

October 10, 2017
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Filed Via Email: DEP.Comments@wv.gov

Austin Caperton,
Cabinet Secretary
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

Re: Regulatory Reform

Dear Secretary Caperton:

The following comments are offered in response to your agency's proposed review of its regulatory program as directed by S.B. 619 and as publicly noticed on September 5, 2017. These comments represent a subset of key elements of the West Virginia environmental statutory and regulatory program.¹ These comments and recommendations are filed on behalf of the West Virginia Chamber of Commerce (the "Chamber").

The Chamber is the largest, most influential general business organization, representing all business sectors in every region of the state. Members range from small business enterprises to mid-size manufacturers to tourism destinations to energy companies to Fortune 500 corporations. However, small businesses are the core of our membership -- making up 95 percent of the West Virginia Chamber's companies and firms. The West Virginia Chamber believes business must be a positive force for enhancing the quality of life in the Mountain State. The Chamber is a proactive leader in: the search for solutions to problems, a voice for free market competition and streamlined government, a catalyst for progressive thinking and problem solving, and a partner with government for progress in West Virginia.

S.B. 619 enacted W.Va. Code §29A-3-20 titled, "Executive review of agency rules, guidelines, policies and recommendations." This section of the W. Va. Code directs all executive agencies with rule-making authority to review and evaluate all state rules, guidelines, policies and recommendations to determine whether they are more stringent than their respective

¹ The statutory provisions, rules, guidelines, policies and recommendations highlighted in this letter are not an exhaustive assessment of all portions of the West Virginia environmental statutory and regulatory program. The issues addressed in this letter represent program elements that warrant review at this time.

federal counterparts. The statute directs the agencies to provide for a comment period on that evaluation, which the WVDEP is offering at this time.

Additionally, as noted by WVDEP, is it required to submit a report to the Joint Committee on Government and Finance and the Legislative Rule-Making Review Committee on or before November 1, 2017. That report is required to set forth a description of the state rules, guidelines, policies and recommendations that are more stringent than federal counterparts, and is to include comments received. With this statutory directive from the W.Va. Legislature in mind, the Chamber offers the following recommendations regarding the regulations, guidelines, policies and other statements that the WVDEP should consider addressing in its report to the Legislature.

The Chamber appreciates this opportunity to provide comment and recommendations and is prepared to participate and assist as the Legislature and WVDEP engage in implementing S.B. 619.

Very truly yours,



Kathy G. Beckett
Chair, Environmental Committee
West Virginia Chamber of Commerce

Enclosure

cc: Stephen G. Roberts, President
West Virginia Chamber of Commerce

Scott A. Mandirola, Deputy Cabinet Secretary
West Virginia Department of Environmental Protection

The Honorable Mitch Carmichael
Senate President and Lt. Governor

The Honorable Tim Armstead
Speaker of the House of Delegates

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NUMBER	TITLE	STRINGENCY	COMMENTS	W. VA CHAMBER OF COMMERCE COMMENTS
OFFICE OF ABANDONED MINE LANDS				
59-1	Abandoned Mine Lands Reclamation Rule	No	This rule follows the parameters established in its federal counterpart regulation. <i>Federal Counterpart Regulation:</i> 30 CFR Parts 870 and 872	
DIVISION OF AIR QUALITY				
45-1	Alternative Emission Limitations During Startup, Shutdown, and Maintenance Operations	No	This rule follows the parameters established in its federal counterpart regulation. <i>Federal Guidance:</i> The EPA explicitly details SSM policy as guidance in the Federal Register as a final regulation at 80 Fed. Reg. 33840 (June 12, 2015) that was used to develop this rule.	
45-2	To Prevent and Control Particulate	No	This rule was part of the original State Implementation Plan (SIP)	This rule sets forth an opacity limit of 10%. This West Virginia originating

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	Air Pollution from Combustion of Fuel in Indirect Heat Exchangers		<p>package in 1972. This rule is a “backstop” for existing sources not subject to federal standards.</p> <p>The <i>opacity limit</i> is more stringent than similar federal regulations, unless an alternative limit is approved per section 3.2 and 3.3, because West Virginia was not in attainment with the 1971 health based Total Suspended Particulate (TSP) National Ambient Air Quality Standards (NAAQS), and these limits were required to bring the State into attainment. Although there are instances where the <i>particulate matter (PM) limit</i> appears to be more stringent in the State rule, the test method in the appendix of the State rule does not capture condensable PM, since the sample is at the temperature of the exhaust stack and not a</p>	<p>limit developed many years ago before EPA’s sector emissions programs were fully developed, applies to industrial boilers and electricity generating units. Opacity is a visual metric for assessing particulate emissions. Under both state and federal air emissions regulatory programs, visual opacity limits are paired with more precise particulate monitors to manage such emissions. EPA’s regulatory program for monitoring opacity sets the standard at 20% for both industrial boilers and electricity generating units. 40 C.F.R. §§ 60.42(a)(2), 60.42Da, and 60.43b(f). The Chamber urges the WVDEP to review this difference and consider promulgation of a revised opacity standard that is consistent with federal regulations.</p>

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			<p>lower temperature.</p> <p>Similar Federal Regulation: While there is no federal counterpart regulation to 45-2, there are federal regulations that may apply to the same sources: New Source Performance Standards (NSPS) of 40 CFR Part 60, subparts D (fossil fuel fired steam generators); Da (electric utility steam generating units); Db (industrial commercial institutional steam generating units); Dc (small industrial commercial institutional steam generating units)</p>	<p>While the WVDEP ultimately determined that 45 CSR 2 is not more stringent than a federal counterpart, it does note that its opacity limit is more stringent than similar federal regulations. While WVDEP appears to suggest that a permittee can request an alternate limit, WVDEP should review this opacity limit in comparison to similar federal standards and make the requisite amendments instead of requiring a permittee to request an alternative limit.</p>
45-02A	Testing, Monitoring, Recordkeeping and Reporting Requirements under 45 CSR 2"	N/A	N/A	<p>This rule sets forth guidance on the agency's testing, monitoring, recordkeeping and reporting requirements for owners/operators of fuel burning indirect heat exchangers subject to 45 CSR 2. Section 7.2</p>

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				<p>addresses exception reporting for the operation of continuous opacity monitors (“COMS”). Owners and operators are required to submit to the Director a COMS summary report and/or excursion and COMS monitoring system report. Section 7.2.b.1 provides the guidance on such submittal as follows: if the total duration of excursions for the reporting period is less than one percent (1%) of the total operating time for the reporting period and monitoring system downtime for the period is less than five percent (5%) of the total operating time for the reporting period, the COMS Summary Report shall be submitted. The 5% downtime threshold is inconsistent with the federal program requirements. The Chamber urges the WVDEP to review the disparity between the federal and the state</p>

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				<p>requirement for monitor performance and consider promulgation of a revised standard that is consistent with the federal regulations.</p> <p>WVDEP's Review fails to address this procedural/legislative regulation.</p>
45-3	To Prevent and Control Air Pollution from the Operation of Hot Mix Asphalt Plants	No	<p>This rule was part of the original SIP package in 1972 and follows the parameters of its federal counterpart regulation.</p> <p>Similar Federal Regulation: NSPS subpart I</p>	
45-5	To Prevent and Control Air Pollution from the Operation of Coal Preparation Plants, Coal Handling Operations and	No	<p>This rule was part of the original SIP package in 1972 and follows the parameters of its federal counterpart regulation.</p> <p>Similar Federal Regulation: NSPS subpart Y</p>	

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	Coal Refuse Disposal Areas			
45-7	To Prevent and Control Particulate Matter Air Pollution from Manufacturing Processes and Associated Operations	No	<p>This rule was part of the original SIP package in 1972. This rule is a “backstop” for existing sources not subject to federal standards. West Virginia was not originally in attainment with the 1971 TSP NAAQS, 1997 PM, and 2006 PM2.5. There were six 1997 PM2.5 maintenance areas and two 2006 PM2.5 maintenance areas.</p> <p>Similar Federal Regulation: Several dealing with opacity limits for manufacturing processes.</p>	<p>This rule was last reviewed and updated in 1999-2000. This regulation includes a prohibition concerning the release of mineral acids at specific allowable stack gas concentrations as provided in Table 45-7B. The regulated mineral acids are Sulfuric Acid Mist, Nitric Acid Mist and/or Vapor, Hydrochloric Acid Mist and/or Vapor and Phosphoric Acid Mist and/or Vapor. These “mineral acids” are more comprehensively regulated pursuant to the federal CAA 112 program to regulate hazardous air pollutants (those known to cause cancer and other serious health impacts). Regulated sources for these and other toxic air pollutants listed by EPA are required to meet control technology requirements. EPA’s programs that</p>

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				address hazardous air pollutants include: National Emission Standards for Hazardous Air Pollutants, Area Source Rules, Residual Risk/Technology rules, Area Source Generation Information and Implementations Rules, New Source Performance Rules, and certain Solid Waste rules [for waste combustors and incinerators]. This rule warrants WVDEP review and update as requested.
45-07A	Compliance Test Procedures for 45CSR7 – “To Prevent and Control Particulate Matter Air Pollution from Manufacturing Processes and Associated	No	This companion rule to 45-7 establishes test procedures in accordance with the method(s) established by EPA. Similar Federal Regulation: Method 303	

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	Operations”			
45-8	Ambient Air Quality Standards	No	<p>This rule incorporates by reference its federal counterpart.</p> <p>Federal Counterpart Regulation: 40 CFR Parts 50 and 53</p>	
45-10	To Prevent and Control Air Pollution from the Emission of Sulfur Oxides	No	<p>This rule was part of the original SIP package in 1972. This rule is a “backstop” for existing sources not subject to federal standards.</p> <p>Similar Federal Regulation:</p> <p>While there is no federal counterpart to this rule, there are federal regulations that may apply to the same sources: New Source Performance standards (NSPS) of 40 CFR Part 60, Subparts D (fossil fuel fired steam generators); Da (electric utility steam generating units); Db (industrial commercial institutional steam generating</p>	

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			units); Dc (small industrial commercial institutional steam generating units); J and Ja (petroleum refineries)	
45-11	Prevention of Air Pollution Emergency Episodes	No	Although provisions were added for coal and wood stoves in Table 2 and Table 3 that were not listed in Appendix L, the State rule is not more stringent; Appendix L provides only examples of emission control actions. Similar Federal Regulation: 40 C.F.R. Part 51, Subpart H	
45-13	Permits for Construction, Modification, Relocation and Operation of Stationary Sources of Air Pollutants,	N/A	N/A	This rule is another regulation warranting review and assessment. This is a state air permit program that does not have a federal equivalent and therefore is not required by federal law. There are air emissions thresholds in the rule that trigger this state permit. These trigger emissions

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	Notification Requirements, Administrative Updates, Temporary Permits, General Permits, Permission to Commence Construction and Procedures for Evaluation”			thresholds warrant updating consistent with sound science and technical assessment. This rule warrants WVDEP review and update as requested.
45-14	Permits for Construction and Major Modification of Major Stationary Sources for the Prevention of Significant Deterioration of Air Quality	No	This rule adopts language from its federal counterpart. <i>Federal Counterpart Regulation</i>): 40 CFR § 51.166	

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45-16	Standards of Performance for New Stationary Sources	No	<p>This rule incorporates by reference its federal counterpart, with limited exception.</p> <p><i>Federal Counterpart Regulation:</i> 40 CFR Parts 60 and 65</p>	<p>This rule includes the following section: §45-16-7. Inconsistency Between Rules.</p> <p>7.1. 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.</p> <p>This regulatory provision creates a non-substantive default to a provision, term, condition, method or rule, regardless of its origin or intent. Application of this provision could lead to a West Virginia regulatory decision that would be more stringent than a federal counterpart. The</p>

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				<p>Chamber urges the agency to review this language and propose elimination.</p> <p>An example of implementation of this rule in a manner more stringent than the federal can be found in WVDEP's General Permit G70-D "Natural Gas Production Facilities Class II General Permit" at Section 8.1.1. "Operation and Maintenance of Air Pollution Control Equipment and Emission Reduction Devices" which provides: 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</p>

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				this permit or as set forth by any State rule, Federal regulation, or alternative control plan approved by the Secretary.
45-18	Control of Air Pollution from Combustion of Solid Waste	No	<p>This rule incorporates by reference its federal counterparts for new sources and adopts the language from its federal counterparts for existing sources.</p> <p>Federal Counterpart Regulation: 40 CFR Part 60, Subparts Eb, Ec, AAAA, CCCC, EEEE, and LLLL</p> <p>Federal Guidance: 40 CFR Part 60, Subpart Ce and DDDD</p>	
45-19	Permits for Construction and Major Modification of Major Stationary Sources Which Cause or	No	<p>This rule adopts the language from its federal counterpart.</p> <p>Federal Counterpart Regulation: 40 CFR §51.165</p>	

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	Contribute to Nonattainment Areas			
45-20	Good Engineering Practice as Applies to Stack Heights	No	This rule adopts by reference its federal counterpart regulation. <i>Federal Counterpart Regulation:</i> 40 CFR Part 51	
45-21	Regulation to Prevent and Control Air Pollution from the Emission of Volatile Organic Compounds	No	This rule is part of a federally approved maintenance plan and applies only to sources located in Cabell, Kanawha, Putnam, Wayne, and Wood Counties, because those areas were not in attainment with the 1979 ozone NAAQS, and VOCs are a precursor to ozone. The agency submitted this Rule as part of its control plan in 1994 to establish attainment in those areas. Rule 21 is a “backstop” for existing sources in those designated counties not subject to federal	

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			standards. Similar Federal Regulation: While there is no federal counterpart regulation to 45-21, there are approximately 40 federal regulations that may address the source categories subject to this rule.	
45-23	To Prevent and Control Emissions from Municipal Solid Waste Landfills	No	This rule incorporates by reference its federal counterparts for new sources and adopts the language of its federal counterparts for existing sources. Federal Counterpart Regulation: 40 CFR Part 60, Subparts WWW and XXX Federal Guidance: 40 CFR Part 60, Subparts Cc and Cf	
45-25	Control of Air Pollution from Hazardous Waste	No	This rule adopts and incorporates by reference, with limited modification, its federal	This rule generally incorporates by reference the federal program at 40 CFR Parts 260, 261, 262, 264, 265,

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	Treatment, Storage and Disposal Facilities		counterparts. Federal Counterpart Regulation: 40 CFR Parts 260, 261, 262, 264, 265, 266, 270, and 279	266, 270, and 279. However, this rule also supplements the incorporation with state derived requirements. As such there are redundancies and inefficiencies in this rule that warrant review as requested.
45-27	To Prevent and Control the Emissions of Toxic Air Pollutants	N/A	N/A	The goal of this rule is to require best available (control) technology (BAT) for emissions of state defined Toxic Air Pollutants (TAPs). The rule defines the following chemicals as TAPs: Acrylonitrile, Allyl Chloride, Benzene, 1,3 Butadiene, Carbon Tetrachloride, Chloroform, Ethylene Dichloride (also known as 1,3 Dichloroethane), Ethylene Oxide, Formaldehyde, Methylene Chloride (also known as Dichloromethane), Propylene Oxide, Trichloroethylene, Vinyl Chloride and Vinylidene Chloride (also known as 1,1-

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				<p>Dichloroethylene). All of these compounds are defined by the U.S. EPA as hazardous air pollutants (HAP). Under Title III of the Clean Air Act Amendments, by November 15, 1991 the USEPA Administrator was required to publish the initial list of source categories. This list is required to be updated a minimum of every 8 years. For these source categories and future categories, USEPA was required to develop emission standards. These are referred to National Emission Standards for Hazardous Air Pollutants (NESHAPs). These standards determine the Maximum Achievable Control Technology for HAPs associated with the source category. WVDEP CSR 34 "Emission Standards for Hazardous Air Pollutants" incorporates the federal NESHAP requirements by reference,</p>

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				but also incorporates state derived regulations. These rules warrant WVDEP review and update as requested to assure content is no more stringent than federal requirements. WVDEP fails to address this regulation within its review.
45-30	Requirements for Operating Permits	No	This rule follows the parameters of its federal counterpart. <i>Federal Counterpart Regulation:</i> 40 CFR Part 70	
45-31	Confidential Information	No	This rule establishes the requirements for claiming information submitted to the Secretary as confidential and the procedures for determinations of confidentiality in accordance with the provisions of W. Va. Code § 22-5-10. A federal counterpart to	

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			<p>this rule does not exist; however, the criteria for use in confidentiality determinations at 40 CFR § 2.208 and special rules dealing with certain information at 40 CFR § 2.301 have been incorporated into this rule.</p> <p>Similar Federal Regulation: 40 CFR Part 2, Subpart B</p>	
45-31B	Confidential Business Information and Emission Data	No	<p>This rule establishes the requirements for claiming information submitted to the Secretary as confidential and the procedures for determinations of confidentiality in accordance with the provisions of W. Va. Code § 22-5-10. A federal counterpart to this rule does not exist; however, the criteria for use in confidentiality determinations at 40 CFR § 2.208 and special rules dealing with certain information</p>	

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			at 40 CFR § 2.301 have been incorporated into this rule. Similar Federal Regulation: 40 CFR Part 2, Subpart B	
45-33	Acid Rain Provisions and Permits	No	This rule incorporates by reference its federal counterpart. Federal Counterpart Regulation: 40 CFR Parts 72, 74, 75, 76, and 77	
45-34	Emission Standards for Hazardous Air Pollutants	No	This rule incorporates by reference its federal counterpart. Federal Counterpart Regulation: 40 CFR Parts 61, 63 and 65, to the extent referenced in 40 CFR Parts 61 and 63	
45-35	Determining Conformity of General Federal Actions to Applicable Air Quality	No	This rule incorporates by reference its federal counterpart. Federal Counterpart Regulation: 40 CFR Part 93, Subpart B	

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	Implementation Plans			
45-36	Requirements for Determining Conformity of Transportation Plans, Programs, and Projects Developed, Funded or Approved under Title 23 USC or the Federal Transit Laws, to Applicable Air Quality Implementation Plans	No	This rule incorporates by reference its federal counterpart. Federal Counterpart Regulation: 40 CFR Part 93, Subpart A	
45-38	Provisions for Determination of Compliance with Air Quality Rules	No	This rule follows the parameters established in the federal SIP call. Federal Guidance: This rule was	

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			promulgated in response to a 1994 SIP Call issued by EPA to comply with the enhanced monitoring requirements established in §§ 110(a)(2)(A), (C), and (F), 113(a) and (e), and 114(a)(3) of the Clean Air Act.	
45-40	Control of Ozone Season Nitrogen Oxide Emissions	No	This Rule establishes the budget set up in the NOx SIP Call for non-electric generating units. Federal Guidance: 40 CFR Parts 51.121, 52.96, and 97	
DIVISION OF LAND RESTORATION				
<i>None</i>				
DIVISION OF MINING & RECLAMATION				
38-2	West Virginia Surface Mining Reclamation Rule	YES	<i>Please see attached PDF.</i> Federal Counterpart Regulation: 30 CFR Parts 700 – 702, 705, 707, 710, 715, 716, 722 – 724, 730 – 733, 735, 762,	

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			764, 769, 772 – 780, 785, 795, 800, 810, 815, 816, 819, 824, 827, 828, 840, and 845 – 847	
47-30	WV/NPDES Rules for Coal Mining Facilities	No	This rule follows the parameters established in its federal counterpart regulation. <i>Federal Counterpart Regulation:</i> 40 CFR Part 122	
47-30B	Administrative Proceedings and Civil Penalty Assessment	No	This rule follows the parameters established in its federal counterpart regulation. <i>Federal Counterpart Regulation:</i> § 309(g) of the Clean Water Act (33 USC § 1319(g))	
199-1	Surface Mining Blasting Rule	YES	The restrictions on distance limits from the blasting site to adjacent structures is more stringent in West Virginia than the federal counterpart regulation requires. West Virginia requires blasting	

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			<p>no closer than seven-tenths of a mile from the site of the blast or one-half mile from the permit boundary. This is because studies conducted by the agency in 2001 showed that blasting damage occurred past the federal standard of one-half mile past the permit boundary.</p> <p><i>Federal Counterpart</i> <i>Regulation:</i> 30 CFR Part 816-61 – 816.68</p>	
OFFICE OF OIL & GAS				
<i>None</i>				

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DIVISION OF WATER & WASTE MANAGEMENT				
33-1	Solid Waste Management Rule	No	<p>This rule follows the parameters established in its federal counterpart regulation.</p> <p>Federal Counterpart Regulation: 40 CFR Parts 239 - 258</p>	<p>1) The Chamber requests that the State of West Virginia advocate for the approval of state CCR permit programs containing site-specific flexibility to USEPA. The WIIN Act directs USEPA to approve state CCR permit programs to operate in lieu of the federal CCR rule where the state permit program requires each CCR unit in the state to comply with criteria that, if different from the CCR rule, are “at least as protective” as the federal rule.</p> <p>2) The Chamber also suggests that the State of West Virginia urge USEPA to extend some of the upcoming CCR deadlines to give time for transition from a self-implementing rule to one implemented by a state permit</p>

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				program. The Utility Solid Waste Activities Group (USWAG) has raised this issue with USEPA in the past, stressing that it is important to avoid capital expenditures for elements of the rule that may be implemented differently by a state permit program (e.g., the use of risk-based standards that are equally protective.)
33-2	Sewage Sludge Management Rule	No	This rule follows the parameters established in its federal counterpart regulation. <i>Federal Counterpart Regulation:</i> 40 CFR Part 503	
33-20	Hazardous Waste Management System	YES	Section 4 of this rule subjects conditionally exempt small quantity generators of hazardous waste (CESQG) to notification requirements that are not part of the federal counterpart regulation. West Virginia solid	

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			waste rules restrict disposal of hazardous waste in municipal and non-hazardous waste industrial landfills. Requiring CESQGs to register helps to ensure hazardous waste does not find its way into a landfill that is not permitted to accept it. <i>Federal Counterpart</i> <i>Regulation:</i> 40 CFR Parts 260 – 279	
33-30	Underground Storage Tanks	No	This rule incorporates by reference its federal counterpart. <i>Federal Counterpart</i> <i>Regulation:</i> 40 CFR Part 280 – 282	
47-1	Administrative Proceedings and Civil Penalty Assessment	No	This rule follows the parameters established in its federal counterpart regulation and is, thus, consistent with the federal program.	

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			<p>Federal Counterpart Regulation: § 309(g) of the Clean Water Act (33 USC § 1319(g))</p>	
47-2	Requirements Governing Water Quality Standards	No	<p><i>Please see attached PDF.</i></p> <p>While there is no federal counterpart regulation for this rule, EPA does propose “recommended criteria” for water quality standards through 40 CFR Parts 405 – 471, and the states can either adopt those recommended criteria or establish their own criteria based on conditions specific to each state.</p> <p>Similar Federal Regulation: § 303 of the Clean Water Act (33 USC § 1313)</p>	<p><u>Protection for “Future” Uses on Surface Waters.</u> W. Va. Code 22-11-7(b)(c) provides, “. . . the secretary shall promulgate legislative rules setting standards of water quality . . . Standards of quality with respect to surface waters shall protect the public health and welfare, wildlife, fish and aquatic life and the present and prospective future uses of the water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.” WVDEP has opined that this language on “future uses” could be interpreted to mean the agency is required to expand its obligation to protect surface waters to all potential uses the future may</p>

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				<p>hold. This would amount to WVDEP “setting aside” waterbody assimilative capacity for pollutants in order to accommodate “future uses” where such uses are merely theoretical and undefined. This assertion is in direct conflict with the CWA §§ 101(a)(2) and 303(c); and USEPA regulation 40 CFR Part 131, policy and guidance on use designation and policy implementation. See also, U.S. EPA Water Quality Standards Handbook. The Chamber urges the WVDEP to carefully assess its interpretation of this language to assure it promotes protection of reasonably foreseeable prospective future uses to assure that interpretation is consistent with federal laws, rules, guidelines, policies and recommendations. If WVDEP has an interpretation inconsistent with the federal such</p>

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				<p>interpretation necessarily needs identified as more stringent than the federal laws, rules, guidelines, policies and recommendations.</p> <p>The Chamber finds WVDEP's failure to address the water quality standards program in its report an attempt to ignore the guidance of SB 619. SB 619 directly addresses guidances and recommendations. WVDEP needs to address the water quality standards program as being inconsistent with the federal recommendations.</p> <p><u>Arsenic Water Quality Standard.</u></p> <p>The WVDEP water quality standard for arsenic reflects a water contact recreation concentration of 10 ug/l. This human health derived standard had no federal equivalent. The Chamber urges WVDEP to promulgate a revision to the standard to remove the water</p>

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				<p>contact recreation criteria. The water contact recreation use reflects exposure to pollutants during swimming, fishing, and boating; these activities do not apply to arsenic. Other states and regulatory bodies in the region do not have an arsenic standard for water contact recreation to include: Kentucky, Virginia, Maryland, Pennsylvania, Ohio and ORSANCO.</p> <p>The Chamber also recommends that WVDEP establish a protocol that updates the water quality standards periodically to identify appropriate revisions consistent with federal recommendations.</p> <p><u>Mercury Water Quality Standard.</u> The WVDEP aquatic life mercury criterion for chronic exposure is a</p>

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				<p>methylmercury standard of 0.012 ug/l. The aquatic life mercury criterion for chronic exposure promulgated by U.S. EPA in the Great Lakes Water Quality Guidance Rulemaking is 0.91 ug/l, which is the same value that has been adopted by ORSANCO and the states of Ohio and Pennsylvania. WVDEP's value is more stringent that necessary to achieve EPA approval. The Chamber urges the WVDEP to initiate an administrative rulemaking to promulgate a revised standard.</p> <p>The human health criterion for mercury is a 0.5 mg/kg as a methylmercury fish tissue concentration. WVDEP has yet to develop guidance on how this criterion is implemented in NPDES permit. As such, permittees may be required to incur costly mercury</p>

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				<p>removal treatment technologies when these measures are unnecessary where the fish tissue standard is not exceeded. The Chamber urges WVDEP to do as EPA has done, adopt the 2010 Implementation Guidance EPA has developed. Such adoption would assist in the efficient and effective implementation of the criterion.</p> <p><u>Chloride Water Quality Standard.</u> EPA does not have a recommended water quality standard for human health protection for chloride. The WVDEP human health chloride water quality standard of 250 mg/l is based on the secondary maximum contaminant level (SMCL) for chloride published by EPA under the Safe Drinking Water Act (SDWA). This SMCL is not enforceable under the SDWA, is not recommended for</p>

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				listing as a water quality standard, and should therefore be removed as a human health water quality standard in the WVDEP's water quality standards regulation.
47-5A	Regulations for State Certification of Activities Requiring Federal Licenses and Permits	YES	<p>This rule is more stringent than its federal counterpart in three areas:</p> <p>(1) Wetlands mitigation (3:1 vs 1:1). WV's rule is more stringent in this area, because the State determined that manmade wetlands rarely function as well as natural ones, and they take time to mature.</p> <p>(2) Barge fleeting mitigation. This area is more stringent because barge fleeting areas restrict/eliminate acres of fishable water, and propwash damages fish nesting sites.</p> <p>(3) Impingement/entrainment of</p>	<p>This rule became effective on May 14, 2014. Although the West Virginia Code of State Rules provides a mechanism for the administrative review of State 401 Water Quality Certifications in 47 CSR 5A-7, that part of the rule is not applicable for pipelines regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act ("NGA"), and the regulation should state that. 15 U.S.C. §§ 717-717z. See <u>Del. Riverkeeper Network v. Sec'y Pa. Dept. of Env'tl. Prot.</u>, 833 F.3d 360, 367 (3rd Cir. 2016). While the NGA is the controlling authority for interstate pipelines, the NGA requires states to participate in the</p>

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			<p>fish at FERC hydropower facilities. This area is more stringent, because a previous federal court ruling stated impacts to a <u>fishery</u> must occur before mitigation; this provision in the State rule makes it clear we are concerned about impacts to each fish.</p> <p><i>Federal Counterpart</i> <i>Regulation:</i> 33 CFR Parts 325 and 332 and 40 CFR Part 230</p>	<p>environmental regulation of pipeline projects, including the Clean Water Act's requirement that such projects obtain a State 401 WQC or a waiver. 15 U.S.C. § 717b(d). WVDEP is urged to modify regulation 45 CSR 5A to clarify that its review process for WQC does not apply to FERC regulated activities.</p> <p>In determining jurisdiction for the review of the issuance of a State 401 WQC, the NGA contains the following provision:</p> <p>The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil</p>

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				<p>action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.). See 15 U.S.C. § 717r(d)(1).</p> <p>Numerous Federal Circuit Courts have interpreted the above-cited provision as providing original and exclusive jurisdiction to the United States Court of Appeals for the circuit in which the facility is subject to the NGA with regard to the judicial review of a State administrative agency's issuance of a 401 WQC.</p>

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				<p>See <u>AES Sparrows Point LNG, LLC v. Wilson</u>, 589 F.3d 721, 726-27 (4th Cir. 2009) (holding that it has original jurisdiction over the review of the issuance or denial of a 401 WQC in accordance with 15 U.S.C. § 717r(d)(1)); <u>Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.</u>, 833 F.3d 360, 371-72 (3rd Cir. 2016); <u>Islander E. Pipeline Co. v. Conn. Dep’t of Env’tl. Prot.</u>, 482 F.3d 79 (2nd Cir. 2006); <u>Islander E. Pipeline Co. v. McCarthy</u>, 525 F.3d 141 (2nd Cir. 2008). Again, WVDEP is urged to modify regulation 45 CSR 5A to clarify that its review process for WQC does not apply to FERC regulated activities.</p> <p>Additionally, the WV Chamber proposes the following:</p> <p>1) Section 4.3.c.1 to -4.3.c.7: These sections appear to be outside the purview of Section 401 as it is a</p>

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				<p>water quality certification and has no direct relationship to recreation as written. Recreational need is in the purview of FERC, and hydro power projects are required to provide for recreational opportunities. During licensing or relicensing of hydro projects is the appropriate place for the Department to provide recreation recommendations. Also, many of stated recreational requirements are well outside the control of the licensee.</p> <p>2) Section 6.2.c. The compensatory mitigation requirements of the state are more stringent than the federal found at 33 CFR 332.3(f)(1) as identified by WVDEP. The Chamber urges further assessment of the distinctions and differences of the state program from the federal.</p> <p>3) Section 6.2.c.1. Mitigation</p>

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				<p>for open water impacts should be discretionary based on the quality of the open water and impact.</p> <p>4) Section 6.2.c.5. Mitigation for wetland conversion should not be a requirement as wetland conversion does not always constitute a regulated activity under federal or state law.</p> <p>5) Section 6.2.e.1. As stated above, mitigation for open water should be considered on a case by case basis, if at all.</p> <p>6) Section 6.2.k. 1. and 2. should be omitted altogether. Monetary payments for Section 10 impacts to recreational resources are not appropriate or a suitable replacement for other uses of the resource. For instance, a commercial barge fleeting area provides for commerce, jobs and the</p>

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				<p>economy. This should be encouraged and incentivized by WV, not discouraged or require mitigation for recreation. In other words, irrespective of other considerations, why build a facility on the WV side of the Ohio River when it could be built on the OH side?</p> <p>7) Section 6.2.1. Payment for potential fish losses as a result of entrainment and impingement at a hydro facility is highly inappropriate, subjective to whatever costs WVDNR comes up with (not a standard or based on value), not an acceptable means for migration by FERC, and the hydro itself can provide better fishing and recreational opportunities than any potential loss of fish through the turbines. It is also unclear where and how any mitigation dollars for fish losses would be spent and what</p>

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				the environmental benefit would actually be (i.e. loss of gizzard shad that are highly fecund and sensitive to other stressors).
47-10	National Pollutant Discharge Elimination System (NPDES) Program	No	This rule follows the parameters established in its federal counterpart regulation. Federal Counterpart Regulation: 40 CFR Part 122 - 125	The Chamber welcomes WVDEP taking a proactive role in assessing improvements in the implementation of the state WV/NPDES program. To further such an effort, the Chamber proposes that WVDEP conduct a review and/or be receptive to a request for review of NPDES permit conditions as identified by a permittee or permit applicant. Such review would identify any proposed or existing permit provisions that are more stringent than federal counterparts. Any such provisions must be changed so as to not be more stringent than the federal counterpart prior to issuance,

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				<p>renewal or reissuance of a final permit. Existing NPDES permits should be eligible for review and modification as a matter of WVDEP policy and pursuant to the NPDES permit modification provisions. WVDEP should support any permit changes to conditions that will eliminate provisions in permits that are more stringent than required by federal law. WVDEP should also commit to provide supportive comment, justification and agency action, upon appropriate demonstration of inconsistency with federal law, rules, guidelines, policies and recommendations, for such modification requests.</p> <p><u>NPDES Permit Terms Can Be Interpreted as Eliminating Federal CWA Provisions.</u> The U.S. Court of Appeals for the Fourth Circuit ruled</p>

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				<p>in a citizen suit case, <u>Ohio Valley Environmental Coalition v. Fola Coal</u>, that “a court must interpret an NPDES permit as it would a contract.” 845 F.3d 133, 138 (4th Cir. 2017). The Court read the text of the WV/NPDES permit at issue as an agreement between West Virginia and the NPDES permit holder to render void the “permit shield” concept of the Clean Water Act § 402(k), 33 U.S.C. § 1342(k) and W. Va. Code § 22-11-6(2). See, <u>Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits</u> (April 11, 1995). Because the permit condition that was more stringent than the federal counterpart was not removed from the permit before it was finalized, (despite the request of the permittee, and statutory changes in state law), the permittee (who fully</p>

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				<p>disclosed in its application the constituents in the waste water at issue) was determined to be in violation of a vintage permit condition. The Chamber urges WVDEP to actively engage in permit modifications as justified by law.</p> <p><u>Direct Enforcement of Water Quality Standards.</u> W. Va. Code §§ 22-11-6(2) and 22-11-8(a) imply that water quality standards are the basis for the development of effluent limitations in water discharge permits. This West Virginia statutory law is consistent with the CWA which lays out the process for setting water quality standards and implementing them in NPDES permits. 33 U.S.C. §§ 1313(c), 1311(c)(2)(B), 1342(b). It is federal law that water quality standards are not effluent limitations. 33 U.S.C. § 1362(11); <u>Va. Elec. &</u></p>

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				<p>Power Co., v. Costle, 566 F.2d 446, n. 17 (4th Cir. 1977). In the Fola case, the issue involved assertion that Fola was required to comply with any sulfate and conductivity levels necessary to comply with the narrative criteria. The impact of a ruling that implements an NPDES permit in a manner more stringent than federal policy is uncertainty as to compliance obligations of a NPDES permittee. These uncertainties lend a lack of confidence when determining investment options in West Virginia as opposed to other jurisdiction. The Chamber urges the WVDEP to strengthen its NPDES program by clarifying the implementation process for water quality standards through recommended statutory amendments, rulemaking, and policy.</p>

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				<p>Intake Water Credit. The WVDEP water quality standards regulations unnecessarily limit the application of credit for pollutants that exist in water taken into a facility and ultimately returned to the same surface water. 47 CSR 10, Section 7.7.a. narrowly provides that “upon request of the permittee, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the permittee’s intake water if certain conditions are met.” U.S. EPA has approved implementation of intake credit (or “netting” of intake pollutants) to water quality based effluent limits in addition to technology based limits, in the following states: Delaware, Kentucky, Illinois, Indiana, Ohio, Pennsylvania, and Virginia. The West Virginia Regulation, W. Va.</p>

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				<p>C.S.R. § 47-10-7.7a. is not federally mandated. The Chamber urges WVDEP to review the authorizations EPA has granted to other states and to promulgate an administrative rule to allow for intake credit related to water quality based effluent limits.</p> <p>Stormwater Benchmarks. WVDEP implements stormwater discharge benchmark concentrations for water quality parameters as a threshold in their NPDES permitting of industrial stormwater discharges. WVDEP has chosen to use the benchmark values prepared by EPA. These benchmark values are largely derived from nationally-recommended water quality criteria for aquatic life protection. WVDEP's comparison of stormwater discharge values against these benchmarks as indicators of potential aquatic toxicity (i.e.,</p>

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				<p>bioavailability, exposure duration and frequency, and background concentrations) is scientifically and technically improper. Stormwater discharges, by their very nature, are of limited duration such that aquatic life are exposed to pollutants at a rate much different than used for EPA nationally-recommended criteria, WVDEP's stormwater benchmark protocol is more stringent than the federal and warrants revision. EPA guidance provides, "[a]n exceedance of a benchmark does not necessarily mean that your control measures are insufficient." <i>Industrial Stormwater Monitoring and Sampling Guide</i>, EPA 832-B-09-003. Final Draft. March 2009. The Chamber urges WVDEP to engage in a process of improving its existing stormwater benchmark approach to evaluate the potential impact on in-</p>

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				<p>stream aquatic life from stormwater discharges. The West Virginia Manufacturers Association has led the effort to inform WVDEP of the problems relative to its implementation of benchmark values. The Chamber is working with the WVMA. We commend to WVDEP the research and efforts being led by the WVMA.</p> <p>Federal NPDES exemption. The CWA does not require discharge permits for uncontaminated storm water associated with oil and gas exploration and production activities. See 33 U.S.C. 1342(l)(2). The CWA conditionally exempts oil and gas related storm water discharges from federal NPDES permitting requirements, so long as certain discharge criteria are met. <i>Id.</i> In contrast to its federal counterpart, West</p>

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				Virginia's Water Pollution Control Act regulates storm water discharges related to 'oil and gas construction activities' through a state water pollution control permit, regardless of whether there is or is not a violation of an applicable water quality standard. The Chamber urges WVDEP to identify this inconsistency as directed by S.B. 619.
47-13	Underground Injection Control	No	This rule follows the parameters established in its federal counterpart regulation. Federal Counterpart Regulation: 40 CFR Parts 144 – 148	
47-31	State Water Pollution Control Revolving Fund Program Rule	No	This rule follows the parameters established in its federal counterpart regulation. Federal Counterpart	

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			Regulation: 40 CFR Part 35	
47-34	Dam Safety Rule	No	This rule follows the parameters established in its federal guidance. Federal Guidance: FEMA's Federal Guidelines for Dam Safety Risk Management	
60-5	Antidegradation Implementation Procedures	No	Similar Federal Regulation: While there is not federal counterpart regulation for this rule, EPA required states to develop antidegradation policies through 40 CFR Part 131, and West Virginia developed this rule in accordance with the parameters established pursuant to the federal regulation.	

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