

**West Virginia Oil and Natural Gas Association
and
Independent Oil and Gas Association of West Virginia, Inc.**

**Joint Comments to West Virginia Department of Environmental Protection
Rules With Federal Counterparts**

West Virginia Oil & Natural Gas Association ("WVONGA") and the Independent Oil & Gas Association of West Virginia ("IOGA") appreciate the opportunity to submit the following joint comments on the West Virginia Department of Environmental Protection's ("WVDEP") publication on September 6, 2017, of a list of legislative rules and whether such legislative rules contain provisions that are more stringent than the counterpart federal rule or program. The WVDEP announced that it would accept public comments on the legislative rules containing provisions more stringent than the counterpart federal rule or program until October 10, 2017. WVONGA and IOGA have limited these joint comments to legislative rules that contain provisions more stringent than the counterpart federal rule or program (the "More Stringent Rules"), including 33 C.S.R. 20 and 47 C.S.R. 5A. And while not included on the WVDEP's list, comments are also submitted in connection with 47 C.S.R. 63, the Aboveground Storage Tank Rule, general permit for oil and gas construction activities and 45 C.S.R. 16 which contain more stringent than requirements.

IOGA and WVONGA (sometimes jointly referred to herein as "Commenters" or "the Associations") are recognized as representing virtually the entire oil and gas industry in West Virginia and appreciate the opportunity to submit their joint comments to the Proposed Rule. These comments are submitted without prejudice to any member of one or both Associations to submitting comments, including comments that may be inconsistent with these comments, concerning the More Stringent Rules.

The Associations

Chartered in 1915, WVONGA is one of the oldest trade organizations in West Virginia, and serves the entire oil and gas industry. The activities of WVONGA members include construction, environmental services, drilling, completion, gathering, transporting, distribution and processing. WVONGA members operate in almost every county in West Virginia and employ thousands of people across the State, with payrolls totaling hundreds of millions of dollars annually. Members have cumulative investment of nearly ten billion dollars in West Virginia, account for most of the production and recent well work permits, operate more than 20,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses. As such, WVONGA's members have a keen interest in all aspects of health and environmental regulation associated with oil and gas activities, including the More Stringent Rules.

Formed in 1959, IOGA is a statewide nonprofit trade association that represents companies engaged in the extraction and production of natural gas and oil in West Virginia, as

well as, the companies that support these extraction and production activities. IOGA was formed to promote and protect a strong, competitive and capable independent natural gas and oil producing industry in West Virginia, while also protecting the natural environment of our state. IOGA has been in existence during times of boom and bust and its members have a long history of driving innovation in exploration and development of West Virginia's oil and gas reserves. IOGA members operate in virtually every county in West Virginia and have a longstanding tradition of working with the WVDEP and other state agencies to help regulators understand existing operations and new innovations and how to effectively regulate new technologies in a manner that protects the environment while promoting the economic development so crucial to West Virginia.

It is in this spirit of experience and partnership with WVDEP that the Associations offer these comments.

A. General Comments

As an initial matter, the Associations would like to emphasize that their members recognize the critical importance of the safe and effective exploration, drilling and operation of oil and gas wells, consistent with the protection of the health and safety of the public and the environment.

The Legislature is appropriately interested in the impact of More Stringent Rules because such rules can and do adversely impact the business climate in West Virginia. The additional out-of-pocket and administrative costs associated with compliance with the More Stringent Rules, especially in the absence of significant accompanying reduction in risks to the public or environment, will adversely affect economic investment in West Virginia and job creation. The More Stringent Rules impose more burden on the oil and gas operations in West Virginia than neighboring states like Pennsylvania and Ohio, which, all other things being equal, will drive investment decisions toward development in neighboring states before investing in West Virginia natural resource development. The results of More Stringent Rules could be to divert billions of dollars of investment away from West Virginia, along with the direct and indirect jobs such investment would create. The risk of ill-advised More Stringent Rules can also cause loss of revenues to the state (severance and income (both individual and corporate) taxes), counties (ad valorem taxes) and individuals (royalty income).

B. Specific Rules That Are More Stringent

1. WVDEP Imposes Conditions and Requirements on "conditionally exempt small quantity generators" In Excess of the Federal Requirements

The WVDEP regulates "conditionally exempt small quantity generators" of hazardous waste ("CESQGs") more stringently than the United States Environmental Protection Agency ("EPA") does. [Note that CESQGs are being renamed "very small quantity generators," for consistency with current federal regulations, in the proposed revisions to legislative rules, 33 C.S.R. 20, currently being considered by the West Virginia Legislature's Legislative Rulemaking Review Committee.] In order to qualify as a CESQG (or "very small quantity generator," as

defined in the proposed revisions conforming to the federal rules), the entity must generate in a calendar month (i) 1 kg or less of acute hazardous waste, (ii) 100 kg or less of non-acute hazardous waste and (iii) 100 kg or less of residues from a cleanup of acute hazardous waste, *see*, 40 C.F.R. § 262.13. An entity that qualifies as a "very small quantity generator" and meets the conditions for exemption in 40 C.F.R. § 262.14 is not required to apply to the EPA for an EPA identification number and submit re-notification forms as provided in 40 C.F.R. § 262.18, nor to notify EPA in any other way.

Notwithstanding the exemption for certain regulatory requirements established by the EPA, the WVDEP expressly imposes the requirements of 33 C.S.R. § 20-3.2 and §20-4 (which in the proposed legislative rule revisions references 40 C.F.R. § 262.18) "Notification of Hazardous Waste Activity Regulations." Section 3.2 requires that "conditionally exempt small quantity generators shall notify the Secretary of their hazardous waste activity in accordance with section 4 of this rule." Section 4 requires that "any person who engages in a hazardous waste activity in the State of West Virginia shall notify the Secretary of these activities when that activity begins ..." (i.e. regardless of the quantity of hazardous waste involved). In addition to the notification requirement, Section 3.2 also removes some of the disposal options allowed by EPA for CESQGs or "very small quantity generators," which represents another provision of the WVDEP regulations that are substantively more stringent than the Federal counterparts. The EPA has determined that the risk associated with "very small quantity generators" is sufficiently *de minimis* that notification is not required and that certain disposal options are appropriate. Nonetheless, the WVDEP has chosen to impose the additional regulatory burden of §§ 3.2 and 4 of the Hazardous Waste Management System Rule and the potential enforcement actions authorized pursuant to **W. Va. Code § 22-18-17** "Civil penalties and injunctive relief."

It should also be noted that the Notice accompanying the 33 C.S.R. 20 Agency Approved Proposed Rule filed with the LRRC on July 21, 2017 states that "the rule adopts and incorporates by reference the federal regulations set forth in 40 CFR Parts 260 through 279 that are in effect as of July 1, 2017 with the exception of the 2008 and 2015 Definition of Solid Waste amendments," and explains the proposed regulatory revisions by stating that "these amendments are necessary to maintain consistency with the federal program ..." However, the retention of the More Stringent Rules with regard to "very small quantity generators" is clearly inconsistent with both of those statements.

Commenters respectfully request the WVDEP to eliminate the regulatory requirements imposed on "very small quantity generators" to the extent that those requirements are more stringent than the counterpart federal rule or program.

2. WVDEP Imposes a Wetland Mitigation Ratio Three Times More Stringent than the Federal Requirement.

The WVDEP expressly acknowledges in its published notice that 47 C.S.R. 5A is more stringent than its federal counterpart (33 C.F.R. Part 332) by (a) imposing a wetlands mitigation ratio of 3:1 as compared to the federal counterpart that is 1:1 and (b) imposing increased requirements on barge fleeting mitigation.

The imposition of more stringent mitigation requirements than the federal standard increases the administrative delays and out-of-pocket costs of § 404 permitting under the federal Clean Water Act. As noted above, West Virginia competes with other states for oil and gas development investment dollars, but the more stringent West Virginia mitigation requirements contribute to an atmosphere discouraging investment in West Virginia projects.

Commenters respectfully request that the WVDEP conform the compensatory mitigation ratios and requirements to those set forth in the counterpart federal rule or program.

3. The Aboveground Storage Tank Rule, 47 C.S.R. 63, Is More Stringent than the Counterpart Regulation or Program, 40 C.F.R. Part 112

The WVDEP did not identify the Aboveground Storage Tank ("AST") Rule, 47 C.S.R. 63, as a West Virginia legislative rule that is more stringent than its federal counterpart. However, with regard to tanks containing oil, alone or in combination with other fluids, the AST Rule is significantly more stringent than 40 C.F.R. Part 112 "Oil Pollution Prevention." Oil is broadly defined as

"oil of any kind or form, including, but not limited to: fats, oils, or greases of animal, fish, or marine mammal origin; vegetable oils, including oils from seeds, nuts, fruits, or kernels; and, other oils and greases, including petroleum, fuel oil, sludge, synthetic oils, mineral oils, oil refuse, or oil mixed with wastes other than dredged spoil."

Part 112 requires the preparation and implementation of a "spill prevention, control and countermeasure" ("SPCC") plan to "prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or upon the navigable waters . . ." 40 C.F.R. § 112.1(a)(1) and applies to aboveground containers that have oil in them. The SPCC plan requirements are extensive and are designed to prevent discharge of oil to navigable waters as defined in the regulation.

The AST Rule applies to containers holding oil and other fluids, but does not limit its applicability to the SPCC regulations in the case of oil containers. The federal Oil Pollution Prevention regulation provides adequate protection from discharge of oil to waters of the United States and West Virginia. The AST Rule imposes excessive and unnecessary additional rules on ASTs containing oil that are more stringent than the federal counterpart rule or program.

Commenters respectfully request that the WVDEP conform the AST Rule to those set forth in the counterpart federal rule or program, at least in connection with oil containers.

4. The West Virginia General Permit for Oil and Gas Construction Activities Is More Stringent Than Federal Requirements

Another program that was not identified by WVDEP, the general permit for oil and gas construction activities is not required under the Federal Clean Water Act and is therefore more restrictive than federal requirements. While certain oil and gas exploration activities and facilities are conditionally exempt from federal stormwater discharge permitting requirements, this exemption is not duplicated in the West Virginia program. 33 U.S.C.S. § 1342(1)(2); 40

CFR § 122.26(a)(2); 40 CFR § 122.26(c)(1)(iii), and W. Va. Code § 22-11-8. The Federal Exemption provides:

40 CFR § 122.26(a)(2):

The Director may not require a permit for discharges of storm water runoff from the following:

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

40 CFR § 122.26(c)(1)(iii):

The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

The West Virginia Oil and Gas Construction Stormwater Permit for oil and gas field activities or operations associated with exploration, production, processing or treatment operations or transmission facilities outside the limit of disturbance authorized by an active permit or certification issued by the Department of Environmental Protection's Office of Oil and Gas is a state based program that is more stringent than the Federal NPDES program. See, http://www.dep.wv.gov/WWE/Programs/stormwater/csw/Documents/OG%20stormwater%20GP%203_10_15.pdf.

Unlike West Virginia, Ohio regulations do not require a permit for stormwater discharges associated with certain oil and gas exploration activities and facilities and Ohio's regulations are consistent with the federal exemption.

5. **Inconsistency Between Rules -- 45 C.S.R. 16-7.1**

Similarly, although not listed by the WVDEP as more stringent, 45 C.S.R. § 16-7.1 provides that:

“in the event of any inconsistency between this rule and any other rule of the West Virginia Department of Environmental Protection, the inconsistency shall be resolved by the determination of the Secretary and ***the determination shall be based upon the application of the more stringent provision, term, condition, method or rule.***” (emphasis added).

Thus, 45 C.S.R. §16-7.1 subjects individuals regulated under West Virginia’s ‘*Standards of Performance for New Stationary Sources*’ to the *more stringent* provision of any rule that conflicts with § 45-16-1 *et seq.* This requirement is stricter than the federal baseline.

WVDEP’s General Permit G70-D “Natural Gas Production Facilities Class II General Permit” provides an example of a more stringent state requirement. Section 8.1.1. “Operation and Maintenance of Air Pollution Control Equipment and Emission Reduction Devices” provides that:

The registrant shall, to the extent practicable, install, maintain, and operate all air pollution control monitoring equipment and emission reduction devices listed in the General Permit registration and associated monitoring equipment in a manner consistent with safety and good air pollution control practices for minimizing emissions, ***or comply with any more stringent limits set forth in this permit or as set forth by any State rule, Federal regulation, or alternative control plan approved by the Secretary.*** (emphasis added).

Commenters respectfully request that the WVDEP conform its regulations and permits to eliminate requirements that are more stringent than the federal baseline regulations.

The Associations request that these comments be given serious and careful consideration.

Respectfully Submitted,

West Virginia Oil and Natural Gas Association

Independent Oil and Gas Association
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By: Anne C. Blankenship

By: **Charlie Burd**

Its: Executive Director

Its: Executive Director