[redacted]

NOVEMBER 13

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

SUNDAY, NOVEMBER 13, 1994, 5:00 - 7:00 P.M.

SENATE FINANCE COMMITTEE ROOM - M-451

1. Approval of Minutes - Meeting October 4, 1994

2. Review of Legislative Rules:

   a. Division of Corrections
   Furlough Program for Inmates Under the Custody and Control of the Commissioner of Corrections

   b. Dept. of Health and Human Resources
   Public Water Systems

   c. Dept. of Health and Human Resources
   Behavioral Health Patient Rights Rule

   d. State Fire Commission
   State Building Code

   e. Office of Air Quality
   Acid Rain Provisions and Permits

   f. Office of Air Quality
   Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 61

   g. Office of Air Quality
   Requirements for Determining Conformity of General Federal Actions to Applicable Air Quality Implementation Plans

   h. Office of Air Quality
   To Prevent and Control Air Pollution From Combustion of Refuse

   i. Office of Air Quality
   To Prevent and Control Air Pollution from the Operation of Coal Preparation Plants and Coal Handling Operations

   j. Office of Air Quality
   Standards for Performance for New Stationary Sources

   k. Office of Air Quality
   Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration

l. Office of Air Quality
Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63

m. Office of Air Quality
Requirements for Determining Conformity of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act, To Applicable Air Quality Implementation Plans

n. Office of Air Quality
Provisions for Determination of Compliance with Air Quality Management Rules

3. Other Business:

Sunday, November 13, 1994

5:00 - 7:00 p.m. Legislative Rule-Making Review Committee (Code §29A-3-10)

Keith Burdette
ex officio nonvoting member

Robert "Chuck" Chambers,
ex officio nonvoting member

Senate	House
Manchin, Chairman	Gallagher, Chairman
Grubb	Douglas
Anderson	Compton
Macnaughtan	Huntwork (absent)
Minard	Burk
Boley	Faircloth

The meeting was called to order by Mr. Gallagher, Co-Chairman.

The minutes of the October 4, 1994, meeting were approved.

Ms. Graham explained that the rule proposed by the Division of Corrections, Furlough Program for Inmates Under the Custody and Control of the Commissioner of Corrections, had been laid over at the last meeting to allow the Division to develop more specific standards. She responded to questions from the Committee. Rita Stuart, General Counsel to the Division of Corrections, responded to questions from the Committee.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was rejected.

Mr. Manchin asked Ms. Stuart if the Division would be willing to withdraw the proposed rule. She said that the Division would not be willing to withdraw the proposed rule.

Mr. Manchin moved that the proposed rule be placed at the foot of the agenda. The motion was adopted.

Ms. Graham explained that the rule proposed by the Department of Health and Human Resources, Public Water Systems, had been laid over at the previous meeting to allow Mr. Anderson time to obtain additional information. Kay Howard, of Regulatory Development of the Department, and Bill Herold, Assistant Director of the Division of Environmental Engineering, Department of Health and Human Resources, responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained the rule proposed by the Department of Health and Human Resources, Behavioral Health Patient Rights Rule, and stated that the Department has agreed to technical modifications. She responded to questions from the Committee. Ms. Howard and Dr. Garrett Moran, Commissioner of the Bureau for Community Support for the Department, responded to questions from the Committee.

Ms. Boley moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Ms. Graham stated that the rule proposed by the State Fire Commission, State Building Code, has been laid over at the Committee's last meeting to allow the Commission and Counsel the opportunity to research a court case from Berkeley County regarding whether or not the State may delegate to the counties the ability to set penalties for violations of the State Building Code. She told the Committee that the Supreme Court overturned the ruling of the Berkeley County Circuit and stated that it is lawful delegation of authority.

Ms. Douglas moved that the proposed rule be placed at the foot of the agenda. The motion was adopted.

Joe Altizer, Associate Counsel, explained the rule proposed by the Office of Air Quality, Acid Rain Provisions and Permits, and stated that the Office has agreed to technical modifications. Karen Price, West Virginia Manufacturers Association, addressed the Committee.

Ms. Compton moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Altizer reviewed his abstract on the rule proposed by the Office of Air Quality, Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 61, and stated that the Office has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Altizer explained the rule proposed by the Office of Air Quality, Requirements for Determining Conformity of General Federal Actions to Applicable Air Quality Implementation Plans, and stated that the Office has agreed to technical modifications.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Altizer reviewed his abstract on the rule proposed by the Office of Air Quality, To Prevent and Control Air Pollution From Combustion of Refuse, and stated that the Office has agreed to technical modifications. He responded to questions from the Committee. Dale Farley, from the Office, responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Gallagher stated that the next rule on the agenda is the rule proposed by the Office of Air Quality, To Prevent and Control Air Pollution from the Operation of Coal Preparation Plants and Coal Handling Operations.

Mr. Manchin moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Mr. Altizer reviewed his abstract on the rule proposed by the Office of Air Quality, Standards for Performance for New Stationary Sources, and stated that the Office has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Altizer explained the rule proposed by the Office of Air Quality, Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration, and stated that the Office has agreed to technical modifications.

Mr. Faircloth moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Mr. Altizer reviewed his abstract on the rule proposed by the Office of Air Quality, Emission Standards for Hazardous Air Pollutants Pursuant to 40 CFR Part 63, and stated that the Office has agreed to technical modifications.

Mr. Faircloth moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Altizer explained the rule proposed by the Office of Air Quality, Requirements for Determining Conformity of Transportation Plans, Programs and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act, To Applicable Air Quality Implementation Plans, and stated that the Office has agreed to technical modifications.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Altizer reviewed her abstract on the rule proposed by the Office of Air Quality, Provisions for Determination of Compliance with Air Quality Management Rules, and stated that the Office has agreed to technical modifications.

Ms. Compton moved that the proposed rule be approved as modified. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: 11-13-94

TIME: 5:00-7:00 p.m.

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Brian Gallagher, Co-Chair	✓			
Burk, Robert W., Jr.	✓			
Faircloth, Larry V.	✓			
Douglas, Vickie	✓			
Compton, Mary P.	✓			
Huntwork, John	✓			
Burdette, Keith, President				
Joe Manchin, III Co-Chair	✓			
Anderson, Leonard	✓			
Grubb, David	✓			
Minard, Joseph	✓			
Macnaughtan, Don	✓			
Boley, Donna	✓			
TOTAL				

RE: _____

REGISTRATION OF PUBLIC
AT
COMMITTEE MEETINGS
WEST VIRGINIA LEGISLATURE

COMMITTEE: Leg. Rule-Making Review DATE: Sunday, November 13, 1994

NAME Please print or write plainly	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
DALE FAKLEY	CHARLESTON WV	WVDEP - Office of Air Quality	X
WALTER SMITTLE III	CHARLESTON	STATE FIRE COMMISSION	
Karen Price	Charleston	WV Manufacturers Assn.	X
Rita Studt	Bld. 4, Room 300	Corrections	
Mike McThomas	PO Box 1791 Chas WV	Robinson+McElwee WVMA	if necessary
Kay Howard	Charleston	DHHR	if needed
GREG WILLIAMSON	CHARLESTON	WV SOCIETY of ARCHITECTS	

LS-C-66-1a

purpose, to a specific place, under specific conditions, and for a specific period of time.

2.4. Unescorted absence - An approved absence from the correctional center during which the inmate is not accompanied by Correctional Officer.

§90-3-3. Applicability.

3.1. This rule is applicable to all Division of Corrections correctional centers which house adult inmates.

§90-3-4. Eligibility for furlough consideration.

4.1. The Commissioner of Corrections may grant furloughs when appropriate for medical or psychiatric treatment, substance abuse treatment, to strengthen family relationships or other similar reasons.

4.2. This rule will normally be applicable to inmates whose overall custody classification is I (Community) or II (Minimum) as determined by the WV Corrections Classification Profile (CCP).

4.3. Furlough for inmates whose custody classification exceed II requires a written recommendation from the Chief Executive Officer of the requesting correctional center and specific approval of the Commissioner of Corrections or his designee.

§90-3-5. Restrictions, conditions and criteria.

5.1. An inmate may not be granted a furlough if Division of Corrections officials believe that he or she poses a threat to him or herself or others, may become involved in criminal activity while on furlough, poses a risk to the victim of the crime or crimes for which committed or poses a risk to the community in general.

5.2. In order to eligible for a furlough, an appropriately classified inmate must have served at least thirty (30) days in the correctional center and have had no finding of misconduct during the preceding six (6) months.

5.3. Inmates approved for furloughs are eligible to receive furloughs as follows:

a. After thirty (30) days in the center one (1) 24 hour furlough.

b. After sixty (60) days in the center two (2) 24 hour furloughs.

c. After ninety (90) days in the center forty-eight (48) hours of furlough each week.

d. Special furloughs granted by the Commissioner for medical, psychiatric or substance abuse treatment will be for a maximum of thirty (30) days unless the treating physician or psychiatrist requests, as a medical necessity, additional treatment time.

5.4. Furlough Requests; Contract; Notification of Counties.

5.4.1. The Warden, Superintendent, or Administrator of each correctional center shall establish the requirements necessary for requesting a furlough, and shall designate a Furlough Officer to review and handle the requests.

5.4.2. Reporting requirements, rules, regulations, and special conditions shall be in the form of a contract. The contract shall inform the inmate that his or her conduct will be monitored by the center while he or she is on furlough.

5.2.3. Upon receiving the first valid request for a furlough from an eligible inmate, the Furlough Officer shall notify in writing the Prosecuting Attorney, Sheriff, and Parole Officer in the original sentencing county, as well as the Sheriff and Parole Officer in the county to which furlough is requested, if different, that the inmate may be eligible to receive furlough privileges beginning on a particular date.

§90-3-6. Procedure.

6.1. The Division may cancel an inmate's furlough for any violation of the terms and conditions of the furlough.

6.2. The Division may discipline inmates who violate the terms and conditions of a furlough in accordance with Division of Corrections Policy Directive 670.00 "Discipline of Adult Inmates".

6.3. The Division shall report to the appropriate law enforcement authority for prosecution under the applicable statute any violation of conditions of a furlough which is a violation of Federal or State Law .

6.4. Violation of Contract Conditions of Furlough: Any inmate who fails to timely return from a furlough, as provided for in the furlough contract or upon the order of a corrections official, shall be considered to have escaped. Corrections officials will report the escape to the proper authorities and charge the inmate under the applicable statute.

§90-3-7. Exceptions.

7.1. The Commissioner of Corrections may, for good cause shown, grant exceptions to this rule.

7.2. Extended furloughs may be granted by the center upon special request of the inmate or his or her family in instances such as the injury or illness of the inmate or a member of his or her immediate family or extreme, adverse weather conditions. The center shall document the circumstances which require that the furlough be extended.

7.3. Special time frames may be designated by the Central Office for specific holidays.

7.4. Any special exception that is granted shall not count against the normal duration or frequency criteria for furloughs applicable to that inmate.

§90-3-8. Notification of Sentencing County (Work Release Inmates).

8.1. Within one week of any inmate's arrival at a Work Release Center, the Administrator shall provide, in writing, to the Prosecuting Attorney, Sheriff, and Parole Officer of the sentencing county the following information:

a. That the inmate has been assigned to a community-based program;

b. That the inmate may be eligible to receive furlough privileges beginning on a particular date; and

c. That the inmate's stay at the Center will be for a particular period of time contingent upon parole eligibility and the inmate's conduct.

W.Va. 524, 345 S.E.2d 824 (1986); syl. pt. 1, *Tanner v. Workers' Compensation Commissioner*, 176 W.Va. 427, 345 S.E.2d 29 (1986). Similarly, when the language of a regulation promulgated pursuant to the West Virginia Surface Mining and Reclamation Act, *W.Va.Code*, 22A-3-1 *et seq.*, is clear and unambiguous, the plain meaning of the regulation is to be accepted and followed without resorting to the rules of interpretation or construction.

In that vein, our reading of 12.4(c) makes it clear that the respondent has a mandatory duty to utilize the proceeds from the forfeited bonds to accomplish the completion of reclamation at the Laurel Mountain site.[10]

Therefore, we hold that pursuant to 38 *C.S.R.* § 2-12.4(c) (1991), the Commissioner of the Division of Environmental Protection has a duty to utilize the proceeds from forfeited bonds to accomplish the completion of reclamation of affected lands of a surface mine.

Consistent with the foregoing, the petitioners' writ of mandamus is granted.[11]

Writ granted.

10. The respondent points out that the only proceeds available for reclamation of this site are $3000 in the form of a certified check. While this may not be adequate to accomplish the complete reclamation of the Laurel Mountain site, it does not abrogate the respondent's duty in this case. Accordingly, the respondent will need to take the necessary steps to collect payment on the bonds from their respective sureties. Until that time, the $3000 must be utilized to carry out the respondent's duty.

We note that this case illustrates the need for the bonds to be set at levels that are sufficient to cover the costs associated with accomplishing completion of reclamation.

418 S.E.2d 585

STATE of West Virginia ex rel. STATE LINE SPARKLER OF WV, LTD.; R. Robert Kirk; and Jerry G. Kirk, Petitioners Below, Appellees,

v.

William J. "Bucky" TEACH, Hon. Joan V. Bragg, Ruth Donaldson, and Harold E. Darlington, Magistrates of Berkeley County, Respondents Below, Appellants.

No. 20908.

Supreme Court of Appeals of West Virginia.

Submitted April 29, 1992.

Decided May 15, 1992.

Rehearing Denied June 24, 1992.

Petition was brought for writ of prohibition to prevent county's building code enforcement officer from obtaining, and magistrates from issuing, criminal warrants to enforce provisions of county building code. The Circuit Court of Berkeley County, Patrick G. Henry, III, J., found unconstitutional the provisions of county ordinance imposing penalties for violations of building codes, and enforcement officer appealed. The Supreme Court of Appeals, Miller, J., held that: (1) power to impose pecuniary penalties for violations of county building code was within legislature's delegation of authority to county commission, even though statutes authorizing county commissions to adopt building codes did *not* expressly authorize imposition of penalties for violations thereof, and (2) legislature's

11. The petitioners also assert that under 38 C.S.R. § 2-3.25(b) (1991), the respondent has a nondiscretionary duty to correct all outstanding unabated violations of F & M. Specifically, that regulation provides, in part: "Any person who, through whatever means, assumes ownership or control directly or indirectly of a surface mining and reclamation operation shall become responsible for the correction of all outstanding unabated violations." The petitioners argue that because the Division is now the entity responsible for the Laurel Mountain site, then 3.25(b) imposes this duty. However, we need not decide this matter in light of our holding herein.

delegation of authority to county commission as to matter of building code was valid.

Reversed and remanded.

1. Counties ⇐47

County commission is corporation created by statute, and is possessed only of such powers as are expressly conferred by Constitution and legislature, together with such as are reasonably and necessarily implied in full and proper exercise of powers so expressly given; it can do only such things as are authorized by law, and in mode prescribed.

2. Municipal Corporations ⇐589, 633(1)

Grant of police power to local government or political subdivision necessarily includes right to carry it into effect and empowers governing body to use proper means to enforce its ordinances; consequently, power to punish by pecuniary fine or penalty is implied from delegation by legislature of right to enforce particular police power through ordinances or regulations.

3. Health and Environment ⇐38

Power to impose pecuniary penalties for violations of county building code was within legislature's delegation of authority to county commission, even though statutes authorizing county commissions to adopt building codes did not expressly authorize imposition of penalties for violations thereof. Code, 29-3-5b.

4. Administrative Law and Procedure ⇐12

Supreme Court of Appeals has not yet passed on constitutionality of revisions to state Administrative Procedures Act requiring that regulations be approved by entire legislature. Code, 29A-1-1 et seq.

5. Health and Environment ⇐32

Legislature's delegation of authority to county commission as to matter of building code was valid. Const. Art. 5, § 1.

6. Constitutional Law ⇐63(2, 3)

Legislature has authority to delegate its law-making power to municipal corporations and counties as to matters of local concern; such delegation does not violate separation of powers doctrine. Const. Art. 5, § 1.

7. Appeal and Error ⇐169

Supreme Judicial Court will not pass on nonjurisdictional question which has not been decided by trial court in first instance.

Syllabus by the Court

1. "'The county [commission] is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed.' Point 3, syllabus, *Barbor v. County Court of Mercer County*, 85 W.Va. 359 [101 S.E. 721 (1920)]." Syllabus Point 1, *State ex rel. County Court v. Arthur*, 150 W.Va. 298, 145 S.E.2d 34 (1965).

2. A grant of the police power to a local government or political subdivision necessarily includes the right to carry it into effect and empowers the governing body to use proper means to enforce its ordinances. Consequently, the power to punish by a pecuniary fine or penalty is implied from the delegation by the legislature of the right to enforce a particular police power through ordinances or regulations.

3. The legislature has authority to delegate its law-making power to municipal corporations and counties as to matters of local concern. Such delegation does not violate the separation of powers doctrine contained in Article V, Section 1 of the West Virginia Constitution.

4. "'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)." Syllabus Point 2, *Duquesne Light Co. v. State Tax Department*, 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert. de-*

ied, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985).

Michael L. Scales, Greenberg & Scales, Martinsburg, for appellees.

Pamela Jean Games-Neely, Janet L. Scalia, Asst. Pros. Attys., for Berkeley County, Martinsburg, for appellants.

MILLER, Justice:

This is an appeal of a final order of the Circuit Court of Berkeley County which granted the petitioners below a writ of prohibition to prevent respondent William J. "Bucky" Teach from obtaining and the respondent magistrates from issuing criminal warrants to enforce provisions of the Berkeley County Building Code. The circuit court ruled that because the statutes authorizing county commissions to adopt building codes did not expressly authorize the imposition of penalties for violations thereof, the provisions of the county ordinance imposing such sanctions were unconstitutional. We disagree, and we reverse the judgment of the circuit court.

I.

Two statutes are at the heart of this dispute. In 1988, the legislature enacted W.Va.Code, 29-3-5b, which required the state fire commission to promulgate comprehensive rules and regulations, to be known as the "state building code," for the purpose of "safeguard[ing] life and property and ... ensur[ing] the quality of construction of all structures erected or renovated throughout this State." These regulations were required to address all aspects of building construction, renovation, and operation. W.Va.Code, 29-3-5b, provided that the state building code shall be effective in those counties and municipalities which adopt it, but allowed for more stringent ordinances or regulations. The statute placed the responsibility for enforcement of the state building code on the adopting local jurisdictions. The current statute is virtually identical.[1]

At the same time, the legislature enacted W.Va.Code, 7-1-3n (1988), which voided all existing county building codes one year after the promulgation of the state building code and required a county commission, if it desired thereafter to enact a building code, to adopt the rules and regulations promulgated by the state fire commission under W.Va.Code, 29-3-5b.[2]

In response to the legislative mandate of W.Va.Code, 29-3-5b, the state fire commis-

1. The relevant portions of W.Va.Code, 29-3-5b (1990), are:

"(a) The state fire commission shall promulgate and repeal rules and regulations to safeguard life and property and to ensure the quality of construction of all structures erected or renovated throughout this state pursuant to the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code through the adoption of a state building code. Such rules, regulations, amendments or repeals thereof shall be in accordance with standard safe practices so embodied in widely recognized standards of good practice for building construction and all aspects related thereto and shall have force and effect in those counties and municipalities adopting the state building code.

* * * * * *

"(c) For the purpose of this section the term 'building code' is intended to include all aspects of safe building construction and mechanical operations and all safety aspects related thereto....

"(d) Enforcement of the provisions of the state building code is the responsibility of the respective local jurisdiction. Also, any county or municipality may enter into an agreement with any other county or municipality to provide inspection and enforcement services.

"(e) After the state fire commission has promulgated rules and regulations as provided herein, each county or municipality intending to adopt the state building code shall notify the state fire commission of its intent."

2. W.Va.Code, 7-1-3n, provides, in pertinent part:

"(a) In addition to all other powers and duties now conferred by law upon county commissions, county commissions are hereby authorized and empowered, by order duly entered of record, to adopt building and housing codes establishing and regulating minimum building and housing standards for the purpose of improving the health, safety and well-being of its citizens....

"(b) Notwithstanding the provisions of subsection (a), all existing county building codes are void one year after the promulgation of a state building code by the state fire commission as provided in section five-b [§ 29-3-5b], article three, chapter twenty-nine of this code.

"Upon the voidance of the county's existing building code, if the county commission votes

sion adopted as part of the state building code the standards set out in the 1990 Building Officials & Code Administrators National Building Code (BOCA).[2] *See* 7 W.Va.C.S.R. § 87-4-4.1 (1991). The BOCA standards provide for penalties for violations in the form of fines and/or imprisonment. The state building code leaves the determination of the appropriate penalty to the discretion of the local government. In particular, the state building code provides that the BOCA standards providing for a penalty of imprisonment for a violation of the rules are "optional with each adopting local jurisdiction." 7 W.Va.C.S.R. § 87-4-5.4. The state fire commission's rules also authorize local governments to adopt or reject certain discretionary provisions of the BOCA standards as a way of adapting them to local conditions. 7 W.Va.C.S.R. § 87-4-5.3.

On January 31, 1991, the Berkeley County Commission adopted a county building code based on the state fire commission's regulations. The ordinance designated violations of the building code as misdemeanors, punishable by fines of up to $500.

In May of 1991, Mr. Teach, Berkeley County's building code enforcement officer, issued notices of building code violations to the petitioners, State Line Sparkler of WV, Ltd. (SLS), a West Virginia corporation, and its principals, R. Robert Kirk and Jerry G. Kirk. Mr. Teach also posted a stop-work notice, requiring construction, alterations, or repairs to cease at the SLS premises in Berkeley County. Mr. Teach subsequently filed criminal complaints in magistrate court charging the Kirks with continuing to operate their business without the required permits after the posting of the stop-work notice. As a result, the Kirks and several SLS employees were arrested.

to adopt a building code, it must be the state building code promulgated pursuant to section five-b, article three, chapter twenty-nine of this code.

"(c) In addition to all other powers and duties now conferred by law upon county commissions, county commissions are hereby authorized and empowered, by order duly entered of record, to adopt such state building code upon promulgation by the state fire commission...."

On June 6, 1991, the petitioners filed with the Circuit Court of Berkeley County a petition for a writ of prohibition seeking to prevent the respondents from obtaining, issuing, or enforcing any warrants against them for alleged violations of the county building code. The petition alleged that the provisions of the building code did not pertain to the activities taking place on the SLS premises and that the language of the ordinance was unconstitutionally vague.

A hearing was conducted on the petition for a writ of prohibition on June 19, 1991. At that time, the circuit court announced its conclusion that the county ordinance adopting the building code was unconstitutional insofar as it permitted imposition of penalties for a violation thereof. The court concluded that because such penalties were not expressly authorized by W.Va.Code, 29-3-5b (1990), and 7-1-3n, provision therefor in the county ordinance exceeded the legislative delegation of authority. A *nunc pro tunc* order reflecting these conclusions was entered on October 12, 1991.

II.

[1] The general rule with regard to the powers of county governments is set forth in Syllabus Point 1 of *State ex rel. County Court v. Arthur*, 150 W.Va. 298, 145 S.E.2d 84 (1965):

"'The county [commission] is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed.' Point 3, syllabus,

Similar power is granted to municipalities under W.Va.Code, 8-12-13 (1989).

3. The state fire commission initially adopted the 1987 BOCA standards. These provisions were in effect from April 28, 1989, until June 28, 1990, when they were replaced by emergency rules which incorporated the 1990 revisions to the BOCA standards. Those revisions became part of a permanent rule, now in effect, on April 3, 1991.

Barbor v. County Court of Mercer County, 85 W.Va. 359 [101 S.E. 721 (1920)]."

See also Berkeley County Comm'n v. Shirley, 170 W.Va. 684, 295 S.E.2d 924 (1982). It is undisputed that neither W.Va.Code, 29-3-5b nor W.Va.Code, 7-1-3n expressly authorizes a county commission adopting the state building code to enact penalties for violations thereof. Nor are we directed to any general grant of power to impose penalties for the violation of county ordinances, such as that conferred upon municipalities.[4]

[2] It appears, however, that such power may arise by implication. The general rule is that a grant of the police power to a local government or political subdivision necessarily includes the right to carry it into effect and empowers the governing body to use proper means to enforce its ordinances. *See generally* 5 *McQuillan Municipal Corporations* § 17.04 (3d ed. 1989); 56 Am.Jur.2d *Municipal Corporations, Counties and Other Political Subdivisions* § 414 (1971). Pursuant to this rule, it has been held that even in the absence of an express grant of authority, the power to punish by a pecuniary fine or penalty is implied from the delegation by the legislature of the right to enforce a particular police power through ordinances or regulations.[5] *See, e.g., Dunn v. Mayor & Council of Wilmington*, 59 Del. 287, 219 A.2d 153 (1966); *Metropolitan Sanitary Dist. v. On-Cor Frozen Foods, Inc.*, 36 Ill.App.3d 239, 343 N.E.2d 577 (1976); *City of Louisville v. Fischer Packing Co.*, 520 S.W.2d 744 (Ky.1975); *City of Detroit v. Fort Wayne & B.I. Ry. Co.*, 95 Mich. 456, 54 N.W. 958 (1893); *State v. Grimes*, 49 Minn. 443, 52 N.W. 42 (1892); *Belleview Inv. Co. v. Kansas City*, 321 Mo. 969, 13 S.W.2d 828 (1929); *State v. Iams*, 78 Neb. 678, 111 N.W. 604 (1907); *Sitterle v. Victoria Cold Storage Co.*, 33 S.W.2d 546 (Tex.Civ.App.1930).

Of particular interest is *City of Louisville v. Fischer Packing Co., supra*, where the court considered a city ordinance which provided that any person who failed to file an occupational license tax return would be assessed a penalty of up to 25 percent of the unpaid license fee. The legislation authorizing cities to issue such licenses provided no penalty for failure to file a return. It did, however, provide that licenses issued pursuant to the statute would be "issued and enforced on terms and conditions as prescribed by ordinance." 520 S.W.2d at 745. Recognizing, as we do, that counties and municipalities "possess only those powers which have been granted to them expressly plus those powers necessarily implied or incident thereto as to enable them to carry out the expressed powers," the Kentucky court held that the enabling legislation,

> "having expressly authorized the levy and the collection of the occupational license and having provided that they shall be issued and enforced as prescribed by ordinance, authorize by implication the power to require the filing of a return and the enforcement of that requirement by means of a penalty as a necessary incident to the exercise of the expressed grant." 520 S.W.2d at 746. (Citations omitted).

[3] The enabling legislation here contains similar provisions. W.Va.Code, 29-3-5b(d), provides: "Enforcement of the provisions of the state building code is the responsibility of the respective local jurisdiction." By authorizing county commissions to exercise the police power with regard to the safety and quality of building construction, maintenance, and operation, and by placing the responsibility for enforcement

4. W.Va.Code, 8-11-1 (1990), gives municipal corporations plenary power to enact ordinances "and, for a violation thereof, to prescribe reasonable penalties in the form of fines, forfeitures and imprisonment in the county jail or the place of imprisonment in such municipality, if there be one, for a term not exceeding thirty days." *See also* W.Va.Code, 8-12-2(a)(11) (1966), 8-12-5 (1989).

5. The rule may be otherwise where the ordinance is not enacted pursuant to a grant of police power. *See City of Detroit v. Fort Wayne & B.I. Ry. Co.*, 95 Mich. 456, 54 N.W. 958 (1893). *See generally* 62 C.J.S. *Municipal Corporations* § 179 (1949).

on the adopting local government, the legislature has, by implication, granted counties the power to enforce violations of building code ordinances by imposing a fine. We conclude, therefore, that the power to impose pecuniary penalties for violations of the county building code was within the legislature's delegation of authority to the county commission.

III.

The circuit court concluded, and the petitioners argue on appeal, however, that the delegation of legislative authority was itself invalid. In this regard, the petitioners rely on *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974).

In *Grinstead*, the Court considered a challenge to a criminal statute proscribing the possession or sale of dangerous drugs on the ground that the legislature had unlawfully delegated its law-making authority to the West Virginia Board of Pharmacy. The statute in question authorized the Board to expand a list of proscribed drugs by adding substances which (1) contained or were derived from barbituric acid or amphetamines, (2) were determined by the Board, after investigation, to be habit-forming because of their stimulant effect on the central nervous system, or (3) were designated as dangerous or habit-forming by existing or future federal drug regulations. The defendant in *Grinstead* was convicted of possession and delivery of lysergic acid diethylamide (LSD) after that drug was added to the federal list.

This Court in *Grinstead* was concerned with whether the legislature's delegation of authority violated Article VI, Section 1 of our State Constitution, which reposes the law-making authority in the legislature.[6] We noted that under this provision, a statute "may be invalid as incomplete if it is left to a body other than the Legislature to determine without benefit of legislative standards what shall and shall not be an infringement of the law." 157 W.Va. at 1010, 206 S.E.2d at 918. We determined that the Board's power to expand the list of proscribed drugs under the first two categories was accompanied by sufficient legislative standards to constitute a valid delegation of legislative authority. Moreover, we stated that the legislature could adopt and incorporate by reference existing model legislation or the enactments of other bodies declaring conduct unlawful.

[4] Our ultimate conclusion, however, was that the legislature could not empower the Board to engraft future declarations of unlawful conduct by other bodies onto the present statute: "[W]hen a legislative body delegates its legislative powers so loosely as to permit another legislative body or an executive board or agency to redefine and expand the criminal acts *in futuro* and without limitation, such attempt at delegation is constitutionally invalid." 157 W.Va. at 1011, 206 S.E.2d at 919. We reasoned that under Article VI, Section 1 and Article V, Section 1, relating to separation of powers,[7] "enactment of criminal statutes is solely a legislative function.... The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others." 157 W.Va. at 1013, 206 S.E.2d at 920. (Citations omitted). We found the statute to be unconstitutional insofar as it granted the Board of Pharmacy the power to declare conduct unlawful based on future federal pronouncements[8] and reversed the defendant's conviction.

6. Article VI, Section 1 of the West Virginia Constitution provides, in pertinent part: "The legislative power shall be vested in a senate and house of delegates."

7. Article V, Section 1 of the West Virginia Constitution provides:

"The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except the justices of the peace shall be eligible to the legislature."

8. In *West Virginia Manufacturers Association v. State*, 714 F.2d 308 (4th Cir.1983), the Court of Appeals held that the principal concern of the *Grinstead* court, i.e., that the statute allowed the Board to proscribe certain conduct as unlawful without the prior approval of the legislature, has been addressed by revisions to the state Administrative Procedures Act requiring such

[5] The petitioners argue that the principles enunciated in *Grinstead* precluded the legislature from delegating to county commissions the power to penalize violations of county building codes. What this argument ignores is the fact that in *Grinstead*, the legislature attempted to delegate its law-making function to an administrative body, an agency of the executive branch of government. In such cases, the constitutional provisions relating to separation of powers and reposing the law-making function in the legislature prevent delegation except where the legislation is complete and sets forth adequate standards to guide the agency in the exercise of such power. *See, e.g., State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981); *Quesenberry v. Estep*, 142 W.Va. 426, 95 S.E.2d 832 (1957); *State v. Grinstead, supra; Rinehart v. Woodford Flying Serv.*, 122 W.Va. 392, 9 S.E.2d 521 (1940).

[6] Here, however, the delegation was made to the county commission, a political subdivision of the State. In such circumstances, the general rule restricting delegation of legislative authority has no application. *See generally* 16 Am.Jur.2d *Constitutional Law* § 350 (1979). We have repeatedly recognized the legislature's authority to delegate its law-making power to municipal corporations and counties as to matters of local concern. *See, e.g., State ex rel. City of Charleston v. Bossly*, 165 W.Va. 332, 268 S.E.2d 590 (1980); *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 207 S.E.2d 113 (1973); *State ex rel. City of Charleston v. Sims*, 132 W.Va. 828, 54 S.E.2d 729 (1949); *Brackman's, Inc. v. City of Huntington*, 126 W.Va. 21, 27 S.E.2d 71 (1943); *Haigh v. Bell*, 41 W.Va. 19, 23 S.E. 666 (1895). The Constitution itself recognizes the legislature's right to delegate to county governments by stating in Article IX, Section 11 that county commissions "may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law." Such delegation does not violate the separation of powers doctrine contained in Article V, Section 1 of the West Virginia Constitution.

Here, no other infirmity in the legislative grant of authority is alleged. The legislature itself had the authority to exercise the powers it delegated to the county commission. There is no allegation that the penalty imposed under the county ordinance is in conflict with any other legislative enactment. We therefore find no reason for holding the ordinance unconstitutional as the result of an invalid delegation of state authority, and we reverse the judgment of the circuit court.

IV.

[7] We note in closing that the parties below raised several issues with regard to the certainty of the language of the ordinance and its application to the particular facts in this case. Resolution of those issues was avoided by the circuit court's ruling on the constitutionality of the ordinance. We do not address these issues based on our familiar rule expressed in Syllabus Point 2 of *Duquesne Light Co. v. State Tax Department*, 174 W.Va. 506, 327 S.E.2d 668 (1984), *cert. denied*, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985):

> "'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)."

For the reasons stated herein, the judgment of the Circuit Court of Berkeley County is reversed, and the case is remanded for such further proceedings as may be necessary.

Reversed and remanded.

regulations to be approved by the entire legislature. *See* W.Va.Code, 29A–1–1, *et seq.*; 29A–3–11 (1986); 29A–3–12 (1986). We have not yet passed on the constitutionality of this procedure, and we decline to do so here. *See Chico Dairy Co. v. West Virginia Human Rights Comm'n*, 181 W.Va. 238, 382 S.E.2d 75 (1989); *West Virginia Chiropractic Soc'y, Inc. v. Merritt*, 178 W.Va. 173, 358 S.E.2d 432 (1987).

Dist. meeting 11-13-94

TITLE 90
LEGISLATIVE RULE
DIVISION OF CORRECTIONS

SERIES 3
FURLOUGH PROGRAM FOR ADULT INMATES

§90-3-1. General.

1.1. Scope - This legislative rule establishes the furlough program for inmates under the custody and control of the West Virginia Division of Corrections.

1.2. Authority - W.Va. Code §25-1-13

1.3. Filing Date -

1.4. Effective Date -

1.5. Repeal and Replace - This rule repeals and replaces Furlough Programs For Inmates Under The Custody And Control Of The Commissioner Of The Division Of Corrections, 90 CSR 3, effective January 13, 1989.

§90-3-2. Definitions.

2.1. Classification - A process for determining the appropriate security placement and special needs of the inmate population in order to provide a safe, secure and humane correctional system for the public, staff and inmates.

2.2. Correctional Classification Profile (CCP) - A scientific system for the classification of adult inmates developed in accordance with the American Correctional Association Standards. The CCP is a grid system which incorporates those factors known to be important in determining inmates' institutional assignments, identifying inmates' programmatic and service needs as well as public (security) and institutional (custody) risks. The CCP takes into consideration such things as the current offense, level of violence of the offense, institutional violence, escape history, mental and physical health and disciplinary rule violations. Inmates are classified on a scale of I to V. Level V is the most severe and restrictive and level I is the least restrictive.

2.3. Furlough - An authorized unescorted absence from actual confinement within a correctional center for a specific

NOVEMBER 14

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: 11-14-94

TIME: _____

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Brian Gallagher, Co-Chair				✓
Burk, Robert W., Jr.			✓	
Faircloth, Larry V.			✓	
Douglas, Vickie				✓
Compton, Mary P.				✓
Huntwork, John				
Burdette, Keith, President				
Joe Manchin, III Co-Chair			✓	
Anderson, Leonard			✓	
Grubb, David				✓
Minard, Joseph			✓	
Macnaughtan, Don				✓
Boley, Donna			✓	
TOTAL			6	5

RE: Amendment - Proposed Revisions to Section 7.2.a.B. (WV Mfg. Assoc. Recommendation): Rule: Env. Quality Bd - Requirement Governing Water Quality Standards

AGENDA

LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

MONDAY, NOVEMBER 14, 1994, 12:00 - 2:00 P.M.

SENATE FINANCE COMMITTEE ROOM - M-451

1. Approval of Minutes - Meeting November 13, 1994

2. Review of Legislative Rules:

   a. Division of Corrections
      Furlough Program for Inmates Under the Custody and Control of the Commissioner of Corrections

   b. State Fire Commission
      State Building Code

   c. Insurance Commissioner
      Regulation of Credit Life Insurance and Credit Accident and Sickness Insurance

   d. Insurance Commissioner
      Credit for Reinsurance

   e. State Tax Division
      Exchange of Information Agreement Between Tax Division and Division of Environmental Protection

   f. State Tax Division
      Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, Small Business Tax Credit

   g. Environmental Quality Board
      Requirements Governing Water Quality Standards

   h. Water Resources
      Dam Safety Regulations

   i. Water Resources
      Regulations Governing Environmental Laboratories Certification and Standards of Performance

   j. Alcohol Beverage Control Commission
      Nonintoxicating Beer Licensing and Operations Procedures

   k. Bd. Examiners for Registered Professional Nurses
      Requirements for Licensure and Registration

l. Bd. Examiners for Registered Professional Nurses Continuing Education

m. Bd. Examiners for Registered Professional Nurses Criteria for the Evaluation and Accreditation of Colleges, Departments or Schools of Nursing

n. Bd. Examiners for Registered Professional Nurses Policies and Procedures Related to the Accreditation of Colleges, Departments or Schools of Nursing

3. Other Business:

Monday, November 14, 1994

12:00 - 2:00 p.m. Legislative Rule-Making Review Committee (Code §29A-3-10)

Keith Burdette ex officio nonvoting member	Robert "Chuck" Chambers, ex officio nonvoting member
Senate	House
Manchin, Chairman	Gallagher, Chairman
Grubb	Douglas
Anderson	Compton
Macnaughtan	Huntwork (absent)
Minard	Burk
Boley	Faircloth

The meeting was called to order by Mr. Gallagher, Co-Chairman.

The minutes of the November 14, 1994, meeting were approved.

Mr. Gallagher told the Committee that the rule proposed by the Division of Corrections, Furlough Program for Inmates Under the Custody and Control of the Commissioner of Corrections, had been placed at the foot of the agenda at the Committee's last meeting and that the Committee adjourned prior to taking action on the proposed rule.

Mr. Minard moved that the Committee reconsider its action whereby it rejected a motion to approve the proposed rule as modified. The motion was adopted.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr.Gallagher told Committee members that the rule proposed by the State Fire Commission, State Building Code, had been also been placed at the foot of the agenda at the Committee's last meeting and that the Committee adjourned prior to taking action on the proposed rule.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Debra Graham, Committee Counsel, explained her abstract on the rule proposed by the Insurance Commissioner, Regulation of Credit Life Insurance and Credit Accident and Sickness Insurance, and stated that the Commissioner has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed the rule proposed by the Insurance Commissioner, Credit for Reinsurance, and stated that the Commissioner has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained the rule proposed by the State Tax Division, Exchange of Information Agreement Between Tax Division and Division of Environmental Protection, and stated that the Division has agreed to technical modifications. Ms. Graham and Mark Morton, of the Division, responded to questions from the Committee.

Mr. Minard moved that the proposed rule be placed at the foot of the agenda. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the State Tax Division, Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, Small Business Tax Credit, and stated that the Division has agreed to technical modifications.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Joe Altizer, Associate Counsel, reviewed his abstract on the rule proposed by the Environmental Quality Board, Requirements Governing Water Quality Standards, and stated that the Board has agreed to technical modifications. Gene Current, Environmental Control, Weirton Steel, addressed the Committee and responded to questions from the Committee. Libby Chatfield, Technical Advisor to the Board, answered questions from the Committee.

Ms. Douglas moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Mr. Altizer explained the rule proposed by the Environmental Quality Board, Dam Safety Regulations, and stated that the Board has agreed to technical modifications.

Ms. Compton moved that the proposed rule be approved as modified. Brian Long, Office of Water Resources, responded to questions from the Committee. After further discussion, Ms. Compton asked unanimous consent to withdraw her motion. There being no objection, the motion was withdrawn.

Mr. Manchin moved that the proposed rule lie over until the December meeting. The motion was adopted.

Mr. Anderson moved that the Committee reconsider its action whereby it laid over until the December meeting, the rule proposed by the Environmental Quality Board, Requirements Governing Water Quality Standards. The motion was adopted.

Mr. Anderson moved that the Committee modify the proposed rule to incorporate a proposed modification offered by the West Virginia Manufacturers Association which would change the method of measuring the discharge of pollution in relation to public water intakes. Ms. Chatfield responded to questions from the Committee. Mr. Grubb demanded a roll call vote. The demand was not sustained. The motion was adopted. Ms. Chatfield told the Committee that the Board was not willing to adopt the proposed modification.

Mr. Anderson moved that the proposed rule be amended to incorporate a proposed modification offered by the West Virginia Manufacturers Association which would change the method of measuring the discharge of pollution in relation to public water intakes. Mr. Grubb demanded a roll call vote. The demand was sustained. The motion was adopted. The vote was seven Yeas and six Nays.

Mr. Manchin moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Mr. Altizer reviewed his abstract on the rule proposed by the Division of Environmental Protection, Regulations Governing Environmental Laboratories Certification and Standards of Performance, and stated that the Division has agreed to technical modifications. Karen Price, West Virginia Manufacturers Association, addressed the Committee regarding several concerns the Association has regarding the proposed rule.

Mr. Anderson moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Mr. Gallagher announced that the next rule on the agenda is the rule proposed by the Alcohol Beverage Control Commission, Nonintoxicating Beer Licensing and Operations Procedures.

Mr. Manchin moved that the proposed rule lie over until the Committee's December meeting. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the Board of Examiners for Registered Professional Nurses, Requirements for Licensure and Registration, and stated that the Board has agreed to technical modifications.

Mr. Faircloth moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained the rule proposed by the Board of Examiners for Registered Professional Nurses, Continuing Education, and stated that the Board has agreed to technical modifications. She responded to questions from the Committee.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the Board of Examiners for Registered Professional Nurses, Criteria for the Evaluation and Accreditation of Colleges, Departments or Schools of Nursing, and stated that the Board has agreed to technical modifications and to combine the substance of the proposed rule with the next proposed rule on the agenda. She stated that if both proposed rules are approved, the Board would subsequently withdraw this proposed rule.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained the rule proposed by the Board of Examiners for Registered Professional Nurses, Policies and Procedures Related to the Accreditation of Colleges, Departments or Schools of Nursing, and stated that the Board has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained the authority for the rule proposed by the State Tax Division, Exchange of Information Agreement Between Tax Division and Division of Environmental Protection. John Montgomery, State Tax Division, responded to questions from the Committee.

Ms. Douglas moved that the proposed rule be approved as modified. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: 11-14-94

TIME: 12:00 Noon - 2:00 pm

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Brian Gallagher, Co-Chair	✓			
Burk, Robert W., Jr.	✓			
Faircloth, Larry V.	✓			
Douglas, Vickie	✓			
Compton, Mary P.	✓			
Huntwork, John				
Burdette, Keith, President				
Joe Manchin, III Co-Chair	✓			
Anderson, Leonard	✓			
Grubb, David	✓			
Minard, Joseph	✓			
Macnaughtan, Don	✓			
Boley, Donna	✓			
TOTAL				

RE: _____

_____

_____

_____

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: 11-14-94

TIME: _____

NAME	Present	Absent	Yeas	Nays
Chambers, Robert "Chuck", Speaker				
Brian Gallagher, Co-Chair				✓
Burk, Robert W., Jr.			✓	
Faircloth, Larry V.			✓	
Douglas, Vickie				✓
Compton, Mary P.				✓
Huntwork, John				
Burdette, Keith, President				
Joe Manchin, III Co-Chair			✓	
Anderson, Leonard			✓	
Grubb, David				✓
Minard, Joseph			✓	
Macnaughtan, Don				✓
Boley, Donna			✓	
TOTAL			6	5

RE: Amendment - Proposed Revisions to Section 7.2.a.B (WV Mfg. Assoc. Recommendation) Rule: Env. Quality Bd - Requirement Governing Water Quality Standards

Distributed meeting 4-14-94

Proposed Revisions to the West Virginia Water Quality Standards, Title 46 Legislative Rules, Series I, Section 7.2.a.B Recommended by the West Virginia Manufacturers Association.

I. Background

As currently interpreted by the WVDEP, Section 7.2.a.B is being used to impose overly stringent water quality-based "end-of-pipe" effluent limitations on **all** discharges located within five miles upstream of a drinking water intake, **regardless** of their actual impact, or lack thereof, on the intake. The effect is to require all such dischargers to treat their wastewater to **drinking water quality**, then discharge it into a receiving stream which often does **not** meet drinking water quality. As a result, a discharger could be forced to expend millions of dollars without achieving a significant environmental benefit. Revisions to Section 7.2.a.B are, therefore, required to clarify its meaning.

II. Proposed Revisions to Section 7.2.a.B.:

Each segment extending upstream from the intake of a water supply public (Water Use Category A), for a distance of five (5) miles or to the headwater, must be protected by prohibiting the discharge of any pollutants such that the instream concentrations at said intake(s) are in excess of the concentrations designated for this Water Use Category in Section 8. Prior to imposing any water quality criteria as "end-of-pipe" effluent limitations, the Chief shall demonstrate that other, less stringent, effluent limitations will adversely impact said intake(s).

III. Benefits of Revisions

A. Clarifies and reenforces original purpose of the rule.

B. Protects municipal drinking water intakes.

C. Does not require industry to spend millions of dollar to protect against non-existent threats.

Comments of Gene Current
to the Legislative Rulemaking Review Committee
November 14, 1994

I. Good afternoon. My name is Gene Current and I am Director of Environmental Control for Weirton Steel Corporation. I appreciate the opportunity to present comments to the Committee at this public meeting.

II. Weirton Steel is an employee-owned company located in Weirton, West Virginia. It owns and operates an integrated steelmaking facility which draws water from, and discharges treated effluents into, the Ohio River.

III. Weirton Steel is West Virginia's largest industrial employer and taxpayer, employing approximately 6,000 people. In addition to its employees, Weirton Steel indirectly supports virtually every business and service in Weirton and its surrounding communities.

IV. Weirton Steel is committed to a healthy environment. During the past 10 years, Weirton Steel has spent 103 million dollars for environmental control facilities. This represents 13.3% of the total capital expended over the 10-year period. $73 million of these expenditures were for new wastewater treatment facilities. Weirton Steel is prepared to spend millions of additional dollars to address **reasonable** environmental requirements in the future.

V. Weirton Steel is here today because it very concerned about the WVDEP's **unreasonable** current interpretation of Section 7.2.a.B. of the Water Quality Standards which is sometimes referred to as the "Five-Mile Rule".

VI. As originally envisioned by the Water Resources Board, and as endorsed by the United States Environmental Protection Agency, 7.2.a.B would protect public drinking water intakes from undue adverse impacts caused by point source discharges. This protection would be balanced against the legitimate need by industry to utilize our state's water resources, by providing dischargers with the opportunity to demonstrate that their discharges do not have an adverse impact on the intakes.

VII. As currently interpreted by the WVDEP, however, Section 7.2.a.B. is being used to impose overly stringent water quality-based "end-of-pipe" effluent limitations on **all** discharges located within five miles upstream of a drinking water intake, **regardless** of their actual impact, or lack thereof, on the intake. The effect is to require all such dischargers to treat their wastewater to **drinking water quality**, then discharge it into a receiving stream which often does **not** meet drinking water quality.

VIII. On June 30, 1994, Weirton Steel was issued a renewal NPDES permit which imposes overly stringent water quality-based effluent limitations that achieve no significant environmental benefit. In addition to the absence of environmental benefit, Weirton Steel considers the achievement of these limitations to be cost prohibitive. Indeed, Eichleay Engineers recently provided Weirton Steel with a cost estimate of $65 million, $\pm$ 50%, to build the additional treatment systems necessary to meet the new limitations. As a result, we have appealed the permit.

IX. The successful appeal of this permit is essential to Weirton Steel in that WVDEP's interpretation, as imposed in the NPDES permit would have devastating economic and social consequences on Weirton Steel and the community. These consequences would occur despite the fact that Weirton Steel's discharges are not having an adverse impact on the downstream drinking water intakes, a fact which Weirton Steel has offered to demonstrate to the WVDEP. To date, Weirton Steel has been informed that such a demonstration is "irrelevant" under the WVDEP's interpretation of Section 7.2.a.B.

X. Weirton Steel urges the Committee to revise Section 7.2.a.B such that it is expressly consistent with the original intent of the Water Resources Board and the United States Environmental Protection Agency. Specifically, we urge you to make two changes to Section 7.2.a.B.: (1) clarify that the point of focus for determining the impact of the discharge is at the drinking water intake, where an impact matters; and (2) place the burden on the Chief of the Office of Water Resources to demonstrate the need for otherwise more stringent limitations that the DEP may wish to impose.

XI. By incorporating these changes, the Committee will continue to protect the water quality at municipal drinking water intakes, and at the same time ensure that Weirton Steel and other companies are not forced to spend millions of dollars to protect against imaginary environmental threats.

XII. Weirton Steel stands ready to provide additional information or otherwise participate in this process in any way that the Committee sees fit. Thank you for your time and consideration.

G.P.C.
11/14/94

Distributed meeting 11-14-94

ENVIRONMENTAL QUALITY BOARD
1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126
(304) 558-4002
Fax: (304) 558-0899

Gaston Caperton
Governor

Charles R. Jenkins
Chairman

November 10, 1994

The Honorable Brian Gallagher
Co-Chair, Legislative Rule-Making Review Committee
Building 1, Room 474-M
Capitol Complex
Charleston, West Virginia 25305

The Honorable Joe Manchin
Co-Chair, Legislative Rule-Making Review Committee
Building 1, Room 206W
Capitol Complex
Charleston, West Virginia 25305

Dear Sirs:

As you are aware, the Board filed amendments to the legislative rule 46 CSR 1, Requirements Governing Water Quality Standards, on August 15, 1994. Since filing the amended rule, the Board has continued to review the comments on the proposed rule filed by EPA Region III, and has met with staff from that agency, both telephonically and in person, several times. Those communications, discussions with counsel to your committee, and the Board's continued review of the rule, prompt the Board to propose, for the Committees consideration, the additional amendments outlined below.

46-1-1.5. Counsel to your committee has advised the Board that this section, which addresses the repeal of the existing rule, is unnecessary. We propose deleting this section.

46-1-2.6 The Board proposes moving the second sentence in this section to proposed §4.1.b.B., which includes a list of high quality waters. This will not change the substance of the definition, but is proposed to clarify the newly organized high quality waters section.

46-1-4.1. For clarification purposes, the Board proposes striking the comma and the word "and" after the word "herein" at the end of §4.1.b.A and replacing them with a period. Additionally, the Board proposes adding the following sentence as subsection (c) of 4.1.b.B (see comment at 46-1-2.6 above):

(c) Streams or stream segments which receive annual stockings of trout but which do not support year round trout populations.

46-1-5.2.b. To clarify the requirements of the sizing of the zone of initial dilution in a mixing zone, the Board proposes inserting the following sentence after the third sentence in that subsection:

Where a zone of initial dilution is assigned by the Chief, the size of the zone shall be determined using one of the 4 alternatives outlined in Section 4.3.3 of EPAs Technical Support Document for Water Quality Based Toxics Control.

This language is necessary to assure that the proper criteria are used to establish a zone of initial dilution (ZID) within a mixing zone. The ZID is the zone in which discharged pollutants initially mix with the receiving water. The size of the ZID is important because the ZID is the only area within the mixing zone in which water quality standards are not required to be met. The alternatives referred to in the proposed language include the criteria developed by EPA for sizing ZIDs to ensure that they are kept as small as possible and prevent lethality to aquatic organisms. (See attachment)

46-1-6.4 For clarification, the Board proposes adding the following sentence at the end of that section:

See Appendix D for a representative list of category C waters.

46-1-7.1 On page 16, the item number after "D(a)" should be "E", not "5".

46-1-8.2.b. Because of the changes proposed in 8.2.a., the language of 8.2.b is redundant. The Board proposes deleting 8.2.b and reordering 8.2 accordingly.

46-1-9. Section 9 addresses methods used to establish safe concentration limits for the protection of aquatic life from pollutants for which no numeric criteria have been promulgated in the water quality standards. The Board proposes updating this section by adding categories B3 and B4 to the water use categories subject to the provisions of this section.

APPENDIX A The reference made to Section 2.14 should be changed to 2.16.

APPENDIX E 46-1-8.1. The Board has proposed a site-specific numeric criterion for aluminum for Opequon Creek which differs from the numeric standards for aluminum in appendix E. In order to alert the reader to this exception from the aluminum criterion, the Board proposes adding the following language in the first column after "Not to exceed:":

(See 7.2.d.B(b))

46-1-8.11. The Board intended that the value for dissolved oxygen in this section apply to the "All Other Uses" category. Therefore the Board proposes placing an X in that box.

We appreciate the Committee's thoughtful consideration of these proposed amendments.

Additionally attached is a response summary to the comments submitted on the proposed rule by EPA in their letter to Chairman Jenkins dated July 13, 1994.

Please contact Libby Chatfield, Technical Advisor to the Board with any questions you may have regarding these proposed changes.

Sincerely,

Dr. Charles R. Jenkins
Chairman

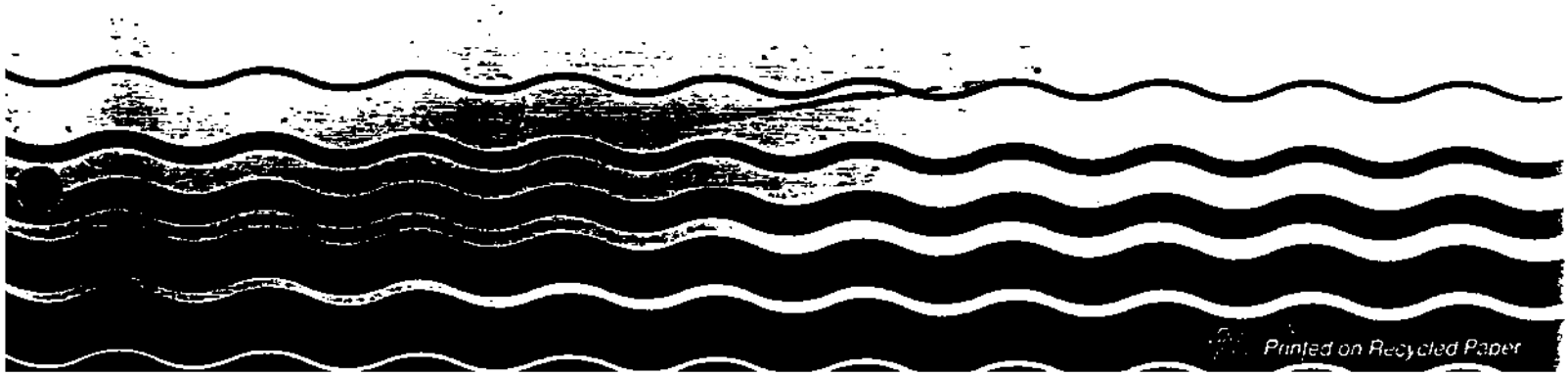
CRJ/LMC

attachments

EPA/505/2-90-001
PB91-127415
March 1991

EPA

Technical Support Document For Water Quality-based Toxics Control



feeders and other nonmobile organisms, spatial distribution of organisms and reinforcement of weakened populations are enhanced, and embryos and larvae of some fish species develop while drifting [11]. Anadromous and catadromous species must be able to reach suitable spawning areas. Their young (and in some cases the adults) must be assured a return route to their growing and living areas. Many species make migrations for spawning and other purposes. Barriers or blocks that prevent or interfere with these types of essential transport and movement can be created by water with inadequate chemical or physical quality.

As explained above, a State regulatory agency may decide to deny a mixing zone in a site-specific case. For example, denial should be considered when bioaccumulative pollutants are in the discharge. The potential for a pollutant to bioaccumulate in living organisms is measured by (1) the bioconcentration factor (BCF), which is chemical-specific and describes the degree to which an organism or tissue can acquire a higher contaminant concentration than its environment (e.g., surface water); (2) the duration of exposure; and (3) the concentration of the chemical of interest. While any BCF value greater than 1 indicates that bioaccumulation potential exists, bioaccumulation potential is generally not considered to be significant unless the BCF exceeds 100 or more. Thus, a chemical that is discharged to a receiving stream, resulting in low concentrations, and that has a low BCF value will not create a bioaccumulation hazard. Conversely, a chemical that is discharged to a receiving stream, resulting in a low concentration but having a high BCF value, may cause in a bioaccumulation hazard. Also, some chemicals of relatively low toxicity, such as zinc, will bioconcentrate in fish without harmful effects resulting from human consumption.

Another example of when a regulator should consider prohibiting a mixing zone is in situations where an effluent is known to attract biota. In such cases, provision of a continuous zone of passage around the mixing area will not serve the purpose of protecting aquatic life. A review of the technical literature on avoidance/attraction behavior revealed that the majority of toxicants elicited an avoidance or neutral response at low concentrations [13]. However, some chemicals did elicit an attractive response, but the data were not sufficient to support any predictive methods. Temperature can be an attractive force and may counter an avoidance response to a pollutant, resulting in attraction to the toxicant discharge. Innate behavior such as migration may also supersede an avoidance response and cause fish to incur a significant exposure.

4.3.2 Minimizing the Size of Mixing Zones

Concentrations above the chronic criteria are likely to prevent sensitive taxa from taking up long-term residence in the mixing zone. In this regard, benthic organisms and territorial organisms are likely to be of greatest concern. The higher the concentrations occurring within an isopleth, the more taxa are likely to be excluded, thereby affecting the structure and function of the ecological community. It is thus important to minimize the overall size of the mixing zone and the size of elevated concentration isopleths within the mixing zone.

4.3.3 Prevention of Lethality to Passing Organisms

The *Water Quality Standards Handbook* [14] indicates that whether to establish a mixing zone policy is a matter of State discretion, but that any State policy allowing for mixing zones must be consistent with the CWA and is subject to approval of the Regional Administrator. The handbook provides additional discussion regarding the basis for a State mixing zone policy.

Lethality is a function of the magnitude of pollutant concentrations and the duration an organism is exposed to those concentrations. Requirements for wastewater plumes that tend to attract aquatic life should incorporate measures to reduce the toxicity (e.g., via pretreatment, dilution) to minimize lethality or any irreversible toxic effects on aquatic life.

EPA's water quality criteria provide guidance on the magnitude and duration of pollutant concentrations causing lethality. The criterion maximum concentration (CMC) is used as a means to prevent lethality or other acute effects. As explained in Appendix D, the CMC is a toxicity level and should not be confused with an LC_{50} level. The CMC is defined as one-half of the final acute value for specific toxicants and 0.3 acute toxic unit (TU_a) for effluent toxicity (see Chapter 2). The CMC describes the condition under which lethality will not occur if the duration of the exposure to the CMC level is less than 1 hour. The CMC for whole effluent toxicity is intended to prevent lethality or acute effects in the aquatic biota. The CMC for individual toxicants prevents acute effects in all but a small percentage of the tested species. Thus, the areal extent and concentration isopleths of the mixing zone must be such that the 1-hour average exposure of organisms passing through the mixing zone is less than the CMC. The organism must be able to pass through quickly or flee the high-concentration area. The objective of developing water quality recommendations for mixing zones is to provide time-exposure histories that produce negligible or no measurable effects on populations of critical species in the receiving system.

Lethality to passing organisms can be prevented in the mixing zone in one of four ways. The first method is to prohibit concentrations in excess of the CMC in the pipe itself, as measured directly at the end of the pipe. As an example, the CMC should be met in the pipe whenever a continuous discharge is made to an intermittent stream. The second approach is to require that the CMC be met within a very short distance from the outfall during chronic design-flow conditions for receiving waters (see Section 4.4.2).

If the second alternative is selected, hydraulic investigations and calculations indicate that the use of a high-velocity discharge with an initial velocity of 3 meters per second, or more, together with a mixing zone spatial limitation of 50 times the discharge length scale in any direction, should ensure that the CMC is met within a few minutes under practically all conditions. The discharge length scale is defined as the square root of the cross-sectional area of any discharge pipe.

A third alternative (applicable to any waterbody) is not to use a high-velocity discharge. Rather the discharger should provide

data to the State regulatory agency showing that the most restrictive of the following conditions are met for each outfall:

- The CMC should be met within 10 percent of the distance from the edge of the outfall structure to the edge of the regulatory mixing zone in any spatial direction.

- The CMC should be met within a distance of 50 times the discharge length scale in any spatial direction. In the case of a multiport diffuser, this requirement must be met for each port using the appropriate discharge length scale of that port. This restriction will ensure a dilution factor of at least 10 within this distance under all possible circumstances, including situations of severe bottom interaction, surface interaction, or lateral merging.

- The CMC should be met within a distance of five times the local water depth in any horizontal direction from any discharge outlet. The local water depth is defined as the natural water depth (existing prior to the installation of the discharge outlet) prevailing under mixing zone design conditions (e.g., low flow for rivers). This restriction will prevent locating the discharge in very shallow environments or very close to shore, which would result in significant surface and bottom concentrations.

A fourth alternative (applicable to any waterbody) is for the discharger to provide data to the State regulatory agency showing that a drifting organism would not be exposed to 1-hour average concentrations exceeding the CMC, or would not receive harmful exposure when evaluated by other valid toxicological analysis, as discussed in Section 2.2.2. Such data should be collected during environmental conditions that replicate critical conditions.

For the third and fourth alternatives, examples of such data include monitoring studies, except for those situations where collecting chemical samples to develop monitoring data would be impractical, such as at deep outfalls in oceans, lakes, or embayments. Other types of data could include field tracer studies using dye, current meters, other tracer materials, or detailed analytical calculations, such as modeling estimations of concentration or dilution isopleths.

The Water Quality Criteria—1972 [11] outlines a method, applicable to the fourth alternative, to determine whether a mixing zone is tolerable for a free-swimming or drifting organism. The method incorporates mortality rates (based on toxicity studies for the pollutant of concern and a representative organism) along with the concentration isopleths of the mixing zone and the length of time the organism may spend in each isopleth. The intent of the method is to prevent the actual time of exposure from exceeding the exposure time required to elicit an effect [10]:

$$\Sigma \left[\frac{T(n)}{ET(X) \text{ at } C(n)} \right] \leq 1$$

where T(n) is the exposure time an organism is in isopleth n, and ET(X) is the "effect time." That is, ET(X) is the exposure time required to produce an effect (including a delayed effect) in X percent of organisms exposed to a concentration equal to C(n), the concentration in isopleth n. ET(X) is experimentally determined; the effect is usually mortality. If the summation of ratios of exposure time to effect time is less than 1, then the percent effect will not occur.

4.3.4 Prevention of Bioaccumulation Problems for Human Health

States are not required to allow mixing zones. Where unsafe fish tissue levels or other evidence indicates a lack of assimilative capacity in a particular waterbody for a bioaccumulative pollutant, care should be taken in calculating discharge limits for this pollutant or the additivity of multiple pollutants. In particular, relaxing discharge limits because of the provision of a mixing zone may not be appropriate in this situation.

4.4 MIXING ZONE ANALYSES

Proper design of a mixing zone study for a particular waterbody requires estimation of the distance from the outfall to the point where the effluent mixes completely with the receiving water. The boundary is usually defined as the location where the concentrations across a transect of the waterbody differ by less than 5 percent. The boundary can be determined based on the results of a tracer study or the use of mixing zone models. Both procedures, along with simple order-of-magnitude dilution calculations, are discussed in the following subsections.

If the distance to complete mixing is insignificant, then mixing zone modeling is not necessary and the fate and transport models described in Section 4.5 can be used to perform the WLA. It is **important to remember that the assumption of complete mixing is not a conservative assumption for toxic discharges; an assumption of minimal mixing is the conservative approach.** If completely mixed conditions do not occur within a short distance of the outfall, the WLA study should rely on mixing zone monitoring and modeling. Just as in the case of completely mixed models, mixing zone analysis can be performed using both steady-state and dynamic techniques. State requirements regarding the mixing zone will determine how water quality criteria are used in the TMDL.

This section is divided into five subsections. The first discusses recommendations for outfall designs and means to maximize initial dilution. The second provides a brief description of the four major waterbody types and the critical design period when mixing zone analysis should be performed for each. The third provides a brief description of tracer studies and how they may be used to define a mixing zone. The fourth and fifth subsections discuss simplified methods and sophisticated models to predict the two stages of mixing (i.e., discharge-induced and ambient-induced mixing). For a detailed explanation of the mechanisms involved in estimating both stages of mixing, two references are recommended, Holley and Jirka [15] and Fischer et al. [16]. Although the models presented in Sections 4.4.4 and 4.4.5 simplify the mixing process, the assessor should have an understanding of the basic physical concepts governing mixing to use these

RESPONSE SUMMARY

The Environmental Protection Agency (EPA) Region III office submitted comments to the proposed legislative rule, Requirements Governing Water Quality Standards, on July 13, 1993. The following is a summary of those comments and the Boards responses to them. Note that in a number of instances, EPAs comments request a legal interpretation through Attorney General Certification, of provisions in the rule. The Board is working with the Office of Water Resources and the Office of the Attorney General to prepare a letter of certification which responds to EPAs questions.

46-1-2 Definitions.

EPA requests clarification of a number of definitions included in the rule. The Board is working with the Office of Water Resources and the Attorney General's Office to clarify the definitions requested by EPA through a letter of certification from the Attorney General.

§ 2. Definitions. EPA requests that definitions for 6 new terms be included in the rule.

The term "pollutant" is defined in the State's Water Pollution Control Act (W. Va. Code §22-11-3(17). All definitions in the Act are incorporated by reference in the water quality standards rule. (see first paragraph of 46-1-2)

To clarify the definition of zone of initial dilution, the Board proposed amending section 5.2.b. to include the following language: "The zone of initial dilution is the area within the mixing zone where initial dilution of the effluent with the receiving water occurs and where the concentration of the effluent will be its greatest in the water column."

The Board agrees with EPAs suggestion that definitions for the terms lethality, mixing zone, surface impoundment and toxic, would be appropriately added to the rule and will work with EPA and the Office of Water Resources to include those definitions in the next triennial review.

§ 3. Conditions Not Allowable in State Waters. EPA requested that the State adopt narrative biological criteria in the rule, to meet one of EPAs National Goals for the 1991-1993 Triennium. In discussions with EPA since this letter, they have agreed that the existing language in the rule is sufficient for this triennium. The Board intends to revisit this provision and update it according to EPAs future recommendations as part of the next triennial review.

§ 4. Antidegradation. EPAs comments regarding this section address implementation of the High Quality Water category and the Outstanding National Resource Water Category. As discussed in the

rationale document, the Board is working with the Office of Water Resources to develop guidelines for implementing the antidegradation provisions in the rule. The issues raised by EPA are being considered in that effort.

§ 5. Mixing Zones. The Board believes that it has responded to all of EPAs concerns in the proposed rule and in the changes proposed in the letter to this committee dated November 7, 1994.

§ 6. Water Use Categories. The Board has responded to the comments provided by EPA in sections 6.2, 6.3 (the comment regarding wetlands) 6.3.b. and 6.4. The remainder of the comments raise issues which the Board will continue to consider and address in the next triennial review.

§ 7. West Virginia Waters The Board adopted the amendments language proposed by EPA in 7.1, 7.2.c, 7.2.c.B., 7.2.d.P(b) and 7.3.a.. Further, the Board has addressed the issues raised in EPAs comments on 7.2.d (identification of the exceptions in A through KK as either site-specific criteria, variances or use removals) and 7.3.d. The remainder of the comments in this section will receive the Boards continued consideration and will be addressed in the next triennial review.

§ 8. Specific Water Quality Criteria The Board adopted the suggestions made by EPA in 8.2.a and 8.4 (see rationale document). EPAs third comment under section 8.2.b. has been addressed in the November 7, 1994 letter to this committee. The remainder of the comments will receive the Board's continued consideration.

§ 9. Establishment of Safe Concentration Values The Board has adopted EPAs first and third suggestions under that section; the Board will take EPAs remaining comments under advisement.

Appendix A The Board proposed incorporating the corrections to the typographical errors identified in EPAs comments.

Appendix E The Board has proposed incorporating the suggestions made by EPA in sections 8.1, 8.73, 8.11.1. 8.11.2. 8.11.3, 8.15.1, 8.17.1, 8.18, 8.22, 8.23.1 and 8.33.2. The Board proposed the deletion of sections 8.7.2 and 8.33.3 for which EPA requested rationales. EPAs comment on 8.30 appears to be in error, the values for total residual chlorine as proposed are correct according the EPA Gold Book values. The Board will take the remainder of EPAs comments regarding this section under advisement.