Category A criteria that significantly exceed levels established in 46-12, particularly if those parameters are not susceptible to 'conventional treatment' as previously stipulated in 46-1-6.2. Examples are:

<u>Parameters</u>	<u>46-1</u>	<u>46-12</u>
Lead	50 ug/l	15 ug/l
Nickel	510 ug/l	100 ug/l
1,4 dichlorobenzene	0.4 mg/l	0.075 mg/l
Toluene	6.8 mg/l	1.0 mg/l
Ethlybenzene	3.1 mg/l	0.7 mg/l

Note that some metals may be precipitated to a degree by what is generally considered 'conventional treatment' if tied up in the solids. However, 'conventional treatment' is not typically designed to remove dissolved metals or various organic pollutants. Alternately, an expanded definition of what is generally termed 'conventional treatment' (46-1-2.3) should be considered.

Reference Section 8.22.1. – OWR recognizes that the Board is actively pursuing a resolution to this Section of the rule to overcome EPA objections, however, if the Board resolves to keep the current language, the following issues remain:

Practical Quantitative Levels (PQL) are not recognized as authorized under the CWA. Additionally use of the PQL was precluded from use as a result of a previous Board Appeal Decision. As a result, MDL in lieu of PQL should be referenced here.

Further it is unclear as to the intent of this section. It is presumed that the EQB is suggesting that in-stream values should be calculated through a back calculation process using fish body burden values. Attempting to use discharge concentrations and flows would only be supportive toward an individual discharger's input to the background water quality level. It must be recognized, however, that the discharge itself, in many instances, could be less than an MDL. It is recommended that the Board consider and include the development of a protocol for processing the inclusion of the discharger's input (i.e., using the MDL or some fraction, e.g., 1/2 MDL for calculation purposes).

Reference Section 8.25. – OWR suggests that values be reassessed in light of ORSANCO criteria for the Ohio River or, at a minimum if more stringent levels are necessary for the Ohio, that alternately categorized levels be specifically addressed for the Ohio similar to those for criteria e.g. Fecal coliform and Temperature. Note that the ORSANCO criteria is significantly more restrictive for gross beta (50 vs 1000 pCi/l), and marginally more restrictive (4 vs 5 pCi/l) for gross alpha activity.

Reference Section 8.28.3. – OWR suggests a need for correction of the monthly periods that currently overlap creating conflicting criteria. Additionally, either "cold waters" need to be defined, or change this phrase to "trout waters".

Reference Section 8.32. – The Board is urged to undertake a review of this section of the rule. It is our understanding that this is also consistent with recommendations soon to be forwarded by the ASW. At a minimum, it is unclear why or how the requirement applies to chronic aquatic life criteria. It appears that this criteria, should it remain, may be criteria that is intended to be applied as a "not to be exceeded value at any time."

Reference Section 8.32.1. – As noted in 8.32 above, reconsideration by the Board of this section is also warranted. At a minimum, there is a need to delete the phrase "the rule" and replace it with "the requirements of 8.32" as well as eliminate the reference to "208 Water Quality Management Plan" and replace it with the "Non-Point Source Management Plan." Additionally, the second reference to "208" needs to be removed. It is further strongly urged that the exceptions also not apply to any discharges in other Tier 2.5 beyond trout waters as well as in Tier 3 waters.

Finally, as indicated above in relation to 7.2.e., as a result of CWA requirements under 303(d) and the affect and impact that listings of streams impart to the TMDL process, the Board is urged to fully address and consider, to the maximum degree practical, consistency of its standards with bordering states and/or interstate pollution control agencies, particularly where shared waters exist.

Every effort should be made to set or revise standards and criteria that fully protect designated and existing uses but are based on the best science available and that can be agreed to by all affected parties.

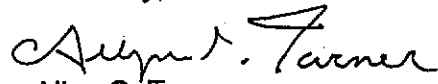
Beyond the mandates of the CWA that necessitate close coordination among states for assessing the status of their respective waters which further impact other program requirements (e.g. those in the permitting process where the regulated community must accept different

treatment in receipt of permit limitations for discharges into the same waters), an equally critical issue is the perception of the public that views and attempts to understand and utilize these assessments.

A coordinated and consistent approach among bordering states has become more important, especially where shared waters exist. Therefore, OWR urges the Board to consider these factors when reviewing West Virginia's water quality standards and, if necessary, initiate efforts to coordinate with other states' standards personnel and interstate agencies' staffs toward the cooperative development of scientifically sound standards and criteria.

The Office of Water Resources is appreciative of the opportunity to offer comments in this process. As principal implementor of the rule, we take seriously our charge under 40 CSR 1.1.

Sincerely,



Allyn G. Turner  
Chief, Office of Water Resources

HB 2533

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99 APR -2 PM 4:17

OFFICE OF THE CLERK  
SENATE

# WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1999

---

## SECOND ENROLLMENT

Com. Sub. for  
House Bill No. 2533

(By Delegates Hunt, Compton, Jenkins,  
Linch, Faircloth and Riggs)

---

Passed March 21, 1999

In Effect from Passage

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OFFICE OF THE CLERK  
SECRETARY OF STATE

## SECOND ENROLLMENT

COMMITTEE SUBSTITUTE

FOR

### H. B. 2533

(BY DELEGATES HUNT, COMPTON, JENKINS,  
LINCH, FAIRCLOTH AND RIGGS)

---

[Passed March 21, 1999; in effect from passage.]

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AN ACT to amend and reenact sections one and two, article three, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended; all relating generally to the promulgation of administrative rules by the various executive or administrative agencies and the procedures relating thereto; legislative mandate or authorization for the promulgation of certain legislative rules by various executive or administrative agencies; authorizing various executive or administrative agencies to promulgate certain legislative rules in the form that the rules were filed in the state register; authorizing the various executive or administrative agencies to promulgate legislative rules as amended by the Legislature; authorizing various executive or administrative agencies to promulgate legislative rules with various modifications presented to and recommended by the legislative rule-making review committee; authorizing the division of environmental protection to promulgate a legislative

rule relating to carbon monoxide & ozone; authorizing the division of environmental protection to promulgate a legislative rule relating to standards of performance for new stationary sources; authorizing the division of environmental protection to promulgate a legislative rule relating to the prevention and control of emissions from hospital, medical, and infectious waste incinerators; authorizing the division of environmental protection to promulgate a legislative rule relating to the prevention and control of air pollution from hazardous waste treatment, storage or disposal facilities; authorizing the division of environmental protection to promulgate a legislative rule relating to acid rain provisions and permits; authorizing the division of environmental protection to promulgate a legislative rule relating to ambient air quality standards for sulfur oxides and particulate matter; authorizing the division of environmental protection to promulgate a legislative rule relating to emission standards for hazardous air pollutants pursuant to 40 CFR Part 63; authorizing the division of environmental protection to promulgate a legislative rule relating to the awarding of West Virginia stream partners program grants; authorizing the division of environmental protection to promulgate a legislative rule relating to West Virginia surface mining and reclamation; authorizing the division of environmental protection to promulgate a legislative rule relating to solid waste management; authorizing the division of environmental protection to promulgate a legislative rule relating to sewage sludge management; authorizing the division of environmental protection to promulgate a legislative rule relating to hazardous waste management; authorizing the division of environmental protection to promulgate a legislative rule relating to the state construction grants program; authorizing the division of environmental protection to promulgate a legislative rule relating to the pollution prevention and compliance assistance rule; authorizing the division of environmental protection to promulgate a legislative rule relating to the state water pollution control revolving fund program; and authorizing the environmental quality board to promulgate a legislative rule relating to the requirements governing water quality standards.

*Be it enacted by the Legislature of West Virginia:*

That sections one and two, article three, chapter sixty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 3. AUTHORIZATION FOR BUREAU OF ENVIRONMENT TO PROMULGATE LEGISLATIVE RULES.**

**§64-3-1. Division of environmental protection.**

1 (a) The legislative rule filed in the state register on the  
2 thirty-first day of July, one thousand nine hundred ninety-eight,  
3 authorized under the authority of section four, article five,  
4 chapter twenty-two of this code, modified by the division of  
5 environmental protection to meet the objections of the legisla-  
6 tive rule-making review committee and refiled in the state  
7 register on the fifth day of January, one thousand nine hundred  
8 ninety-nine, relating to the division of environmental protection  
9 (ambient air quality standards for carbon monoxide and ozone,  
10 45 CSR 9), is authorized.

11 (b) The legislative rule filed in the state register on the  
12 thirty-first day of July, one thousand nine hundred ninety-eight,  
13 authorized under the authority of section four, article five,  
14 chapter twenty-two of this code, modified by the division of  
15 environmental protection to meet the objections of the legisla-  
16 tive rule-making review committee and refiled in the state  
17 register on the fifth day of January, one thousand nine hundred  
18 ninety-nine, relating to the division of environmental protection  
19 (standards of performance for new stationary sources, 45 CSR  
20 16), is authorized.

21 (c) The legislative rule filed in the state register on the  
22 third day of August, one thousand nine hundred ninety-eight,  
23 authorized under the authority of section four, article five,  
24 chapter twenty-two of this code, modified by the division of  
25 environmental protection to meet the objections of the legisla-  
26 tive rule-making review committee and refiled in the state  
27 register on the fifth day of January, one thousand nine hundred  
28 ninety-nine, relating to the division of environmental protection  
29 (to prevent and control emissions from hospital, medical, and  
30 infectious waste incinerators, 45 CSR 24), is authorized.

31 (d) The legislative rule filed in the state register on the third  
32 day of August, one thousand nine hundred ninety-eight,  
33 authorized under the authority of section four, article five,  
34 chapter twenty-two of this code, modified by the division of  
35 environmental protection to meet the objections of the legisla-  
36 tive rule-making review committee and refiled in the state  
37 register on the fifth day of January, one thousand nine hundred  
38 ninety-nine, relating to the division of environmental protection  
39 (to prevent and control air pollution from hazardous waste  
40 treatment, storage or disposal facilities, 45 CSR 25), is autho-  
41 rized.

42 (e) The legislative rule filed in the state register on the  
43 thirty-first day of July, one thousand nine hundred ninety-eight,  
44 authorized under the authority of section four, article five,  
45 chapter twenty-two of this code, relating to the division of  
46 environmental protection (acid rain provisions and permits, 45  
47 CSR 33), is authorized.

48 (f) The legislative rule filed in the state register on the  
49 thirty-first day of July, one thousand nine hundred ninety-eight,  
50 authorized under the authority of section four, article five,  
51 chapter twenty-two of this code, modified by the division of  
52 environmental protection to meet the objections of the legisla-  
53 tive rule-making review committee and refiled in the state  
54 register on the twenty-second day of January, one thousand nine  
55 hundred ninety-nine, relating to the division of environmental  
56 protection (ambient air quality standards for sulfur oxides and  
57 particulate matter, 45 CSR 8), is authorized.

58 (g) The legislative rule filed in the state register on the  
59 thirty-first day of July, one thousand nine hundred ninety-eight,  
60 authorized under the authority of section four, article five,  
61 chapter twenty-two of this code, modified by the division of  
62 environmental protection to meet the objections of the legisla-  
63 tive rule-making review committee and refiled in the state  
64 register on the fifth day of January, one thousand nine hundred  
65 ninety-nine, relating to the division of environmental protection  
66 (emission standards for hazardous air pollutants pursuant to 40  
67 CFR Part 63, 45 CSR 34), is authorized.

68 (h) The legislative rule filed in the state register on the  
69 thirty-first day of July, one thousand nine hundred ninety-eight,  
70 authorized under the authority of section fourteen, article  
71 thirteen, chapter twenty of this code, modified by the division  
72 of environmental protection to meet the objections of the  
73 legislative rule-making review committee and refiled in the  
74 state register on the second day of November, one thousand  
75 nine hundred ninety-eight, relating to the division of environ-  
76 mental protection (awarding of West Virginia stream partners  
77 program grants, 60 CSR 4) is authorized.

78 (i) The legislative rule filed in the state register on the  
79 thirtieth day of July, one thousand nine hundred ninety-eight,  
80 authorized under the authority of section three, article one,  
81 chapter twenty-two of this code, modified by the division of  
82 environmental protection to meet the objections of the legisla-  
83 tive rule-making review committee and refiled in the state  
84 register on the twenty-second day of January, one thousand nine  
85 hundred ninety-nine, relating to the division of environmental  
86 protection (surface mining and reclamation regulations, 38 CSR  
87 2), is authorized.

88 (j) The legislative rule filed in the state register on the  
89 thirty-first day of July, one thousand nine hundred ninety-eight,  
90 authorized under the authority of section five, article fifteen,  
91 chapter twenty-two of this code modified by the division of  
92 environmental protection to meet the objections of the legisla-  
93 tive rule-making review committee and refiled in the state  
94 register on the seventh day of October, one thousand nine  
95 hundred ninety-eight, relating to the division of environmental  
96 protection (solid waste management, 33 CSR 1), is authorized.

97 (k) The legislative rule filed in the state register on the  
98 thirty-first day of July, one thousand nine hundred ninety-eight,  
99 authorized under the authority of section twenty, article fifteen,  
100 chapter twenty-two of this code, modified by the division of  
101 environmental protection to meet the objections of the legisla-  
102 tive rule-making review committee and refiled in the state  
103 register on the twentieth day of November, one thousand nine  
104 hundred ninety-eight, relating to the division of environmental  
105 protection (sewage sludge management, 33 CSR 2), is autho-  
106 rized.

107 (l) The legislative rule filed in the state register on the third  
108 day of August, one thousand nine hundred ninety-eight,  
109 authorized under the authority of section six, article eighteen,  
110 chapter twenty-two of this code, modified by the division of  
111 environmental protection to meet the objections of the legisla-  
112 tive rule-making review committee and refiled in the state  
113 register on the second day of October, one thousand nine  
114 hundred ninety-eight, relating to the division of environmental  
115 protection (hazardous waste management, 33 CSR 20), is  
116 authorized.

117 (m) The legislative rule filed in the state register on the  
118 thirtieth day of July, one thousand nine hundred ninety-eight,  
119 authorized under the authority of section six, article two,  
120 chapter twenty-two-c of this code, relating to the division of  
121 environmental protection (state construction grants program, 47  
122 CSR 33), is authorized.

123 (n) The legislative rule filed in the state register on the  
124 thirty-first day of July, one thousand nine hundred ninety-eight,  
125 authorized under the authority of section six, article one,  
126 chapter twenty-two of this code, modified by the division of  
127 environmental protection to meet the objections of the legisla-  
128 tive rule-making review committee and refiled in the state  
129 register on the twenty-second day of January, one thousand nine  
130 hundred ninety-nine, relating to the division of environmental  
131 protection (pollution prevention and compliance assistance rule,  
132 47 CSR 3), is authorized.

133 (o) The legislative rule filed in the state register on the  
134 thirty-first day of July, one thousand nine hundred ninety-eight,  
135 authorized under the authority of section three, article two,  
136 chapter twenty-two-c of this code, modified by the division of  
137 environmental protection to meet the objections of the legisla-  
138 tive rule-making review committee and refiled in the state  
139 register on the second day of November, one thousand nine  
140 hundred ninety-eight, relating to the division of environmental  
141 protection (state water pollution control revolving fund pro-  
142 gram, 47 CSR 31), is authorized.

143 (p) The legislative rules filed in the state register on the  
144 seventh day of October, one thousand nine hundred ninety-

145 eight, relating to the division of environmental protection  
146 (underground storage tank insurance trust fund, 33 CSR 32) are  
147 authorized.

**§64-3-2. Environmental quality board.**

1 The legislative rule filed in the state register on the third  
2 day of August, one thousand nine hundred ninety-eight,  
3 authorized under the authority of section four, article three,  
4 chapter twenty-two-b, of this code, relating to the environmen-  
5 tal quality board (requirements governing water quality  
6 standards, 46 CSR 1), is authorized until the thirtieth day of  
7 October, 1999: *Provided*, That the environmental quality board  
8 shall review, revise and propose, within this statutory deadline,  
9 and in accordance with the provisions of chapter twenty-nine-a  
10 of this code, emergency and legislative rules to address the  
11 interpretive differences regarding the designation of category A  
12 waters and analyze the need for distance prohibitors for the  
13 policies of public drinking water intake, with the amendments  
14 set forth below:

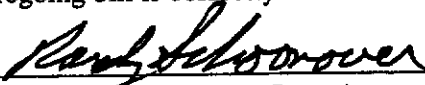
15 On page fourteen, subsection 7.2.b., by following the words  
16 "contrary provision," by striking the word "numeric";

17 And, on page twenty, by striking-out all of subsection 8.5..

18 On page 14, at the end of paragraph 7.2.a.2 after the word  
19 "headwaters.)" by inserting the following:

20 "Until June 30, 2003, the one-half mile zone described in  
21 this section shall not apply to the Ohio River main channel  
22 (between Brown's Island and the left descending bank) between  
23 river mile points 61.0 and 63.5."

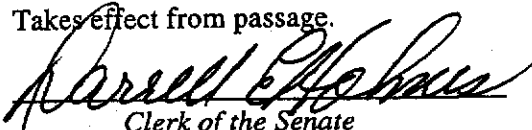
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

  
Chairman Senate Committee

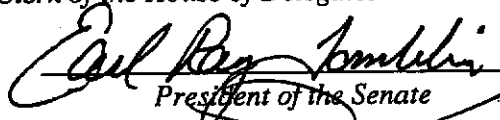
  
Chairman House Committee

Originating in the House.

Takes effect from passage.

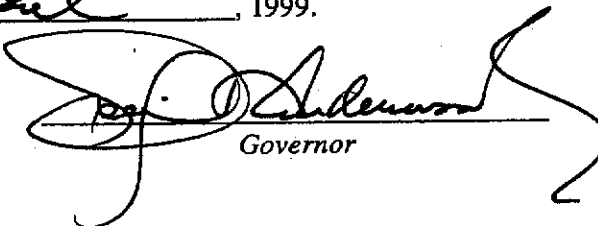
  
Clerk of the Senate

  
Clerk of the House of Delegates

  
President of the Senate

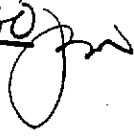
  
Speaker of the House of Delegates

The within approved this the 2nd  
day of April, 1999.

  
Governor

PRESENTED TO THE  
GOVERNOR

Date 3/30/99

Time 3:30 

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #7

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Filing Date

OCT 13 3 05 PM 1999

OFFICE OF THE SECRETARY OF STATE

Effective Date

RECEIVED OCT 14 2002

Oct. 29, 1999

NOTICE OF AN EMERGENCY RULE

AGENCY: Environmental Quality Board TITLE NUMBER: 46 CSR 1

CITE AUTHORITY: 22B-3-4

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 1 (One)

TITLE OF RULE BEING AMENDED: Requirements Governing Water Quality Standards

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SCANNED

*Elizabeth M. Chaffee*

Signature

Use additional sheets if necessary



Executive Office  
#10 McJunkin Road  
Nitro, WV 25143-2506  
Telephone No: (304)759-0575  
Fax No: (304)759-0526



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## West Virginia Bureau of Environment

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Cecil H. Underwood  
Governor

Michael C. Castle  
Commissioner

October 18, 1999

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

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

Dear Ms. Cooper:

WV Code §29A-3-11(a) requires the Secretary of the executive department which administers an agency under WV Code §5F-2-1, et seq., to take the necessary steps to submit rules finalized by the agencies which it administers to the legislative rulemaking process. Because I am charged with providing administrative support to the Environmental Quality Board pursuant to WV Code §5F-2-1(a)(3)(C), I hereby submit, as notice of an emergency rule, the enclosed rulemaking package prepared by the Environmental Quality Board entitled "Requirements Governing Water Quality Standards." In my capacities both as Commissioner of the Bureau of Environment and Director of Environmental Protection, though, I take no position on the appropriateness or need for the rule, and note that it is more stringent than the parallel federal rules concerning the designation of stream uses.

Should you have any questions, please feel free to contact me at 759-0515, or Libby Chatfield, Technical Advisor, Environmental Quality Board at 558-4002.

Sincerely,

Michael C. Castle  
Commissioner

MCC:cc

cc: Libby Chatfield  
Carrie Chambers

Date: Oct. 18, 1999

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Environmental Quality Board, Libby Chatfield, 558-4002

EMERGENCY RULE TITLE: Requirements Governing Water Quality Standards

1. Date of Filing: Oct. 18, 1999

2. Statutory authority for promulgating emergency rule:

22B-3-4

3. Date of filing of proposed legislative rule: \_\_\_\_\_

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule?

Adopts new language to amend a current legislative rule.

5. Has the same or similar emergency rule previously been filed and expired?

NO.

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare:

The proposed amendment clarifies that all waters of the State are protected by the public drinking water supply designated use category. The Board was directed to review and revise the rule to clarify the application of category A by October 30, 1999. (See #7) Passage of the emergency rule is necessary to extend the authority of the Water Quality Standards rule beyond the October 30, 1999, deadline.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

WV Code §64-3-2 authorizes 46 CSR 1 until October 30, 1999, provided that the Board review, revise and propose, within this statutory deadline, and in accordance with the provisions of chapter twenty-nine-a of this code, emergency and legislative rules to address the interpretive differences regarding the designation of category A water and analyze the need for distance prohibitors for the sources of public drinking water intake(s).

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The proposed language clarifies that the category A use applies to all waters of the State. Although the use category has been implemented in that way for many years, questions have arisen recently from the regulated community regarding whether this interpretation/implementation is correct and appropriate. The Board has determined that this interpretation is appropriate at this time. Additionally, the Board had determined that using the watershed approach is a valuable way of implementing the public drinking water category. The Board will review the zones of critical control in the Source Water Assessment and Protection Program prepared by the Bureau of Public Health which applies the watershed approach to the waters of the State. The Board will then implement the reassessment of this category based on those zones of critical concern.

**46 CSR 1**  
**Requirements Governing Water Quality Standards**  
**Emergency Rulemaking**  
**October 18, 1999**

**Summary of Proposed Changes**

The changes proposed address the implementation of the drinking water supply use category (category A) in section 6.2 of the rule. The rule will be amended to clarify that the public drinking water supply use category applies to all waters of the state. This is not a new interpretation of this section. The Office of Water Resources of the Division of Environmental Protection has implemented the use category in this way for some time. However, the existing language in the rule does not clearly define this interpretation. The Board is therefore proposing the amendment to make this clarification.

The specific changes proposed are to remove the existing language in section 6.2 and replace it with language providing that Category A applies to all waters unless it has been specifically removed as provided in Section 7 of the rule. Additional language is proposed which provides an exemption from the manganese human health criterion above five miles of a known drinking water source. This change has been included to address concerns raised by the coal industry regarding the difficulty of meeting the manganese limit.

The Board intends that the application of category A will be revisited upon completion of the delineation of Zones of Critical Concern (ZCCs) in the Source Water Assessment and Protection Plan being implemented by the WV Bureau for Public Health. According to that plan the Bureau will delineate zones of protection in all waters to ensure that appropriate water quality is maintained in the vicinity of public drinking water intakes. Those delineations are scheduled for completion in July 2000. Upon completion, the Board will review the delineations and reconsider the application of category A waters using the ZCCs.

**46 CSR 1**  
**Requirements Governing Water Quality Standards**  
**Emergency Rulemaking**  
**October 18, 1999**

**Statement of Circumstances Requiring Proposed Amendments**

In 1997, the West Virginia Legislature passed HB2533, which, among other things, approved amendments to the Water Quality Standards rule. Section 65-3-2 authorized the rule until October 31, 1999 with a proviso that the Board review, revise and propose emergency and legislative rule to address the current designation of category A waters.

The proposed language clarifies that the use category applies to all waters of the state, except where that use has been removed through legislative rulemaking and is listed in section 7.2.d of the rule. This clarified language is consistent with the current application category A by the Office of Water Resources of the Division of Environmental Protection in the National Pollutant Discharge Elimination System (NPDES) permitting program. Additional language is proposed which provides an exemption from the manganese human health criterion above five miles of a known drinking water source. This change has been included to address concerns raised by the coal industry regarding the difficulty of meeting the manganese limit.

In considering the clarification of how Category A is to apply to the state's waters, the Board looked at a number of alternatives to the current implementation protocol. After reviewing a number of options, the Board believes that applying the watershed approach is a valuable way of implementing the public drinking water category. The Board will review the Zones of Critical Concern to be delineated around drinking water intakes as outlined in the Source Water Assessment and Protection Plan prepared by the West Virginia Bureau for Public Health which applies the watershed approach to the waters of the State. The Board will then implement the reassessment of the Public A use category based on those Zones of Critical Concern. The projected completion of the delineations of the ZCC's is July of 1999. Until that time, the Board has determined that the current application of the use category to all streams of the state is appropriate in that it ensures full protection of those waters until a review of the protection zones in the SWAPP can be completed.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 46 CSR 1 Requirements Governing Water Quality Standards

Type of Rule:  Legislative  Interpretive  Procedural

Agency: WV Environmental Quality Board

Address: 1615 Washington Street, E., Suite 301  
Charleston, WV 25311

1. Effect of Proposed Rule N/A

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

2. Explanation of above Estimates:

N/A

3. Objectives of these rules:

Proposed changes clarify the application of category A, the public drinking water supply use designation in the Water Quality Standards Rule.

Rule Title: Requirements Governing Water Quality Standards.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None. The amendments clarify the existing implementation protocol employed by the Division of Environmental Protection.

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

No changes in the permitting process will occur as a result of the proposed changes. NPDES permits will continue to include discharge limits based on use category A requirements where applicable.

C. Economic Impact on Citizens/Public at Large.

Retaining Statewide application of category A will ensure protection of States waters with a watershed approach as outlined in the West Virginia Bureau for Public Health's Source Water Assessment and Protection Program can be implemented.

Date:

3.8.1999

Signature of Agency Head or Authorized Representative

Elizabeth M. Chaffee

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

**§46-1-1. General.**

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

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

1.3. Filing Date. -- October 18, 1999

1.4. Effective Date. --

**§46-1-2. Definitions.**

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

2.1. "Board" is the Environmental Quality Board.

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

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

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

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

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

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

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

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

2.9. "High quality waters" are those waters whose quality is equal to or better than the minimum levels necessary to achieve the national water quality goal uses.

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

2.11. "Outstanding national resource waters" are those whose unique character, ecological or recreational value or pristine nature constitutes a valuable national or State resource.

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

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

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

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

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

2.15. "Point source" shall mean any discernible, confined and discrete conveyance,

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

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

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

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

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

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

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

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

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

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

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

waters of the State.

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

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

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

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

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

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

3.2.f. Distinctly visible color;

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

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

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

#### **§46-1-4. Anti-Degradation Policy.**

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

4.1.a. Existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included as designated uses within these water quality standards.

4.1.b. The existing high quality waters of the State must be maintained at their existing high quality unless it is determined after satisfaction of the intergovernmental

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **§46-1-5. Mixing Zones.**

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

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

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

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

5.2.c. Concentrations of pollutants which exceed the criteria for the protection of human health set forth in Appendix E shall not be allowed at any point unless a mixing zone has

been assigned by the Chief after consultation with the Commissioner of the West Virginia Bureau of Public Health. Human health criteria may be exceeded within an assigned mixing zone, but shall be met at the edge of the assigned mixing zone. Mixing zones for human health criteria shall be sized to prevent significant human health risks and shall be developed using reasonable assumptions about exposure pathways. In assessing the potential human health risks of establishing a mixing zone upstream from a drinking water intake, the Chief shall consider the cumulative effects of multiple discharges and mixing zones on the drinking water intake. No mixing zone for human health criteria shall be established on a stream which has a seven (7) day, ten (10) year return frequency of 5 cfs or less.

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

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

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

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

5.2.h. Mixing zones shall not:

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

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

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

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

5.2.h.5. Overlap one another.

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

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

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

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

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

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

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

#### **§46-1-6. Water Use Categories.**

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

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

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

6.1.b. At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under Sections 301 (b) and 306 of the Federal Clean Water

Act and use of cost-effective and reasonable best management practices for non-point source control. Seasonal uses may be adopted as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria. If seasonal uses are adopted, water quality criteria will be adjusted to reflect the seasonal uses; however, such criteria shall not preclude the attainment and maintenance of a more protective use in another season. A designated use which is not an existing use may be removed, or subcategories of a use may be established if it can be demonstrated that attaining the designated use is not feasible because:

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

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

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

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

6.1.b.5. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or

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

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

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

6.2. Category A -- Water Supply, Public. -- This use category shall apply to all waters of the state unless specifically removed as indicated in section 7.2.d. herein. This category is used to describe waters which, after conventional treatment, are used for human consumption. This category includes streams on which the following are located:

~~6.2.a. All community domestic water supply systems; The manganese human health criteria shall not apply where the discharge point of the manganese is located more than five mile upstream from a known drinking water source.~~

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

~~6.2.c. All private domestic water systems;~~

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

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

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

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

6.3.c. Category B4 -- Wetlands. -- As defined in section 2.22; certain numeric stream criteria may not be appropriate for application to wetlands (see Appendix E).

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

6.5. Category D -- Agriculture and wildlife uses.

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

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

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

**APPENDIX B**

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

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

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

MT	Randolph	Elkins Municipal Water	Tygart River
MT	"	Beverly Water	Tygart river
MT	"	Valley Water	Tygart River
MT	"	Huttonsville Medium	Tygart River
		Security Prison	
MT	"	Mill Creek Water	Mill Creek
MTB	Upshur	Duckhannon Water Board	Duckhannon River

Ohio River

⊖	Zone 1	Hancock	Chester Water & Sewer	Ohio River
⊖	"	Brooke	City of Weirton	Ohio River
⊖	"	"	Weirton Steel Division	Ohio River
⊖	"	Ohio	Wheeling Water	Ohio River
⊖	"	Tyler	Sistersville Mun. Water	Ohio River
⊖	"	Pleasants	Pleasants Power Station	Ohio River
⊖	"	Cabel	Huntington Water Corp.	Ohio River
⊖	"	Marshall	Mobay Chemical Co.	Ohio River
⊖	"	Wood	E. I. DuPont	Ohio River
⊖	Zone 2	Marshall	Cameron Water	Glass House Hollow
⊖	"	"	New Urindahana Water	Wheeling Creek
			System	
⊖	"	Wetzel	Pine Grove Water	North Fork, Fishing Creek
⊖	"	Marshall	Consolidated Coal Co.	Impoundment
⊖	"	Tyler	Middlebourne Water	Middle Island Creek
⊖	"	Doddridge	West Union Mun. Water	Middle Island Creek
⊖	"	Mason	Hidden Valley Country	Lake/Impoundment
⊖	"	Jackson	Ripley Water	Mill Creek
⊖	"	Wayne	Wayne Municipal Water	Twelve Pole Creek
⊖	"	"	East Lynn Lake	East Lynn Lake
⊖	Zone 2	Wayne	Monterey Coal Co.	Impoundment

Little Kanawha

LK	Wood	Claywood Park PSD	Little Kanawha River
LK	Calhoun	Grantsville Mun. Water	Little Kanawha River
LK	Gilmer	Glenville Utility	Little Kanawha River
LK	"	Consolidated Gas	Steer Creek
		Compressor	
LK	Braxton	Burnsville Water Works	Little Kanawha river
LK	Roane	Spencer Water	Spring Creek & Mile Tree
			Reservoir
LK	Wirt	Elizabeth Water	Little Kanawha River
LKH	Ritchie	Cairo Water	North Fork Hughes River
LKH	"	Harrisville Water	North Fork Hughes River
LKH	"	Pennsboro Water	North Fork Hughes River

Kanawha River

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

#### Pocatalico river

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

#### Coal River

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

#### Elk River

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

Gauley River

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

New river

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

Bluestone River

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

Greenbrier River

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

KNG	"	Upper Greenbrier PSD	Greenbrier River
KNG	"	The Hermitage	Greenbrier

Guyandotte River

OG	Cabell	Salt Rock PSD	Guyandotte River
OG	Lincoln	West Hamlin Water	Guyandotte River
OG	Logan	Logan Water Board	Guyandotte River
OG	"	Man Water Works	Guyandotte River
OG	"	Buffalo Creek PSD	Buffalo Creek/ Mine/Wells
OG	Logan	Chapmanville	Guyandotte River
OG	"	Logan PSD	Whitman Creek/ Guyandotte River
OG	Mingo	Gilbert Water	Guyandotte River
OG	Wyoming	Occana Water	Laurel Fork
OG	"	Glen Rogers PSD	Impoundment
OG	"	Pineville Water	Pinnacle Creek/ Guyandotte River
OG	Raleigh	Raleigh Co. PSD-Amigo	Tommy Creek
OMG	Cabell	Milton Water Works	Guyandotte River
OMG	"	Culloden PSD	Indian Fork Creek
OMG	Putnam	Hurricane Municipal Water	Impoundment
OMG	"	Lake Washington PSD	Lake Washington

Big Sandy River

BS	Wayne	Kenova Municipal Water	Big Sandy River
BS	"	Fort Gay Water	Tug Fork
BST	Mingo	Kermit Water	Tug Fork
BST	"	Matewan Water	Tug Fork
BST	"	A & H Coal Co., Inc.	Impoundment
BST	"	Williamson Water	Impoundment
BST	McDowell	City of Welch	Impoundment/Wells
BST	"	City of Gary	Impoundment/Mine



## ENVIRONMENTAL QUALITY BOARD

1615 Washington Street, East, Suite 301  
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August 31, 2000

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Bradley M. Campbell, Regional Administrator  
US Environmental Protection Agency, Region III  
1650 Arch Street (3RA00)  
Philadelphia, Pennsylvania 19130

RE: West Virginia Water Quality Standards

Dear Mr. Campbell:

The Environmental Quality Board proposed changes to West Virginia's water quality standards and filed proposed amendments to those standards with the West Virginia Legislature in August 1999. The proposed amendments were considered and, with some modifications, approved by the Legislature in the 2000 session and the bill of authorization for the rule was signed by Governor Underwood in May of 2000.

Enclosed is a copy of the final, promulgated version of the water quality standards, the rationale document which explains the amendments and addresses the public comments received on the rule, a copy of the notice of the public hearing held on the proposed amendments and documentation for the revisions. In addition, Attachment A to this letter provides further explanation of the change to the applicability of the manganese criterion. A copy of the letter of certification from the Office of the Attorney General of West Virginia will be sent to you from that office.

This information is submitted for your review and approval pursuant to your authority outlined in 40 CFR 131.5.

If you have any questions about the enclosed information, please contact Libby Chatfield, the Board's technical advisor at (304) 558-4002.

Sincerely,

Dr. Edward M. Snyder  
Chair

enclosures

**Rationale Document**  
**Water Quality Standards - Effective July 1, 2000**

**Section 6.2.d. - Limitation on applicability of the manganese criterion**

The new language in 6.2.d prohibits the application of the human health criteria for manganese where the discharge point of the manganese is located more than five miles upstream from a known drinking water source. While this language was not proposed by the Board in the document filed with the Legislature for consideration in the 2000 session, the Board had approved and proposed it in an emergency rule filed in October 1999.

Prior to 1997 the Water Quality Standards rule included aquatic life and human health criteria for manganese. In that year, the Board proposed deleting the aquatic life manganese criteria in response to requests from the regulated community. The reasons for that change were that the justification for the Board's aquatic life limit for manganese was dated, and further because EPA does not have a National Recommended Water Quality Criterion for manganese for the protection of aquatic life. The legislature approved that proposal to delete the aquatic life criteria.

Since that change, manganese is regulated based on the human health criterion of 1 mg/l. Because the drinking water use category (Category A) applies to all streams in the state<sup>1</sup>, the human health criterion for manganese is used to establish permit limits for all dischargers.

The Board has received comments for a number of years from representatives of the coal industry requesting relief from the application of numeric criteria for manganese. The industry has long maintained that in order to treat manganese to meet effluent limits based on the criterion, the pH must be raised to 9 or 10 SU; a range which is obviously in violation of the WQS for pH and which is deleterious to aquatic life. Further treatment to correct the pH adds additional expense. Copies of several papers on the issue, which have been submitted to the Board in regard to this issue are attached.

The industry has expressed additional concerns about being required to meet a standard established for protection of drinking water. They do not support the current implementation of the public drinking water use category (Category A) because they believe that it is overprotective and, with regard to manganese, results in expensive treatment in areas where waters are not used for drinking water purposes.

The Board has also received numerous comments from the environmental community and citizens interested in full protection of waters as Category A and state agencies on this issue who have expressed concern about the potential problems caused downstream if manganese is not treated by the discharger. If not treated, the aesthetic problems caused by manganese surface,

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<sup>1</sup>Except where it has been removed by legislative action as noted in section 7 of the rule.

and local treatment such discharges result in additional costs to the treatment facilities and their customers. Many see this as inappropriately shifting the burden of pollution control from the outfall to the drinking water intake. The West Virginia Bureau for Public Health has also expressed concern that increased metals concentrations can also result in interference with the disinfection process.

The Board acknowledges the comments regarding concerns about the regulation of manganese which is an issue that has been debated before it for many years. The Board believes that the limitation of the application to manganese criterion to the 5-mile zone above intakes is a compromise which will provide adequate protection to the majority of the public. In recognition of the long-standing concerns expressed regarding this issue, the Board intends to continue to review other available options and to work with the WV Bureau for Public Health and WV Division of Environmental Protection to ensure that appropriate protection is provided by this proposal. We will also revisit this language after final decisions are made regarding the application of Category A waters throughout the state.



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### RESPONSES TO COMMENTS

#### 46 CSR 7

#### Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply

January 8, 2003

This document addresses comments received on the new procedural rule titled "Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply". It includes a description of the proposed rule; the comments received on the proposed rule; the Board's response to the comments, and final Board action.

The proposed rule addresses the implementation of the Public Drinking 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."

**Note:** The majority of the comments received addressed the general issue of the application of the Public Water Supply designated use ("Category A") to state waters, rather than specific comments on the proposed rule. Those the general comments regarding application of Category A to state waters are outlined in the following #1 – 20; the specific comments on the procedural rule are addressed in #21 - 29.

#### Comments on the Application of Category A to State Waters.

1. The WV Department of Environmental Protection commented that the Board's continued support of DEP's practice in applying the Category A use designation to all streams has done much to enhance and protect the overall quality of our state's waters and this Procedural Rule is a positive step to attempt to streamline a process that will enable our continued implementation of

Public A while providing relief from those requirements where judged appropriate. The agency also provided comments on substance of procedural rule – see below.

2. The West Virginia Bureau for Public Health expressed support for the current implementation of Category A by the WV Division of Environmental Protection, which is to apply to all waters of the State unless specifically removed by the Environmental Quality Board. The Agency indicated that all water sources currently designated as Category A have the potential to become used as domestic water supply source. They expressed concern that if the quality of a stream were to be compromised, what process would be used for re-designation of waters when new drinking water intakes are consistently becoming more restrictive, requiring an ever-higher quality for source water so that treatment will produce finished water meeting regulatory requirements.

3. Comments from citizens indicated support for statewide application of Category A as well as support of the proposed procedural rule. They indicated that clean water is one of our state's greatest assets, and we should require industries and other users to keep it clean. Comments indicated that millions of hikers, fishermen and river runners use state waters and that – clear healthy streams make West Virginia an exceptionally appetizing tourist destination.

4. Comments suggested that Category A one of our most protective use designations and that even with the broad statewide application of the use, only a handful of exemptions have been requested by dischargers to date. If the Category A use would be removed on a broad basis throughout the state, and pollutant discharges allowed that do not meet Category A criteria, streams will be degraded to the point where it will be hard, if not impossible, to later bring that stream back to drinking water standards.

5. One commenter, citing comments from USEPA, Region 3, urge the Board that in establishing designated uses – a state should consider future uses that might be made of the state's waters. Commenters also suggested that the federal Clean Water Act requires that standards ensure protection of downstream users. A limited application of Category A may not ensure such protection.

6. In support of continued broad application of Category A, a commenter indicated that such statewide application supports the historic implementation of the use by the WV Department of Environmental Protection; ensures continuation of historic level of protection of waters being used directly from stream.

7. Several comments were received indicating that the federal Clean Water Act prohibits the removal of existing uses. There is a segment of the state's population who take water directly from streams for use as drinking and domestic water. Some commenters argued that such direct use from stream is considered an existing use, therefore cannot be removed consistent with federal law. The commenter indicated that changing historic application of category A to a more limited application would result in the effective removal of such existing use – contrary to Clean Water Act provisions.

Others commenting on this issue argued that those taking water directly from streams should not be considered in determining application of Category A. They maintain that these users are not public water supplies as defined by the Water Quality Standards. Further, they maintain that an occasional drink of water by a boater or hunter doesn't meet exposure assumptions on which human health criteria are based.

8. One commenter suggests that there is data demonstrating that drinking water usage directly from streams exists throughout the state – including testimony from public as well as a US Census Report (1990) which indicates that 28% of state households gather drinking water from non-municipal sources including rivers, streams and ponds. (463,000 people)
9. Commenters indicated that the impact on tourism should be considered in all decisions affecting natural resources – high quality water is significant economic factor in West Virginia.
10. The coal industry has expressed concern about the environmental and monetary costs of meeting the Category A criterion for manganese. In response to coal industry's position on manganese, commenters expressed concern that the cost of water treatment should not be shifted so as to pass the costs away from those who pollute and on to West Virginia residents. Commenters indicated that the coal industry is seeking such cost shifting, though technology is available to treat for manganese removal. If not treated at the source, municipal facilities must treat and must pass the cost off to their customers.
11. In response to an argument made at the public hearing that antidegradation provisions provide protection if the Category A use is removed – a commenter stated that there is no relationship between Category A and protections afforded by antidegradation provisions in Water Quality Standards rule. The commenter indicated that in fact, the antidegradation provisions allow for significant pollution (10% de minimus) in high quality streams without socio-economic review. Also, the antidegradation rule exempts non-point source pollution beyond the application of Best Management Practices.
12. In response to position of industry that Category A could be removed through NPDES permitting process – a commenter indicated that consideration of Category A removal through NPDES permitting process will not provide insurance proposed with this rulemaking. Not clear that removing through permitting process consistent with CWA.
13. A commenter suggested that they would like to see more information regarding the evidence of economic hardship to permit holders allegedly caused by compliance with Category A designation. They have been unable to find any evidence of documented cost analysis by a permit holder or applicant that provides proof of economic hardship.
14. Commenters indicated the need for additional data before applying Category A to all streams. (Generally those expressing this concern support application of Category A at intakes).

15. One commenter expressing concern about the statewide application of Category A indicated that there is no federal law requiring Category A to apply to all waters. They further stated that most other states have regulations similar to WV's existing rules. Commenters objecting to a broad application of the designated use suggested that existing permits protect waters based on Category A limits, and that the DEP can continue to do this in making permitting decisions without a change to the WQS rule.
16. Commenters suggested that there is no need for clarification to ensure future discharges will not degrade state waters, indicating: 1) Future drinking water uses of streams must be afforded same protection as existing drinking water uses. 2) new dischargers are not allowed to degrade existing water quality under the antidegradation provisions.
17. One comment indicated that application of Category A streamwide could result in discharges discharging water of drinking water quality at low flows – which they believe would be an extreme application of the designated use.
18. A commenter suggested that current Water Quality Standards adequately protect public water supplies.
19. A comment opposing state-wide application of Category A use indicated that such application does not reflect actual uses and the Board has acknowledged that it is inappropriate in many locations. Their comments recommended language indicating that compliance with criteria will be determined at the surface water intake and providing that the Director, at his or her discretion, may extend the Category A area up to ½ mile upstream of a surface water intake.
20. Some commenters argued that the DEP, through its permitting process has actually established Category A stream-wide. They expressed concern that the Board would remove the use, which has been established through practice rather than by legislative rulemaking

*The Board acknowledges the numerous comments provided regarding the application of the Public Water Supply designated use to the waters of the state. A number of important issues were raised, many of which the Board has been discussing for some time. However, because these comments do not directly address the content of the procedural rule, we decline to address them in detail here. As the Board continues to consider the application of Category A we will keep all of these comments in mind, and will provide opportunities for further discussion of them. Rather than as part of a decision on the procedural rule.*

#### **Specific Comments on Procedural Rule**

21. Concerns were expressed by some commenters that the Board should not take this action via

procedural rulemaking – has been carried out by legislative rulemaking historically. They indicated that the proposed procedural rule appears to circumvent that process. They maintain that a legislative rule cannot be amended via the procedural rulemaking process. Further, they indicate that the procedural rulemaking process is inappropriate where it is “determinative of an issue affecting private rights, privileges and interest.”

*The Board acknowledges the commenters' concerns. The Board's intent in proposing this rule is to provide an expedited process for the removal of the Category A use, where a discharger demonstrates that removal of the use will not affect current or possible future use of waters of the state public water supply. The procedural rulemaking process allows decisions to be made relatively quickly, as compared to the legislative rulemaking process, which is the current method of removing designated uses. It is not the Board's intent to circumvent the Legislature's authority, and we will take any steps necessary to ensure that we are appropriately authorized to conduct the proposed activity. To that end, we are submitting the proposed rule to the West Virginia Legislative Rule-Making Review Committee for its review – we look forward to any suggestions the committee may have regarding this matter.*

22. Commenters also indicated that the Board tried to establish Category A streamwide in 1999 and the West Virginia Legislature rejected the Board's proposal. They suggest that until there is a legislative rule that applies Category A to all waters, procedural rule to remove the use is premature.

*It is the Board's understanding that the WV Department of Environmental Protection is, and intends to continue its historic implementation of the designated use, that is, to assume that it applies to all waters of the state, unless specifically removed from a stream by the Board. Therefore, the Board believes that the procedural rule is an appropriate action to take at this time.*

23. Several commenters expressed concern regarding the possibility of decisions subject to this rule being delayed because of the failure of USEPA to approve them in a timely manner.

*The Board acknowledges that in the past few years USEPA has failed to act on submissions of our Water Quality Standards in a timely fashion. We have addressed this matter with the agency, and have worked closely with EPA staff to write the procedural rule in a manner that will provide an expedited process for both agencies.*

24. The West Virginia DEP/Division of Water Resources, West Virginia Department of Health and Human Resources/Bureau for Public Health and USEPA Region 3 all expressed support for the procedural rule with comments, which are addressed in comments below.

25. The West Virginia Chamber of Commerce expressed support for the proposed procedural rule to remove Category A, but strongly urges Board to develop scientific justification in establishing waters to which Category A use is to be designated. Statewide application has not

been adequately justified.

*The Board acknowledges the commenters support. Note comments on the application of Category A, above.*

26. Several suggestions were made by the DEP/DWR regarding specific language changes to the procedural rule.

*We appreciate the agency's comments, and will continue to consider them once the procedural rule is implemented. We acknowledge the need to correct the citation in section 5.2.b.. At this time, however, the Board proposes no additional revisions to the procedural rule, as proposed.*

27. A commenter questioned why an aquatic life assessment is included in the application requirements.

*It is possible that the removal of a designated use may result in increased concentrations of certain pollutants in a stream. The Board believes it will be helpful to have baseline data on aquatic life in the stream for future comparison purposes.*

28. A commenter objects to requirement that attainment of Category A not feasible, stating, "The fact is, many streams could qualify as a public water supply"

*The reference to feasibility is included in section 5.1.c of the proposed rule. This language is taken directly from federal regulation – 40 CFR 131.10(g) – which outlines circumstances where designated uses can be removed.*

28. A commenter indicated that the proposed application requirements much more onerous than those imposed in the past.

*We acknowledge the commenters concern. However, the requirements in the proposed rule come primarily from existing state and federal regulations.*

29. Commenter indicates that the criteria for removing use mirror those at 40 CFR 131.10 – these are more appropriate for removing the aquatic life use than the public water supply use.

*The language in 40 CFR 131.(g) does not limit the criteria to removal of any particular use; it states "States may remove a designated use which is not an existing use, as defined in section 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designate use is not feasible because: . . ."*

**Board Action**

The Board adopts the procedural rule as proposed.