West Virginia C
PO Box 3923, Charleston, WV 25339 • (304)

July 24, 2014

Mr. Charles S. Sturey
West Virginia Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street SE
Charleston, WV 25304
Via electronic mail: Charles.S.Sturey@wv.gov

Re: Comments on Proposed Revisions to 47 CSR 30, the Coal Mining NPDES Rule

Dear Mr. Sturey:

Pursuant to the notice published in the State Register by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revision to the coal mining NPDES rule, 47 CSR 30.

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 producing members account for 98 percent of the 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. These include

coal transportation companies, engineering firms, mining equipment manufacturers, coal consumers and land holding companies. 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.

As we explain below, the current rulemaking initiative is intended to implement the provisions of Senate Bill (SB) 615 (passed in 2012) and to clarify that the "permit shield" provision for coal permits (found at 47 CSR 30.3.4.a) works just as effectively as those in non-coal permits and federal permits. As such, the permit shield in the coal NPDES rules defends a permittee from a challenge where effluent limits are being met, even where such a suit alleges a violation of water quality standards. The proposed revisions will also address a provision that was improperly added to the coal mining NPDES rule in violation of the state's rulemaking processes.

As discussed by the Legislature during its consideration of SB 615, the objective of the statutory revision is to address a provision contained in the coal mining NPDES rule that has no parallel in federal regulations or West Virginia's non-coal NPDES rule:

> *The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47CSR2...*[1]

[1] 47 CSR 30.5.1.f.

WVDEP historically understood and applied the rule simply as a statement that effluent limits should be calculated for parameters of concern during the permit process to ensure that discharges did not violate applicable water quality standards—not to make compliance with water quality standards a universal permit condition. Nonetheless, anti-mining activists have filed citizen suits against mine operators claiming that under the rule language cited above, coal mining NDPES permit holders, unlike their non-coal counterparts, were required to meet all water quality standards regardless of the actual effluent limits contained in their NPDES permits.[2] The rule language resulted in a bizarre regulatory situation where coal mining operations were subject to claims they were liable for compliance with all state water quality standards while a non-mining discharge, even though exactly the same, was held only to compliance with the effluent limits contained in its permit.

Recognizing this anomaly and its absurd regulatory result, the Legislature passed SB 615 to address this peculiar language found in 47 CSR 30 by amending the West Virginia Water Pollution Control Act (WV WPCA). The legislature intended to conform the coal NPDES program to that which exists for the industrial community and require WVDEP to impose express effluent limits in NPDES permits before enforcement action could be taken against a permit holder for violating effluent limitations.

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[2] *See generally* 47 CSR10.3.4.a (setting out "permit shield" for non-coal NPDES permits) with 47CSR 10.5 (containing no "shield piercing" provision analogous to 47CSR 30.5.1f).

WV DEP followed SB 615 with a rule, but unfortunately a federal court ruled that neither SB 615 nor the 2012 rule were sufficiently clear to affect the Legislature's intent to conform the coal NPDES program to that which exists for the non-coal world and under the federal Clean Water Act (CWA) as it exists in most other states. WVCA believes the currently proposed revisions will finally address the unfair and irrational disparity between the coal mining NPDES rule, West Virginia's other NPDES regulations, the regulations of surrounding states and the federal CWA.

While the lack of a corresponding federal requirement and the disparity between the regulatory programs for coal and non-coal operations in the state is enough to justify the proposed change, a revision is warranted since the validity of the current rule language is suspect. An examination of the history of 47 CSR 30.5.1.f reveals serious lapses in the rulemaking process to the point where it is clear the provision was not properly enacted.

In 1984, the predecessor agency to WV DEP separated its NPDES permitting program into two sets of rules- one for coal mining operations and one for non-coal facilities. This administrative separation was undertaken to synchronize the issuance of permits for coal facilities since mining operations are also required to obtain permits under the West Virginia Surface Coal Mining & Reclamation Act (WV SCMRA).

Prior to this separation, the state's NPDES rules applied to both coal and non-coal facilities. These "inclusive", pre-1984 NPDES rules contained the equivalent of the modern permit shield provision currently found in 47 CSR 30.3.4.a (coal) and 47 CSR

10.3.4.a. (non-coal). These rules DID NOT contain anything even resembling the problematic language now found at 47 CSR 30.5.1.f.[3]

After the separation of the two permitting programs in 1984, the coal mining NPDES rule continued to include the permit shield provision currently found at 47 CSR 30.3.4.a, but for the first time now included language similar to 47 CSR 30.5.1.f. requiring discharges to meet all water quality standards.

When the West Virginia Department of Natural Resources (WV DNR), WV DEP's predecessor agency filed its proposed coal mining NPDES rule with the West Virginia Secretary of State and established a public comment period to begin the rulemaking process, the agency stated the rules merely facilitated the consolidation of coal mine permitting functions (WV SCMRA and NPDES) within the agency. The documents did not disclose any substantive changes to the rules and provided no public notice to the fact the rule would alter the program for coal mining operations by effectively converting all water quality standards into permit effluent limitations.[4]

The provision requiring compliance with all water quality standards did not appear in the rule until it was filed by WV DNR with the Secretary of State as a "final agency rule" for consideration by the Legislature's Rulemaking Review Committee (LRRC). The LRRC approved the rule package on December 4, 1984 and it was

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[3] See pages 5-7 of attachment "A", the codified version of the West Virginia Department of Natural Resources' NPDES rules that were effective from 1982 until April 24, 1984.

[4] *See generally* attachment "B", letter dated May 8, 1984 from the West Virginia Department of Natural Resources to the West Virginia Secretary of State regarding the proposed coal mining NPDES rules, attachment " C", a press release dated May 29, 1984 from the West Virginia Department of Natural Resources announcing a public comment period on the proposed coal mining NPDES rule and attachment "D", publication of the proposed coal mining NPDES rule in the State Register.

subsequently approved by the full Legislature. There is no explanation in the administrative records of the agency, the Secretary of State or the LRRC as to how or why the additional language now found at 47 CSR 30. .5.1.f. was added to the rule between its initial filing for public comment and its submission as a final agency rule.[5]

Since the agency provided no public notice or disclosure to the Legislature regarding an obviously substantive change to the regulatory process for mining operations, it violated the rulemaking provisions of the West Virginia Administrative Procedures Act requiring amendments to proposed agency rules be filed in the State Register "with a description of any changes and a statement listing the reasons for the amendment."[6]

Further evidence of the rulemaking infirmities of 47 CSR 30.5.1.f. is provided by the federal Environmental Protection Agency's (EPA) review and approval of the coal mining NDPES rule. After the state completed its rulemaking in 1984, EPA published a notice in the Federal Register announcing the federal agency's tentative decision to approve the revised coal mining NPDES rules. In that notice EPA stated that "...no substantive rights or obligations of any person will be altered by this program modification."[7]

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[5] *See generally* attachment "E", letter dated November 8, 1984 from the West Virginia Department of Natural Resources to the West Virginia Secretary of State regarding the filing of a final agency rule related to the coal mining NPDES program and attachment "F", publication of the Legislative Rulemaking Review Committee's recommendations on the coal mining NPDES rule and pages 7-27 of attachment "G", a preamble to the proposed rules filed by the Department of Natural Resources with the Secretary of State.

[6] W.Va. Code §29A-3-6.a

[7] 50 Fed. Reg. (January 23, 1985) 2996-299.

When EPA provided notice of its final decision to approve the program revisions, it again noted that separation of the coal and non-coal NPDES rules would occur "without any substantive change in [the] state regulating authorities or responsibilities."[8] In its consideration of the rule, EPA obviously suffered the same disadvantage as the public, the coal mining industry, the Secretary of State and the Legislature- incomplete information supplied by the agency in contravention of the state's long-established rulemaking procedures. The proposed revisions to the rule would remedy this grave mistake and finally return the coal mining NDPES rule to its intended purpose and effect as explained in 1984.

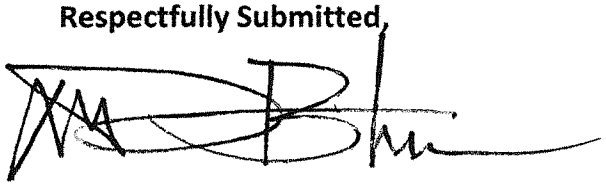
Finally, WVCA feels that swift action on this rule is necessary for West Virginia to maintain the control of its NPDES permitting program as intended by the Legislature and the state-federal relationship established under the CWA.

Recent federal court decisions have relied on the differences between the coal and non-coal programs in an attempt to "hijack" the interpretation and implementation of the state's water quality standards with respect to coal mining operations. Individual permit holders have been confronted with potentially costly and perhaps unworkable compliance situations based on this single provision of the coal mining NPDES rule that was illegally enacted and has no parallel in the federal program or non-coal state NPDES program.

[8] 50 Fed. Reg. (July 11, 1985) 28202.

WVCA appreciates the opportunity to provide these comments regarding contemplated changes to the state's coal mining NPDES rules.

Respectfully Submitted,



Jason D. Bostic
Vice-President

Obsolete
valid April 8, 1982
to April 24, 1984

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

STATE WATER RESOURCES BOARD

Chapter 20-5A

1981

(Series ~~III~~) 2

Requirements Governing the State National Pollutant Discharge Elimination System (NPDES) Program

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 4/8/82

TABLE OF CONTENTS

not supersede any permit previously issued under the State act. All provisions of both permits shall be in force; except, in the event of a conflict, the more stringent provisions shall apply. Such permits shall be deemed consolidated and considered as a single permit for the purposes of reporting, administration and enforcement.

(c) Those unexpired permits previously issued under the State Act shall be revoked by the Chief whenever a new NPDES permit is issued for the same facility under this chapter; the issuance of the new permit shall constitute cause for revocation under the State Act. Any unexpired NPDES permit issued by the U. S. EPA shall not be enforceable by the Chief upon the issuance of a new NPDES permit under this chapter.

3.04 Effect of a Permit

(a) Except for any toxic effluent standards and prohibitions imposed under Section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement with Sections 301, 302, 306, 307, 318, 403 and 405 of CWA. In addition, one who is in compliance with the terms and conditions of a permit shall not be subject to criminal prosecution under Section 19 of the State Act for pollution recognized and authorized by such permit. However, a permit may be revoked, suspended, revoked and reissued or modified during its term for cause as set forth in Section 9.

(b) The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

3.05 Duration and Transferability of Permits

(a) Permits shall be effective for a fixed term not to exceed five (5) years.

(b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the Chief prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) Certification. Any person signing a document under paragraphs (a) or (b) of this section shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

4.07 Filing Fee - For all NPDES permits, the filing fees required under Chapter 3, Section 7 shall apply, as though fully set forth herein.

Section 5. Conditions Applicable to All Permits

The following conditions apply to all permits. All conditions shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit.

(a) Duty to comply:

(1) The permittee must comply with all conditions of this permit. Permit noncompliance constitutes a violation of the CWA and State Act and is grounds for enforcement action; for permit modification, revocation

and reissuance, suspension or revocation; or for denial of a permit renewal application.

(2) The permittee shall comply with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

(b) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for a new permit at least 180 days prior to expiration of the permit.

(c) Duty to halt or reduce activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit. Upon reduction, loss or failure of the treatment facility the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided.

(d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate

laboratory and process controls, including appropriate quality assurance procedures. Unless otherwise required by Federal or State law, this provision requires the operation of back-up auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit. For domestic waste treatment facilities, waste treatment operators as classified by State Health Department Regulations authorized under Chapter 16, Article 1, Public Health Laws, Code of West Virginia, will be required except that in circumstances where the domestic waste treatment facility is receiving any type of industrial waste, the Chief may require a more highly skilled operator.

(f) Permit actions. This permit may be modified, revoked and re-issued, suspended, or revoked for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or revocation, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive priviledge.

(h) Duty to provide information. The permittee shall furnish to the Chief, within a specified time, any information which the Chief may request to determine whether cause exists for modifying, revoking and reissuing, suspending, or revoking this permit, or to determine compliance with this permit. The permittee shall also furnish to the Chief, upon request, copies of records required to be kept by this permit.

(i) Inspection and entry. The permittee shall allow the Chief, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
Governor

May 8, 1984

WILLIS H. HERTIG, JR.
Director

RONALD R. POTESTA
Deputy Director

The Honorable A. James Manchin
Secretary of State
State Capitol, Suite 157-K
Charleston, West Virginia 25305

Dear Mr. Manchin:

Re: Filing of Proposed Regulations - Series VII - West Virginia Surface Mining Regulations; Section 10 - Article 5A/NPDES Regulations

The Department is filing with your office proposed rules and regulations relating to the consolidation of the State's surface mining program and water pollution control program as it relates to coal mines, preparation plants, and all refuse and waste therefrom under Article 5A.

We are proposing these rules for public comment until the close of business on June 8, 1983 or until the end of the public hearing scheduled for that day. We have enclosed a separate Notice of Public Hearing.

Please file these proposed regulations at your earliest convenience.

Sincerely,

W. H. Hertig Jr.

Willis H. Hertig, Jr.
Chairman, Reclamation Commission

WHH/rsb

Attachments

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE May 8, 1984
Administrative Law Division

STATE OF WEST VIRGINIA
OFFICE OF THE SECRETARY OF STATE
CHARLESTON 25305

A. JAMES MANCHIN
SECRETARY OF STATE

STATE REGISTER FILING

I, Willis H. Hertig, Jr., Chairman (Title or Position),
Reclamation Commission (Department or Division), hereby submit to record in the State Register on 8 1/2 x 11" paper two (2) copies of

(X) proposed rules and regulations concerning topics of material not covered by existing rules and regulations;

( ) proposed rules and regulations superseding rules and regulations already on file;

( ) notice of hearing;

( ) findings and determinations;

( ) rules and regulations; or

( ) other - specify (

This filing pertains to

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 5-8-84
Administrative Law Division

Chapter 20
Article 6
Series VII
Section 10
Page No.

(X) proposed rules and regulations are required to go to Legislative Rule Making Committee;

( ) proposed rules and regulations are excluded from Legislative Rule Making Committee;

May 8, 1984
Date Submitted

W. H. Hertig Jr.
Signature of Person Authorizing this Filing

SECTION 10

Article 5A/NPDES Regulations

INDEX

(a) Information required from all applicants
(b) Information required from Existing Sources or New Dischargers
(c) Information Required for New Sources.
(d) Plan for Abandopnment and Application to Abandon a Mine.
(e) Discharges into non-complying waters
(f) Variance Requests
(g) Expedited Variance Procedures and time extensions

10D.06 Record Keeping by Applicant

10D.07 Signatories to Permit Applications and Reports

10D.08 Filing Fee

10E CONDITIONS APPLICABLE TO ALL PERMITS

10E.01 Duty to comply

10E.02 Duty to reapply.

10E.03 Duty to halt or reduce activity.

10E.04 Duty to mitigate.

10E.05 Proper operation and maintenance.

10E.06 Permit actions.

10E.07 Transfer.

10E.08 Property rights.

10E.09 Duty to provide information.

10E.10 Inspection and entry.

10E.11 Monitoring and records

10E.12 Signatory requirement.

10E.13 Reporting requirements

10E.14 Bypass

10E.15 Upset

10E.16 Reopener Clause.

10C.04 Effect of a Permit

(a) Except for any toxic effluent standards and prohibitions imposed under Section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement with Sections 301, 302, 306, 307, 318, 403, and 405 of the CWA and Article 5A. However, a permit may be modified, reissued or revoked during its term for cause as set forth in Section 10H.

(b) The issuance of a WV/NPDES permit does not convey any property rights of any sort, or any exclusive privilege.

10C.05 Duration and Transferability of Permits

(a) Duration - WV/NPDES permits shall be effective for a fixed term not to exceed five (5) years. The Director may vary the term of a WV/NPDES permit to ensure that expiration dates of the WV/NPDES permit and the Article 6 Surface Mining permit coincide, but in no case may the WV/NPDES permit be shortened to less than three and one-half years for the sole purpose of reconciling expiration dates of Article 6 and WV/NPDES permits unless the permittee agrees.

(b) Extensions - A WV/NPDES permit may be extended by the Director for a period not to exceed eighteen (18) months beyond its expiration date if the applicant has made a timely and complete application for permit reissuance. Timeliness of an application for permit reissuance is governed by Section 10D.04 (120 days prior to permit expiration). A complete application for the purpose of this extension shall mean that the required number of copies of the application were submitted, including the filing fee of $50.00, the application questions are faithfully answered and the application

credit of the operating permit Fees Fund in accordance with 20-6-9(f) of the State Act.

10E CONDITIONS APPLICABLE TO ALL PERMITS

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit.

10E.01 Duty to comply

(a) The permittee must comply with all conditions of this permit. Permit noncompliance constitutes a violation of the CWA and Article 5A and is grounds for enforcement action; for permit modification, suspension or revocation; or for denial of a permit reissuance application.

(b) The permittee shall comply with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

(c) The Clean water Act and Article 5A provide that any person who violates a permit condition implementing sections 301, 302, 306, 308, 318 or 405 of the Clean Water Act, or any provision of a WV/NPDES permit or rule or regulation promulgated under Article 5A, is subject to a civil penalty not to exceed $10,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Act or any provision of Article 5A or its

WV/NPDES permit, is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.

10E.02 Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this WV/NPDES permit, the permittee must apply for a new permit at least 120 days prior to expiration of the permit.

10E.03 Duty to halt or reduce activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit. Upon reduction, loss or failure of the treatment facility the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power to the treatment facility fails or is reduced or lost.

10E.04 Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

10E.05 Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance,

Attachment "C"

NEWS

STATE OF WEST VIRGINIA • DEPARTMENT OF NATURAL RESOURCES • CHARLESTON 25305

Willis H. Hertig, Jr., Director

FOR RELEASE: May 25, 1984 *Phone: 304/348-3381*

TRANSFER AND CONSOLIDATION OF WATER POLLUTION CONTROL PROGRAM

NOTICE OF PUBLIC HEARING

TRANSFER AND CONSOLIDATION OF WATER POLLUTION CONTROL PROGRAM

The West Virginia Reclamation Commission filed proposed rules and regulations with the Secretary of State in the State Register May 7, 1984, concerning the transfer and consolidation of the water pollution control program (Article 5A/NPDES) into the reclamation program.

Comments from the public will be accepted until the close of business Friday, June 8, 1984, or until the end of a public hearing scheduled to begin at 7:00 p.m. on that date.

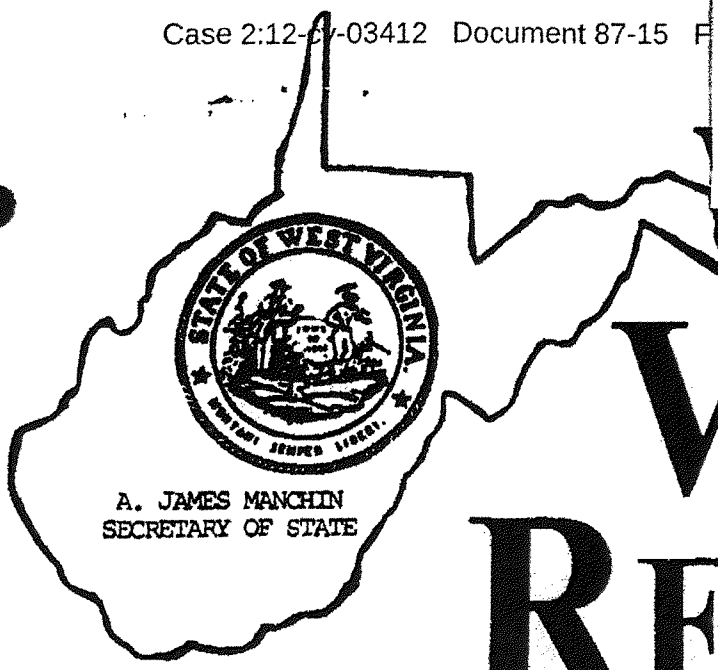
Copies of the proposed rulemaking filing can be obtained from the Director's Office, Department of Natural Resources, by contacting Ron Shipley, 304/348-2754.

# # # #

NOTICE OF PUBLIC HEARING

The West Virginia Reclamation Board of Review will hold a site viewing and hearing on the Appeal of Elizabeth Meredith and Eleanor McGinnis v. Willis Hertig, Jr., concerning Omega Mining Company, Inc., SMA No. 1265 on Tuesday, June 12, 1984. Participants in the site viewing will meet at the Ramada Inn in Morgantown, WV at 8:30 a.m. and depart from there for the site viewing. The hearing will immediately follow the site viewing at the Northern Division Office of the West Virginia Department of Mines, 300 Scott Avenue, Morgantown, WV.

# # # #



WEST VIRGINIA REGISTER

Rules of Governmental Agencies

Volume I

Issue 49

A Weekly Publication

May 11, 1984

Pages 766-785

Robert Jackson
Secretary of State's Office
Administrative Law Division

State Capitol
Charleston, WV
25305

304/345-4000

PROPOSED RULES FILED IN THE SECRETARY OF STATE'S OFFICE

a) State Tax Department -- Amendments on corporation net income tax. Chapter 11-24-16, 17, 17(a) & 18. ($9.00)

b) Department of Natural Resources -- West Virginia Surface Mining regulations. Section 10 - Article 5A/NPDES. Chapter 20-6-43b. ($11.90)

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EMERGENCY RULES FILED IN THE SECRETARY OF STATE'S OFFICE
(effective on filing)

a) State Tax Department -- Listing of property for purposes of the first statewide reappraisal. Chapter 11-1A-5. ($3.10)

b) Department of Natural Resources -- Governing hunting with a pistol or revolver. Chapter 20-1-7. ($1.00)

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LEGISLATIVE RULE MAKING COMMITTEE

a) No report this week.

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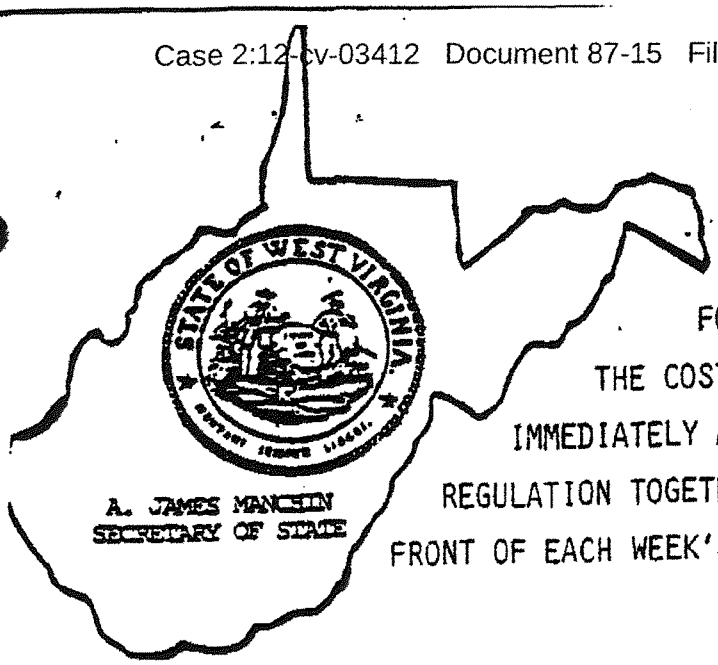
RULES THAT ARE EXCLUDED FROM LEGISLATIVE RULE MAKING COMMITTEE

a) None this week.



THOSE PERSONS WHO WISH TO OBTAIN A COPY OF AN ENTIRE REGULATION MAY DO SO FOR THE COST OF COPYING AND DISTRIBUTION. THE COST OF OBTAINING THE COMPLETE REGULATION IS IMMEDIATELY AFTER THE TITLE. JUST SEND THE TITLE OF REGULATION TOGETHER WITH THE COST TO THE ADDRESS ON THE FRONT OF EACH WEEK'S REGISTER.

Rules of Governmental Agencies

LEGISLATIVE RULES PASSED BY THE LEGISLATURE
March 10, 1984 -- Senate Bill #425

a) Department of Motor Vehicles -- Compulsory Motor Vehicle Liability Insurance regulations. Chapter 17A-2-9. ($1.60)

b) West Virginia Board of Medicine -- Licensing, Disciplinary and Complaint Procedures; Podiatry; Physician Assistants. Chapter 30-3-7(a)(1). ($8.40)

CHRONOLOGICAL INDEX BY AGENCY AND AUTHORITY

NOTICES OF PUBLIC MEETING
(enclosed)

1) Board of Barbers and Beauticians.
2) Air Pollution Control Commission.
3) Municipal Bond Commission.
4) State Tax Department.
5) Department of Natural Resources.
6) West Virginia Board of Examiners of Radiologic Technology.
7) Nursing Home Advisory Council.
8) West Virginia Public Legal Services Council.
9) West Virginia Department of Human Services.
10) Library Commission.
11) United Cerebral Palsy of West Virginia.
12) Department of Health -- 7 Meetings.
13) West Virginia Appraisal Control & Review Commission.

STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
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RONALD R. POTESTA
Deputy Director

May 8, 1984

The Honorable A. James Manchin
Secretary of State
State Capitol, Suite 157-K
Charleston, West Virginia 25305

Dear Mr. Manchin:

Re: Filing of Proposed Regulations - Series VII - West Virginia Surface Mining Regulations; Section 10 - Article 5A/NPDES Regulations

The Department is filing with your office proposed rules and regulations relating to the consolidation of the State's surface mining program and water pollution control program as it relates to coal mines, preparation plants, and all refuse and waste therefrom under Article 5A.

We are proposing these rules for public comment until the close of business on June 8, 1983 or until the end of the public hearing scheduled for that day. We have enclosed a separate Notice of Public Hearing.

Please file these proposed regulations at your earliest convenience.

Sincerely,

W. H. Hertig Jr.

Willis H. Hertig, Jr.
Chairman, Reclamation Commission

WHH/rsb

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FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE May 8, 1984
Administrative Law Division

STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
Governor

WILLIS H. HERTIG, JR.
Director

RONALD R. POTESTA
Deputy Director

November 8, 1984

The Honorable A. James Manchin
Secretary of State
Capitol Complex
Charleston, West Virginia 25305

Dear Secretary Manchin:

Enclosed please find two copies of the West Virginia Surface Mining Reclamation Regulations as approved by the Department of Natural Resources after a public hearing was held on September 26, 1984.

As you will note from the attached statement made by Dennis Treacy, Assistant Attorney General, who was appointed by the Director of the Department of Natural Resources to administer the public hearing, no one appeared to comment on the regulations nor were there any written comments received by the deadline.

Due to an oversight by the Department, one change had to be made [see errata sheet under 4C.05(f)] to correspond with changes in other MSHA approvals as directed by OSM conditions on our program.

If you have questions or need additional information, please do not hesitate to let me know.

Sincerely,

James E. Pitsenbarger

James E. Pitsenbarger, Chief
Division of Reclamation

JEP/baa

Enclosures

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WV/NPDES Regulations - Section 10 Index

10B.41 Schedule of compliance"
10B.42 "Secretary"
10B.43 "Site"
10B.44 "State"
10B.45 "Total dissolved solids"
10B.46 "Toxic pollutant"
10B.47 "Variance"
10B.48 "WV/NPDES Application"
10B.49 "WV/NPDES Permit" or "Permit"
10B.50 "Wetlands"

10C. PERMITS

10C.01 Permit Requirement; Exemptions; Prohibitions.
10C.02 Prohibition Against Issuing a WV/NPDES Permit
10C.03 Denial of Permits
10C.04 Effect of a Permit
10C.05 Duration and Transferability of Permits
10C.06 NPDES Permits Issued by EPA and the Chief of the Division of Water Resources
10C.07 Transition and Consolidation Program for WV/NPDES and Article 6 Permits.

10D. APPLICATION FOR PERMITS

10D.01 Duty to Apply
10D.02 Responsible Party lies
10D.03 Completeness
10D.04 Time to Apply
10D.05 Information Required from Applicants
10D.06 Record Keeping by Applicant
10D.07 Signatories to Permit Applications and Reports
10D.08 Filing Fee

10E. CONDITIONS APPLICABLE TO ALL PERMITS

10E.01 Duty to comply: Penalties
10E.02 Duty to reapply.
10E.03 Duty to halt or reduce activity.
10E.04 Duty to mitigate.
10E.05 Proper operation and maintenance.
10E.06 Permit actions.
10E.07 Transfer.
10E.08 Property rights.
10E.09 Duty to provide information.
10E.10 Inspection and entry.
10E.11 Monitoring and records
10E.12 Signatory requirement.
10E.13 Reporting requirements
10E.14 Bypass
10E.15 Upset
10E.16 Reopener Clause.
10E.17 Removed Substances
10E.18 New Sources
10E.19 Definitions

10C.03 Denial of Permits

WV/NPDES permits may be denied for noncompliance with Article 5A and this section including the reasons specified in 10H.04 or when a surface mining permit under Article 6 has been denied. In the case of an application for reissuance an outstanding violation of an existing permit is grounds for denial. Any denial of the WV/NPDES permit is appealable to the Water Resources Board pursuant to W.Va. Code §20-6-43(d) and in accordance with the procedures and authority of W.Va. Code §20-5A-15.

10C.04 Effect of a Permit

(a) Except for any toxic effluent standards and prohibitions imposed under Section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement with Sections 301, 302, 306, 307, 318, 403, and 405 of the CWA and Article 5A. However, a permit may be modified, reissued or revoked during its term for cause as set forth in Section 10H.

(b) The issuance of a WV/NPDES permit does not convey any property rights of any sort, or any exclusive privilege.

10C.05 Duration and Transferability of Permits

(a) Duration - WV/NPDES permits shall be effective for a fixed term not to exceed five (5) years. The Director may shorten the term of a WV/NPDES permit to ensure that expiration dates of the WV/NPDES permit and the Article 6 Surface Mining permit coincide, but a WV/NPDES permit may not be shortened to less than three and one-half years for the sole purpose of reconciling expiration dates of Article 6 and WV/NPDES permits unless the permittee agrees.

accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

10D.08 Filing Fee - A filing fee of $50 shall be required with all WV/NPDES Applications and shall be deposited with the State Treasurer to the credit of the operating permit Fees Fund in accordance with 20-6-9(f) of the State Act.

10E. CONDITIONS APPLICABLE TO ALL PERMITS

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit.

10E.01 Duty to comply: Penalties

(a) The permittee must comply with all conditions of this permit. Permit noncompliance constitutes a violation of the CWA, Article 5A and Article 6 and is grounds for enforcement action; for WV/NPDES permit modification, suspension or revocation; or for denial of a WV/NPDES permit reissuance application.

(b) The permittee shall comply with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

(c) The Clean Water Act and Article 5A provide that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318 or 405 of the Clean Water Act, or any provision of a WV/NPDES permit or rule or regulation promulgated under Article 5A, is subject to a civil penalty not to exceed $10,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Act or any provision of Article 5A or its WV/NPDES permit, is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.

(d) Any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or be both.

(e) The CWA and Article 5A provide that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six (6) months per violation, or by both.

(f) The effluent or effluents covered by this permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the State Water Resources Board. Further, any activities covered under this permit shall not lead

to pollution of the groundwater of the state as a result of the disposal or discharge of such wastes covered herein.

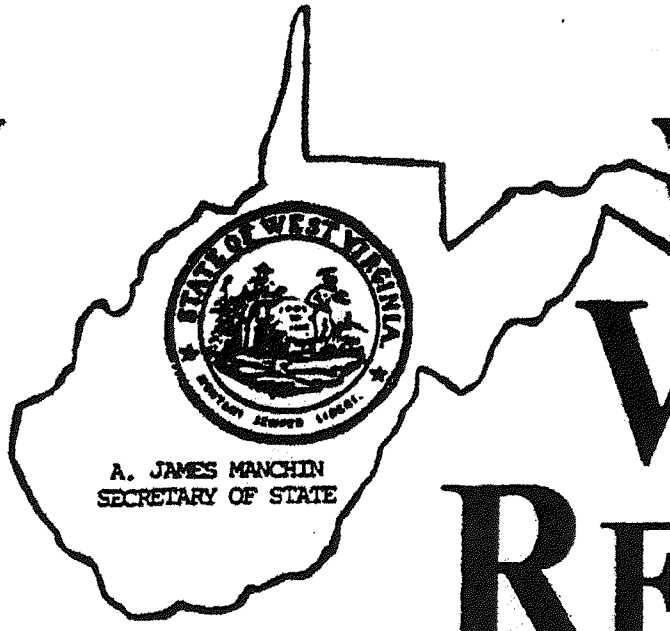
(g) Nothing in this subsection shall be construed to limit or prohibit any other authority the Director may have under Article 5A or Article 6, or to relieve the permittee from any responsibilities, liabilities or penalties for not complying with Series I and III of the Water Resources Board's regulations.

10E.02 Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this WV/NPDES permit, the permittee must apply for a new permit at least 120 days prior to expiration of the permit.

10E.03 Duty to halt or reduce activity. Upon reduction, loss or failure of the treatment facility the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power to the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

10E.04 Duty to mitigate. The permittee shall take all reasonable steps to minimize, correct or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

10E.05 Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment



WEST VIRGINIA REGISTER

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Robert Jackson
Secretary of State's Office
Administrative Law Division

State Capitol
Charleston, WV
25305

304/345-4000

PROPOSED RULES FILED IN THE SECRETARY OF STATE'S OFFICE

a) Commissioner of Banking — Procedural rules of the Commissioner of Banking. Chapter 31A-8-1. ($1.30)

****

EMERGENCY RULES FILED IN THE SECRETARY OF STATE'S OFFICE
(effective on filing)

a) Department of Motor Vehicles. Pertaining to compulsory insurance. Chapter 17A-2-9. ($1.80)

b) Commissioner of Banking -- Procedural rules of the Commissioner of Banking. Chapter 31A-8-1. ($1.30)

****

LEGISLATIVE RULE MAKING COMMITTEE

Eleven recommendations from December meeting.

****

RULES THAT ARE EXCLUDED FROM LEGISLATIVE RULE MAKING COMMITTEE

a) Department of Human Services — Change in Economic Services Manual -- Change #197. ($1.00)

****

West Virginia Housing Development Fund

Notice -- Notice of Public Hearing.

WEST VIRGINIA LEGISLATURE

Legislative Rule-Making Review Committee

NOTICE OF ACTIONS TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Dec. 4, 1984

TO: A. James Manchin, Secretary of State; State Register
And

TO:

Dept. of Natural Resources

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: WV/NPDES Rules, Chapter 20-6, Series VII (section 10) (1984)

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule XXX

2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.

3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.

4. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached.

FILED 1984 DEC 10 PM 3:35 OFFICE OF SECRETARY OF STATE

Pursuant to Code 29A-3-11(c), this notice has been filed in the state register and with the agency proposing the rule.

Attachment "G"

PREAMBLE TO APPR
CONSOLIDATING THE ARTICLE 5A AND ARTICLE 6 PROGRAMS

I. WHAT: This constitutes the agency's response to comments and explanation for approving regulations which will consolidate the water pollution control program under Article 5A with the surface mining and reclamation program under Article 6 of Chapter 20 of the Code of West Virginia.

II. BACKGROUND: During the 1983 legislative session, legislation was enacted allowing the Director of the Department of Natural Resources to consolidate the current water pollution control program under Article 5A, Chapter 20, with the Article 6, Chapter 20 Reclamation program. It was amended during the 1984 session. This legislation, which is codified at West Virginia Code, Chapter 20, Article 6, Section 43, accomplishes consolidation by transferring all the powers, duties, and responsibilities of the Chief of the Division of Water Resources to the Director. Such legislation, however, is not effective until the Governor signs a proclamation stating that the United States Environmental Protection Agency has granted its approval to the partial transfer of the Federal National Pollutant Discharge Elimination System Program (NPDES) to the Director.

The purposes behind consolidation include:

One-Stop Permitting and Coordinated Enforcement: By consolidating the two programs, the Department provides one-stop shopping for permits required under both the Water Pollution Control and the Surface Mining and Reclamation Acts. Currently, these permits are issued by two separate Divisions, who operate under two separate statutes and two separate set of regulations, by two separate permitting groups, and are enforced by two separate set of field inspectors. Consolidation will allow the Division of Reclamation Field Inspectors to enforce both Article 6 and Article 5A requirements. This consolidation should provide benefits to the industry in the form of less paperwork, and consistent regulatory and enforcement signals from the agency.

Administrative Efficiency: By consolidating the programs, the agency will need only one group of permit reviewers to examine the application for a facility, one set of regulations, and one enforcement group. This will make better use of the existing resources within the agency.

Less Confusion Among the Public: By consolidating the two programs, the public will only need to deal with one DNR Division, one public notice procedure, and the local inspector of only one Division.

Better Environmental Results: Consolidation will bring better environmental results, as well. The field inspection staff of the Division of Water Resources, for example, is spread out among many different point sources. A staff of approximately 30 inspectors must examine all the sewage discharges, all the industrial waste discharges, solid waste facilities, and discharges from coal

operations. By consolidating, the Division of Reclamation will inspect all coal sources (which will not include dredging) with their inspection forces which number approximately twice the Division of Water Resources' inspection forces. This means that the thirty inspectors from the Division of Water Resources will lose a substantial portion of their workload, which they can then devote to the other discharges within their jurisdiction, that is, sewage, industrial wastes, and solid waste. In addition, permit reviews will be consolidated, thereby eliminating conflicting requirements which the two programs occasionally produce. Finally, the water pollution control provisions of Article 5A will be enforceable by the provisions of Article 6, as well as Article 5A. Article 6 enforcement authority is, in some ways, more effective than the authority of Article 5A.

III. EXPLANATION: When the proposed rules were published, several issues were highlighted and explained. These included: (1) Scope of Consolidation; (2) Consolidation Program; (3) New Sources Issue; (4) Abandonment Issue; (5) Public Participation and (6) Enforcement. This preamble will explain the decision contained in the approved regulations as well as other issues which arose during the comment period.

A. Scope of Consolidation

The proposed regulations proposed a scope of consolidation which, among other things, did not include sewage facilities associated with coal mines, preparation plants, and all refuse and waste therefrom as well as dredging operations. Several commenters suggested that both associated sewage facilities and dredging operations be included in the transfer and consolidation.

The approved regulations include associated sewage facilities but do not transfer Article 5A jurisdiction for dredging operations. The reason for this decision revolves around the benefits of consolidation and the current regulatory scheme for dredging operations.

As noted in the preamble, the legislative history concerning the scope of consolidation is confusing. It appears, however, that the legislature was seeking economic, administrative, and environmental benefits from the consolidation legislation. These benefits can be further realized by including associated sewage facilities in the transfer and consolidation; no such benefits could be realized by including dredging operations.

As regards sewage facilities, it appears that a majority of the "surface coal mines" under Article 6 have sewage facilities associated with them. WV/NPDES permits for these facilities are required and, by not including associated sewage facilities, the goal of "one-stop shopping" is not as completely realized. Secondly, by transferring Article 5A authority, the Department of Natural Resources will be able to use its field inspectors

more efficiently by eliminating the need for a Division of Water Resources Inspector to travel to the mine facility. Unless sewage facilities are included in the transfer, this more efficient use of Department Inspectors will not be as fully realized.

Dredging operations, on the other hand, are not amenable to the same administrative efficiencies. First, two federal agencies regulate dredging operations under the Clean Water Act. The U.S. EPA must issue an NPDES permit for land based point source discharges. The U.S. Army Corps of Engineers, under Section 404, issues a Clean Water Act permit for barge based discharges. The State has assumed primacy of the NPDES program but not the Section 404 program. Consolidation of the Article 5A and Article 6 program, therefore, could not produce a one-stop permitting program.

In addition, on the State level all coal dredging operations need a license from the Public Land Corporation. Therefore, any coal dredges will need two State authorizations, in addition to the Section 404 federal permit.

Secondly, the Division of Reclamation regulatory program is devoted almost entirely to the federal SMCRA program as reflected in Article 6. Currently, they do not issue permits for dredging nor does Article 6 contemplate such permits. All of the provisions address land based mining. For example, operators must return land to "approximate original contour" and revegetate the area--both concepts which address the relatively stable terrestrial environment. Therefore, to accept such a transfer of authority, the Division of Reclamation would have to create a program and acquire the necessary expertise. Finally, because the Division of Reclamation does not regulate dredging, the Reclamation Division inspectors and Water Resources inspectors are not making separate inspections as they currently do for deep mines because of dual jurisdiction.

Consolidation and transfer of the dredging program, therefore, will not accomplish the perceived benefits of the legislation.

B. Consolidation Program

In the preamble to the proposed regulations, the consolidation program was discussed. The preamble explained that the consolidation program generally was permissive consolidation for current operations and DNR would exercise its authority to alter permit expiration dates to facilitate consolidation. Only minor changes were made to the proposed regulations consisting of clarifications and no further discussion is needed.

C. New Source Issue

In the preamble to the proposed regulations, the concept of new sources, new dischargers, and existing sources was discussed.

Several comments were received on this topic. EPA in particular said that the State had "misconceptions regarding the federal program." To correct that misconception, we hereby offer EPA's clarification as submitted to the State.

> "For general purposes, EPA has defined "new source" to be essentially a facility the construction of which began after the promulgation of an applicable new source performance standard or after proposal of such standard but only if promulgated within 120 days. The "new discharger" category was created to pick up those new facilities which were in essence "new" since construction began after promulgation of a NSPS but did not meet the definition of new source because the regulation was not promulgated within 120 days. The new discharger provision, accordingly, was not created to deal with the "old" new source problem, as is the State's understanding, but to deal with the definition of new source. However, for purposes of the coal mining point source category a "new source coal mine" means a coal mine the construction of which commences after the proposal of a NSPS if subsequently promulgated whether or not promulgated within 120 days. Thus, the problem addressed by the new discharger category does not exist under EPA's new source coal mine definition. (emphasis supplied)
>
> "When EPA issues a NSPS for the coal category, that standard defines new source coal mine, for purposes of the applicability of that standard, to be those facilities commencing construction after the date of the proposal of that standard. Thus, the current NSPS applies only to those coal mines the construction of which began after May 29, 1981. It does not apply to "old" new sources which were "new sources" under EPA's prior NSPS proposed in 1977 which the current NSPS replaced. Pennsylvania Citizens Coalition v. EPA struck down EPA's 120-day promulgation requirement only for coal and set 1977 as the new source date only for the NSPS in effect at that time. A new NSPS has been promulgated since then and the proposal date was May 29, 1981.
>
> "In light of the preceding, there is some problem with the State's definitions of new and existing sources. The State has set September 19, 1977 as the trigger date for a new source. Since it appears as though the State intends the 1977 date to be the trigger date indefinitely and not to be changed as new NSPS are promulgated, "old" new sources after that date would be arguably be subject to each NSPS which may be

promulgated down the line, once their protection period expires. Under EPA's regulations, however, since the trigger date in the definition of new source changes with each new NSPS promulgated to reflect the proposed date of the NSPS, once the 10-year protection period ends, the source is no longer a "new source" under a subsequent NSPS and therefore is not subject to new NSPSs. Although the State's program as it stands would be more stringent than the federal program, it is doubtful the State intended this result.

"Thus, the State should insert either the date of May 29, 1981 as in EPA's current NSPS as the trigger date for a new source or insert "after the date of promulgation of a NSPS or of the proposal of a NSPS which is subsequently promulgated" in place of after "September 19, 1977." The latter change would be preferable since it would not require any changes as new NSPSs are promulgated. The definition of existing sources should then be deleted since those facilities which are not new sources would automatically be existing sources. ("New discharger" would be inapplicable because of the lack of the 120-day promulgation restriction in the State's definition of new source. Accordingly, the new discharger definition and references to new dischargers can also be deleted.)"

We have adopted EPA's suggestion and (1) deleted the phrase "new discharger" and all references thereto and (2) have substituted EPA's suggested language in place of the date September 19, 1977. We have, however, retained the definition of existing sources but modified it to mean only that an existing source is not a new source. In this way all dischargers can know which classification they fall into.

D. Abandonment Issue

The key issue discussed in the preamble concerning the abandonment issue was when to declare that abandonment was occurring and to limit a permit to abandon to only deep mines. For surface mines the regulations declared that the initial WV/NPDES permit would be a permit to abandon.

Comments were received questioning the proposed practice of treating the initial WV/NPDES permit for surface mines as a permit to abandon.

The issue is a complicated one since, under W. Va. Code §20-6-13(b)(16), surface mines have "contemporaneous" reclamation responsibility. This means that one portion of a surface mine may be backfilled before another. In analyzing this problem, the Department recommended that equating the Phase II bond release under DR Regulations Section 41 requires, among other

things, that the quality of water coming from that site be evaluated and requires the filing of an application and public notice procedures. Thus, the Phase II bond release procedure addresses two key issues of granting a permit to abandon: water issues related to abandonment and public notice procedures. The approved regulations therefore, define an application for abandonment of a surface mine as the application for Phase II bond release and the permit to abandon will be issued with the Phase II bond release using existing public notice procedure. The definition of the term "abandonment" in 10A.01 was deleted because it related only to deep mines and, based on the new abandonment program, was no longer necessary.

E. Public Participation

In the preamble to the proposed regulations the timetable of Article 6 public notice and hearings was proposed. Several comments were received objecting to the fourteen (14) day notice period for public hearings. Indeed EPA informed the State that the fourteen (14) day notice period was less stringent than the federally required thirty (30) day notice period for hearings.

The approved regulations call for 30 days public notice on WV/NPDES permits and 30 days public notice for public hearings. We expect some initial confusion over the public right to comment because the legal advertisement publicly noticing the WV/NPDES permit will contain two comment periods--30 days to comment on the WV/NPDES permit and 51 days to comment on the Article 6 permit.

At the same time, it is the Department's desire to hold any public hearings and informal conferences on the same day. Because of a thirty day (30) notice requirement for the WV/NPDES hearing, and the requirement W. Va. Code §20-6-20(b) to hold the informal conference within 21 days after the close of the 51 day public comment period, the Director will have to decide whether to hold the WV/NPDES public hearing before the Article 6 public comment is concluded. The approved regulations require the operator to provide a copy of the legal advertisement before the end of the 30-day WV/NPDES comment period to aid the Department in scheduling any potential public hearings/informal conferences.

F. Enforcement

In the preamble to the proposed regulations the enforcement procedure and mechanism was explained. Only minor changes were made to 100.01. However, the after-the-fact permitting section was deleted based upon protest by EPA, comments received, and the Division of Reclamation. The Division of Reclamation argued that sufficient authority already exists to adequately enforce for this violation.

ATTACHMENT 1

The following pages contain a summary, in tabular form, of comments received by the Commission on the proposed West Virginia Surface Mining Regulations -Section 10 -Article 5A/NPDES Regulations filed with the Secretary of State's Office on May 8, 1984, and the Commission's responses to those comments.

The comments and responses are organized into General Comments, EPA Comments on Specific Regulations, EPA Comments on Omitted Provisions, and Comments by Others. EPA's comments are further subdivided into comments by Washington, D.C. Headquarters (H) and Region III, Philadelphia (R).

On August 8 and September 26, 1984, EPA published a final rulemakings which modified several NPDES regulations (see 49 FR 31840 and 37998). The Commission received a comment urging it to adopt proposed EPA regulations into this rulemaking package. When the EPA rulemaking was finalized during our examination of comments, the Commission decided it could adopt many of the recently finalized EPA regulations. The EPA changes to the regulations, therefore, were reviewed and adopted where appropriate. The Reclamation Commission, however, did not make all the changes which will be required for EPA consistency, since EPA either did not adopt what they originally proposed or the Commission did not have enough time to study EPA's changes and finalize their regulations in time for this year's Legislative review. Some of these regulations, therefore, will need to be proposed next year in order to meet EPA's one year deadline for regulations changes. A summary of these regulation changes is provided in this attachment.

C O N T E N T S

COMMENT	RESPONSE
The State has no mechanism for the issuance of "area-wide" permits. "Area-wide" permits were developed by EPA to cover any and all point source discharges created in an area rather than just those in existence at the time a permit application is submitted. This concept would facilitate long range planning by coal companies with some certainty that new discharges in the area would be permitted.	"Area-wide" permits are a form of general permit and, therefore, are allowable under these regulations. The State, however, may not operate an "area-wide" permitting program in the same manner as EPA. This permitting mechanism will be considered further, but for the purposes of promulgating regulations specific mention of "area-wide" permits is unnecessary.
The permit application package required by these regulations should be streamlined by utilizing applications (DR-4) already on file with the Department rather than have the applicants unnecessarily duplicate material already in the Department's files	The Department hopes to achieve a streamlining of application procedures through the transfer and consolidation of the Article 6 and 5A programs. To this end, the Department has adopted a modular NPDES permit application form. The Department will review DR-4's which are on file and use them to the extent that they provide sufficient information and either request updating of information previously supplied or a new DR-4 where necessary.
Modify regulations at 10D.05(b) and 10E.02 so that permittees would not have to submit a "full-blown" applications for reissuance.	In regard to not requiring "full-blown" applications for reissuance, it is the Department's understanding that the material required in 10D.05(b) (which parallels EPA's requirements in 122.21) is necessary for existing sources and consequently for reissuance situations.
These regulations should be consistent with EPA issued NPDES permits which do not require monitoring of discharges after grade release.	The provisions of an adopted NPDES permit may control pursuant to 10C.06. Therefore, the NPDES permit may be controlling.
Many provisions of the WV/NPDES regulations are based on EPA regulations which have been withdrawn, are under litigation, or may be changed. Should adopt those which have been proposed.	The State has reviewed and adopted changes from the September 1, 1983, August 8, 1984, and September 26, 1984 EPA final rulemaking. Certain changes to the EPA final rulemaking have not yet been made in the State's regulations because EPA adopted provisions different than they had proposed. See Pages 14 to 18. The State has one year to propose and adopt such changes. See 40 CFR §123.62.
EPA HEADQUARTERS: The WV/NPDES regulations do not contain conflict of interest provisions equivalent to 40 CFR 123.25(c).	Such a conflict of interest provision is unnecessary because WV Code, Article 20-6-40 is a conflict of interest provision equivalent to 123.25(c) for the Reclamation Division employees. The Water Resources Board equivalent conflict of interest provision is in 20-5-3.

"OMITTED" PROVISION	RESPONSE
122.21(f)(8): Information Requirement - A brief description of the nature of the business.	Requirement redundant with 100.05(a)1 and because all operations are coal mining related.
122.7(b)-(d): Confidentiality of Information (There is no (d))	WV Code, Section 20-5A-6 and the Freedom of Information Act, WV Code, §29B-1-1 et seq., are equivalent to 122.7(b) & (e) and regulations imcorporate State FOIA, Section 105.06.
122.28(b)(2)(A) & (F): General Permits - (A): An individual permit is required because a discharge is a significant contributor of pollution. (F): Requirements in paragraph (a) of 122.28 are not met.	Provision incorporated. See specific comments at 10L.02(b).
122.44(d)(2): Water Quality related Effluent Limits under Section 302	Provision incorporated. See specific comments at 10F.02(c).
122.44(i)(1)(i): The mass for each pollutant limited in the permit	Provision is unnecessary because the coal mining effluent limitation guidelines - 40CFR Part 434 - are not expressed in terms of mass.
122.44(i)(1)(iv): Approved test procedures for analyses of pollutants.	See 10E.11(a).
122.44(p): Coast Guard	Provision not applicable to transferred WV/NPDES Program for coal mining operations since dredging operations are not transferred
124.8: Fact Sheet	See 10K
123.25(c): Conflict of Interest Provsion	See 20-5-3 for Water Resources Board and 20-6-40 for Division of Reclamation employees
123.27(c): Enforcement Authority - Civil Penalty shall be appropriate to the violation	Provision Incorporated. See 100.01(b)
124.10(a)(1)(iii): Public Notice that a draft permit has been prepared.	See 10J.02(d)(1)(A)

"OMITTED" PROVISION	RESPONSE
124.10(c)(1)(ix): Methods - Notice to any unit of local government having jurisdiction over area where facility is located.	No regulations at 124.10(C)(1)(ix). Believe the citation should have been to 124.10(C)(1)(iv). Notice will be given to Division of Water Resources. See 10J.02(d)1.B.
124.10(c)(2)(i): Methods - Notice of general permits in Federal Register	Notice of general permit in Federal Register is for EPA issued permits only and is not applicable to State programs; General permits must be publicly noticed in accordance with 10J.02(c)
124.10(d)(2): Methods - Name and address of permittee.	See 10J.02(e)1.B.
124.10(c)(3): Legal Notice	See 10J.02(C)
124.10(d)(1)(ix): Contents: Any additional information necessary or proper	See 10J.02(e)1.G.
124.10(d)(1)(vii): Contents: General Description, etc.	See 10J.02(e)1.F.

REGULATION	COMMENT	RESPONSE
10A.03 Effective Date	H: Regulations must be effective prior to approval of program delegation	Regulations will be effective in accordance with 40 CFR 123.23(a) at the time of program approval.
10B Definitions (General)	H: Wants Director, Person, and Pollutant defined.	Comment rejected. Definition of Director is unnecessary. Statutory definition of person is lengthy and confusing. In defining pollutant, must still refer to Article 5A which defeats the purpose of definition.
10B.18 "Draft Permit"	H: Suggests that the definition be similar to 122.2 definition. 122.2 states that notices of intent to terminate or deny a permit are "types" of permits, and that denial of requests for modification, revocation and reissuance, or termination is not a draft permit.	Comment rejected. To incorporate comment would be redundant. 10H.01(b) indicates that a denial of requests for modification, suspension, or revocation is not a draft permit. 10H.04 indicates that a notice of intent to revoke is a type of draft permit.
10B.31 "New Discharger"	R: Regulation okay, but different. 10B.31 is more stringent than Federal definition at 122.2.	Definition deleted because unnecessary. The State will recognize only two categories of sources - new and existing.
10B.32 "New Source"	H: Disagrees that 9/19/77 should be the new source determination date. Wants "after the date of promulgation of a NSPS which is subsequently promulgated" substituted. Wants State to examine definitions of facility, activity, equipment, and clarify their consistency with 122.2 and 122.29. Delete the reference to 434.65 because it is not yet promulgated.	The new discharger definition and category has been deleted from these regulations. Have incorporated the EPA proposed language for the new source determination date. Have examined the definitions of facility, activity, equipment, and find they are consistent with Federal definitions. Changed reference to 434.65 to new subsection 10L.03, Modification of NPDES permits for new sources. Incorporated new source criteria that were published in EPA's September 26, 1984 final rulemaking.
10B.38 "Proposed Permit"	R: A proposed permit must be sent to EPA for a review; not "may be" as stated in 10B.38.	Comment Incorporated.
10C.02(h) Prohibition Against Issuing a NPDES Permit	H: Reg must be deleted because the State must be able to permit an indirect discharger, even if the State permits only the treatment facility.	The State does not intend to issue permits to indirect dischargers. See 10C.02(h)

REGULATION	COMMENT	RESPONSE
10C.05(a) Duration and Transferability of permits	R: Finds 2nd line misleading. Suggests that "may vary" be changed to "shorten".	Comment Incorporated.
10C.05(c) Transfer of Permits	H: Wants clarification that permits can only be transferred to owners or operators. Also, indicated that transferring permits to any person might find a permit transferred to someone not a proper signatory under Federal regulations. R: "Person" can be any one and therefore is less stringent than Federal regulations. Suggests that "operator" be substituted for "person".	Comment Incorporated. Comment Incorporated.
10C.07(a) Transition	H: Should cite Article 5A in addition to 10I concerning draft permits in public notice on effective date of regs.	Comment Incorporated.
10D.02 Responsible Party Applies	H: Must always require at least the operator to get a permit although an owner may also be bound by the permit.	Comment Incorporated.
10D.04(a) Time to Apply	R: Opinion is that 120 day time frame to reapply is less stringent than Federal 180 day requirement, but wants to defer to headquarters for final decision.	Comment rejected. 180 day time to apply period of 122.21(c) is not a state requirement for program delegation. See 123.25(a)(4) Citation to 122.62(b)(2) which EPA provides seems irrelevant.
10D.05(a)(6) Topographic Map	H: 1000 ft. beyond site should be changed to 1 mile.	Comment rejected. Current NPDES delegated program requires less than 1 mile. The 1000 ft. requirement provides sufficient information for permit issuance in West Virginia.
10D.05(b)6(A)2 Effluent Characteristics	R: Doesn't think that an automatic waiver for sewage parameters is a good idea. Suggests that applicant must request waiver.	Comment Rejected. EPA final rulemaking on September 26, 1984 allows the Director to grant a waiver for sewage parameters for an entire industry sub-category.

REGULATION	COMMENT	RESPONSE
10D.05(e)3 Discharges into Noncomplying Waters	H: Suggests that State delete (e)3 because a demonstration that a source meets variance requirements is not relevant to a determination whether or not a new source can discharge into noncomplying waters. R: Since Federal regulations do not contain variances in this section the State's regulations are too broad.	This section has been modified t eliminate the reference to variances. However, the demonstration for alternate water quality based on effluent limits has been retained Same response
10D.07(a)1B Signatories to Applications	H: An attorney-in-fact with appropriate authorization may only sign reports under Federal regulations.	Comment Incorporated.
10D.07(d) Certification	R: Federal regulations require that a signatory personally examine permit applications and reports. Region suggests that this requirement be incorporated since the certification doesn't explicitly require a signatory to personally examine applications and reports.	Comments Rejected. 10D.07(d) is identical to Federal language as revised 9/1/83.
10E.01(c) Duty to Comply	H: Insert 307.	Inserted.
10E.04 Duty to Mitigate	R: Suggests that "steps to correct" be inserted. "Steps to correct" differs from the "duty to mitigate or prevent".	Inserted.
10E.11(h) "Rigging" Monitoring Devices	H: Wants penalties spelled out and AG opinion on State's ability to impose penalties for this type of violation.	Comment Incorporated. AG's opinion will address.
10E.13(d)2 Immediate Reporting	R: Won't decide whether "immediate" is more stringent than "within 24 hrs.". Suggests "within 24 hrs." inserted.	Comment Incorporated.
10E.13(a) Reporting Requirements	H: Qualification that changes which may affect the "nature or quantity of the discharge" should be deleted; not in the Federal Regulations. R: Won't decide whether 30 days is more stringent than "as soon as possible" therefore wants "as soon as possible" inserted.	Comment Incorporated Comment Incorporated

REGULATION	COMMENT	RESPONSE
10F.02(c) Effluent Limitations	H: Regulation doesn't specifically address water quality related effluent limits under §302. Should include.	Comment Incorporated.
10G.07 Net Limitations	R: Suggests that "discharger" be substituted for "permittee".	Comment Rejected. Although Federal regulations use discharger net limitations are only allowed for permitted discharges, therefore, permittee is more appropriate.
10H.02(c)1(J) Minor Modification	H & R: This minor modification is too broad, must conform with Federal regulations.	Regulation modified to restrict minor modification to causes which do not affect the quality quantity of discharge.
10H.02(c)2C(3) New Regs or Judicial Decision	H: Notice is not enough. Must provide a comment period and opportunity for public hearing. Any notice should reference the specific permits to be modified. R: In addition to general public notice the permittee must be notified individually.	This regulation has been deleted because there is no similar provision in Federal regulations and the state could not develop a regulation which would meet EPA objections. Same Response.
10H.02(c)2C(2) Judicial Decision	H: Interprets this reg to say that for Judicial Decisions a modification can be made only if a permittee requests it and not if the State wants to initiate a modification. Alternate language is suggested.	Suggested language incorporated
10H.02(2)M Emergency Modifications	H: Modification of a permit without prior public notice is inconsistent with Federal regulations. 122.62(a)4 even requires formal modification procedures for acts of God, strikes, and other events beyond the permittee's control. A 10 day comment period or after the fact comment period is unacceptable. Suggests that reg be deleted. R: Concurs with headquarters.	Regulation deleted.
10I.02(a)(2)B Public Notice	H: Finds 14 day notice for a public hearing inadequate.	Comment Accepted. 30 days provided.
10I.02(d)1A Public Notice	H: Insert Advisory Council on Historic Preservation.	Inserted.

REGULATION	COMMENT	RESPONSE
10I.02(d)1C Public Notice	H: Insert "knows" after Director in 1st line.	Inserted.
10I.02 Paragraph on Page 10-71	R: A copy of the draft permit and permit application must accompany the fact sheet.	Comment Incorporated. See 10J.02(d)(3).
10L.02(b) General Permits	H: State must have the authority to issue an individual permit to a storm sewer significant contributor and sites that aren't covered in 10L.01.	First comment rejected; storm sewers not subject to program, Division of Water Resources will retain jurisdiction. Second comment incorporated. Sites not covered in 10L.01 will be permitted individually.
10N.01 Enforcement (General)	H: "State Act" includes both Article 6 and 5A. Article 6 penalties may be less severe than Article 5A's penalties. State must provide assurance that minimum and maximum penalties under Article 5A will be imposed.	Comment Incorporated, "State Act" deleted and the regulation has been clarified to make Article 5A provisions applicable.
10N.01 Enforcement	H: State must include an appropriateness of penalty clause.	Specific penalties have been deleted. Comment Incorporated.
10N.03 After the Fact Permitting	H: State must make clear that the after the fact penalty is in addition to other penalties. R: Amount of fine is less stringent than Federal regulations. As long as this fine is in addition to other penalties the region has no problem with the reg.	Regulation deleted Regulation deleted

REGULATION	COMMENT	RESPONSE
10B.10 "Coal Mines"	Sewage treatment facilities and dredging operations should not be excluded from these regulations.	Have included sewage treatment facilities and bathhouses in the regulations. Have not included dredging because the recovery process, equipment, mode of operations is not within DR expertise
	Definition is not consistent with the SSCMRA because there are no exemptions for mine offices, supply areas, parking lots, etcs.	Have made a minor change to the definition which improves consistency with the SSCMRA
10B.12 "Coal Prep Plant"	Definition is not consistent with EPA's at 40 CFR 434.	Have modified definition to be consistent.
10B.32 "New Source"	Delete the fifth factor for new source determination to be consistent with settlement agreement.	Fifth factor deleted.
10B.34 "Owner"	Definition of owner when taken with definition of facility implies that a land owner could be liable under these regulations. Kolb doesn't agree with this premise.	Comment considered, but discussions with EPA leave no choice but to leave definition as is. EPA intends for an owner to be potentially responsible, however, it is the operator who must obtain the permit.
10C.01 Permit Requirement; Exemptions	Provide an exemption for haulroad sumps, excavated sediment channels and other sumps with a volume less than 5000 cubic feet because these structures cause no environmental harm.	An attractive suggestion for administrative efficiency, however, the law doesn't allow for such an exemption, and past experience indicates that these structures can cause serious environmental impacts in certain areas.
	Many of the activities listed are unrelated to mining. Suggests that these activities be deleted.	Incorrect reading of Article 5A. The transfer of authority of NPDES to the Director is all of the Chief's powers under Article 5A which includes all of the activities listed. The SWPCA regulates both mining practices impacts on water quality and discharges related to mining.

REGULATION	COMMENT	RESPONSE
10C.06 NPDES Permits Issued by EPA and Chief	What happens when a permit is not not adopted by the Director? Clarify regulation.	No clarification is needed. If the Director doesn't adopt a permit then EPA will maintain jurisdiction and administrate the permit.
10D.02 Responsible Party Applies	Objects to permits being issued to both owner and operator. Suggests issuance to person who applies.	Comment generally accepted. Generally, the Director will be permitting the operator, however, there may be a need to permit other responsible parties in certain situation.
10D.05(b)2,3,&4 Information Required for Existing Sources.	Delete Regulations because the mapping requirements are too detailed.	Comment Rejected. EPA Requirement.
10D.05(b)6.A.2 Effluent Characteristics	Since sewage treatment facilities and bathhouses are excluded from regulation then this regulation should be deleted.	Sewage treatment facilities and bathhouses are now included and this regulation is an EPA requirement.
10D.05(b)6.B Toxic Metals, etc.	Quantitative data for large numbers of outfalls may be impossible to obtain.	The regulations provide relief for outfalls that are essentially identical. No intent to require quantitative data for haulroad sumps.
10D.05(b)7 Small Business Exemption	100,000 tons is too small; suggests 300,000 tons.	Comment Rejected. EPA Requirement.
10D.05(d)1.A Deep Mine Map	Requirements to color code maps should be deleted because of the labor required to construct the maps.	Comment Rejected. Color coded maps needed to aid application review.
10D.05(b)15 Additional Information	Specifying types of information is unnecessary.	Comment Rejected. Retained to put regulated community on notice that such information may be required.
10D.05(d)4.c. Report of Water Quality	Data may not be available. Suggests that data be required if reasonably available.	Regulation modified. If data is unavailable then provide an analysis of current quality and quantity.

REGULATION	COMMENT	RESPONSE
10D.05(d) Plan for Abandonment	All mines should have an abandonment plan and obtain an abandonment permit. For surface mines the reclamation plan is not an adequate plan for abandonment. Suggests that the intention to issue an abandonment permit with the operating permit is ridiculous. Suggests that the regulation be modified to require abandonment plans and permits. For surface mines the plan could be a reclamation plan with a yearly update reflecting on-site experience.	The reclamation plan is an adequate plan for abandonment. The Phase II bond release will also be a permit to abandon.
10D.05(e) Discharges into Noncomplying Waters	This regulations doesn't adequately address abandoned mine drainage affected streams which do not comply with present water quality standards. Clarify close of comment period.	10D.05(e)3 addresses this issue. Alternate water quality based effluent limitations are available. No clarification necessary. See 10J.02.
10D.05(f)1. Variance Requests	Regulation should be clarified to indicate that variances relate to changing permit conditions.	Comment Rejected. The introductory paragraph explains that they are "variances from effluent limitations".
10E.05 Proper Operation and Maintenance	Objects to "back-up" provisions as they relate to ponds.	On September 26, 1984 EPA final rulemaking deleted the requirement for back-up equipment. 10E.05 now reflects the new EPA regulation language.
10E.10 Inspection and Entry	Suggests that an authorized representative be described as an employee of the Reclamation Division.	Comment Rejected. Concern understood, however, there may be times (emergencies) where authorized inspectors other than DR inspectors will be needed. DNR plans to limit the routine inspection of coal facilities to DR personnel.
10E.13(d) Immediate Reporting	Noncompliance should be reported to the Reclamation Division, not Water Resources. Therefore, DR should establish another toll free "Hotline"	Comment Rejected. DNR will retain the toll free number already in effect and develop procedures whereby appropriate Reclamation personnel are notified.
10E.13(d)2 Immediate Reporting	Reporting of spills and accidental discharges should be consistent with the Water Resources Board's Regulations.	The requirements of this regulations are consistent with the Water Resources Board's Regulations.

REGULATION	COMMENT	RESPONSE
10E.14(d)1.B. Prohibition of Bypass	Objects to "back-up" ponds.	Comment Rejected. Do not agree that reg requires back-up ponds. This regulation gives the permittee the right to bypass if the bypass won't exceed limits under certain circumstances. Permittees are expected to conduct routine maintenance without exceeding limits.
10E.16 Reopener Clause	Questions legal authority. Objects because it reopens for more stringent regulations but not less stringent regulations.	Legal authority is at 20-5A-14 and this requirement is taken from EPA. Does allow for upgrade to meet more stringent regs. Federal regs prevent "back-sliding" toward less stringent regs unless conditions of 122.44(1) which is incorporated in these regs as 10F.02(1).
10F.02(d) Reopener Clause	Same comment as above.	Same response as above.
10G.07(c) Net Limitations	Wants credit for pollutants in intake waters universally if not put there by permittee. Wants credit even if taken from underground sources.	Comment Rejected. Regulation contains EPA required language. Commenter's suggestion would make this provision less stringent.
10H.01(b) Permit Actions	Specify a time frame to deny a request for modification. Suggest 30 days.	Comment Rejected. Sometimes 30 days isn't enough time. However, the agency will attempt to meet 30 days in most cases.
10H.02(c) Minor Modification	Include as a minor modification an addition of a new outfall which is similar to existing ones, and which do not discharge into a new drainage basin.	Comment Rejected. Commenter's suggestion would make this reg less stringent than EPA's.
10G.08 Internal Waste Streams	Objects to internal monitoring requirements.	Comment Rejected. Need to retain especially for situations where sewage is commingled with mine drainage before final discharge.
10H.02(c)2.C. Major Modification	Wants Director to keep permittees informed of changes to these regulations.	Comment Rejected. Good idea, and Director plans to do so, however, no regulation stipulating this plan is necessary.

REGULATION	COMMENT	RESPONSE
10H.02(c)2.C.(3) General Modification	Wants permittees directly notified of a general modification. Suggests certified mail.	This regulations was eliminated in response to an EPA objection.
10I.02(2)B Public Notice	14 day notice of a Public Hearing is not enough.	Comment Adopted. Changed to 30 days.
10I.02(d) Methods	Not clear who applicant must send a copy of the public notice.	Will provide a list to permit applicants in the permit application instructions.
10I.02(d)2 Methods	See duplication with 10I.02(d)1.	Should be no duplication since (d)1 is for State and Federal agencies, and (d)2 is for general public.
10N.03 Enforcement	No legal authority. If there is legal authority then provide a grace period to submit application. Add that facilities which cause water quality violations must be shut down.	Regulation deleted. Regulation deleted.

EPA REGULATION CHANGES OF AUGUST 8, 1984 AND SEPTEMBER 26, 1984

AUGUST 8, 1984 EPA CHANGES:

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	STATE ACTION
122.21(d)(2)	10D.05(b)(15)	EPA published rule allowing submission of effluent data after expiration of permit.	Partially	Adopted
122.44;122.46	—	EPA revised rule to require that all permits must meet BPT, BCT, and toxics limits whether or not applicable effluent guidelines are promulgated.	No	Did not adopt; unnecessary because Coal Mining Guidelines are promulgated.

SEPTEMBER 26, 1984 EPA CHANGES

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.21(g)(7)(ii) Mandatory Testing	10D.05(b)6A.2	Waiver of testing for 7 conventional and nonconventional pollutants if demonstrated that Director still has enough information to write adequate permit limits.	Yes	Adopted
122.21(g)(7)(iii)(A)&(B) Potentially Required Testing — Toxic Pollutants	10D.05(b)(6)	Set threshold limit for testing at 10 ppb and 100 ppb for 4 toxics	No	Propose Next Year
122.21(g)(iii)(A) Sampling for Conventional and Non-Conventional Pollutants	10D.05(b)(6) C.2 and 10D.05 (b)(6)F	Applicants required to submit quantitative data only if pollutants were either directly or indirectly (through an indicator) limited in an applicable effluent limitation guideline but applicant still required to identify any pollutants that they know or have reason to believe are present.	Yes	Didn't adopt because DR needs some of these pollutants, such as Aluminum, sulfates to be reported all the time for water quality standards setting purposes

122.21(g)(7) Sampling	10D.05(b)6 and 10D.05(b)(6)F	Changes sampling from composite to grab samples with retention time of over 24 hours and storm water discharges (requires 4 grab samples - once per hour) or could allow waiver of composite if applicant demonstrates that use of composite samples is infeasible for storm water.	Yes	Adopted
122.21(g)(10) Potential Discharges	10D.05(b)(9)	Deleted application requirement	Yes	Adopted
122.21(g)(9); 122.42(a)(2); 122.44(e)(1)(ii); 122.62(a)(13) Used or Manufactured Toxic Pollutants 122.21(g)(9)	10D.05(b)8 10E.03(d)4B 10F.02(g)(i)B 10H.02(c)2F	Deleted 3 EPA regulation sections relating to toxics used or manufactured pollutants; retained application requirements for listing all toxic pollutants currently used or manufactured; allows Director to waive this application requirement if applicant can demonstrate that it is overly burdensome	Yes (3) No (1)	Did not Adopt; Propose next Year
122.42(a) (Toxics notification)	10E.13(d)4A	Requires an existing industrial permittee to notify Director when some activity occurred or will occur causing it to discharge toxics not previously limited in the permit.	Yes	Did not adopt; Propose it Next Year
125.3(c)(4) Toxicity Limits	—	No Change	No	Nothing to do
122.21; 122.22; 122.26 (Storm Water Runoff)	—	Made substantial changes to storm water discharge requirements	No	No change now-will be studied for potential rulemaking
122.29(c)(4), (c)(5) (Construction Prohibition)	—	Retained construction ban prior to EIS completion	Yes	Did not adopt; EIS not a State Program Requirement

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.44, 122.62(15) (Anti-backsliding)	10H.02(b)	Retains current policy with one exception. Will allow BPJ permits to be made less stringent if permittee can demonstrate that its removal costs are wholly disproportionate to those considered in a subsequently promulgated effluent guideline	Yes and No	Adopted modification provision; Propose other changes next year if necessary; policy not generally applicable since no BPJ permits in coal; should examine for rulemaking next year since we might develop BPJ limits for pollutants not regulated in guidelines
122.50 (Disposal into wells)	10G.09(b)	Retained existing policy - but clarified regulation to allow less stringent limitations if the character or treatability of discharged wastewater is changed	No	Did not adopt; Should reevaluate our current DR policy for consistency with EPA's explanation of this policy
124.56(b)(1); 125.3(c)(2)(3) 125.3(d) BPJ and Draft Development and Technical Manuals	——	EPA listed statutory factors which are used in BPJ but decided against adopting the fact sheet portion of the proposal	Partially	We are adopting this by reference since it is a change to §125 which is adopted as of time of delegation. Also, non-substantive change
122.45(g) Net-Gross Limits	10G.07	Changed net-gross substantially	No	Did not adopt; Need to evaluate it for remining situation in particular; EPA did not adopt as proposed; Will examine for rulemaking next year

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.45(c) Total Metals	10G.02	Allows metals limitation to be expressed as "total recoverable metal" as defined in 40CFR Part 136	Yes	Adopted one subsection; however, Fe & Mn are expressed as total metals; therefore, regulation change is generally irrelevant
122.45(b)(2) Actual Production	—	Allows use of alternate limits for increased production; originally proposed only for auto industry - but expanded it to all industries in final regulation	No	Did not adopt; should not impact coal mining since the effluent limits are not production based; should, however, examine the concept to reduce need for modifications when water flow is increased; May propose next year
122.44(d)(3) Importance of Water Quality Conditions Stayed by a Court or Agency	—	Allowed EPA to include 401 conditions	Yes	Nothing required; 401 cetification not applicable to State Programs
122.7(g); 122.29(c)(3) 122.49(d)(9) 124.85(e); 124.121(f) Incorporation of NEPA based Conditions in Permits	—	Allows incorporation of NEPA based conditions	Yes - except for 124.85(e)	Did not adopt; No impact since NEPA not part of State Program

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.47; 122.29(d)(4) Compliance Schedule Prohibition	10F.02(n) 10L.02(d)	Allows compliance schedules for new source if requirements were issued or revised after construction began but less than 3 years before they begin to discharge	Yes	Adopted
122.41(e)(1) Notice of Physical Alterations or Additions	10E.13(a)	Requires notice to state of alterations or additions which could "significantly" change the discharge for pollutants which would otherwise not require notice	Yes - with minor clarifications	Did not adopt; our regulations already have similar requirement
122.22(b)(2) Signatories to Reports	10D.07(b)2	Allows environmental managers with corporation-wide responsibility to sign reports	Adopted equivalent provisions	Adopted
122.41(m) By-pass	10E.14(d)1B	Retained existing regulation governing by-passes not exceeding limitations; adopted new language regarding back-up equipment	Yes and No	Adopted back-up provision; propose to change remainder next year
122.41(n) Upset Defense	10E.15	Retained original regulation concerning defense for technology based limits; Adopted proposal deleting "specific" cause	No and Yes	Deleted the word "specific"
122.41(e) Proper O & M	10E.05	Deleted reference to specific examples of O & M; clarified O & M provision for back-up facilities	Yes	Did not adopt; Unnecessary
122.62(a)(16)(17; Mistake and failure to meet BPJ Limits as Grounds for Permit Modification	10H.02M 10H.02N	Allows permits to be modified if a mistake ws made in determining BPJ limits or the technology cannot meet the limit	Yes	Adopted
40CFR Part 124 Non-Adversary Panel Procedures	----			Irrelevant to State Programs

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
124.13; 124.14; 124.76 Hearing Procedures	——			Irrelevant to State Programs
122.21(k)(4) Deferral of Hearing on New Source Determination	——	Eliminated deferral of hearing which deferred the hearing until after permit issuance unless all parties agreed	Yes	Not relevant to State Programs
122.29(b) New Source Criteria	10L.03	Adopted new source criteria where EPA had previously suspended regulations	Yes - with clarification	Adopted
122.62; 122.63 Modifications of Permits		Permits after March 9, 1982 can be modified to conform to new final rules for "actual production" and "total methods"; minor modifications for by-pass, toxics notification, and up-sets	Yes	Adopted for minor modification, by-pass, and upsets