

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #3

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OFFICE OF THE SECRETARY OF STATE  
WEST VIRGINIA

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY 20-5M-5-C

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 NEW RULE BEING PROPOSED: 6A

TITLE OF RULE BEING PROPOSED: General Groundwater Protection Rules for  
Fertilizers and Manures

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



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OFFICE OF BEST MANAGEMENT  
PRACTICES

TITLE 61 SERIES 6A

GENERAL GROUNDWATER PROTECTION RULES FOR FERTILIZERS AND MANURES

Summary and Description of the rule

This rule establishes requirements for manure handling in an environmentally correct manner, establishes the duties and powers of the commissions and requires the commissioner of agriculture to make voluntary practices mandatory when found to be ineffective to protect groundwater from residues of fertilizer or manure.

The rule establishes a strong educational program for the application of these best management practices.

Circumstances requiring this rule

This rule is required to comply with the mandates of the Groundwater Protection Act which states that the Department of Agriculture is the groundwater protection agency for the use and application of fertilizers.

The use and application of fertilizers and manures may serve as a source of groundwater contamination, so these activities are regulated under this rule to protect groundwater in this state.

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 DEPARTMENT OF STATE

APPENDIX B  
 FISCAL NOTE FOR PROPOSED RULES  
 TITLE 61, SERIES 6A

GENERAL GROUNDWATER PROTECTION RULES FOR FERTILIZER AND MANURE

Type of rule: Legislative

Agency: West Virginia Department of Agriculture  
 Compliance Division  
 1900 Kanawha Boulevard, E.  
 Charleston, West Virginia 25305

Effect of Proposed Rule Estimated Total Cost	ANNUAL		FISCAL YEAR		
	Increase \$	Decrease \$	Current \$	Next \$	Thereafter \$
Personal Services	27,000	0	0	27,000	27,000
Current Expense	1,000	0	0	1,000	1,000
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2. Explanation of above estimates:

The estimates are based on the assumption that an annual inspection will be performed for each facility storing manure and that other investigational trips for follow-up on reports of contaminated groundwater will occur throughout the year. The estimates also factor in the travel costs and facility costs for training and education courses that should be held throughout the state in order to comply with the mandate of the law.

One additional field position will be needed for initial compliance with this rule.

These estimates are very rough as the Department has no experience with enforcement of this type of program.

3. Objectives of these rules:

The objective of this rule is to provide for mandatory and voluntary practices for the storage, use and application of fertilizers and manures. The Groundwater Protection Act designated the Department of Agriculture as the regulatory agency for the application and use of fertilizers and required the agency to develop practices to prevent groundwater contamination in this area.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government.

This rule increases the responsibility of the Department of Agriculture. The impact on state government will be that an additional program will be added to a staff that is already working at capacity. There will be increased current expense and a reduction of the amount of time spent on other mandated programs.

B. Economic Impact on Political Subdivisions, Specific Industries, Specific groups of citizens.

approximate cost \$ 1,500,000

The economic impact on the agricultural community and those served by it will be high for those that need to install manure holding facilities. It is estimated that the capitol cost to each farm or firm installing manure holding facilities will be from \$12,000 to \$100,000 with additional auxiliary equipment costs of \$20,000 to \$50,000. The ASCS does have limited money available for cost sharing for approximately \$10,000 per facility, when available. The number of facilities that would be needed is estimated at 15 based (@ \$100,000 each facility) on interpretation of the data from the 1987 U.S. Agricultural Census. This number may include farms that already have adequate facilities, and may be inaccurate due to assumptions made to interpret the data.

C. Economic Impact on Citizens/Public at Large.

The economic impact on citizens and the public at large will be that costs of using manure will increase and the costs of raising animals sold from large facilities may increase to compensate for the increased manure holding costs.

Page Three

General Groundwater Rules - Fertilizer/Manure

As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules.

Date: September 15, 1992

A handwritten signature in cursive script, appearing to read "Bob Nichols Flynn". The signature is written in dark ink and is positioned above a horizontal line.

Signature of Agency Head or Authorized Representative

DATE: September 15, 1992

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TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

1992 SEP 15 PM 1:13

FROM: Barbara J. Smith, Director of Compliance, WV Dept. of Agriculture

LEGISLATIVE RULE TITLE: General Groundwater Protection Rules for Fertilizers and Manures

1. Authorizing statute(s) citation 20-5M-5-C

2. a. Date filed in State Register with Notice of Hearing:

June 5, 1992

b. What other notice, including advertising, did you give of the hearing?

copy rule sent to all persons on attached list; Class I  
Legal ad in Charleston Daily Mail and Morgantown Dominion  
Post; press release to all state newspapers

c. Date of hearing(s): July 21, 1992, Charleston, WV

July 23, 1992, Morgantown, WV

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached  No comments received

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

September 15, 1992

f. Name and phone number(s) of agency person(s) to contact for additional information:

Barbara J. Smith, 558-2226

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STATE DEPARTMENT OF AGRICULTURE  
MARTINSBURG, WEST VIRGINIA

TITLE 61  
LEGISLATIVE RULE  
STATE DEPARTMENT OF AGRICULTURE

SERIES 6A  
GENERAL GROUNDWATER PROTECTION RULES FOR FERTILIZER AND MANURES

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§61-6A-1. General.

1.1. Scope - The rules establish practices to prevent or minimize the entry of nutrients from fertilizers and manures into groundwater while maintaining and improving the soil and plant resources of this state.

1.2. Authority - Code of West Virginia 20-5M-5-c.

1.3. Filing Date -

1.4. Effective Date -

1.5. This is a new legislative rule.

§61-6A-2. Incorporation by Reference.

2.1. The following documents are adopted in their entirety:

2.1.a. Generic State Management Plan for Pesticides and Fertilizers in Groundwater, (latest version) WV61CSR 22 et seq.

2.1.b. Primary and Secondary Containment of Fertilizers WV 61 CSR 6B et seq. (rule is proposed and not effective).

2.1.c. Water Well Design Standards WV 64 CSR 46 et seq. (effective 6-8-84).

2.1.d. Soil Conservation Service Field Office Technical Guide as supplemented by the West Virginia Soil Conservation Committee (access number PB85-2444661AS) (current version at effective date of this rule).

2.1.e. Best Management Practices for Fertilizers and Manures WV 61 CSR 22B et seq. (rule is proposed and not effective).

§61-6A-3. Definitions.

3.1. "Animal unit" means a unit of measurement calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

3.2. "Best Management Practices" means activities, procedures and practices to prevent or remedy the introduction of fertilizer or manure residues into groundwater to the extent technically feasible and economically practical. Best Management Practices are designed to maintain the health and long-term productivity of the soil, water and related plant and animal resources and to minimize the threat of soil, waste and nutrient contamination to the waters of the state.

3.3. "Commissioner" means the commissioner of agriculture of the state of West Virginia or his or her duly authorized agent.

3.4. "Department" means the West Virginia Department of Agriculture.

3.5. "Feedlot" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met: 1.) animals (other than aquatic animals) have been are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period, and 2.) crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. Two or more animal feeding operations under common ownership are considered, for the purposes of these rules, to be a single feedlot if they adjoin each other or if they use a common area or system for the disposal of wastes.

3.6. "Fertilizer" means any substance containing one or more recognized plant nutrients which is used for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth. The term fertilizer does not include agricultural liming materials, wood ashes, gypsum, unmanipulated animal or vegetable manures and other products exempted by regulation of the commissioner.

3.7. "Manure" means any substance composed of excreta of animals, other than man, and may include bedding or other materials normally associated with the substance as well as water associated with or added to the substance.

3.8. "Non-point source" means a diffuse source of substances that have the potential to impair the beneficial uses of groundwater resulting from activities over a relatively large area, the effects of which must normally be addressed or controlled by a

management or conservation practice.

3.9. "Point source" means a source of substances that have the potential to impair the beneficial uses of groundwater resulting from an activity over a small area and generally is limited to mixing, loading and storage sites or feedlots. A source is not considered a point source until a discharge of substances occurs.

3.10. "Water quality standards" means the standards of purity and quality promulgated by the State Water Resources Board (WV 46 CSR Series 12, (this rule is filed but is not yet effective)).

#### §61-6A-4. Program and Policy Statements.

4.1. The commissioner finds that current knowledge of the chemical balance and leaching of chemicals found in fertilizers and manures in soils and groundwaters of this state is not sufficient to allow for the development of mandatory use and application practices that will effectively protect the groundwaters of this state. The practices adopted by reference in this rule are current good conservation practices that the commissioner believes will be helpful in the protection of the groundwaters of this state.

4.2. The commissioner will encourage the education of all users of fertilizers and manures so that they have the knowledge and technical means to respond independently and voluntarily in addressing environmental concerns. The commissioner will encourage the development of training and educational programs for persons who make recommendations for the application rates for fertilizers and manures and for those persons who apply fertilizers and manures.

4.3. The commissioner will support the development of financial incentives for the implementation of best management practices and will instruct potential users of these incentives of the availability of the programs.

4.4. The commissioner reserves the right to develop mandatory best management practices by rule, in accordance with the provisions of Chapter 29A, Article 1 of this code, for the application and use of fertilizers or manures when valid groundwater data indicates that chemicals from fertilizers or manures are contaminating the groundwaters and when scientific knowledge develops to indicate that the mandatory best management practices will be effective in the protection of groundwater.

4.5. The commissioner will take action to promulgate rules to make some or all of the voluntary best management practices mandatory in a portion or all of the state when the monitoring program indicates that the chemical concentrations of residues from

fertilizers or manures in groundwater are increasing or other valid data shows that contamination exceeding the water quality standards have occurred. A change in technology or methodology that lowers the detection limits and thus changes the amount of pollutant detected will not be interpreted as showing an increase in chemical concentration of a particular residue. The commissioner will utilize data averaged from at least four samples over a one year period to determine if the water quality standards have been exceeded or there is a trend of increasing concentrations of the chemical residue from fertilizers or manures.

4.6. The commissioner will review the voluntary and mandatory programs every 5 years to determine the effectiveness of the programs and will effect change in the programs if the voluntary and/or mandatory programs are not effective or if the current best available technology needs to be incorporated into these programs.

4.7. Activities conducted in this state, if consistent with the voluntary or mandatory practices outlined in this rule, shall be entitled to a rebuttable presumption that the activity is reasonable and does not constitute a hazard to groundwater. If such activity is conducted in conformity with federal and state laws and regulations, it is presumed to be an activity that does not adversely affect the public health and safety. However, a person who alters groundwater quality or character as a result of such activities regulated by the commissioner shall be liable if the alteration was negligent, reckless or intentional.

#### §61-6A-5. Powers and duties of commissioner.

5.1. The commissioner has the power and authority to:

5.1.a. enter and inspect, during reasonable hours, any location where fertilizers or manures are manufactured, distributed, transported, stored or used, and where records relating to the storage, manufacture, distribution, shipment, labeling or use of fertilizers or manures are kept;

5.1.b. coordinate the sampling and inspection program with all other groundwater regulatory agencies within the framework of the Department of Environmental Protection, Division of Natural Resources state groundwater management strategy and their rules relating to monitoring and analysis of groundwater;

5.1.c. utilize the Department of Environmental Protection, Division of Natural Resources data management system for data on groundwater;

5.1.d. conduct a study to determine the cause of contamination, assess remediation options for the situation, and notify the groundwater user(s) or owner(s), if known to the

commissioner, of the situation whenever contamination is predicted or is known to be occurring due to the residues of fertilizers or manures;

5.1.e. share data with other federal and state agencies for their evaluation and further investigation;

5.1.f. promote the protection of groundwater from fertilizers or manures through public education programs;

5.1.g. encourage, participate in, conduct or cause to be conducted studies on the environmental impact of the use of fertilizers and manures on the groundwaters of this state, as well as ecologically and economically sound fertilizer and manure use and application practices;

5.1.h. take action in the shortest reasonable time to revise this rule when these voluntary best management practices are found to be inadequate to protect the groundwaters in this state from contamination with residues from fertilizers or manures that affect the present and future beneficial use of the groundwaters of this state, whenever that data is found to be valid and relevant to the conditions found in this state;

5.1.i. collect and expend moneys under the terms of this rule as provided by WV Code §20-5M-1 et seq.;

5.1.j. cooperate and enter into agreements with governmental agencies of this state or other states, agencies of the federal government and foreign governments, and private associations in order to carry out the purpose and provisions of this rule;

5.1.k. make reports and recommendations to the Groundwater Coordinating Committee or to the legislature as needed to further the protection of groundwaters in this state;

5.1.l. maintain a testing laboratory or contract with other laboratories for testing;

5.1.m. conduct hearings as provided by this rule;

5.1.n. assess civil penalties, negotiate agreements and refer violations to a court of competent jurisdiction;

5.1.o. obtain court orders directing any person refusing to submit to inspection, sampling or auditing to submit;

5.1.p. issue orders requiring compliance with these rules; and

5.1.q. promulgate additional rules as necessary to

protect groundwater within statutory mandates that may include, but not limited to, permitting, licensing and certification, facility design, operational management, closure, remediation and monitoring of water quality.

**§61-6A-6. Protection of groundwater from point sources.**

6.1. Any person storing fluid bulk fertilizers in undivided quantities in excess of five thousand (5,000) U.S. gallons or dry bulk fertilizers in undivided quantities exceeding 25 tons shall comply with the rules for Primary and Secondary Containment of Fertilizers (WV 61 CSR 6B) in addition to these rules. For purposes of this rule, the term "undivided" indicates the total amount of product stored at the facility which may be divided into several storage containers.

6.2. Any person maintaining more than the number of animals in a feedlot as listed in this paragraph shall obtain a Nutrient Management Plan within 2 years of the effective date of these rules and shall implement the plan within 3 years of the development of the Nutrient Management Plan. The Nutrient Management Plan is specified in the Nutrient Management Standard Practice #590 of the Soil Conservation Service Field Office Technical Guide.

6.2.a. Number of animals maintained: 1,000 slaughter or feeder cattle; 700 mature dairy cattle (whether milked or dry cows); 2,500 swine each weighing over 25 kilograms (approximately 55 pounds); 500 horses; 10,000 sheep or lambs; 55,000 turkeys; 100,000 laying hens or broilers (if the facility has continuous overflow watering); 30,000 laying hens or broilers (if the facility has a liquid manure handling system); 5,000 ducks; or 1,000 animal units.

6.3. Any person maintaining more than the animals in a feedlot as listed in this paragraph in an area where the potential for impairment of existing groundwater quality is high from the storage of manure; such as in a karst limestone area, in an area with sandy soils, in an location near sinkholes or near wells that do not meet the Water Well Design Standards set by WV 64 CSR 46 et seq.; shall obtain a Nutrient Management Plan within 5 years of the effective date of these rules and shall implement the plan within 5 years of the development of the Nutrient Management Plan.

6.3.a. Number of animals maintained: 300 slaughter or feeder cattle; 200 mature dairy cattle (whether milked or dry cows); 750 swine each weighing over 25 kilograms (approximately 55 pounds); 150 horses; 3,000 sheep or lambs; 16,500 turkeys; 30,000 laying hens or broilers (if the facility has continuous overflow watering); 9,000 laying hens or broilers (if the facility has a liquid manure handling system); 1,500 ducks; or 300 animal units.

6.4. Any person storing an amount of manure in a defined area generated by the number of animals specified in Sections 6.2.a. or 6.2.b. for a period of 45 days or more in a 12 month period even if the person does not meet the other criteria of a feedlot shall comply with the applicable provisions of sections 6.2. and 6.3, except that this Section will not be construed to apply to the normal practice of pasturing animals.

**§61-6A-7. Hearings.**

7.1. The commissioner will offer a person an opportunity for an informal hearing prior to issuing an order in all cases, except where the protection of the public health requires immediate action to protect groundwaters in this state.

**§61-6A-8. Civil and criminal penalties.**

8.1. The commissioner may assess civil and criminal penalties only to violations of the mandatory practices or actions that were performed in a grossly negligent, reckless or intentional manner.

8.2. When determining the assessment of civil or criminal penalties, the commissioner shall consider the following factors in determining the unreasonableness of any harm referred to in this rule which shall include, but need not be limited to:

8.2.a. the extent of harm to the public health, the environment, or the beneficial use of the groundwater;

8.2.b. the burden and fairness of requiring a person to bear the loss;

8.2.c. the causing of harm in the conduct of reasonable activities utilizing practices conducted in conformity with federal and state laws and regulations;

8.2.d. the person's history of compliance that may indicate continued noncompliance or disregard for compliance;

8.2.e. the person's knowledge of the rules and regulations that were violated; and

8.2.f. activities that were conducted in a negligent, reckless or intentional manner, where negligence means a failure to exercise reasonable care.

**§61-6A-9. Remediation.**

9.1. The commissioner has the authority to order persons to conduct remedial actions when issuing an order. The commissioner

will;

9.1.a. encourage agreements for investigation and cleanups in appropriate cases;

9.1.b. use permanent solutions to the maximum extent practical to correct groundwater contamination where possible;

9.1.c. not allow for dilution and dispersion of the contaminant if active remedial measures are technically and economically feasible; and

9.1.d. specify which parameters will be tested in a monitoring program in order to demonstrate control and containment.

JUL 30 1992

West Virginia Poultry Association



Barbara Smith  
Compliance Division WVDA  
1900 Kanawha Blvd.  
East Charleston, WV 25305

July 29, 1992

The West Virginia Poultry Association is writing to relay concerns over the state's regulations of General Groundwater Protection Rules for Fertilizer and Manures and the potential effects on the poultry and related agricultural industries. We feel these regulations are very unfair to the poultrymen.

The poultry industry is a major economic resource which contributes millions to the economy. The consequences of these regulations down the road will eventually be unfair to all concerned as rules, regulations and fees will adversely affect the business climate in West Virginia.

In formulating regulations which will govern the future growth of the poultry and related agricultural industries, the West Virginia Poultry Association urges state officials to consider only those regulations which are reasonable and fair to all parties which allow for orderly expansion of the poultry industry, and display a prudent balance between environmental concerns and practical economic reality.

Some of the items in the regulations that need to be reconsidered: a definition of manure, Animal units as compared with ASCS & SCS standards, definition of a 25 year flood, Composting manure, layers, broilers, and breeders all in on category - pullets were omitted.

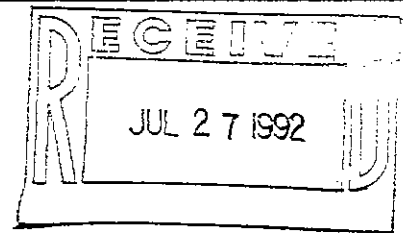
We request that you reconsider the regulations and consult poultrymen, poultry association, WV University personnel, and other agricultural personnel for the needed input to set up reasonable standards for all concerned.

As we are adamantly opposed to these regulations, we hope you will rewrite the regulations in a way that is less detrimental to the poultry and related agricultural industries and the economy in West Virginia.

A handwritten signature in black ink, appearing to read "Grover M. See", is written over a horizontal line.

Grover M. See, Executive Secretary

CC: Commissioner of Agriculture Cleve Benedict  
House of Delegate Harold K. Michael  
Robert L. Williams



West Virginia Department of Agriculture  
Attn: Barbara Smith, Director  
Compliance Division  
1900 Kanawha Blvd., East  
Charleston, WV 25305

July 24, 1992

Dear Ms. Smith,

Enclosed please find written comments relating to the proposed legislative rule Title 61, Series 6A **General Groundwater Protection Rules For Fertilizer and Manure**. As currently written, the proposed rule is vague, confusing, non-effective, and obviously not fully intent upon its objective of maintenance or improvements to existing groundwater quality. In some ways I can understand the Departments apprehension to require mandatory BMP's in regards to land application of animal waste and required storage structures. On the other hand, by the authority given you with the recent mandate of the Groundwater Protection Act, you have been assigned the lead position in regulating the use and application of fertilizers and animal wastes. Granted, it is not politically popular to enforce agricultural rules in a state where most farmers are pretty much unregulated in their day to day operations. However, it may be even less popular for the Department to endure the public criticism which will develop as more instances of ground and surface water contamination are detected and documented.

In the Eastern Panhandle, the counties of Grant, Hardy, and Pendleton are currently the leading producers of poultry in our state. It is big business here; again, unregulated development from the site selection processes which, being exempt from sediment and erosion control practices, often lead to tons of sediment deposition into state waters, down to the unregulated waste utilization measures which are left to the imagination and discretion of the grower. Now we are looking at a two-fold expansion effort by the poultry business here. It's no wonder; conditions became such in Virginia, Maryland, and Delaware that these companies responsible for this corruption realize that, Hey! Let's move into that user friendly place where our profits can thrive, the environment can go to Hell, and we are unregulated.

Its time in this state for state and county government to take leadership in sensible environmental protection instead of bowing to corporate interests as in the case of the current poultry expansion. Specifically, the majority of poultry growers with adequate land and management abilities would not be handicapped by such mandatory action as following the required Management Plan and its required BMP's.

Specific concerns:

\*In the summary preceding the rule, it is indicated that "the rule establishes a strong educational program". How?

\*In the section 61-6A-6, Protection of groundwater from point sources, a Nutrient Management Plan is referred to. Who is responsible for writing this plan? What agency is responsible for determining that the operator is in compliance with the plan? What agency will enforce non-compliance with the plan?

\*In Item 6.2a of the above mentioned section, are these animal numbers considered as annual numbers maintained or one time capacity as in the case of broilers. Example: one cycle in standard broiler house may be 25,000 birds (250 Animal Units) but the yearly animal waste production from this house may be from 175,000 (1750 AU). Depending upon interpretation, this could have significant impact on producers requiring management plans.

In some way, management plan requirements should center on tonnage of animal waste generated from an operation and the producers ability (or inability) to provide adequate land surface or other means of safely utilizing this waste for the dual purpose of enhancing crop production while maintaining surface and groundwater quality.

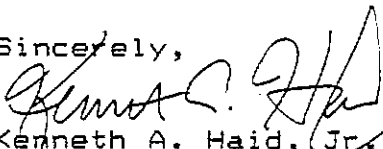
\*The terms 'continuous overflow watering' and 'liquid manure handling system' used in 6.2.a. are not applicable to current commercial poultry production systems in the State.

This gives the appearance of copying from another document rather than a good working knowledge of the industry.

\*When manure is applied at a rate not to exceed 125% of the nitrogen requirement of the crop as is indicated in 7.3.f, this may reduce some threat of nitrate leaching (providing those producers using high poultry litter rates are accountable for residual soil nitrate testing); however, in the case of most poultry litter, you have compounded the problem of surface water contamination by overapplication of the other principal nutrients, primarily phosphorus.

As poorly written and ineffective as this ruling is currently, it would probably be in the best interest of the Department to scrap it and start over. If the ruling must be ineffective in dealing with protecting ground water, it would behoove all concerned if at least it was shorter to read.

Sincerely,



Kenneth A. Haid, Jr.  
Rt. 1, Box 121  
Arthur, WV 26816



# SIERRA CLUB WEST VIRGINIA CHAPTER

P. O. Box 4142  
Morgantown, WV 26504

July 23, 1992

Barbara Smith  
Compliance Division  
West Virginia Dept. of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Ms. Smith:

I am submitting the following comments regarding the proposed groundwater regulations on behalf of the West Virginia Chapter of the Sierra Club. We have long advocated strong groundwater protection legislation for West Virginia and are strong supporters of West Virginia's Groundwater Protection Act of 1991. Thus it is disappointing to see such weak and ineffective rules being promulgated to enforce the Act. We believe that these proposed regulations violate the intent of the Legislature in passing the Groundwater Protection Act.

The Act states "it is the public policy of the state of West Virginia to maintain and protect the state's groundwater so as to support the present and future beneficial uses and further to maintain and protect groundwater at existing quality where the existing quality is better than that required to maintain and protect the present and future beneficial uses." It further states "Pollution of groundwater shall not be considered a beneficial use." The Legislature intended that the regulations proposed under the Act "provide for the establishment of groundwater protection programs consistent with this Article;" and "provide for such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program." I cannot believe that these proposed regulations will even come close to fulfilling the intent of the law.

I wish to first cite several major gaps which exist in groundwater regulations currently being developed that are relevant to these regs. Specific comments on the weaknesses of the proposed regs and suggestions for their amendment will follow.

1. The issue of land application of various sludges, soil amendments, fly ash, and other solid wastes being applied as beneficial uses has not been addressed, in spite of frequent requests to do so. While many of these materials are actually solid wastes that are being disposed of on land, their organic matter or mineral nutrient content allows them to be exempted from solid waste regs under the beneficial use provisions. Although we do not wish to impede the application of those

*"Not blind opposition to progress, but opposition to blind progress."*

materials that truly do present benefit to the land, many of these substances produce a leachate that may be high in heavy metals, toxic organic compounds, or strongly alkaline or acid forming constituents. The definition of fertilizers and manures must be expanded to include these so-called beneficial materials into a regulatory program in order to assure that these beneficial uses are in fact beneficial and not just a convenient way for industry to avoid solid waste regulations.

2. Underground storage tanks for fuels used on farms were not included in regulations proposed by DNR to regulate groundwater impacts from these tanks because "Dept. of Ag will handle those" or so environmentalists were told. While the volume of these tanks is generally smaller than for many commercial facilities, their potential to contaminate groundwater is still very significant. An enforceable maintenance and monitoring program is needed.

3. These regs do not contain adequate remediation requirements if contamination should occur. Furthermore, no mention is made of how victims of pollution are to be compensated. As such, there is very little enforcement incentive to encourage voluntary compliance with these regs. Obviously, prevention is considerably cheaper than remediation, unless the cost of remediation is borne only by downstream users and not the polluter. Without the "stick" of remediation and cleanup costs, there is no incentive to follow the carrot of prevention by complying with these regs. Thus the Dept. is left with an enforcement nightmare.

4. These regs also lack any mention of a monitoring program. Without even a semblance of a monitoring program, the regs are totally unenforceable. Section 5 Paragraph (d) of the Act clearly states that agencies shall develop practices to prevent groundwater contamination and states specifically that such practices shall include "remediation and monitoring".

Areas discussed in these regs which must be amended include:

5. Enforcement. Regulatory actions by the Commissioner are discretionary. The regs should be amended to make regulatory action by the Commissioner mandatory when pollution is occurring. Citizens must have some assurance that their groundwater will be protected and that action to stop pollution will be forthcoming. A regulatory agency should not have the discretion to knowingly ignore pollution which violates West Virginia's groundwater protection law. Other states, such as Wisconsin, have adopted regulations which require regulatory agencies to evaluate, among other regulatory responses, "the practicality of stopping the further release" of a pollutant that exceeds groundwater standards, and "the risks and benefits of continued operation of a facility, practice, or activity." Unless these enforcement options are spelled out and made mandatory when pollution is occurring, the enforcement program simply is not credible.

6. Definitions of regulated facilities. Series 12-I defines "non-bulk permanent operational areas" as those exceeding 300 gallons liquid, 3000 pounds dry weight, or 1500 pounds active ingredient handled over thirty days. Areas smaller than these are not regulated. Series 6A defines feedlots to be regulated as those with more than 1000 animal units (500 in vulnerable areas). Facilities handling much smaller volumes of pesticides, or feedlots with many fewer animal units, could present very serious risks to groundwater, yet these regs do not provide for any mandatory enforcement activities for these facilities. As such, these regs clearly fail in their legislatively-mandated purpose of "providing such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program".

7. Timetable for implementation. Various timetables are proposed for mandatory portions of these regs, ranging from three years for bulk pesticide storage facilities, up to ten years for feedlots. I believe that these timetables are simply too long to provide any incentive for a credible groundwater protection program. Our experience has shown that, if given three years to implement a rule, nothing will be done for two and a half years. If given ten years, nothing will get done for nine and a half years. Is there any credible justification for delaying implementation of these rules more than two years?

8. Findings. Many of the policy statements not only contradict those of the Act, but are contradicted internally within the regs as well. For example, in Series 6A and in 12-G, paragraph 4.1, the Commissioner finds that current knowledge is not sufficient to develop mandatory practices that will effectively protect groundwater. Yet in the next paragraph, 4.2, he believes voluntary practices will be effective in protecting groundwater. How can voluntary practices be effective, while mandatory ones won't?

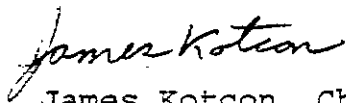
9. Making voluntary regs mandatory. Paragraphs 4.4 and 4.5 of series 6A and 12-G reserves the right of the Commissioner to make mandatory various practices when monitoring data indicate that pollution has occurred. This provision is directly contrary to the provisions of the law and to the principle of prevention. After contamination has occurred, it is too late to prevent it through mandatory rules. The Legislature mandated a policy to protect and maintain existing groundwater quality "unless it is established that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives." If the mandatory provisions are technically feasible after contamination has occurred, they are also feasible before. If the provisions are made mandatory after contamination has occurred, then the contamination clearly is not justified based on economic or societal objectives, otherwise mandatory provisions would not be needed. While I recognize the value of a phased in regulatory program, the

procedures identified in this section are clearly inconsistent with the intent of the Act as well as the processes spelled out in the Act.

10. Penalties. This section needs to spell out specific penalties for specific acts, or alternatively, indicate the liability incurred for contaminating groundwater. Paragraph 9.1 in particular clearly limits the Commissioner's ability to assess penalties and, furthermore, places a substantial burden of proof on him to show that violations were "grossly negligent, reckless or intentional". This is directly contrary to the need, which I have expressed above, for nondiscretionary enforcement actions for violations. The language throughout this section seems to imply that just about any excuse will relieve a polluter of any liabilities for penalties.

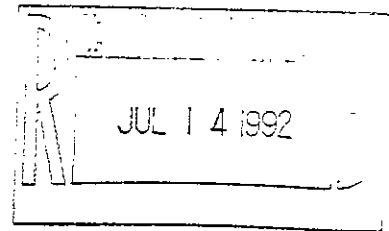
In conclusion, we urge the Dept. of Agriculture to revise and strengthen these regs to address our concerns and to bring them into compliance with the Groundwater Protection Act. We cannot support these regs as currently drafted because they undermine both the intent and the letter of the law. We anticipate submitting additional comments regarding specific language before the close of public comment. Thank you for the opportunity to present our views.

Sincerely,



James Kotcon, Chair  
West Virginia Chapter of the Sierra Club

cc:  
Chuck Chambers, Speaker, WV House of Delegates  
Dr. Eli McCoy, Chief, Water Resources Section



Tennessee Valley Authority Post Office Box 1010, Muscle Shoals, Alabama 35660

July 10, 1992

Ms. Barbara Smith  
Director, Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305

Dear Barbara:

Thank you for allowing me to review the proposed rules General Groundwater Protection Rules for Fertilizer and Manures (61-6A) and Primary and Secondary Containment of Fertilizers (61-6B). Comments for 61-6A are as follows:

- (1) Impressed that at least at this stage they are voluntary.
- (2) In section 6.2 it seems very lenient to allow 5 + 5 years for final implementation of a Nutrient Management Plan.
- (3) The allowable limits of animal units in sections 6.2.a. and 6.3.a appear very high.
- (4) All conditions in sections 6.4 - 6.11 and 7.1 - 7.3 obviously have been well researched and seem reasonable and attainable.

In general, the 61-6A document shows the result of thorough investigation and careful preparation. It should be submitted to the AAPFCO subcommittee charged with developing a model Nutrient Management Plan.

Turning our attention to document 61-6B I also have a few comments to offer.

- (1) On page 2 of Appendix B under 4.c. it is stated that containment will increase the cost of fertilizer by \$10-\$20 per ton. This seems very high and I am curious how these numbers were obtained.

Ms. Barbara Smith  
Page 2  
June 9, 1992

- (2) Thank you for the recommendation in section 3.1, but you may also want to add "Designing Facilities for Pesticide and Fertilizer Containment" by Midwest Plan Service, 122 Davidson Hall, Iowa State University, Ames, Iowa 50011-3080. This is a 116 page bulletin that gives a lot of engineering details.
- (3) Other than adding some special sections and placing the retained sections in a different order you followed the AAPFCO model rules rather faithfully.

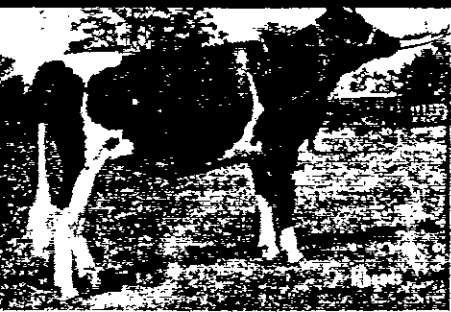
I believe you have done an excellent job of drafting the containment rules. Hopefully your public hearings scheduled for next week will go smoothly and the proposed rules will be ready for adoption.

If I can be of further assistance do not hesitate to call on me.

Sincerely,



Frank J. Johnson  
Projects Manager  
Field Programs Department  
National Fertilizer and  
Environmental Research Center



## SHADY GROVE FARM

MR. & MRS. JAMES L. LOUTHAN

P.O. Box 142

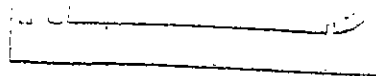
Rippon, W. Va. 25441

— Home of Gaylord Holsteins —

(304) 725-5388



JUL 30 1992



July 26, 1992

Ms. Barbara Smith  
W. Va. Dept. of Ag.  
Compliance Division  
1900 Kanawha Blvd.  
Charleston, W. Va. 25305

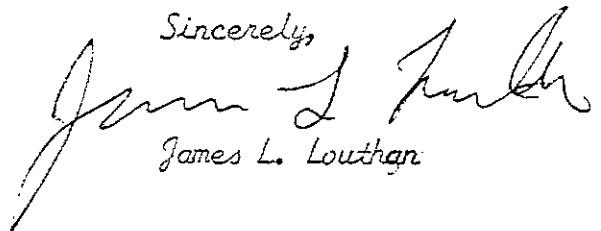
Dear Madam,

Thanks to Luther B. Smith West Virginia Extension Service, I have been forwarded a copy of the West Virginia Groundwater Protection Act. Title 61, Series 6 A and 6 B.

Is this law or a proposed law? If proposed who is backing it and who is bucking it? I am familiar with the Clean Water Act, so I know where it is coming from.

I am quite disappointed that no hearings were scheduled here in the Eastern Panhandle where we have more animal and crop agriculture. I am much more dismayed that due to the Karst limitations that hearings were not held here in the Eastern Panhandle.

Sincerely,

  
James L. Louthan

# WEST RUN WATERSHED IMPROVEMENT DISTRICT

A Sub-District of

## Monongahela Soil Conservation District

201 Scott Avenue · Vista Del Rio · Morgantown, West Virginia 26505 · Phone (304) 296-0081

July 29, 1992

JUL 30 1992

Ms. Barbara Smith  
Director, Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East      RE: Title 61, Series 6A  
Charleston, WV 25305                      General Groundwater Rules

Dear Ms. Smith:

This comment regarding the proposed General Rules on Groundwater Protection for Fertilizer and Manure is being made on behalf of the West Run Watershed Improvement District, a subdistrict of The Monongahela Soil Conservation District. We represent a number of farmers and other land users in a suburban area north of Morgantown.

Upon examination of the rules proposed by the Commissioners office, we believe there is some inconsistency in the rules, which should be examined and hopefully reconsidered.

Rule 7.1.c. which is designed to protect the groundwater from non-permit source pollution forbids the application of nitrogen containing manures or fertilizers to slope having an average slope greater than twenty percent. This figure seems to be arbitrary when past practices of the United State Department of Agriculture have permitted tillage of soils for corn production and application of fertilizers on meadow lands having a soil capability classifications of Class IV. This class includes slopes up to twenty-five percent slope. It is our belief that many farmers are applying manures with nitrogen (or at least some urea or related compound of nitrogen) and fertilizers to Class IV land with no ill effects.

The SCS in Monongalia County has conducted demonstration projects with liming and fertilization of Class VI slopes. The reports of these tests conducted by Bernie Yednock were made available some years ago.

The use of nitrogen fertilizer as topcover on Class VI land may be controlled by certain management practices to reduce discharges into streams by including appropriate buffers. It would be only reasonable to express limits consistent with Class IV land use capability.

Furthermore, we find it significant that sewage sludge is exempted from these application rules at a time limitations are placed on animal manures. Sewage sludge applications are not automatically harmless, especially if the sludges have not been carefully tested.

Respectfully submitted,

Ina M. Baker  
Board of Trustees, West Run  
Watershed Improvement District

Copy to Cleve Benedict  
Commissioner of Agriculture

Albert Spurlin Jr.  
Agriculture Committee Member



College of Agriculture and Forestry  
Division of International Agriculture and Forestry  
P.O. Box 6108  
Morgantown, WV 26506-6108  
304 293-2041

JUL 31 1992

July 30, 1992

Barbara Smith  
Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

Dear Ms. Smith,

We would like to submit the following comments regarding the proposed rules affecting groundwater protection from fertilizers and pesticides associated with the Groundwater Protection Act.

Comments concerning TITLE 61, SERIES 6A

1. Summary and Description: As written, this appears to suggest that ineffective voluntary practices will be made mandatory.
2. 61-6A-4.6: Recommend that a standard protocol be established with respect to frequency of sample collection (i.e., quarterly) over the one year period used to evaluate when water quality standards have been exceeded.
3. 61-6A-6.3: Need to be more specific in defining what is meant by a "karst limestone area", "sandy soils", and "a location near sinkholes or wells" to identify when Nutrient Management Plans are required.

The section should specify who is to develop and/or certify the nutrient management plan (i.e., Soil Conservation Service, Department of Environmental Protection, Department of Agriculture) and identify the required components of the plan.

4. 61-6A-7.1.c: Restriction of manure and fertilizer applications on land with an average slope greater than 20% will eliminate nutrient applications on 20 to 30% of crop and pastureland in West Virginia. In addition, it could have significant adverse impacts on reclamation of disturbed land including construction sites and mined land, which is essential to stabilize these areas and prevent serious erosion. We suggest that allowances be made for reclamation/revegetation programs and that development of nutrient management plans utilizing best management practices such as buffer strips be considered as an optional control measure on steeper crop and pastureland.

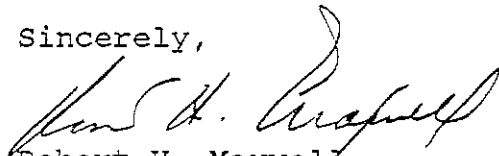


Barbara Smith  
July 29, 1992  
Page Two

5. 61-6A-7.1.e: Need to define what is implied by "imminent danger". Does this refer to timing of application or location? Some of the most productive farmland occurs in river valleys which are subject to periodic flooding; however, this likely would have little effect on groundwater quality.
6. 61-6A-7.1.f: Recommend an increase in the separation distance for application of manure in an area that drains directly into a sinkhole. These areas present the greatest opportunity for groundwater contamination and should be protected from direct inflow of water from recently fertilized or manured fields. The separation distance should be at least as great as that for a wellhead (i.e. 50 feet), with similar recommendations for maintenance of a vegetative buffer zone.
7. 61-6A-7.2: Need to define what is meant by "coarse textured soil". It may be more useful to recommend use of cover crops on all land which receives fall applications of fertilizers containing nitrogen.
8. 61-6A-7.3.f: Need to define what is meant by "demonstrated need of the crop". In addition, if nutrient application rates are based on crop requirements then application rates in excess of 100% should not be recommended. In general, when manure application rates are determined, allowances are made for nutrient release rates which provide that margin of error.

Thank you for the opportunity to comment on these regulations. I hope our name will be included among those solicited for comment in the future. A more timely distribution of proposed regulations would also be helpful for all of us at the College of Agriculture and Forestry.

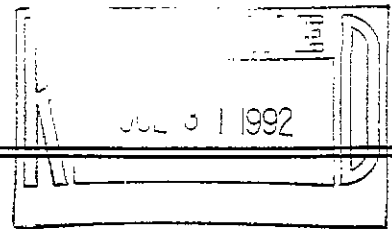
Sincerely,



Robert H. Maxwell  
Dean and Director

cc: B.S. Baker  
A.L. Barr  
M. McFarland

# The Allegheny Development Corp., Inc.



1225 PINEVIEW DRIVE  
MORGANTOWN, WEST VIRGINIA 26505

July 28, 1992

West Virginia Department of Agriculture  
Attn: Ms. Barbara Smith  
1900 Kanawha Boulevard, East  
Charleston, WV 25303

Madam/Gentlemen:

It has come to our attention that you are addressing the issue of fertilizer, manure and sewage sludge for cultivated fields, etc.

We have read and are in possession of a copy of Appendix B which is entitled Physical Note for Proposed Rules, Title 61, Series 6A. Perhaps, your rule-making writers do not fully understand the implication and true reality of this enactment as it will affect many steep slopes in West Virginia which is unlike the Midwest where you have flat lands. Many of our farming fields in West Virginia have severe slopes!


It would appear from this proposed document that your rules are more lenient for the spreading and application of sewage sludge than fertilizer. This we believe, to be out of sink with good farming and agriculture practices in the mountain state of West Virginia. Who determines the analysis, composition and end result of applied sludge? Urban or out of state sludge should not take precedence over fertilizer.

Our company owns several farms in Preston County, West Virginia and we would respectfully request that you consider this letter as opposing your stringent rules which will have an adverse effect on good farming practices. We believe both suppliers and farmers will find these "regs" problematic and very costly in terms of total compliance. We would further solicit an explanation as to the reason for having more stringent rules enacted in this state than what is required by the Federal Government.

Granted, we are all interested in the prevention of ground water contamination. However, lets not get the cart before the horse in failing to address the real issue of the actual and true source and cause of contamination.

A response to this letter is hereby requested and also anticipated.

Yours very truly,



Richard B. Yoder  
President

RBV/eks

Copy to:

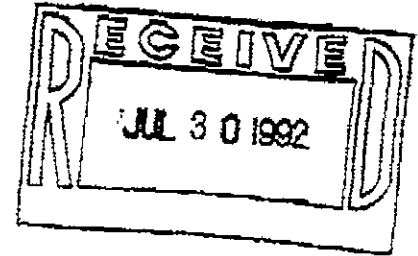
Charles B. Felton, Senator  
Cleve Benedict, Commissioner



Mr. & Mrs. Russell T. Linger, Jr.  
(304) 335-4434

## LINGER FARMS INC.

P. O. Box 14  
Huttonsville, WV 26273



July 28, 1992

The Honorable Cleve Benedict  
Commissioner of Agriculture  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Commissioner Benedict,

I am making a few comments on the proposed regulations for ground water protection from fertilizer, manure and pesticides.

I feel these regulations will have a serious economic impact on farmers and farm supply business of the state. If surrounding states do not have equal or more stringent rules on storage of fertilizer and pesticides, the small suppliers in West Virginia will be forced to discontinue their service and farmers in West Virginia will be forced to go out of state to get these products. Our farm, on occasion, stores trailer load lots of bulk fertilizer for up to 5 months if they can be bought at a more competitive price earlier in the season. With these being stored in a sound building with a concrete floor. I can see no possibility of the fertilizer getting into the ground water. Also, I feel if pesticides are stored, locked in a good building, there is no danger.

I believe that instead of listing some of the management practices for the spreading of manure and fertilizer that reference be made to the Soil Conservation Service manual. They have the technical expertise and would keep this updated as the need arises.

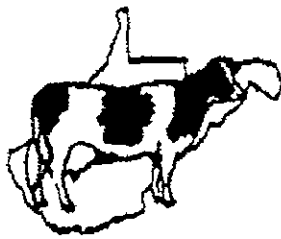
I realize we must protect our environment and our farm strives to do this. It would be damaging to the agriculture economy of the state if we set up more stringent rules than are necessary until a problem is located, especially since this state is a low user of these products compared to other more dense agriculture states.

Thank you for your consideration to these points. I hope that we can end up with final regulations that will protect our ground water supply but will not put an untimely or unnecessary economic burden on the agriculture economy.

Sincerely,

Russell T. Linger, Jr.

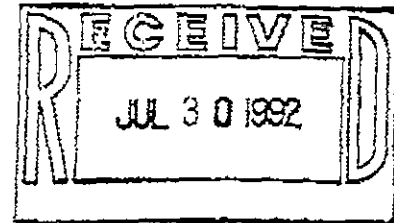
c11



West Virginia  
Holstein Association

Mrs. Cathy Brivvec, Secretary/Treasurer  
620 Adaline Avenue  
Morgantown, WV 26505  
(304) 296-5028

CC: Bob Flame  
Barbara



July 28, 1992

The Honorable Cleve Benedict  
Commissioner of Agriculture  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Dear Commissioner Benedict:

At our last board of directors meeting Steve Hannah, Executive Secretary, WV Farm Bureau, spoke to us about the following proposed legislation:

- Title 61 - Series 6A - General Groundwater Protection Rules for Fertilizer and Manures
- Title 61 - Series 6B - Primary and Secondary Containment of Fertilizers
- Title 61 - Series 12H - Bulk Pesticides Operational Rules
- Title 61 - Series 12I - Non-Bulk Pesticide Rules for Permanent Operation Areas
- Title 61 - Series 12G - General Groundwater Protection Rules for Pesticides
- Title 61 - Series 22 - Best Management Practices for Temporary Operational Areas of Non-Bulk Pesticides

Mr. Hannah supplied us with a copy of these regulations and I understand the deadline for comments on these regulations is July 30th.

We discussed the economic impact these regulations would have on the agricultural industry as well as state and local government. Considering the following found in the Economic Impact Statement of Title 61, Series 6B - Primary and Secondary Containment of Fertilizers: "As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules", we feel adequate study must be done to determine the financial impact these regulations will have on individuals, companies, state, county, and local government.

Mr. Hannah has commented on specific parts of each proposed legislation and we trust you will view these comments favorably. We are concerned about the economic impact upon the dairy industry which is already overburdened with expenses and with low milk prices. We appreciate the efforts of the WV Farm Bureau to reflect the concerns of the agriculture industry in this state.

Sincerely,

*Ivan McCombs*

Ivan McCombs  
President



West Virginia University  
Extension Service

Cooperative  
Extension Service

1064 Agricultural Science Building  
P.O. Box 6108  
Morgantown, WV 26506-6108  
(304) 293-2219 or FAX 293-6954

July 22, 1992

Barbara Smith  
Compliance Division  
WV Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

Dear Barbara:

I submit the following comments on the proposed rules for Groundwater Protection from Fertilizer and Manures.

1. Title 61, Series 6A, Appendix B:
  - a. Paragraph 3: The storage of any hazardous material by a commercial entity should, perhaps, be regulated by its potential for harm not by its intended use. Therefore, the off-farm storage of fertilizer would appropriately be regulated by permits from state agency responsible for regulating other potentially harmful materials stored at these sites. This would simplify the regulatory environment and this activity does not seem to fall under the Department of Agriculture's responsibility for regulation of "application and use" of fertilizers.
  - b. Paragraph 4: The concept that the cost of building manure holding structures by "large facilities" can be made up by increasing price of animals sold from these farms is not valid economically.
2. Title 61, Series 6A: The summary sentence needs to be reworded. It can be read to imply that ineffective practices will be made mandatory.
3. Title 61, Series 6A - 3.6: Why would dried and bagged sewage sludge be included and liquid sludge not be included in the definition of fertilizer? The latter has much more potential for groundwater pollution. There should, at a minimum, be a reference to the Department of Environmental Protection's regulations concerning the land application of this sewage sludge.

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Series 6A has a different definition of fertilizer than 6B. There doesn't seem to be any valid reason for this distinction. Specifically manure should either be included or not. As it reads now there are inconsistencies between the two series (see para 5 below).

4. Title 6a, Series 6A - 4.5: How do you distinguish between chemicals from fertilizer and those from failing domestic wastewater systems or concentrations of animals in non-feed lot numbers? This issue must be resolved if farmers are not to be penalized for non-agricultural pollution. Some protocol must be established in these regulations for the methods used to differentiate groundwater pollution by fertilizers from that attributable to other sources prior to finalizing these rules.
5. Title 61, Series 6A - 6.1: Which definition of fertilizer applies here that in 6A or 6B? There is some potential for confusion. For example, manure is included in the 6A definition this paragraph states the WV CSR 6B rules apply. This implies liquid manure in concentrations exceeding 2,500 gallons would be treated as "Fluid Bulk Fertilizer" and require a storage permit. The 6B definition, however, specifically excludes manure.
6. Title 61, Series 6A - 6.2 thru 6.3: Groundwater pollution is a function of concentration of animals more than of total number. Nutrient management plans may be more critical on small dairy farms with high concentrations of animals than on large beef operations with lower concentrations. These regulations will not have a significant impact on groundwater problems unless concentration of animals is considered.

An appendix outlining all the components of a West Virginia Nutrient Management Plan should be included. This appendix should also outline the approval process for the plan.

What is "near wells"? 200 feet? 1/2 mile? If a person avoids wells, sink holes, etc., can he use the higher limits para. in 6.2 even though these features exist on his farm. Perhaps regulations concerning, stand off distances, and buffer zones for these sensitive areas should included in this regulation.
7. Title 61, Series 6A - 6.6.
  - a. Paragraph 6.6a. Does this mean manure and litter piles must be covered. If so, this is more stringent than US EPA standards for temporary storage of sewage sludge. There should be a minimum limit on the length of time these materials can be placed in a field before it is considered storage. I suggest the limit be 30 days. This would be consistent with 6B requirements.

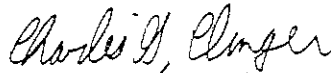
- b. Paragraph 6.6.b. Suggest this paragraph be changed to read 100 ft. of domestic water supply. As this paragraph reads now it is in direct conflict with Paragraph 6.6.c. Also, springs are not normally a source of groundwater pollution.
  - c. Paragraph 6.6.c. Why are the "ground water" regulations concerned with surface water in general. Surface water recharge of groundwater is only a common in limited areas of the state and should only be controlled there by groundwater regulation. Most wet areas and springs have a net flow from ground to surface water. This paragraph seems to be protecting a resource not covered by the Ground Water Act.
  - d. Paragraph 6.6.d. What is an open portal of a sink hole? This phrase needs to be explained in a definition or eliminated. I suggest the term sinkhole is sufficient and that it be defined as follows: Any natural depression capable of ponding water to a depth of greater than 12 inches in an area larger than 100 sq. ft. if there were no outflow to groundwater. This would cover many of the areas that would lead to groundwater pollution from surface water sources.
  - e. Paragraph 6.6.g. An impervious layer at the surface would perhaps protect groundwater. Excessive permeability is the problem. Only once the nutrients move below the root zone there is potential for a groundwater problem. Suggest this paragraph be changed to read: on land with a permeability greater than 6 inches/hour or less than 0.6 inches/ hour in any layer in the surface 12 inches of the soil.
  - f. Paragraph 6.6.h and 6.6.e. These floodplain and slope requirements would eliminate all land on some farms.
8. Title 61, Series 6A - 6.9. This paragraph should apply to all animal producers, not just feedlots. Some of our more serious problems are from small farms.
9. Title 61 - series 6.A - Paragraph 7.1.
- a. Paragraph 7.1.b. The prohibition on frozen and snow covered soil again protects surface water not groundwater.
  - b. Paragraph 7.1.c and 7.1.e. These best management practices would eliminate the application of fertilizer to 20 to 30% of crop land and pasture in the state of West Virginia. This is particularly significant on some of the steeper pasture and bottom land crop areas. The steep pastures need nutrients for plant growth necessary to prevent soil erosion. The bottom lands are some of

our more productive lands. Flooding of fertilized land has only a minimal impact on groundwater in most areas in the state because the flood carries nutrients away from the land to the surface waters. The concept of best management practices that, if implemented as suggested, would eliminate or greatly reduce production on over 1/5 of our farm land just does not seem to make sense.

The term imminent danger needs to be clarified or eliminated. The farmer has to know what the best management practice means to his practice of agriculture. Instead of imminent danger of a flood, the areas should be defined as: the area covered by the annual flood, or something to this effect. This would provide specific areas that the farmer can understand and that soil conservation service can plot.

10. Title 61, Series 6.A, Paragraph 7.2. The paragraph needs to be changed so that it reflects permeability not texture. Organic fertilizers and other slow release type fertilizers may be suitable for year round application particularly on meadows and pastures. This paragraph should include an exemption for this type material.
11. Title 61, Series 6.A., Paragraph 7.3. It is not clear exactly what this paragraph means. Specifically, what is the demonstrated need of the crop? Who determines this need? How is the need demonstrated? This should be clearly laid out in an appendix that lays out the procedure for determining the need. It should tell the farmer: what records he is required to maintain, if any; who he must see, if anyone, to validate the crop requirements; and just what the approval process is.

Sincerely,



Charles G. Clinger  
Assistant Extension Specialist,  
Waste Management

# West Virginia Farm Bureau

Member of American Farm Bureau Federation

JUL 30 1992

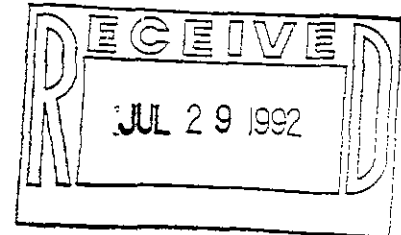


1 Red Rock Road, Buckhannon, WV 26201

304/472-2080

July 27, 1992

The Honorable Cleve Benedict  
Commissioner of Agriculture  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305



RE: COMMENTS ON PROPOSED REGULATIONS

Title 61 - Series 6A - General Groundwater Protection  
Rules for Fertilizer and Manures

Title 61 - Series 6B - Primary and Secondary  
Containment of Fertilizers

Title 61 - Series 12H - Bulk Pesticides Operational Rules

Title 61 - Series 12I - Non-Bulk Pesticide Rules  
for Permanent Operation Areas

Title 61 - Series 12G - General Groundwater Protection  
Rules for Pesticides

Title 61 - Series 22A - Best Management Practices  
for Temporary Operational Areas of Non-Bulk Pesticides

Title 61 - Series 22 - Generic State Management Plan for Pesticides  
and Fertilizers in Groundwater

Dear Commissioner Benedict:

This is to respectfully comment on the proposed above-cited rules as they pertain to agriculture in West Virginia.

First, we would like to make some general comments on the regulations.

While we appreciate your decision to fully comply with the Groundwater Protection Act particularly 20-5M-5(c) which requires the various agencies and departments to promulgate rules as they may be necessary to implement the authority granted them, we feel that the regulations filed by your department exceed the intent of the law.

We can certainly understand your desire to take the lead on this important issue; but we believe that it will be difficult to implement some of these regulations until the Water Resources Board establishes standards as provided in 20-5M-6(a)(2). Obviously, there is chronological ambiguity in the statute.

Copies sent to:  
• Brenda Harper  
• Barbara Smith

-N

Honorable Cleve Benedict  
Commissioner of Agriculture  
Page -2- --

We are also very concerned with the economic impact these regulations will have on the agricultural industry as well as state and local government. In several instances, the impact is not clear, however "significant".

Given the scope and impact of these regulations, adequate study must be done to determine as nearly as possible the financial impact these regulations will have on individuals, companies, state, county and local government.

The Groundwater Protection Act capped fees at \$1 million and therefore did not intend to expand the cost to citizens, businesses and government.

We compliment you on the approach that was used in the Generic State Management Plan for Pesticides and Fertilizer in Groundwater. We feel these regulations comply with the law, particularly 20-5M-6(c) (1) thru (5), where voluntary cooperation is encouraged, to conduct studies, research, experiments, demonstrations, and to develop public education programs.

Following are the specific comments on each set of Regulations:

Title 61 - Series 6A - Groundwater Protection  
Rules for Fertilizer and Manures

The fiscal note provides for an expenditure of \$28,000 by the Department of Agriculture. Since the authority cited is 20-5M, we believe that these expenditures should be included in the Groundwater Protection Act Fee Schedule Regulations 47-CSR-55 which have been filed as emergency regulations by the Department of Natural Resources, and not taken out of the department's budget.

We are also very concerned about the economic impact on those farms that need to install manure holding facilities. The projected costs range from \$12,000 to \$100,000 with additional auxiliary equipment cost of \$20,000 to \$50,000. This could put some farms out of business. We would suggest that an in depth study be made on each site to determine if alternative methods are available.

We concur with your assessment that the impact on the agricultural community by using Best Management Practices will be low. However, we believe it will take an extensive education program by the Department of Agriculture, the Cooperative Extension Service and Soil Conservation Service. The West Virginia Farm Bureau is willing to provide any assistance that we can in this matter.

#### 61-6A-6 Protection of Groundwater from Point Source

6.3 and 6.3a - We recommend that these two sub-sections be deleted. We feel that sections 6.2 and 6.2a adequately cover those areas that are most likely to cause pollution. The description in 6.3 and 6.3a are vague and leaves room for different interpretation by different people. These items would best be covered under voluntary best management practices.

6.4 - It is recommended that this sub-section be deleted. This statement is unclear. It is very difficult to determine the volume of manure that would be produced. It is also unclear as to what time frame is covered. Again, this item would best be covered under voluntary best management practices.

6.5 thru 6.11 - It is recommended that these sub-sections be deleted. These are generally considered to be non-point source and not point source. Again, we feel these areas would best be addressed under the voluntary best management program.

#### 61-6A-7 - Protection of Groundwater from Non-Point Sources

7.1 thru 7.3g - It is recommended that these sub-sections be deleted and replaced by reference to the Soil Conservation Service Technical Guide.

The SCS manual provides a complete list of Best Management Practices. The BMP are developed so that they may be used for site specific locations.

The SCS also updates this manual as new technology is developed.

We believe that if the manual is referenced rather than listing a few of the items that are listed in the regulations, the farm community and the environment will be better served.

#### Title 61- Series 6B - Primary and Secondary Containment of Fertilizers

Fiscal note - Again, we point out that if the regulations are being promulgated under the authority of Groundwater Protection Act, funds should come from that act and not from the budget of the Department of Agriculture.

Economic Impact - We are very concerned with the "very high" impact these regulations will have on the agricultural industry.

The \$50,000 to \$150,000 cost that retail firms will be required to spend is a considerable investment. If these firms do spend this kind of money, we believe that the cost of fertilizer to farmers will increase more than the \$10-\$20 that has been projected. Southern States Co-op projects \$75/Ton if the capitol costs are amortized over a 10 yr. period.

The other alternative that these businesses have is to not make the expenditure and not provide the service to farmers. If this happens, farmers may need to purchase fertilizer from out-of-state, incurring additional transportation cost and terrific inconvenience.

As is pointed out in the Economic Impact Statement, "As there is no evidence that fertilizers are a major, or minor, pollutant of groundwater there can be no calculation of the benefits to the present and future users of groundwater due to the impact of these rules." We, therefore, recommend that these regulations be withdrawn until:

1. The Division of Natural Resources develops a central groundwater data management system, as provided in 20-5M-6(a) (2).
2. The Department of Agriculture develops procedures to identify currently unknown farmers and firms that will be affected by these regulations.
3. The Department of Agriculture develops a procedure to determine an accurate estimate of the cost to farmers and firms for the installation of the facilities required.

#### Title 61 - Series 12H - Bulk Pesticide Operational Rules

61-12-H-2 Definitions - 2.7 Recommends changing the definition of discharge to mean any spill, etc. outside of the secondary containment area. The purpose of the secondary containment is to prevent such "spills" from escaping.

#### Title 61 - Series 12I - Non-Bulk Pesticide Rules for Permanent Operational Areas

Fiscal Note: The Groundwater Protection Act Fee Schedule establishes \$75,000 from the Department of Agriculture for pesticides. These regulations as well as Series 12G indicate that \$75,000 will be needed for each 12I and 12G.

We do not believe that the extra \$75,000 should come from the Department of Agriculture's general funds.

#### Economic Impact on State Government

One must ask the question, "With the state in dire economic times and no indication that pesticides have contaminated groundwater, is the cost benefit ratio justified?"

#### Economical Impact on Political Subdivisions

Specific Industries and Groups of Citizens (Same as above.)

Honorable Cleve Benedict  
Commissioner of Agriculture  
Page -5-

#### Economic Impact on Citizens/Public at Large

With an estimated total cost of implementation these regulations at \$11,520,000 and the statement that "these costs would cause some small businesses to close", we respectfully request that these regulations be withdrawn.

We do not believe that it was ever the intent of the Legislature in passing the Groundwater Act to put people out of business, especially when there has been no indication that a problem exists.

#### Title 61-12G - General Groundwater Protection Rules for Pesticides

Fiscal Note: \$75,000 - We recommend that this money come from the Groundwater Protection Act Fees.

We totally agree with the program and policy statement listed in 61-12G-4.1 thru 4.4.

We would encourage the Department of Agriculture in Cooperation with other State and Federal Agencies to develop an aggressive education program on the use of Best Management Practices.

As stated in 4.4, we also agree that other steps may be necessary, but only after "valid predictive technology or valid groundwater data indicates that pesticides are contaminating the groundwater of the state and when technology develops to indicate the mandatory best management practices will be effective in the protection of groundwater".

#### Title 61 - Series 22A - Best Management Practices for Temporary Operational Areas of Non-bulk Pesticides

In general, these regulations are satisfactory. However, we are somewhat concerned by the lack of information that the department has on the number of sites that will be affected. Again, an educational program would be most beneficial.

#### Title 61 - Series 22 - Generic State Management Plan for Pesticides and Fertilizer in Groundwater

Fiscal Note: \$75,000 as stated previously, there is only a total of \$75,000 in the Groundwater Protection Act Fee Schedule for use by the Department of Agriculture.

General Comments: It is our belief that it is this type of regulations that was intended by the Legislature. That is to say, prior to adopting other very costly regulations, one must first put in place an educational program, provide for an assessment and planning phase mandated in 61-22-8 and establish a monitoring program as mandated in 61-22-11.

Honorable Cleve Benedict  
Commissioner of Agriculture  
Page -6-

In summary, we feel that the regulations are chronologically not possible to implement at this time. If other agencies have not performed their statutory responsibility then these agencies should be held accountable for such non performance.

The 13,000 member West Virginia Farm Bureau considers itself and its individual members to be very environmentally responsible and our comments should be construed as constructive criticism. We trust you and your agency will view these comments favorably.

Sincerely,



Richard S. (Steve) Hannah  
Executive Secretary

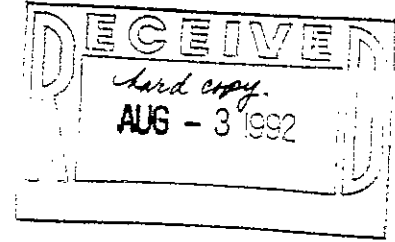
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**CHEMLAWN®**

3 Page FAX to 304-558-3594

*rec'd fax on July 31*  
July 31, 1992



Ms. Barbara Smith  
Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Blvd., East  
Charleston, WV 25305

Re: General Groundwater Protection Rules for Fertilizer and Manures  
and Primary and Secondary Containment of Fertilizers

Dear Ms. Smith:

I am submitting my comments on behalf of ChemLawn, a nationwide landscape care company providing services to customers in 44 states. ChemLawn shares the states' growing concern regarding chemical runoff into surface water and chemical leaching into groundwater and is in the process of working with committees in several states as they address these issues. ChemLawn commends your department's efforts to construct reasonable regulations and best management practices for the protection of our nation's groundwater. I appreciate this opportunity to comment on these proposed regulations and to offer suggestions where applicable.

General Groundwater Protection Rules for Fertilizer and Manures

§61-6A-5. Powers and duties of commissioner.

5.1.K. ChemLawn is unfamiliar with the referenced Groundwater Coordinating Committee and requests a description of the responsibilities of this committee as well as its participants.

§61-6A-6. Protection of groundwater from point sources.

6.6. - This section specifies that fertilizers should be stored inside a "sound structure or device having a cover or roof top, sidewalls and a base sufficient to prevent contact with precipitation and surface water." It is ChemLawn's practice to store its liquid bulk fertilizers in tanks outside of the actual facility. This section is unclear as to whether this storage arrangement would require that the tanks be enclosed.

6.7. - ChemLawn supports this provision for a mixing/loading pad for fertilizers, as well as pesticides, and has, in fact, sponsored legislation in several states promoting this type of containment. (Please refer to ChemLawn's *Model Landscape Care Act* enclosed.)

§61-6A-7. Protection of groundwater from non-point sources.

7.1.b. - The use of the term "snow-covered" is somewhat vague. ChemLawn requests clarification of this term.

7.1.d. - ChemLawn is concerned with the recommended 50-foot buffer zone around a wellhead, particularly as it applies to turf. Research indicates that well maintained turf may be one means of protecting the water supply. (Please refer to copies of recent studies enclosed.) Therefore, ChemLawn does not feel that there is any scientific justification for a 50-foot buffer zone around wellheads for lawn care type applications.

As a matter of company policy, ChemLawn maintains a 3-foot "ring of responsibility" around all water sources. It would be our recommendation that the State of West Virginia adopt this type of best management practice.

Primary and Secondary Containment of Fertilizers

§61-6B-5. Permits and Design Plans.

ChemLawn supports the fertilizer storage facility permit system as a means of ensuring the protection of groundwater through properly designed and maintained containment systems. However, ChemLawn would like clarification on the following sections of this process.

5.6 - This section specifies that a non-transferable permit will be issued to each person meeting the requirements of this section. Shouldn't the permit be issued to the facility in the event that the responsible person leaves the company?

§6.1-6B-9. Primary Containment: Storage Containers and Appurtenances for Fluid Fertilizer.

9.1.h - ChemLawn requests clarification of the term "anchored."

9.4.f(a) - ChemLawn requests clarification of the "protective substances" that are deemed adequate to prevent erosion" by the Department, as well as the tank areas that need to be protected.

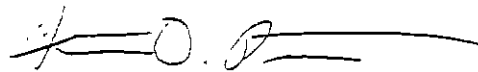
§61-6B-10 - Secondary Containment - Operational Area Containment for Fluid Fertilizer.

10.1 - 10.1.a - In many facilities in our industry it is very difficult to meet the requirements of these provisions for the unloading containment areas where the suppliers fill the existing facility storage containers. It is ChemLawn's recommendation that consideration be given to the use of a portable containment system to be used to recover any material that might be lost during this filling process. Enclosed is language adopted in Illinois that allows for this type of portable containment system and still meets the requirements for protection.

I appreciate the opportunity to address these issues and would encourage you to contact me if you have any questions or require additional information.

Very truly yours,

ChemLawn



Forrester D. Potter  
Manager, Legislative Affairs

jhm  
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GENERAL GROUNDWATER PROTECTION RULES FOR FERTILIZER & MANURES  
(61-6A)

Public Hearing to Consider Proposed Rule  
Oral Comments

Building 2, Guthrie Agricultural Center  
Charleston, West Virginia

July 21, 1992  
9:00 a.m.

Present: Jerry H. Gass, Southern States Coop., Inc.  
John McCallister, Southern States Coop., Inc.  
W. B. Buffaloe, Rhone-Poulenc, Inc.

Barbara Smith, Director of Compliance Division, WVDA  
Bob Frame, Director of Pesticides Division, WVDA  
Dwayne O'Dell, Marketing & Development, WVDA  
Paula Moore, Compliance Division, WVDA

Note: Due to the number of people present at the hearing held July 20 at 9:00 a.m. and to expedite the hearing schedule, Mr. Gass requested and was allowed the opportunity to comment on this rule earlier.

1 MR. GASS: I am Jerry Gass with Southern States. I  
2 appreciate the opportunity to comment on Series 6A.

3 We recognize that there has to be an attempt to comply  
4 with the Groundwater Protection Act, but we believe that the  
5 absence of data indicating that there is a problem with fertilizer  
6 and manure in groundwater in West Virginia, that these regulations  
7 really are unnecessary and would pose an undue burden on the  
8 farmers of the state.

9 By the Department's own estimate, the cost of  
10 implementing these regulations is \$7.5 million. The assumption  
11 that the economic impact on the agricultural community will reduce  
12 the cost of chemical fertilizers just probably is not correct.

13 Our company, along with most other responsible

1 agricultural interests, have promoted the application of  
2 fertilizers at the maximum economic yield rate based on soil tests,  
3 soil capabilities and crop potential, at least, since 1972. We  
4 believe that most farmers in West Virginia have adopted this same  
5 philosophy and that any further reduction of the use of fertilizers  
6 would bring a corresponding reduction in crop yields.

7 Recognizing these facts and the fact that there is no  
8 evidence that fertilizers or manure are a major or minor pollutant  
9 of groundwater, we would submit that we are trying to fix something  
10 here that is not broke. While that is not the criterion that we  
11 can always go by, we are trying to fix it with what could be a  
12 major cost to farmers who cannot really afford to absorb that cost.

13 Farmers, unlike automobile makers or many other  
14 businesses, cannot very easily pass their costs along to consumers.  
15 In fact, consumers have got to be pretty hungry before he or she is  
16 going to spend a whole lot more for food. I think that needs to be  
17 taken into account.

18 Recognizing this, you know, if you determine that despite  
19 these facts, please consider the following observations and  
20 comments.

21 While the definition of fertilizer indicates that drying  
22 and bagging industrial and municipal by-products, which I interpret  
23 it as sewage sludge, classifies them as fertilizer and makes them  
24 subject to regulation, it appears that these same industrial and  
25 municipal by-products, when not dried or bagged, are not regulated  
26 by this proposal. It would seem to me that if there has to be

1 metal and other contaminants within some city and industrial  
2 sludge, that they certainly should be included in the definition of  
3 fertilizer or manure.

4 Secondly, we are concerned that paragraph 4.5. gives the  
5 Commissioner broad authority to develop mandatory best management  
6 practices for the application and use of fertilizers or manure when  
7 groundwater data indicates that chemicals from the fertilizers or  
8 manures are contaminating groundwaters or when technology indicates  
9 that the BMPs would be effective in protection of groundwater.

10 We would recommend that this paragraph be changed so that  
11 the Commissioner may develop such rules only after consultation  
12 with the regulated community and public participation in the  
13 development of those rules.

14 In paragraph 4.7., we disagree with the concept of  
15 implementing programs or taking action merely on the basis of an  
16 increase in concentrations of residues from fertilizers or manure  
17 in groundwater. The basis for this objection is two-fold.

18 First, as already has been alluded to, we know that the  
19 common measure of residues today is parts per million. Technology  
20 has already developed beyond that point and probably will continue  
21 to be able to pick up more and more infinite decimal traces. As  
22 the technology continues to develop, the definition of zero changes  
23 and so that needs to be taken into account.

24 The current wording of the paragraph would require  
25 action, "...if a residue that currently is non-detectable were to  
26 become detectable at any level in the future due to technological

1 advances."

2 The current wording also requires the Commissioner "...to  
3 take action if the detected residue is to increase in any amount,  
4 even though the presence of that residue is far below the  
5 established water quality standards."

6 I would recommend that the paragraph be changed to  
7 reflect that, "The Commissioner will take action to promulgate  
8 rules to make some or all of the voluntary best management  
9 practices mandatory in portions or all of the state when a  
10 monitoring program indicates that the concentration of residues  
11 from fertilizers or manures in groundwater or other valid data  
12 shows the concentration exceeding or approaching the water quality  
13 standards."

14 Then finally, paragraph 6.1., we would ask that that  
15 paragraph be made consistent with the definitions contained in  
16 Title 61 CSR 6B.

17 Thank you. That concludes my comments on 6A.

18 (Hearing recessed on July 20, 1992 at 10:05  
19 a.m. and reconvened on July 21, 1992 at 9:00  
20 a.m.)

21 MS. SMITH: Since no one is present who wishes to  
22 comment, this hearing is now closed.

23 (Hearing closed at 9:30 a.m., July 21, 1992.)

24

GENERAL GROUNDWATER PROTECTION RULES  
FOR FERTILIZER AND MANURES (61-6A)

Public Hearing to Consider Proposed Rule  
Oral Comments

Room 315/316 Percival Hall, Forestry Building  
Evansdale Campus, West Virginia University  
Morgantown, West Virginia

Thursday, July 23, 1992  
5:00 p.m.

Present: Kevin D. Annons, Fairview, WV  
Leslie A. Clark, Enviro Con Ltd., Fairmont, WV  
Charles Clinger, WVU Extension Service, Morgantown, WV  
Robert Cunningham, Morgantown, WV  
Mark Eddy, Eddy Brothers, Core, WV  
Dennis Elbon, Ground Breakers, Inc., Clarksburg, WV  
H.G. Floyd, Morgantown, WV  
Hayward G. Helmick, Southern States, Monongalia County  
Livestock Growers and Farm Bureau, Morgantown, WV  
James Kotcon, West Virginia Sierra Club, Morgantown, WV  
James Linton, Linton Brothers Inc., Martinsburg, WV  
James Moore, Fairview, WV  
Charles H. Moyers, Bruceton Ag Service, Bruceton Mills,  
WV  
Dr. Phillip I. Osborne, Morgantown, WV  
Ken Raines, Southern States, Morgantown, WV  
Timothy Russell, Prescription Lawn and PCOA of WV,  
Bridgeport, WV  
Jennifer Y. Scott, West Virginia Farm Bureau, Buckhannon,  
WV  
Luther Smith, WVU Extension Service, Farm Management,  
Morgantown, WV  
Richard Woodworth, Potomac State College, Keyser, WV  
V. Lilly  
  
Barbara J. Smith, Director of Compliance Division, WVDA  
Bob Frame, Director of Pesticides Division, WVDA

1 MS. SMITH: It is 5:00 p.m., Thursday, July 23. These  
2 rules were promulgated under the auspices of the Groundwater  
3 Protection Act that the Legislature passed a little over a year  
4 ago.

5 This is Bob Frame. He is the Director of the Pesticides

1 Division. My name is Barbara Smith. I am the Director of the  
2 Compliance Division.

3 My responsibility is to cover the fertilizer and manure  
4 end, so I am the person that has been largely responsible for  
5 drafting, so you can address your comments to me if you feel you  
6 want to talk to someone personally.

7 I would like to, at this time, give a little bit of an  
8 overview of why we are here and what happens to this rule after we  
9 leave here. After the agency drafts a rule, it is now a state law  
10 that you have to have public comment and you have to go before the  
11 Legislature for approval before these become in effect, unless you  
12 are going to file them as an emergency rule. There is no need to  
13 file these, we feel, as an emergency.

14 So these have been filed with the Secretary of State's  
15 Office and that provided public notice to all in state that there  
16 were going to be rules and they are available to anyone in the  
17 state. We are having this public hearing, because we want public  
18 comment on these rules. We know that we are not as wise as  
19 Solomon, so we want to hear your views. Public comment is almost  
20 always constructive and good.

21 After this is done and we prepare a written transcript  
22 from what we have from the formal comments, we make a summary. For  
23 each comment that is received and each issue, we write on that  
24 summary what we are going to do, if we are going to modify the rule  
25 or if we are not going to modify the rule.

26 That and the transcript and the rule, as modified, if it

1 is modified, goes back to the Secretary of State and also goes to  
2 the Legislature. The Legislative Rule-Making Committee reviews all  
3 of this information. They usually modify it on their own also, but  
4 it also is an area where they will take public comment.

5 After it goes through that committee, we usually have a  
6 few months where nothing major happens on the rule until it goes  
7 before the full Legislature when they meet in the spring. Then we  
8 expect this to go through two hearings in the House committees and  
9 two hearings in the Senate committees before, if it is finally  
10 passed out by all of those committees, it gets in an Omnibus Rules  
11 Bill for passage.

12 That is the extent of it, so we would not even expect  
13 that these would go into effect, if they are passed, until this  
14 time next year.

15 Now, anyone who would like to make a formal statement, we  
16 ask that you limit your comments to this rule only. We ask you  
17 that you make your comments directed to the rule. While we are in  
18 the public comment period, while we are in the transcript period,  
19 it is not a time for debate. We will only take statements.

20 I do reserve the right, if you are going to talk for an  
21 hour, I might want to try to ask you to be a little more brief.  
22 After everyone has had a chance to speak and no one else wishes to  
23 speak at that time, then I will recess the hearing and we will have  
24 a chance to have some discussion on those issues.

25 Because we are making a transcript of this, and we have  
26 got a lot of echo in this room, I would ask that you come up here

1 to the podium, introduce yourself and who you are representing and  
2 then give your statement. Who would like to be first? Public  
3 statements?

4  
5 MR. CLINGER: My name is Chunk Clinger. I am with the  
6 Cooperative Extension Service and I have a few comments on the  
7 proposed rule.

8 First, in Appendix B, it kind of implies that we are  
9 talking about cost of the facilities, that that cost is going to be  
10 passed on by increasing the price of the cattle. That probably  
11 does not make much sense economically. They are not going to pay  
12 more for a cow just because the guy had to build a manure-holding  
13 facility.

14 In Series VIa, paragraph 4.5., it talks a little bit  
15 about implementing mandatory requirements if we have pollution from  
16 fertilizer. A question I have is, what kind of protocols are you  
17 going to have to distinguish nutrient pollution that is coming from  
18 fertilizer versus that that might be coming from a failing septic  
19 system or from a high concentration of cattle on the same site?

20 I think that really kind of needs to be addressed,  
21 because otherwise the fertilizer could be blamed for things that  
22 are not attributable to it.

23 In paragraph 6.1. through 6.3., you talk about numbers of  
24 animals. Concentrations of animals may be more important than the  
25 total number of animals on the site, as far as groundwater  
26 pollution goes. If a guy has many animals on a small site, he has

1 probably more potential to cause groundwater pollution than a  
2 fellow that had thirteen thousand acres and maybe three hundred  
3 cattle or a thousand cattle. Maybe we should address that issue a  
4 little bit.

5 Also, in paragraph 6.3., you talk about the use  
6 expression "near wells." That probably needs to be defined a  
7 little bit. What does near mean? Two hundred feet, a half a mile?

8 Also in that same area, if a person avoids wells,  
9 sinkholes and that type of thing with a stand-off zone, does he  
10 have to meet the requirements of 6.3., which are more stringent  
11 than those of 6.2. Can he go to the 6.2. requirements, if he  
12 agrees to use some sort of buffer zones? If so, what would those  
13 kind of buffer zones be?

14 Paragraph 6.6.a., does this mean that if a guy takes and  
15 piles manure and litter out on his field for spreading within the  
16 next short period that they have to be covered?

17 In 6.b., you have a thirty-day requirement before it  
18 becomes storage. Does that apply here? If it does, I recommend  
19 that it do and that that be incorporated in the plan.

20 Paragraph 6.6.b. and 6.6.c. seem to be a little bit in  
21 conflict. They both address spraying and they have different  
22 distances. One is fifty feet, I believe, and the other is one  
23 hundred. I would suggest that one of them read, "domestic water  
24 supply" instead of -- because I think that is what we are talking  
25 about in this.

26 Paragraph 6.6.d., I am not sure what open porthole of a

1 sinkhole is. Does that mean if you walk over it, you have to be  
2 able to fall down it or look down it? If so, that is probably not  
3 appropriate and I suggest that you have another definition.  
4 Basically something that a sinkhole be something that ponds water  
5 twelve inches over a certain area or something like that. Open  
6 porthole seems to be a term that is more associated with mining  
7 than sinkholes.

8 Paragraph 6.6.g., you talk about limitation on impervious  
9 area. Well, this might actually protect groundwater, because it  
10 would stop the pollution from getting the root zone. Perhaps we  
11 should talk about permeability within the top twelve inches of the  
12 soil and I have a recommendation in my written comments.

13 Paragraph 6.6.h and 6.6.3, these requirements could  
14 eliminate all land around some farms. That may be okay, but I  
15 think we need to understand that.

16 Now paragraph 7.1.b. prohibits spreading material on  
17 frozen snow-covered ground protects surface water, not groundwater.  
18 I am concerned, is this bill designed to protect surface water, as  
19 well as groundwater, or primarily groundwater?

20 Paragraph 7.1.c. and 7.1.e., I have some information from  
21 the SCS that shows that if these best management practices were  
22 implemented as suggested, we could lose twenty to thirty percent of  
23 the crop and pasture land in the State of West Virginia, probably  
24 a minimum of twenty percent. Are we sure that we really want to  
25 have best management practices that would lead to that?

26 Paragraph 7.2., it talks about soil texture. I recommend

1 that that be changed to talk about soil permeability, which is  
2 probably more appropriate protecting groundwater.

3 I think we need two appendices to this regulation before  
4 it becomes final. One appendix tells what a nutrient management  
5 plan is in some detail and gives the approval process, so that the  
6 person, who reads the regulation, has some idea of what is involved  
7 in this. So it is not something big that some bureaucrat at a  
8 later point has the option of making up.

9 Secondly, there probably needs to be an appendix on  
10 demonstrated need of the crop for nutrients. Who determines what  
11 the demonstrated need is and what process does the farmer have to  
12 go through before he can say that I am applying at one hundred  
13 twenty-five percent of the demonstrated need to my crop. I think  
14 that needs to be lined out in an appendix so that the farmer,  
15 again, is not guessing what the regulation says.

16 Barbara, thanks a lot for the chance to speak.

17 MS. SMITH: Thank you. Does anyone else want to make a  
18 statement? Don't rush up here all at the same time. Jim?

19 MR. KOTCON: My name is James Kotcon. I am here today  
20 speaking on behalf of the West Virginia Chapter of the Sierra Club.  
21 The Sierra Club has had a long history of advocating groundwater  
22 protection and has vigorously supported the passage of the  
23 Groundwater Protection Act.

24 While it is a bill that we have strongly supported, I  
25 guess, in terms of these specific regulations today, we are  
26 somewhat disappointed with the way these regulations are drafted

1 and what we view as their failure to provide for the protection of  
2 the groundwater resources of the State and to provide for  
3 enforcement and compliance mechanisms that would insure the  
4 implementation of the State's management programs.

5 I have drafted a series of comments, some of which relate  
6 to this particular rule. Some of which relate to some of the other  
7 rules that are being considered. Probably most importantly, some  
8 of the comments which relate to gaps that are not covered by any of  
9 the rules.

10 One of the issues that is not covered and that is  
11 probably most relevant to these regulations is the issue of land  
12 application of various sludges, soil amendments, fly ash and other  
13 solid wastes. Many of these solid wastes are being applied to  
14 soils in farmers' fields and for other purposes and are exempted  
15 from solid waste requirements, because they are defined as having  
16 a beneficial use.

17 While I do not, and the Sierra Club certainly does not  
18 wish to impede application of those materials that actually do have  
19 a beneficial use, many of these substances can produce leachate  
20 that may be high in heavy metals, toxic organic compounds or  
21 strongly alkaline or acid forming constituents.

22 It is our position that the definition of fertilizers and  
23 manures should be expanded to include those so-called beneficial  
24 uses into a regulatory program in order to assure that beneficial  
25 uses are, in fact, beneficial and not just a convenient way for  
26 various industries to avoid solid waste regulations.

1           A second issue that has not previously been addressed is  
2 that of underground storage tanks relating to fuels used on farms.  
3 These were not imposed in regulations that were proposed by the  
4 Department of Natural Resources regulating groundwater from  
5 underground storage tanks, because as environmentalists were told,  
6 the Department of Agriculture would be handling those.

7           While I am not entirely sure that it is the Department of  
8 Agriculture's responsibility to handle those, I do believe that  
9 underground storage tanks represent a significant risk to  
10 groundwater and that an enforceable maintenance and monitoring  
11 program is needed for those facilities.

12           One serious problem with these particular regs is that  
13 they do not contain any kind of remediation requirements, if  
14 contamination should be demonstrated to be occurring. There is no  
15 mention of how victims of groundwater contamination might be  
16 compensated. As such, there is very little enforcement incentive  
17 to encourage voluntary compliance with the regulations.

18           The intent of the groundwater legislation was to  
19 encourage prevention of groundwater pollution. It is considerably  
20 cheaper than remediation, but unless the cost of remediation is  
21 presented as a "stick" to encourage enforcement and compliance with  
22 the regulations, in effect, the remediation costs would be borne by  
23 downstream users and the polluter has no incentive to adhere to the  
24 regulations.

25           Basically, this leaves the Department of Agriculture with  
26 what could easily be termed an enforcement nightmare. I do not

1 believe that the Department is at this point ready, willing or able  
2 or even considers an enforcement monitoring program on every farm  
3 in the State, and obviously, voluntary compliance with the  
4 regulations is inherent in everything that this package presents.

5 Fourth comment, the regulations lack any mention of a  
6 monitoring program. While this is probably of minimal importance  
7 with regard to manures and fertilizers, primarily because of the  
8 technical difficulties with regard to some of the other packages  
9 dealing with storage of fertilizers and pesticides, particularly  
10 bulk facilities, a monitoring program would be advisable.

11 Fifth point, enforcement. Regulatory actions by the  
12 Commissioner under these regulations are discretionary. The  
13 Commissioner has the option of making regulations mandatory when  
14 pollution is occurring or, as the regulations are currently  
15 drafted, the Commissioner has the option of not doing anything.

16 It is our belief that a regulatory agency should not have  
17 the discretion to knowingly ignore pollution, which violates State  
18 groundwater regulations, and that the regulatory agency must have  
19 a non-discretionary duty to act when pollution is then demonstrated  
20 to be occurring.

21 There are a number of states that have adopted  
22 regulations, which require regulatory action. Wisconsin is among  
23 those. They require that the regulatory agency evaluate, among  
24 other responses, the practicality of stopping the further release  
25 of a pollutant that exceeds groundwater standards and the risks and  
26 benefits of continued operation of a facility, practice or

1 activity. Unless these enforcement options are spelled out and  
2 made mandatory when pollution is occurring, the enforcement program  
3 probably is not very credible.

4 A sixth point deals with the definition of those  
5 facilities that are being regulated. In Series VIa, feed lots are  
6 defined as those areas with more than one thousand animal units.  
7 Facilities that are considerably smaller than this can still  
8 propose a significant risk to groundwater since those facilities  
9 are not regulated under this particular version of the regulations.  
10 The regulation has clearly failed in their legislative and mandated  
11 purpose of providing such enforcement and compliance mechanisms  
12 that will insure implementation of the State's groundwater program.

13 The seventh point deals with a time table. Various time  
14 tables are proposed in different portion of the regulations. For  
15 instance, the time table in the manure and fertilizer facilities  
16 gives up to ten years -- five years for the development of a plan  
17 and an additional five years for implementation of such a plan.

18 It has been our experience that if you give someone three  
19 years to implement a rule, nothing gets done for at least two-and-  
20 a-half. If you give them five years, nothing gets done for four-  
21 and-a-half years. If you give them ten years, nothing will get  
22 done for nine-and-a-half years. I question whether there is any  
23 real justification for delaying the implementation of these  
24 regulations for this length of time and I would urge that the time  
25 table be shortened.

26 Another point in Series VIa, paragraph 4.1., "The

1 Commissioner finds that current knowledge is not sufficient to  
2 develop mandatory practices that will effectively protect  
3 groundwater." In the next paragraph 4.2., he believes that  
4 voluntary practices will be effective in protecting groundwater.  
5 I suggest that there is a contradiction here. How can one argue  
6 that voluntary practices will be effective while mandatory ones  
7 won't?

8           There are provisions for making these voluntary  
9 regulations mandatory under paragraphs 4.4. and 4.5. That  
10 paragraph reserves the right of the Commissioner to make these  
11 practices mandatory when monitoring data indicates that pollution  
12 has occurred. It is our belief that this provision is directly  
13 contrary to the provisions of the Groundwater Act and to the  
14 principle of prevention.

15           After contamination has occurred, it is too late to  
16 prevent it through mandatory rules. The Legislature mandated a  
17 policy to protect and maintain existing groundwater quality,  
18 "...unless it is established that: (1) the measures necessary to  
19 preserve existing quality are not technically feasible or  
20 economically practical..." -- and I am quoting from the Groundwater  
21 Act here -- "...and (2) a change in groundwater quality is  
22 justified based upon economic or societal objectives."

23           If the mandatory provisions are technically feasible  
24 after contamination has occurred, they should also be technically  
25 feasible beforehand. If the provisions are made mandatory after  
26 the contamination has occurred, then the contamination clearly is

1 not justified based on economic or societal objectives; otherwise,  
2 the mandatory provisions would not be needed.

3 I recognize the value of a phased-in regulatory approach  
4 to these programs, but there is a clear inconsistency between the  
5 way these regulations are drafted and the intent of the Act as  
6 spelled out in the language.

7 Finally, with regard to penalties, the section dealing  
8 with penalties needs to be spelled out a little more specifically  
9 for a specific act or, alternatively, to indicate where the  
10 liability is incurred when groundwater is contaminated.

11 Paragraph 9.1., in particular, clearly limits the  
12 Commissioner's ability to assess penalties and furthermore, it  
13 places a substantial burden of proof on him to show that violations  
14 were "grossly negligent, reckless or intentional." This is  
15 directly contrary to the need, which I have expressed above, for  
16 nondiscretionary enforcement actions for violations.

17 The language throughout this section seems to imply that  
18 just about any excuse would relieve a polluter of any liability for  
19 penalty and that, as such, it clearly limits the ability of these  
20 regulations to prevent groundwater contamination rather than to try  
21 to remediate afterwards.

22 The Sierra Club urges the Department of Agriculture to  
23 revise these regulations to address our concerns and to bring them  
24 into compliance with the Groundwater Protection Act. We do not  
25 feel we can support these regulations as they are currently  
26 drafted, because they undermine both the intent and the letter of

1 the Groundwater Protection Act.

2 I have a copy of the regulations here for the comments  
3 here. We hope to be able to submit a few additional comments as we  
4 review these further.

5 Thank you.

6 MS. SMITH: Thank you, Jim. Would anyone else like to  
7 make a comment?

8 MR. HELMICK: My name is Hayward Helmick. I am a WVU  
9 employee representing Southern States, Monongalia County Farm  
10 Bureau, Monongalia County Livestock Association. Forgive my  
11 ignorance as I stumble through this. I just got it, so I have not  
12 prepared myself.

13 In your fiscal notes, it shows a personnel services  
14 current expense. Can one person handle potential (workload)?

15 The second point is, are we beginning to create another  
16 bureaucracy? Do we have other agencies in place now that are  
17 active and can handle any type of follow-up reports of possible  
18 contamination? I think we do, because Agriculture mentions this.  
19 I would like to have that pursued and see if that cannot be  
20 handled.

21 Overall, on page two, under number 4.a., the impact on  
22 state government, we have an additional program and will be adding  
23 some staff to a staff that is already working at capacity. I have  
24 to wonder still if that does not go back to the same thing and say,  
25 can one person handle the potential impact upon the state?

26 You go down into economic impact upon state citizens. It

1 really does not say too much in there about the size of the  
2 operation, although it does deal with it later on into context, but  
3 I am just wondering as to the monetary capability of the average  
4 farmer in spending that much money to hold facilities or build  
5 facilities and still end up making a profit. I think we are in a  
6 very close operation here or recommendation here that we are going  
7 to end up running a lot of part-time farmers out of the business.

8           The economic impact really is not covered and you do not  
9 really have enough supporting documents, I do not think, to justify  
10 those types of policies that shows that they will need  
11 manufacturing facilities.

12           The second point is, in your fiscal note, there is no  
13 evidence that fertilizers are a major or a minor pollutant of  
14 groundwater. While being a farmer myself, I do not leave the  
15 impression that I am not concerned about groundwater, but I think  
16 we are getting the cart before the horse here. I think we all may  
17 end up paying a penalty for not researching it far enough in  
18 advance.

19           We all want to go under best management practices. I  
20 agree with that one hundred percent. How we get that, I think  
21 there are still, again, agencies in place that can give those.

22           If you look over on the draft of the rules, over on 3.6.  
23 -- some of these things have already been stated, so I will try not  
24 to state what has been re-stated. I have a little problem in  
25 understanding what is "industrial/municipal by-product." Except  
26 for industrial/municipal by-products that are dried and bagged. So

1 are you telling me that municipal waste does not come under  
2 fertilizer or is there another state code that includes the  
3 disbursement of municipal by-products, sludge?

4 Bear in mind, I did have an opportunity to be in the  
5 State of Georgia three weeks ago and the City of Brunswick is  
6 getting sued by various farmers for municipal sludge being  
7 distributed on grounds. I will probably get a note on that case.

8 I really do have a problem under the definition of  
9 "manure." Of course, this comes right back to municipal waste. I  
10 just do not agree with that. It is okay to spread human waste, but  
11 it is not okay to spread manure.

12 Over on Page 3 on 4.3., it says, "The commissioner will  
13 encourage education of all fertilizers and manures." This is  
14 great. I have no problem with education. We all need knowledge,  
15 but here again, I wonder, are we doing a duplication of effort.  
16 The state is in dire need and looking at consolidation. I think we  
17 need to take a look and see if there are any existing state  
18 agencies that can handle this. We have continuing education. We  
19 have satellite use. We have the ASCS Office. We have the  
20 extension offices. Bear in mind, remember, the Farm Bureau and  
21 many livestock associations went out on a limb to get additional  
22 funding from the State to have a county association in every  
23 county.

24 Over to 4.5., "The commissioner reserves the right to  
25 develop mandatory best management practices by rule." I think that  
26 that should be definitely or should be some statement in there that

1 there is public input into the rules and procedures held that would  
2 be developed.

3 Again, under "Powers and Duties of the Commissioner,"  
4 Page 4, 5.1.b., "Coordinate the sampling inspection programs."  
5 Again, I think we are getting into duplication. You had better  
6 look into that area or we will have everybody in the state doing  
7 the same thing.

8 Over on Page 5, 5.1.j., I do not understand and, again,  
9 excuse my ignorance, what do you mean by enter into agreements with  
10 foreign governments? How would that -- I may need to ask you  
11 something about that later on. I just do not understand that  
12 statement.

13 Over on 6.1. and 6.1.a. where it sets the limit of twelve  
14 tons. Forgive me, but I have not read down this thing this  
15 morning, but I have a little bit of a concern for the farmer that  
16 goes out and purchases twenty tons of fertilizer early in the fall  
17 while he has cash flow. I am sure the farmer does not want the  
18 fertilizer sitting out in the cold, out in the weather. (??) But  
19 I am a little concerned over that, setting a limit on this.

20 Again, some of the things have already been stated, so I  
21 will not state them. What I would like to state is, over on Page  
22 8 on 7.1.a., b., c. and d., where it deals with the application of  
23 fertilizers (mumbles) and the slopes of the ground. I think you  
24 should definitely get back to the ASCS and get some geological  
25 maps. I think you will find that probably the pasture in the State  
26 of West Virginia is up to thirty-five percent. That means, we

1 cannot fertilize the fertilizer or manure in pastures. That  
2 basically is where a lot of the cattle are gaining their weight  
3 from is on these pastures and on the slopes. If the cattle don't  
4 keep them clean, then somebody is going to go keep them clean or  
5 they will overgrow in brush. I think you need to take a look at  
6 that.

7 As a matter of fact, I think thirty-five percent of that  
8 is classified as Class VI land. As far as the other Class IV land,  
9 it was twenty to twenty-five percent of your Class IV lands is  
10 classified as \_\_\_\_\_ rotation. So I think we are looking at  
11 stipulating the slope of a field, you need to take into  
12 consideration where the field lays, the source of water that would  
13 be draining from it on the lower areas.

14 As far as public areas, I kind of agree with the areas.  
15 We do not have too much problem. "The Commissioner will offer a  
16 person the opportunity for an informal hearing..." which is great.  
17 It goes on to read and some of these, and it seems to me that this  
18 person must comply with all state and federal laws to the best of  
19 his ability. I was always under the understanding that a person is  
20 innocent until proven guilty. That is what we have a judicial  
21 system for. I want to thank you very much.

22 MS. SMITH: Thank you. Does anyone want to make another  
23 comment at this time? Ken?

24 MR. RAINES: My name is Ken Raines and I am representing  
25 the Southern States Morgantown Cooperative. I would like to say  
26 that the Morgantown Southern States Cooperative supports all

1 concerns, protests and suggestions presented by Jerry Gass and Jim  
2 Stutler from Southern States, Incorporated at the public hearing  
3 Monday, July 20 at the Guthrie Agricultural Center in Charleston.

4 In addition to those comments made at that time, we would  
5 like to make these additional statements in reference to Title 61  
6 VIa, 7.1.c., which states, "No person should apply manure or  
7 fertilizers containing nitrogen to land that has a field that has  
8 an average slope of greater than twenty percent." We feel that  
9 putting a restriction on applying nitrogen to these lands will be  
10 economically significant to this area, especially this local area  
11 is all I can really talk about today, but I am sure it would be the  
12 same all over the state.

13 I would like to share a few figures from the soil survey  
14 from Marion and Monongalia Counties which, of course, is produced  
15 by USDA and Soil Conservation Service.

16 Slopes from fifteen to twenty-five percent fall into a  
17 land capability class of IV. According to the Soil Conservation  
18 Service, Class IV lands can be rotational crops. So we have some  
19 farmers out there that are periodically sod planting some corn on  
20 slopes that are greater than twenty percent. Now when these lands  
21 are not cropped or predominantly used for pay production and  
22 pastures.

23 The slopes from twenty-five to thirty-five percent fall  
24 in land capability Class VI. These lands are predominantly  
25 pastures, a few being production hay fields. Now in Monongalia and  
26 Marion Counties, there are 434,560 total acres in the two acres.

1 In Land Classes IV and VI in these two counties, there is 191,570  
2 acres -- forty-four percent of the total land in the two counties  
3 fall in Class IV and Class VI.

4 If this regulation passes, almost half of all the land,  
5 which a larger percent of the farm land, could not be fertilized  
6 with nitrogen-contained fertilizer. There is going to be several  
7 effects of that, the most obvious being, I mentioned the seed corn,  
8 the corn production. It is obvious we are not going to grow any  
9 corn if we cannot apply nitrogen fertilizer.

10 There would be significant production of hay lowered,  
11 both from the hay fields and the pasture fields. This is going to  
12 drive the prices of cattle up in this area, making us non-  
13 competitive with surrounding states that have not adopted this  
14 legislation as of yet, or these set of rules.

15 It would also be economically significant on businesses,  
16 such as my own, Southern States, through the loss of revenue.  
17 Cooperatives, much the same as farmers in this area, operate on a  
18 very slim profit margin and any loss may be just enough to drive us  
19 under.

20 Another problem may be soil erosion as fertilizing with  
21 nitrogen is not applied in some of these twenty to thirty-five  
22 grounds. There would be a reduction of plant populations, which  
23 would increase the amount of soil erosion in the area.

24 I will make one other mention of an area that I have much  
25 knowledge about, but it would also be very significant to the coal  
26 industry in this state due to the reclamation. I cannot imagine

1 doing some coal mine reclamation without applying nitrogen to the  
2 ground.

3 For these reasons, we request that the twenty percent  
4 slope restriction be modified in Section 7. Thank you.

5 MS. SMITH: Thank you. Any other comments? I am going  
6 to turn off this tape recorder -- okay, go ahead.

7 MR. LILLY: I would like to make a comment.

8 MS. SMITH: Sure. Step right up and introduce yourself.

9 MR. LILLY: My name is \_\_\_\_\_ Lilly and I am here  
10 representing myself. I hope maybe express the feeling of a great  
11 many farm people that I know and have worked with over a number of  
12 years. I have worked as a county agent for about thirteen years.  
13 I have a B.S. and Masters Degree from West Virginia University and  
14 am a full-time farmer.

15 I would like to say that I agree with most of the  
16 comments that have been made here, even those by the Sierra Club,  
17 which I have great respect for, but I think it would be a mistake  
18 for us to throw the baby out with the bath water and I am sure that  
19 Mr. Benedict and the Department of Agriculture has the same concern  
20 that most of us have -- that we would like to comply with federal  
21 regulations and we would like to do that by controlling the  
22 groundwater in combination within our own agencies and environment  
23 so we do not need federal bureaucracies running on to the farms and  
24 telling us what they read out of some textbook when they have  
25 little personal knowledge of what it takes to farm in West Virginia  
26 or this environment.

1 I agree one hundred percent that a slope of the land is  
2 rather ridiculous in West Virginia. We have had a major problem  
3 for many years getting enough fertilizer applied to the land to  
4 control erosion and to put this regulation in force would be a  
5 great detriment to the agriculture industry and, particularly, it  
6 would cause soil erosion like we had back in the 1930's when you  
7 had the dust bowl situation. I know that if I cannot apply  
8 nitrogen fertilizer to land that has a slope of twenty degrees or  
9 more, I would be in serious farming difficulties.

10 I would like to suggest, what is the time table for the  
11 adoption of these regulations?

12 MS. SMITH: The earliest time would be a year from now  
13 once it goes through the whole Legislature.

14 MR. LILLY: These are proposed --

15 MS. SMITH: These are proposed.

16 MR. LILLY: -- guidelines that will be recommended to the  
17 Legislature in the forthcoming session? How much time do we have  
18 to give written comments?

19 MS. SMITH: There is an additional week to have written  
20 comments for all of the rules that you are hearing today and  
21 tomorrow. You will have one additional week to get in written  
22 comments; however, as this proceeds, any time that there is a  
23 hearing before the Legislature, you know that they are all public  
24 meetings and you do also have the chance to have public  
25 representation and comment at each of those meetings.

26 MR. LILLY: I have not had adequate time to review all of

1 the proposed regulations. I would like to have time to do that,  
2 but I concur with what is attempted here. The fact that I think  
3 the overkill may do more harm than good.

4 MS. SMITH: Thank you.

5 MR. LILLY: Thank you.

6 MS. SMITH: This tape might run out while you are  
7 talking, so if it beeps, just stop a second.

8 MS. CLARK: My name is Leslie Clark. I represent Enviro  
9 Con, Ltd. We are a subcontractor in the mining industry and we do  
10 have a large farming operation, too.

11 My concern is over the reclamation. I know this is the  
12 Department of Agriculture, but here I am. I have got the  
13 Department of Energy and the Department of Natural Resources on  
14 this end of me telling me that you must have ground cover. I have  
15 got the Department of Agriculture on this side saying, no, you  
16 cannot apply fertilizer.

17 I do not strip. We do not strip. All we do is go in and  
18 reclaim. We go in and take soil tests. We figure out what the pH  
19 is of the soil, what kind of crops will grow best on that area.  
20 Not necessarily crops, such as corn and such, but as ground cover  
21 of crown vetch, wheat, ryegrass, rye grain, Kentucky 31 Fescue,  
22 orchardgrass, that kind of situation where the climate is -- I  
23 mean, you can take a strip mine in Preston County and plant  
24 buckwheat or you can go down to southern West Virginia around  
25 Beckley and have a strip mine. You are not going to plant  
26 buckwheat. It is a different kind of situation. It is a different

1 soil.

2 Now I agree that we do need to watch the groundwater, but  
3 most of reclamation places -- all of the surface water is contained  
4 in a pond. More than -- I can take you to seven spots that are old  
5 strip mines that have sediment ponds on them and that all of the  
6 surface water goes into that. Then either it is treated or it is  
7 considered safe within, say, ten to twenty years before it ever  
8 goes out into the water.

9 The other area of concern is road cutting. You have got  
10 all of these interstates. You have got highways. You have got  
11 roads in development, residential roads. They are all more than  
12 fifteen or twenty percent. If you cannot put fertilizer on them,  
13 how are you going to get the grass to grow?

14 That is my two concerns and I thank you for your time.

15 MS. SMITH: Anyone else?

16 MR. CUNNINGHAM: I am just representing myself.

17 MS. SMITH: Your name is?

18 MR. CUNNINGHAM: Robert Cunningham. I live out in the  
19 eastern part of the county. As she said, I have had some  
20 experience with strip mining and if they could not put nitrogen  
21 fertilizer and stuff like that on what they strip, they would never  
22 get a vegetation cover.

23 I work for the ASCS. We get approximately \$25,000 to  
24 \$30,000 a year from this county. If this 7.1.c. goes through, we  
25 just as well take that money and send it back down to Kentucky,  
26 Virginia, North Carolina and let them grow tobacco, because we are

1 not going to be able to use it up here. That is just going to tie  
2 our hands.

3 Now if you want to see somebody that has done a job at  
4 stripping, come out to my place. I stripped about twelve acres, a  
5 fellow did for me, and he's got crown vetch growing on it. He has  
6 got trefoil growing on it that is so thick. He has to mulch it.  
7 He has to put nitrogen fertilizer on it to produce.

8 It's like she said about the roads. What about the salt  
9 they put on them? I think that is more of a potential to  
10 groundwater than the fertilizer is, because it washes. It goes  
11 right into the stream. It is going to hunt the deepest hole it can  
12 find. The way our roads are constructed, a lot of it goes into  
13 groundwater.

14 You have got a lot of seepage from deep mines. They do  
15 more than I think what the fertilizer could ever do. I thank you.

16 MS. SMITH: We have still got room on the tape. Is  
17 anyone interested? Okay, I am going to recess this hearing. It is  
18 5:55 p.m. If anyone wants to give a statement between now and  
19 7:00, we will get back on the record.

20 (The hearing was recessed at 5:55 p.m. and  
21 concluded at 7:00 p.m.)

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SCS - WVDA  
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Mr. Kotcon  
WV Sierra Club/WVU  
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Lick Sherman  
Environmental Coordinator  
du Pont de Nemours & Co.  
West DuPont Avenue  
WV 25315

Division Natural Resources  
Mr. Browning  
61 Greenbrier Street  
Martinsburg, WV 25305

*mailing list reg. pg. 3*

Supplemental listing:

Regulations sent to:

Series 6A

West Virginia Poultry Assoc.  
Dennis Zirk, president  
Rt 3  
Milam, WV 26838

Ms. Leslie McCarty  
Box 135  
Hillsboro, WV 24946

William Smith  
Rt 1 Box 415  
Thornton, WV 26440

Patty Rukavina  
Rt 4 Box 112  
Grafton, WV 26354



STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

State Capitol  
Charleston, WV 25305

June 17, 1992

Cleve Benedict  
Commissioner

Charleston Newspapers  
1001 Virginia Street, East  
Charleston, West Virginia 25301

ATTENTION: CLASSIFIED ADS

Dear Sir/Madam:

Please print the attached public hearing notice in the Legal Notices section of the Charleston Daily Mail, pursuant to Article 59, Chapter 3 of the West Virginia Code.

Please send invoicing to:

Administrative Services Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0170

Please send the notarized affidavit and copy of the ad to my attention at the following address:

Barbara J. Smith, Director  
Compliance Division  
West Virginia Department of Agriculture  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0170

Should you have any questions, please call me at 304-558-2226.  
Thank you for your assistance in this matter.

Sincerely,

Barbara J. Smith, Director  
Compliance Division  
FAX: 304-558-3594

BJS:pm:legadch  
Enclosure (1)

*Class I Sept Ad  
Charleston Daily Mail*

## NOTICE OF PUBLIC HEARINGS

The Commissioner of Agriculture has scheduled hearings for the proposed rules affecting groundwater protection from fertilizers and pesticides in accordance with the provisions of the West Virginia Groundwater Protection Act. These rules affect the use and storage of fertilizers, manures and pesticides by any person in this state.

Both written and oral comments will be accepted at the hearings. Written comments will also be accepted by mail until July 30, 1992 and should be addressed Barbara Smith, Compliance Division, WV Dept. of Agriculture, 1900 Kanawha Blvd., E., Charleston, WV 25305-0170.

Each rule will have one public hearing in the Charleston area where oral and written comments will be received. Each hearing will be held at the J.T. Johnson Conference Room, Building 2, Guthrie Agricultural Center, Charleston, WV:

Non-Bulk Pesticide Rules for Permanent Operational Areas (61-12I)  
Monday, July 20 at 1:00 p.m.

General Groundwater Protection Rules for Fertilizer and Manures  
(61-6A) Tuesday, July 21 at 9:00 a.m.

Primary and Secondary Containment of Fertilizers (61-6B) Monday,  
July 20 at 11:00 a.m.

General Groundwater Protection Rules for Pesticides (61-12G)  
Monday, July 20 at 3:00 p.m.

Bulk Pesticide Operational Rules (61-12H) Monday, July 21 at 1:00  
p.m.

Generic State Management Plan for Pesticides and Fertilizer in  
Groundwater (61-22) Tuesday, July 21 at 1:00 p.m.

Best Management Practices for Temporary Operational Areas of Non-  
Bulk Pesticides (61-22A) Tuesday, July 21 at 11:00 a.m.



STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

State Capitol  
Charleston, WV 25305

June 17, 1992

Steve Benedict  
Commissioner

The Dominion-Post  
Greer Building  
Morgantown, West Virginia 26505

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Thank you for your assistance in this matter.

Sincerely,

Barbara J. Smith, Director  
Compliance Division  
FAX: 304-558-3594

BJS:pm:legadmj  
Enclosure (1)

NOTICE OF PUBLIC HEARINGS

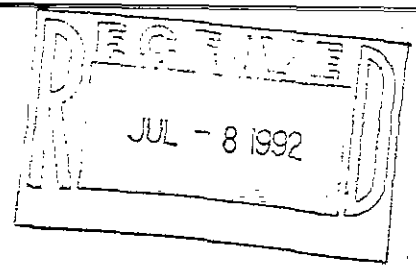
The Commissioner of Agriculture has scheduled hearings for the proposed rules affecting groundwater protection from fertilizers and pesticides in accordance with the provisions of the West Virginia Groundwater Protection Act. These rules affect the use and storage of fertilizers, manures and pesticides by any person in this state.

Both written and oral comments will be accepted at the hearings. Written comments will also be accepted by mail until July 30, 1992 and should be addressed Barbara Smith, Compliance Division, WV Dept. of Agriculture, 1900 Kanawha Blvd., E., Charleston, WV 25305-0170.

Each rule will have one public hearing in the Morgantown area where oral and written comments will be received. Each hearing will be held at Room 315/316 Percival Hall, Forestry Building, Evansdale Campus, West Virginia University, Morgantown, WV:

- Non-Bulk Pesticide Rules for Permanent Operational Areas (61-12I)  
Thursday, July 23 at 3:00 p.m.
- General Groundwater Protection Rules for Fertilizer and Manures  
(61-6A) Thursday, July 23 at 5:00 p.m.
- Primary and Secondary Containment of Fertilizers (61-6B) Thursday,  
July 23 at 7:00 p.m.
- General Groundwater Protection Rules for Pesticides (61-12G)  
Friday, July 24 at 8:00 a.m.
- Bulk Pesticide Operational Rules (61-12H) Friday, July 24 at 10:00  
a.m.
- Generic State Management Plan for Pesticides and Fertilizer in  
Groundwater (61-22) Friday, July 24 at 1:00 p.m.
- Best Management Practices for Temporary Operational Areas of Non-  
Bulk Pesticides (61-22A) Friday, July 24 at 2:30 p.m.

*Press release*



STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

State Capitol  
Charleston, WV 25305

Cleve Benedict  
Commissioner

FOR IMMEDIATE RELEASE:  
July 7, 1992

**WVDA To Hold Public Hearings on Groundwater Rules**

CHARLESTON, W.Va. -- The West Virginia Department of Agriculture (WVDA) has scheduled public hearings for proposed rules affecting groundwater protection from fertilizers and pesticides in accordance with the Groundwater Protection Act, Commissioner of Agriculture Cleve Benedict announced.

These regulations affect the use and storage of fertilizers, manures and pesticides by any person in the state.

Both written and oral comments will be accepted. Written comments will be accepted until July 30, 1992, addressed to Barbara Smith, Compliance Division, WVDA, 1900 Kanawha Blvd., East, Charleston, WV 25305.

Each rule will have two public hearings where oral and written comments will be received. The hearings will be held at:

Location 1: J.T. Johnson Conference Room, Building 2, Guthrie Agricultural Center, Charleston, WV.

Location 2: Room 315/316 Percival Hall, Forestry Building, Evansdale Campus, West Virginia University, Morgantown, WV.

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Non-Bulk Pesticide Rules for Permanent Operational Areas (61-12I)

Location 1: Monday, July 20, 1 pm; Location 2: Thursday, July 23, 3 pm

General Groundwater Protection Rules for Fertilizer and Manures (61-6A)

Location 1: Tuesday, July 21, 9 am; Location 2: Thursday, July 23, 5 pm

Primary and Secondary Containment of Fertilizers (61-6B)

Location 1: Monday, July 20, 11 am; Location 2: Thursday, July 23, 7 pm

General Groundwater Protection Rules for Pesticides (61-12G)

Location 1: Monday, July 20, 3 pm; Location 2: Friday, July 24, 8 am

Bulk Pesticide Operational Rules (61-12H)

Location 1: Monday, July 20, 9 am; Location 2: Friday, July 24, 10 am

Generic State Management Plan for Pesticides and Fertilizer in Groundwater (61-22)

Location 1: Tuesday, July 21, 1 pm; Location 2: Friday, July 24 1 pm

Best Management Practices for Temporary Operational Areas of Non-Bulk Pesticides (61-22A)

Location 1: Tuesday, July 21 11 am; Location 2: Friday, July 24 2:30 pm

For information, contact Compliance Division, WVDA, at (304) 558-2208.

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AMENDMENTS MADE TO TITLE 61, SERIES 6A  
DUE TO COMMENTS RECEIVED

Amendments were made to sections 1.1, 2.1.d, 3.1, 3.5, 3.6, 4.1, 4.4, 4.6, 6.1, 6.2, 6.4 and section 9 was added.

An explanation of the amendments made and the reasons for the amendments is in the "Summary of Comments".

SUMMARY OF COMMENTS RECEIVED AND AGENCY RESPONSE  
TITLE 61, SERIES 6A

GENERAL GROUNDWATER PROTECTION RULES FOR FERTILIZERS AND MANURES

NOTE: Not all commenters identified a specific section of the rule when commenting. The comments were all referenced to a particular section for clarity.

COMMENT 1: Various comments were received on the overall regulation. One commenter stated that the drafting of these regulations was excellent. Two commenters stated that the rules are weak, ineffective and violate the intent of the law and requested reconsideration of this rule. One comment was received that these regulations exceed the intent of the law. One comment was made that these rules appear to be more stringent than necessary to protect the environment. One commenter requested reconsideration of these rules after consultation with poultrymen, poultry association, WV University personnel, and others with the goal of providing for reasonable standards. One commenter suggested that a study be made to determine if alternative methods are available for the protection of groundwater with manure holding facilities prior to filing regulations. Three commenters requested that this rule be withdrawn until studies can be made to determine if there is a groundwater pollution problem from fertilizers. One commenter requested that the rule either be made more stringent or shorter. One question was raised as to why there are more stringent regulations proposed at the state level than at the federal level and stated that he was in opposition to these rules.

AGENCY RESPONSE TO COMMENT 1: These regulations are mandated by the WV Groundwater Protection Act, which is more stringent than federal law. The WVDA discussed the issues of groundwater protection from fertilizers and manures with personnel from West Virginia University, Soil Conservation Service, Agricultural Stabilization Service, the Farm Bureau, poultrymen and environmentalists during the development stages of these rules. The WVDA believes that these regulations do not violate the intent of the Groundwater Protection Act and are adequate to enforce the intent of the Groundwater Protection Act and provide a balanced response to a potential problem. The act does not allow for consideration of regulating only after a groundwater pollution problem is identified. Note that the WVDA was given a deadline of one year from the effective date of the rule to file regulations while the legislative findings were that "West Virginia's groundwater resources are geologically complex, with the nature and vulnerability of groundwater aquifers and recharge areas not fully known;" (§20-5M-2-a-4). The mandate of the law means that regulations are to be filed before studies of potential pollution can be performed.

COMMENT 2: One commenter stated that the costs outweighed the benefits and it was not the legislative intent to put people out of business. One commenter recommended withdrawal of the rules due to lack of information on the economic impact of these practices on the industry and the lack of information on the impact of these practices on groundwater quality. Two commenters stated that these regulations impose a substantial cost to farmers, who cannot really afford to absorb the cost. One commenter stated that he was concerned about the economic disadvantage to the state farmers if other states did not have equivalent rules.

AGENCY RESPONSE TO COMMENT 2: The WVDA agrees that the intent of the Groundwater Protection Act is not to put people out of business. The WVDA believes that the Groundwater Protection Act did not allow the WVDA to exempt practices and facilities on the basis of cost. The Act does allow a person to petition the Director of the Division of Natural Resources (DEP) for a deviation on the basis that the measures needed to preserve existing groundwater quality are not technically feasible or economically practical and that a change in the groundwater quality is justified based on economic or societal objectives (§20-5M-5-f). The fact that other states may or may not have equivalent regulations does not mean that the WVDA is relieved of its mandate to promulgate rules to protect groundwater as provided by the GWP Act.

COMMENT 3: One commenter stated that the purpose of the Groundwater Protection Act fees was to cover the cost to citizens, businesses and local government and stated that these regulations incurring high costs to the industry are beyond the scope of the intent of the law.

AGENCY RESPONSE TO COMMENT 3: The Groundwater Protection Act fees are for the operation of the government programs to implement the law and regulations ("administration, certification, enforcement, inspection, monitoring, planning, research and other activities of the state..." [20-5M-9-c]), not for the costs of practices to protect groundwater that are a cost to citizens, businesses and local government.

COMMENT 4: One comment was received that questioned the expenditures of non-Groundwater Protection Act fees to administer the program.

AGENCY RESPONSE TO COMMENT 4: There is no legal mechanism for the WVDA to assess GWP fees. The fees are assessed to persons who own or operate facilities or conduct activities subject to the provisions of the GWP Act (§20-5M-9-a). The WVDA has no mechanism for taxing persons who apply fertilizer or manure.

COMMENT 5: One comment noted that the intent of the WVDA was to take the lead in this area of regulation.

AGENCY RESPONSE TO COMMENT 5: The WVDA's intent was to comply with the mandated deadlines of the Groundwater Protection Act.

COMMENT 6: One commenter stated that storage of fertilizers and manures "off-farm" does not appear to be the responsibility of WVDA under "application and use" of fertilizers.

AGENCY RESPONSE TO COMMENT 6: The statutory authority of the WVDA is not only for farm use or storage of fertilizers and manures, but applies to all uses and storage activities in this state.

COMMENT 7: One comment was made that there is more potential for contamination from other sources, such as coal mine seepage and road salt that should be addressed first.

AGENCY RESPONSE TO COMMENT 7: The GWP law did not indicate that these sources could be prioritized and the WVDA has no statutory authority to regulate these items.

COMMENT 8: One statement was made that the poultry industry is currently exempt from all regulation such as pollution, sediment control, etc. and that this is why they have moved from the Delmarva area to West Virginia. One comment was made that these rules are unfair to the poultry industry and the adverse economic impact of these rules on the industry as these are unfair and unreasonable and therefor is adamantly opposed to these regulations.

AGENCY RESPONSE TO COMMENT 8: The WVDA believes that these rules are within the intent of the GWP Act and does not unfairly impact on the poultry industry.

COMMENT 9: One request was made to consider composting poultry manure in this rule.

AGENCY RESPONSE TO COMMENT 9: The Nutrient Management Plan would take into account the storage requirements for composting of manure and the provisions of Section 7.3.f. (moved to the procedural rule) would also take the alteration of the material into account when calculating application rates.

COMMENT 10: One commenter asked if one additional staff person could handle all the additional responsibility.

AGENCY RESPONSE TO COMMENT 10: The current concept of the rule, where the emphasis is on educational programs that enhance those already in existence, will allow one additional person to handle the program. When the DEP begins the monitoring program, and data on potential pollution from fertilizer or manure needs to be investigated, then the WVDA

will need to reevaluate the personnel needs of the program.

COMMENT 11: One commenter was concerned over the creation of another bureaucracy. In his opinion there are other agencies in place that can handle this program.

AGENCY RESPONSE TO COMMENT 11: The GWP Act passed by the legislature mandates this program. These regulations are designed to create as little additional bureaucracy as possible.

COMMENT 12: One commenter stated that farmers already want to comply with laws so they do not need federal bureaucracies running on to the farms and telling the farmers what to do out of a textbook. He wants people who know about WV farming practices to run the programs.

AGENCY RESPONSE TO COMMENT 12: No modification of the rule needed.

COMMENT 13: One commenter asked that there be a monitoring program in this regulation as provided in §20-5M-5-d, stating that without a monitoring program, no enforcement was possible.

AGENCY RESPONSE TO COMMENT 13: The reference to §20-5M-5-d is interpreted to mean that the WVDA can require firms to have a monitoring system. §20-5M-6-a-7 indicates that the DNR (DEP) shall promulgate rules for monitoring and analysis of groundwater. Therefore the WVDA cannot have a monitoring program until the DNR (DEP) promulgates their regulations for monitoring.

COMMENT 14: One comment was made that these regulations do not have any incentive to encourage voluntary compliance with the regulations.

AGENCY RESPONSE TO COMMENT 14: The WVDA believes that the incentive for compliance is that the citizens of this state are law-abiding citizens and the majority will voluntarily comply. Also, the threat of making these voluntary provisions mandatory if they are considered not protective of groundwater also provides incentive for compliance.

COMMENT 15: One commenter asked if this is law or proposed law and who is backing this and who is bucking it? He was disappointed that hearings were not scheduled in the karst limestone areas of this state.

AGENCY RESPONSE TO COMMENT 15: This rule is proposed and is not currently effective. These rules are proposed in response to a mandate of the Groundwater Protection Act passed by the WV Legislature.

COMMENT 16: One commenter stated that this rule should be submitted to AAPFCO subcommittee charged with the development of a model Nutrient Management Plan, as it is well researched and shows careful preparation.

AGENCY RESPONSE TO COMMENT 16: This will be submitted.

COMMENT 17: Two comments stated that the summary of the rule was confusing and not what the rule intends to say

AGENCY RESPONSE TO COMMENT 17: The WVDA revised the summary of the rule.

COMMENT 18: One comment was made that the Department of Natural Resources (DEP) was telling the environmentalists that the Department of Agriculture would be regulating underground storage tanks used on farms.

AGENCY RESPONSE TO COMMENT 18: The Department of Agriculture has no legal authority to regulate this area. Note that the Division of Natural Resources (DEP) has filed proposed regulations under Title 47, Service 58 "Groundwater Protection Regulations" that reserves Section 14 for "Requirements for Fuel Storage Tanks Not Subject to Regulation under Chapter 20, Article 5H of the W.Va. Code".

AGENCY CHANGE IN RULE: The scope of the rule was changed when the voluntary best management practices were moved to a procedural rule, so Section 1.1 has been modified.

AGENCY CHANGE IN RULE: Section 2.1.d. was modified to change the word "Service" to "Committee" for clarity.

COMMENT 19: One commenter requested that the definition of animal unit in section 3.1. be made consistent with the ASCS and SCS definition. One commenter was concerned that layers, broilers and breeders are all in the same category and pullets are not covered under the definition of "animal unit".

AGENCY RESPONSE TO COMMENT 19: The definition used is from the Clean Water Act regulations in Appendix B to Part 122 of Title 40 "Criteria for Determining a Concentrated Animal Feeding Operation". This definition is more appropriate for the environmental program than the ASCS or SCS definitions. A review of the current CFR (Code of Federal Regulations) noted that it had a different definition than was in the proposed regulation. The definition has been changed so that it is now what is used in the current edition of the CFR (turkeys, laying hens and broilers are deleted from the calculation of animal units).

AGENCY CHANGE IN RULE: The WVDA modified the definition of

"feedlot" to be equivalent to the definition for "animal feeding operation" in 40 CFR 122.23 which will include stables and racetracks.

COMMENT 20: RE: Section 3.6. Three commenters questioned why dried and bagged product is regulated differently than the other types of industrial/municipal byproducts and asked that industrial byproducts be regulated whether bagged or not. Four commenters questioned why this regulation did not apply to land application of sludges, soil amendments, fly ash, other solid wastes. One stated that urban or out of state sludge should not take precedence over fertilizer. One commenter asked for a reference to the EPA regulations on land application of sludge be made in these regulations. Two commenters pointed out that the definition of "fertilizer" here and in Title 61 Series 6B made compliance with Section 6.1 confusing.

AGENCY RESPONSE TO COMMENT 20: The definition of fertilizer was modified to be equivalent to the definition of "commercial fertilizer" in the WV Fertilizer Law §19-15-1-c and with that used in §61-6B. The Department of Agriculture does not have statutory authority to regulate sludges or other industrial/municipal byproducts. The Groundwater Protection Act would give this authority to the DNR (DEP). Note that in the proposed regulations of the Division of Natural Resources (DEP) Title 47, Series 58 "Groundwater Protection Regulations" that Section 15 is reserved for "Requirements for Reuse of Sludges Generated by Facilities Permitted Under Chapter 20, Article 5A of the W. Va. Code".

COMMENT 21: Two commenters requested a reconsideration of the definition of manure.

AGENCY RESPONSE TO COMMENT 21: Additional conversations with a commenter indicated that he thought that other agricultural agencies used a different definition and it should be used. The ASCS and SCS were contacted and did not have a different definition. No modification to the rule was made.

COMMENT 22: One commenter stated that the "phase-in" of the program as noted in Section 4 is directly contrary to the intent of the act

AGENCY RESPONSE TO COMMENT 22: Consultation with University personnel, Soil Conservation Service and other experts has shown little information is known about specific practices applicable for groundwater protection in this state. The WVDA believes that Section 4 is not contrary to the intent of the act. Section 4 reflects a recognition that further research is needed to determine what practices protect groundwater and mandates changes in these rules as knowledge and technology become available.

COMMENT 23: One commenter stated that the language in 4.1. and 4.2. are contradictory.

AGENCY RESPONSE TO COMMENT 23: Sections 4.1 and 4.2 were combined and some revision of the language was made for clarity. The remainder of the section was renumbered.

COMMENT 24: One commenter questioned if the program referenced (in Section 4.2.) was a duplication of existing programs. One commenter asked how the strong educational program referenced (in Section 4.2.) will be established.

AGENCY RESPONSE TO COMMENT 24: This program will not duplicate, but will assist and enhance the programs of other agencies where needed and will encourage the efforts that are in place. No modification was made to this rule.

COMMENT 25: One commenter stated that the provisions of 4.4. and 4.5. (now Sections 4.3. and 4.4.) are directly contrary to the provisions of the act's principles of prevention and asked that the Wisconsin concept be used. The commenter asked for mandatory evaluation of the practicality of stopping further release of a pollutant that exceeds groundwater standards and an evaluation of the risks and benefits of stopping the release. The commenter thinks that if prevention is technically feasible before data shows there is a pollution problem, then the practice should be implemented before the problem is detected.

AGENCY RESPONSE TO COMMENT 25: The WVDA believes that Section 4.4, 4.5 and 4.6 do require some mandatory action to be made by the commissioner both when pollution is detected and when the technology or scientific knowledge changes.

COMMENT 26: Three commenters asked that Section 4.5 (now Section 4.4) be changed so that the rules may be changed only after consultation with the public and public participation.

AGENCY RESPONSE TO COMMENT 26: The WVDA is required to have public input and comment under the provisions of the Administrative Procedures Act. Language referring to this process was added to Section 4.4 for clarity.

COMMENT 27: Two commenters requested clarification of the protocols for distinguishing between fertilizer/septic/manure pollution.

AGENCY RESPONSE TO COMMENT 27: Protocol not outlined because the methods of sampling and analysis have not be specified in the DNR (DEP) regulations required under this act.

COMMENT 28: Two commenters were concerned about future changes in technology that may result in more minute detection limits. This

situation would look like concentrations of pollutants were increasing so a regulator. They were concerned that action would be taken when increases of concentration were observed, even if that concentration is well below the water quality standards.

AGENCY RESPONSE TO COMMENT 28: The Groundwater law mandates that action be taken to prevent any contamination whenever concentrations are observed to rise. Section 4.6 was modified to add language to specify that a more sensitive method of analysis will not be interpreted as indicating that a concentration of a pollutant is increasing in groundwater.

COMMENT 29: One commenter recommended that a standard protocol be established with respect to the frequency of sample collection over the one-year period referenced here.

AGENCY RESPONSE TO COMMENT 29: These protocols are expected to be in the monitoring and analysis regulations to be promulgated by the DNR as required by the Groundwater Protection Act (§20-5M-6-a-7).

COMMENT 30: Two commenters objected to the concept in 4.7. (now 4.6) where the action is taken solely on the basis of increase in concentrations of residues.

AGENCY RESPONSE TO COMMENT 30: This is a requirement of the GWP act (§20-5M-5-e):

Groundwater regulatory agencies shall take such action as may be necessary to assure that facilities or activities within their respective jurisdictions maintain and protect groundwater at existing quality, where the existing quality is better than that required to maintain and protect the standards or purity and quality promulgated by the board to support the present and future beneficial uses of the state's groundwater.

COMMENT 31: One commenter was concerned that these regulations are duplicating efforts that other agencies are performing.

AGENCY RESPONSE TO COMMENT 31: Section 5 seeks to set guidelines so that duplication can be avoided while performing duties mandated by the GWP Act.

COMMENT 32: One commenter questioned why it was necessary to make agreements with foreign governments in section 5.1.j..

AGENCY RESPONSE TO COMMENT 32: This is included so the commissioner would be able to make such an agreement in order to carry out the provisions of this rule. No modification to the rule was made.

COMMENT 33: One commenter requested further information about the responsibilities of the Groundwater Coordinating Committee referenced in 5.1.k.

AGENCY RESPONSE TO COMMENT 33: This committee is an advisory committee making recommendations on the implementation of the Groundwater Protection Act set by statute (§20-5M-7).

COMMENT 34: Three commenters asked that Section 6.1. be made consistent with that in §61-6b-2.8.

AGENCY RESPONSE TO COMMENT 34: Modification was made to the definition of "fertilizer" in both Series 6A and 6B. Further modification was made to the amount of product stored in Section 6.1 to be consistent with changes in Title 61, Series 6B.

COMMENT 35: One commenter was concerned that the provisions of section 6.1. would adversely affect the farmer who could not purchase the fertilizer that he needed when the price was the most advantageous.

AGENCY RESPONSE TO COMMENT 35: The intent of the rule is to protect groundwater from residues of concentrated fertilizers, not to restrict or constrain purchase of fertilizers.

COMMENT 36: Two commenters were concerned with the 10 year implementation of the provisions of Section 6.2. and urged a shortened time table, with a justification for the time limits set.

AGENCY RESPONSE TO COMMENT 36: The WVDA has reduced the time table for implementation in Section 6.2. from 10 years to 5 years.

COMMENT 37: One commenter stated that the concentration of animals is more important than the number of animals under Section 6.2.

AGENCY RESPONSE TO COMMENT 37: No modification of the rule is needed as the concentration of animals is considered with the definition of "feedlot".

COMMENT 38: Two commenters felt that numbers of animals much fewer than in feedlots as specified in Sections 6.2. and 6.3. could have potential impact on groundwater. They indicated that these facilities should be regulated.

AGENCY RESPONSE TO COMMENT 38: These commenters gave no recommendation on the numbers that should be used and other experts in this field could give no recommendation. The numbers used are those used for the Clean Water Act regulations. No modification of the rule was made.

COMMENT 39: Three comments were made on the Nutrient Management Plan referred to in Section 6.2.. One commenter suggested that a Nutrient Management Plan be specified in detail so that it is not something that a bureaucrat at a later point has a chance to make up. One person asked about the specific components of the Nutrient Management Plan. One commenter stated that the Nutrient Management Plan should consist of the producer's ability to provide for adequate disposal of the manure. Two commenters asked what process would be used to determine if the Plan was acceptable, if compliance with the Plan would be checked, and who was responsible for getting the Plan done. One commenter stated that poultry growers with adequate land and management abilities would not be handicapped by the Nutrient Management Plan as outlined in section 6.2. and 6.3.

AGENCY RESPONSE TO COMMENT 39: The Nutrient Management Plan factors in the land capabilities, the amount of land available to use the manure, climate, storage needs, etc.. The person maintaining the animals would be responsible for obtaining and complying with the Nutrient Management Plan. The commissioner would be responsible for determining compliance with the Plan under the provisions of this rule. Section 6.2. was modified to specify the document where the Nutrient Management Plan can be obtained.

COMMENT 40: One commenter stated that liquid manure handling or continuous overflow water as mentioned in sections 6.2. and 6.3. are not used in the poultry industry in this state and asked for language more applicable to this industry. He stated that this language must have been copied from something else.

AGENCY RESPONSE TO COMMENT 40: This language was adopted from the Clean Water Act regulations (Appendix B to Part 122 of Title 40). Current industry practice for broilers does not use continuous overflow watering or liquid manure handling systems. This means that they use a "dry" system that would not be applicable to Section 6.2.a. or Section 6.3.a.

COMMENT 41: One commenter asked if the numbers in Sections 6.2. and 6.3. are annual numbers or one-time capacity and suggested that these sections should utilize the concept of tonnage of wastes generated and the ability to safely store and utilize the wastes.

AGENCY RESPONSE TO COMMENT 41: This plan does utilize the concept of tonnage of wastes generated over time. The number of animals referenced in 6.2.a. and 6.3.a. must be in a feedlot which is defined as a place of confinement for a total of 45 days in any 12 month period. The ability to safely store the wastes produced is covered in the concept of the Nutrient Management Plan in Section 6.1. No modification made to the rule.

COMMENT 42: One commenter requested the addition of a definition of "sinkhole". Two commenters asked that the terms karst limestone area, sandy soils, location near sinkholes or wells as noted in section 6.3. be better defined. One commenter suggested that buffer zones for these areas be designated so that it could be determined if a facility would need to be regulated under section 6.3. One commenter stated that the terms in sections 6.3. and 6.3.a. are too vague with different interpretation allowed and recommended deletion and movement to a section on voluntary best management practices.

AGENCY RESPONSE TO COMMENT 42: The important designation is a location where the potential for groundwater contamination is high. The examples were given to help explain the intent. Each person operating a feedlot or storing manure will need to determine what the potential for groundwater contamination is for their particular situation. No modification made in the rule.

COMMENT 43: One commenter stated that section 6.4. is unclear as to the volume of manure covered and the time frame covered. The commenter recommended deletion of section 6.4. or moving the section to a voluntary best management practice.

AGENCY RESPONSE TO COMMENT 43: Section 6.4. has been modified in response to the comments asking for clarity. The WVDA does not believe that a person purchasing and storing manure in large quantities should store them under voluntary best management practices.

COMMENT 44: One commenter stated that all conditions in 6.4. to 6.11. are well researched and are reasonable and attainable.

AGENCY RESPONSE TO COMMENT 44: No agency response needed.

AGENCY CHANGE: Sections 6.5. through 7.3.g. in the proposed rule were determined to be "voluntary best management practices" and have been moved to a separate procedural rule. The comments received on these sections 6.5. through 7.3.g. have been considered and modifications made to the rule. The procedural rule will be refiled for additional public comment. The remaining sections of this rule have been renumbered.

COMMENT 45: One commenter said that section 8.1. (now 7.1) was great.

AGENCY RESPONSE TO COMMENT 45: No response needed from WVDA.

COMMENT 46: One commenter said that Section 9 (now Section 8) on penalties needs to be more specific, or to indicate where the liability is incurred. The commenter believes that this section makes the assessment of penalties discretionary and that any excuse

would relieve a polluter from liability.

AGENCY RESPONSE TO COMMENT 46: The DNR (DEP) rule, Title 47 Series 56 "Assessment of Civil Administrative Penalties" provides for specific penalties and is applicable to this rule. No modification was made to the rule.

COMMENT 47: One comment was made that the rule lacks remediation requirements and compensation of victims of contamination of groundwater.

AGENCY RESPONSE TO COMMENT 47: Section 9 on remediation was added to the rule. Compensating victims of contamination is outside the scope of the Groundwater Protection Act. Note that §20-5M-13-b states that:

Nothing contained in this article shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provisions in this article, or any act done by virtue of this article, be construed as estopping...persons as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing, or to recover damages.

No modification to the rule was made to compensate victims due to the provisions of the GWP Act.