



West Virginia Coal Association

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October 10, 2017

Mr. Austin Caperton
Cabinet Secretary
West Virginia Department of Environmental Protection
Division of Water & Waste Management
601 57th Street
Charleston, WV 25304
Via Electronic Mail: dep.comments@wv.gov

Re: Stringency Review of State Rules

Dear Secretary Caperton:

Pursuant to the public notice published by the West Virginia Department of Environmental Protection (WV DEP) on September 6, 2017, the West Virginia Coal Association (WVCA) offers the following comments regarding the agency's review of "rules guidelines, policies and recommendations under their jurisdiction" that have counterpart or similar corresponding federal standards as required by Senate Bill 619.¹

INTRODUCTION

The West Virginia Coal Association (WVCA) is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 98 percent of the

¹ Passed by the Legislature in the 2016 Regular Session, signed by the Governor on April 1, 2016.
http://www.legis.state.wv.us/Bill_Text_HTML/2016_SESSIONS/RS/bills/SB619%20SUB1%20enr.pdf

Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

In addition to these specific comments, WVCA endorses the comments filed by the West Virginia Chamber of Commerce and Murray Energy Corporation.

While WVCA is filing these comments and observations with the agency today, we are compiling a more comprehensive review of the mining-related state environmental regulatory programs, including a more detailed review of interrelated "policies and recommendations" that exist beyond the codified state rules (such as enforcement interpretations), that will be provided to the Legislature independent of this comment period.

GENERAL COMMENTS

As a general matter, WV DEP is to be commended for the pronounced improvements to its coal mining-related environmental regulatory programs over the last several years. The Division of Mining & Reclamation (DMR) has proposed, on its own initiative, common-sense revisions to the state programs that remove ambiguity from the state's administrative rules without compromising environmental protections, adding desperately needed certainty and predictability to the coal permitting and environmental regulatory programs.

Other beneficial revisions to the coal mining and water quality standards programs have been undertaken following specific legislative instruction to remove requirements and

standards that have no parallel in the corresponding federal regulatory programs.² Although these revisions were certainly beneficial, as we detail in our subsequent comments, further changes are not only necessary to stabilize the mining and reclamation and water quality standards programs of West Virginia, but in many cases are required to adequately implement statutory changes previously enacted by the Legislature.

As a general matter, the complexity of the mining and reclamation statutory and regulatory provisions (§22-3-1 and 38 CSR 2) continues to provide opportunities for entirely different interpretations and application of the state standards by the federal Office of Surface Mining (OSM) in their mining oversight role, *especially where there is no direct federal counterpart regulation.*

The lack of equivalent standards in the federal regulatory program invites mischief, leaving the state program open to the subjective interpretations of OSM and others. In many cases, these interpretations are directly contrary to the desired intent of the Legislature, WV DEP and DMR in enacting the provisions, allowing federal oversight agencies or anti-mining groups and activist judges to hijack the state's regulatory program.

In other instances, such as contemporaneous reclamation (see subsequent comments), the complexity of the individual rule provisions coupled with the absence of corresponding federal regulations leads to regulatory confusion among inspectors and mine operators, with

² See generally Senate Bill 357 (2015 Regular Session) http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/bills/SB357%20SUB1%20enr.pdf; House Bill 4726 (2016 Regular Session) http://www.legis.state.wv.us/Bill_Text_HTML/2016_SESSIONS/RS/bills/hb4726%20ENR.pdf; and Senate Bill 687 (2017 Regular Session) http://www.legis.state.wv.us/Bill_Text_HTML/2017_SESSIONS/RS/bills/sb687%20enr.pdf

interpretation, application and enforcement differing between DMR regional offices and even individual inspectors.

SPECIFIC COMMENTS

Mining & Reclamation Rule (38 CSR 2)

Concurrent with the publication of its broader program review, WV DEP provided a separate stringency analysis of the state's mining & reclamation rule.³ While WVCA generally agrees with the agency's referenced examples, we feel that further explanation and detail may be warranted to the Legislature.

"Notice of Technical Completeness" (38 CSR 2.3.g.)

As WVCA detailed in its original comments to the agency on this proposal in 2007, this specific requirement was unneeded and simply adds to the complexity and cost of West Virginia coal mining operations. Absent the addition of 38 CSR 2.3.g., other existing rules grant the agency the authority to require re-advertisement:

38 CSR 2.3.2.e. Re-advertisement. After a Surface Mine Application (SMA) has been advertised once a week for four successive weeks, and is determined by the Secretary to have had a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement, he may require one (1) additional advertisement to be published with a ten (10) day public comment period.

³ <http://www.dep.wv.gov/pio/Documents/Settlements%20and%20Orders/2017-08-21.%20DMR%20Stringency%20Analysis.pdf>

As the above-cited provision reveals, the agency has the authority to require the additional advertisement that appears to be the same goal as 38 CSR 2.3.g. The language of 38 CSR 2.3.e restricts the applicability of the provision to “a limited number of minor changes that do not significantly affect the health, safety or welfare of the public and which do not significantly affect the method of operation, the reclamation plan, and/or the original advertisement...” for changes that are substantive WV DEP has always required re-advertisement.

Valley Fill Construction Provisions

As WV DEP correctly noted in its stringency analysis, these provisions were added to the state mining regulatory program 2003 after consultation with the regulated community. However, subsequent changes made to the contemporaneous reclamation sections of the mining and reclamation rules by the agency were strongly opposed by WVCA and its members, specifically the provisions of 38 CSR 2.14.15.c.2, as they changed the intent of WV DEP referenced 2003 revisions related to valley fill construction.

As WVCA originally commented in 2007, the provisions of 38 CSR 2.14.15.c.2 needlessly penalized the consideration of “bottom-up” valley fills under the state’s already more stringent and exceedingly complex contemporaneous reclamation rules:

WVCA is extremely concerned about this proposed revision and believes that it will unnecessarily restrict operating flexibility and thereby discourage the construction of “bottom-up” valley fills. WVCA strongly suggests the agency delete this proposed revision. This entire section of rules already exceeds the corresponding federal requirements of OSM, but members of WVCA negotiated these rules in good faith to remedy an agency-perceived problem with valley fill construction.⁴

⁴ See generally comment letter dated July 10, 2007 from the West Virginia Coal Association to the West Virginia Department of Environmental Protection regarding proposed changes to the West Virginia Surface Coal Mining & Reclamation Rules.

Absent the existing language, it is doubtful that WVCA and its members would have agreed to the other provisions of the larger set of contemporaneous reclamation rules. The language “as soon as the area is available to do so” was agreed to by both the agency and the industry when these rules were first proposed. **This language was included specifically for the purposes of recognizing that “bottom-up” fills are constructed using different methods, and that not all of these construction approaches allows for immediate access to the toe of the fill.** By removing this language and inserting the prescriptive requirements as proposed, the agency will discourage the very method of fill construction that it favors by removing the construction flexibility that was first acknowledged when the rules were originally negotiated.

Additionally, the existing rules have already been scrutinized and approved by the West Virginia Legislature and OSM as both sufficient to satisfy the state’s concerns with respect to contemporaneous reclamation and in compliance with the federal mining statutes and regulations. WVCA is concerned as to why the agency believes this change is necessary in light of the fact the agency previously negotiated and agreed to the inclusion of the existing language as the proper way to acknowledge the different methods of “bottom-up” fill construction.⁵

Alternative Bonding System / Water Treatment at Bond Forfeiture Sites

In response to statutory revisions made by the Legislature in Senate Bill 687 (2017 Regular Session), WV DEP has proposed changes to its rules that, contrary to federal regulations and policy interpretations, obligated the state to undertake water treatment at bond forfeiture sites as though it were assuming the duties and obligations of the original mine operator under the state and federal versions of the Clean Water Act (CWA). WVCA fully supports these

⁵ See generally comment letter dated July 10, 2007 from the West Virginia Coal Association to the West Virginia Department of Environmental Protection regarding proposed changes to the West Virginia Surface Coal Mining & Reclamation Rules.

revisions, which will be considered by the Legislative Rulemaking Review Committee later this year and the full Legislature in the 2018 Regular Session.

As WV DEP noted in its stringency analysis, not all the rule provisions related to water treatment at forfeiture sites have been proposed for revision. WVCA believes this is contrary to the statutory revisions undertaken by the Legislature during the 2017 Regular Session (that is, the state rules no longer comply with the statute) and will not conform the state rules to the corresponding federal requirements. *A copy of WVCA's comments on the 2017 proposed changes to 38 CSR 2 is provided as attachment "A", and we ask that WV DEP consider them in the context of the current comment period on overall program stringency.*

Contemporaneous Reclamation

In Senate Bill 357 (2015 Regular Session), the Legislature directed WV DEP to revise its rules related to contemporaneous reclamation. In 2016, the Legislature formally enacted the proposed rules as part of the Legislative Rulemaking Review process and the revisions are pending approval at OSM. WVCA supported those revisions and continues to believe they will further stabilize the mining and reclamation program of West Virginia. However, since the revisions were enacted by the Legislature, other sections of the contemporaneous reclamation rule have continued to cause substantial confusion among the industry. Differing interpretations of the existing state rule appear to exist between different regions of DMR and even between different inspectors in the same region. The confounding provisions have no corresponding federal standards.⁶ WVCA believes the legislature should consider other

⁶ See generally 38 CSR 2.14.15 and 30 CFR 816.100.

revisions to these standards to remove the confusion related to their appropriate interpretation and implementation.

Underground Mine Subsidence

The federal Surface Mining Control & Reclamation Act (SMCRA) and the corresponding regulations maintained by OSM require mine operators to take measures to minimize potential “material damage” caused by planned underground mine subsidence to non-commercial buildings and occupied residential dwellings or structures unless the property owner has waived that obligation. By contrast, West Virginia’s mining rules governing prevention of material damage caused by planned subsidence is not limited to non-commercial buildings or occupied residential dwellings but applies to all structures, including residential ones.

Additionally, WV DEP’s mining rules arguably do not recognize the ability of a commercial property owner to *consent* to subsidence or to *wave* its right to seek compensation for damage due to subsidence, as provided in the regulations of OSM.

Ownership & Control

WV DEP’s mining rule governing the ownership and control program are inarguably more stringent than the corresponding federal regulations. Apparently individual sections of the corresponding federal regulations that were invalidated through litigation never were removed from the state’s program. WV DEP should review these provisions and revise its stringency report as appropriate.

Water Quality Standards (47 CSR 2)

Use Designations: “Future Uses”

In addition to the individual water quality standards (chloride, etc.) that are more stringent than the corresponding federal standards, WV DEP maintains certain interpretations of “use designation” that clearly exceed, and in some cases, directly conflict with the federal requirements maintained by the Environmental Protection Agency (EPA) under the federal CWA.

For example, WV DEP interprets its statutory language regarding “protection of future uses” to include an obligation for any use, no matter how unlikely or speculative it may be. This interpretation is complicated by other policies, specifically the designation of all state waters as Category A public drinking water supplies (see subsequent comments) and results in the imposition of restrictive effluent limitations for certain parameters on existing operations. The corresponding federal regulations impose no such requirement.

Use Designations: Category A / Public Drinking Water Supplies and Trout Streams

While maintaining state-specific use classifications is consistent with the corresponding requirements of EPA and the federal CWA, doing so outside of the public comment and rulemaking process and without specific legislative authorization is certainly contrary to the process envisioned in the federal CWA.

Contrary to specific legislative instruction, WV DEP has for years imposed effluent limitations on individual permits as though every single stream or waterbody in the state currently serves as a public drinking water source. This illegitimate application of the Category A use designation has caused difficult and costly compliance issues at coal mining operations

for specific parameters for which the public drinking water standards are remarkably lower than the default water quality standards and use designations (specifically manganese and beryllium). In these specific cases, revisions to the individual water quality standards for those parameters were undertaken (which require the formal approval of EPA before they can be implemented) that, absent the misplaced interpretation of Category A, would not be necessary.

WVCA has commented extensively on this issue and a copy of our previous comments is provided as attachment “B”. WVCA asks WV DEP to consider these previous comments as part of the current public comment period.

With respect to trout streams, despite the existence of a formally-codified and legislatively-approved list of trout waters, WV DEP routinely assigns and revises effluent limitations on existing permits based on the supposed presence of trout populations, usually relying on a secret list of such streams maintained by the West Virginia Division of Natural Resources (WV DNR). As noted in our previous comments on this issue, this practice results in a regulatory “twilight zone” where one agency (WV DEP) with permitting and regulatory responsibility relies on another that has no regulatory obligation or accountability (WV DNR) in assigning the appropriate discharge effluent limits. WVCA has commented extensively on the inappropriate assignment of trout stream effluent limitations and a copy of our previous comments is provided as attachment “B”. WVCA asks the agency to consider these comments as part of the current public comment period.

De-Facto Water Quality Standards / Stream Impairment Use Designations

For several years WV DEP relied solely on a measurement of benthic invertebrates to determine compliance with the state’s narrative water quality standards. Known as the West

Virginia Stream Condition Index (WV SCI), this “tool” has been transformed from an assessment methodology to a water quality standard, despite having never been subjected to the formal rulemaking process that includes public notice and comment and subsequent approval by the West Virginia Legislature. Maintaining and implementing such a measurement that has transformed into a water quality standard is clearly contrary to the corresponding federal regulations and requirements of the CWA (see detailed previous comments on this issue provided as attachment “B”).

State Certification of Activities Requiring Federal Licenses and Permits 47 CSR 5A

In addition to the required mitigation ratios already identified by WV DEP as being more stringent than the corresponding federal requirements maintained by EPA and the U.S. Army Corps of Engineers, the permit certification language authorized by this rule contains language that appears to be unique to West Virginia’s regulatory program- a requirement that any discharge from the authorized activity maintain compliance with all state water quality standards. A similar provision existed in the state’s coal mining NPDES program (47 CSR 30), leading to costly litigation and the interpretation of state water quality standards by the federal judiciary. If such a provision is needed at all, it should reference compliance with the appropriate effluent limits contained in the NPDES permit issued by the agency for that activity. WVCA commented extensively on this provision as it was contained in the coal mining NPDES rule and a copy of these comments is provided as attachment “C”. WVCA would ask WV DEP to consider these previous comments on the coal mining NPDES rule with respect to the requirements of 47 CSR 5A and the current public comment period.

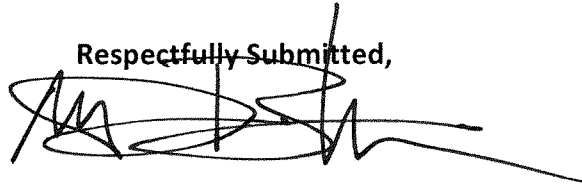
Underground Injection Control (UIC) 47 CSR 13

Historically WV DEP has implemented the UIC program to the mining industry with a default presumption that all underground voids receiving injection from a coal industry source were simultaneously serving as underground sources of drinking water. WVCA believes that such a default presumption is more stringent than the corresponding federal regulations and results in the imposition of discharge limits that are much lower for certain parameters.

CONCLUSION

WVCA appreciates the opportunity to provide these comments to WV DEP and looks forward to continued dialogue with the agency and the Legislature as Senate Bill 619's implementation continues.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jason D. Bostic', written over the text 'Respectfully Submitted,'.

**Jason D. Bostic
Vice-President**