

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE

AND

FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: DCL&ER, Division of Environmental Protection TITLE NUMBER: 47

CITE AUTHORITY § 20-5M-1 thru 6

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

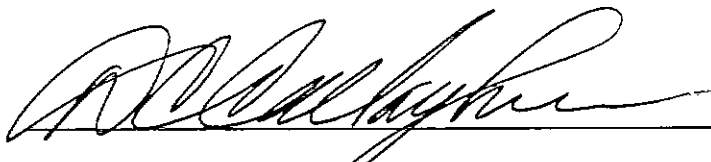
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 57

TITLE OF RULE BEING PROPOSED: Groundwater Quality Standard Variances

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THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



David C. Callaghan, Director
Division of Environmental Protection

6-80

FISCAL NOTE FOR PROPOSED RULE

Rule Title: Groundwater Quality Standard Variances, 47 C.S.R. 57

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Environmental Protection, Office of Water Resources

Address: 1201 Greenbrier Street, Charleston, West Virginia 25311-1088

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$N.A.		N.A.	N.A.	N.A.
Personal Services	\$				
Current Expenses	\$				
Repairs & Alterations	\$				
Equipment	\$				
Other	\$				

2. Explanation of above estimates: All costs related to the implementation of this rule have been provided for through the Groundwater Protection Act Fee Schedule, 47 C.S.R. 55.

3. Objectives of this rule: Provide a means of relief from existing groundwater quality standards/preventative action limits where appropriate.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government. None, see item #2 above.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens. Any person ~~Sources~~ with a potential for causing groundwater contamination, when desiring a variance, will expend ~~monies~~ to scientifically justify the need for the variance.

C. Economic Impact on Citizens/ Public at Large. None.

Date:

Signature of Agency Head or Authorized Representative



Director, Division of Environmental Protection

DATE: August 12, 1993
TO: Legislative Rule-Making Review Committee
FROM: Department of Commerce, Labor and Environmental Resources; Division of Environmental Protection

LEGISLATIVE RULE TITLE: Groundwater Quality Standard Variances

1. Authorizing statute(s) citation: § 20-5M-1 thru 6
- 2.a. Date filed in State Register with Notice of Hearing: 7/7/93
- 2.b. What other notice, including advertizing, did you give of the hearing? Notice placed in 8 newspapers and copies sent to state agencies, U.S. Environmental Protection Agency, Water Quality Advisory Committee and other interested parties.
- 2.c. Date of hearing (s): 8/9/93
- 2.d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments;
Attached X No comments received _____
- 2.e. Date agency approved proposed Legislative Rule filed in State Register following public hearing: 8/16/93
- 2.f. Name and telephone of agency contact: Laidley Eli McCoy, 558-2107
3. If the statute under which the rule was promulgated and submitted requires certain findings and determinations to be made as a condition precedent to their promulgation:
 - 3.a. Date on which a notice of the time and place of hearing for the taking of evidence and a general description of the issues to be decided was filed in the State Register:

 - 3.b. Date of hearing: _____
 - 3.c. Date the required findings and determinations together with reasons therefor were filed in the State Register: _____
 - 3.d. Findings and determinations, and reasons (attached).

FILED

TITLE 47
DIVISION OF NATURAL RESOURCES
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES

AUG 16 3 53 PM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 57
GROUNDWATER QUALITY STANDARD VARIANCES

§47-57-1. General.

1.1. Scope -- This legislative rule establishes criteria for variances and deviations from the requirements of W.Va. Code, §20-5M-1 et seq. that would otherwise obligate sources to assure compliance with existing quality, groundwater quality standards of the state Water Resources Board and preventative action limits imposed by groundwater regulatory agencies.

1.2. Authority -- W.Va. Code, §20-5M-1 through 6.

1.3. Filing Date --

1.4. Effective Date --

§47-57-2. Definitions.

The definitions set forth in W.Va. Code, §20-5M-3 shall apply to this series along with the following definitions unless the context clearly indicates otherwise.

2.1. "Act" means the West Virginia Groundwater Protection Act, W.Va. Code §20-5M-1 et seq.

2.2. "Agency" means any branch, section, division, department or unit of the state, county or local government, however designated or constituted, which has the authority pursuant to W.Va. Code §20-5M-1 et seq. to regulate facilities or activities which have the potential for adversely impacting groundwater.

2.3. "Agency action" means the issuance, renewal or denial of any permit, license or other required agency approval, or any terms or conditions thereof, or any order or other directive issued by the division of environmental protection, division of health, department of agriculture or any other agency of the state or a political subdivision to the extent that such action relates directly to the implementation, administration or enforcement of the Act.

2.4. "Class of sources" means a group of sources which engage in similar types of activities and release, or have the potential to release, similar types of pollutants to the groundwater.

2.5. "Constituent" means any chemical, radiological or biological substance found in groundwater due to either natural or man-made conditions.

2.6. ~~"Deviation" means an action of the Director modifying an agency action taken, or to be taken, for one or more specific constituents to assure that a single source or class of sources maintain and protect groundwater at existing quality, where existing quality is better than that required to maintain and protect applicable groundwater quality standards.~~ "Deviation" means an action of the Director relieving a single source or class of sources, for one or more specific constituents, of the requirement to maintain and protect groundwater at existing quality, where existing quality is better than that required to maintain and protect applicable groundwater quality standards.

2.7. "Director" means the Director of the Division of Environmental Protection of the Department of Commerce, Labor and Environmental Resources.

2.8. "Existing quality limits" means the existing quality of groundwater that is better than groundwater quality standards and which must be maintained and protected pursuant to section 5(e) of the Act.

2.9. "Groundwater" means the water occurring in the zone of saturation beneath the seasonal high water table, or any perched water zones.

2.10. "Groundwater quality standards" means the standards of purity and quality for groundwater of the state promulgated by the State Water Resources Board pursuant to section 4 of the Act.

2.11. "Preventative action limit" means a numerical value expressing the concentration of a substance in groundwater that, if exceeded, shall cause action to be taken to assure that standards of purity and quality of groundwater are not violated.

2.12. "Release" means any act or omission that results in the spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of materials or contaminants in a manner that has caused or is reasonably likely to cause the entry of a constituent to groundwater.

2.13. "Source" means any facility or activity which has caused a release or is reasonably likely to cause a release.

2.14. "Variance" means a legislative rule modifying groundwater quality standards or preventative action limits, or both, for a source or class of sources, for one or more specific constituents.

§47-57-3. Statutory Exemptions.

3.1. The requirements of subsections 5(e), 5(f) and 5(g) of the Act related to groundwater quality standards, preventative action limits or existing quality limits shall not apply to coal extraction and earth disturbing activities directly involved in coal extraction that are subject to either or both Article 3, Chapter 22A of the W.Va. Code or Article 5A, Chapter 20 of the W.Va. Code. All other provisions of the Act are applicable to such exempt activities.

3.2. The Act is not applicable to groundwater within areas of geologic formations which are site specific to the production or storage zones of crude oil or natural gas and which are utilized for the exploration, development or production of crude oil or natural gas permitted pursuant to Chapter 22B of the W.Va. Code nor to the injection zones of Class II or III wells permitted pursuant to the statutes and regulations governing the underground injection control program. All groundwater outside such areas shall remain subject to the Act. An agency has the right to require the submission of data with respect to the nature of such exempt activities.

3.3. The Director has the authority to modify the requirements of subsection 5(g) of the Act with respect to non-coal mining activities subject to Article 4, Chapter 22A of the W.Va. Code. Such modification shall assure protection of human health and the environment. Those agencies regulating such activities shall retain their groundwater regulatory authority as provided for in the relevant statutes and regulations governing such activities other than the Act.

§47-57-4. Contamination in Excess of Groundwater Quality Standards.

4.1. Except for any source or class of sources which has been granted a variance for the particular contaminant at issue, any Any person who owns or operates a source subject to the Act which has caused, in whole or in part, the concentration of any constituent to exceed any applicable groundwater quality standard subject to the Act, must cease further release of that contaminant and must make every reasonable effort to

identify, remove or mitigate the source of such contamination and strive where practical to reduce the level of contamination over time to support drinking water use of such groundwater.

4.2. Sources which are operating in full compliance with and pursuant to an agreement, administrative order, permit, or other authorization of an agency requiring remedial action to be undertaken to address groundwater contamination shall be deemed to be in compliance with ~~the requirements W.Va. Code §20-5M-4(b) of the Act for the duration of such order, permit or other authorization.~~

§47-57-5. Deviation from Existing Quality.

5.1. Application -- Any person may apply to the Director to obtain a deviation from an agency action taken, or to be taken, to assure that a single source or class of sources maintain and protect groundwater at existing quality, where the existing quality is better than that required to maintain and protect applicable groundwater quality standards. Such petition may be independently filed or may be made in conjunction with other matters pending before the Director or may be independently filed. If such other matters require public notice, then the request for a deviation shall be clearly identified in such notice.

5.2. Contents -- An application for a deviation must contain:

5.2.1. name, mailing address and phone number of the person requesting the deviation and the name of the individual to be contacted regarding the application;

5.2.2. a description of the source or class of sources and constituents for which the deviation is being requested and, in the case of a request for a class of sources, a description of how such sources are substantially similar and the geographic area to be covered by such class;

5.2.3. a description of the area for which the deviation is proposed, including an analysis of the geology and hydrology of the area;

5.2.4. ~~a description of the current groundwater quality and uses in the area to be affected by the deviation;~~ a report of the existing groundwater quality and uses in the area to be affected by the deviation, including, but not limited to the levels of constituents for which the deviation is being requested;

5.2.5. ~~a list of other sources which may have an effect on groundwater~~ may be expected to contaminate in the area for which the deviation is requested;

5.2.6. ~~a demonstration that~~ a statement describing why the measures necessary to preserve existing quality are not technically feasible or economically practical; and

5.2.7. ~~a demonstration that~~ a statement describing why a change in groundwater quality is justified based upon economic or societal objectives.

5.3. Director Action -- The Director may grant or deny a deviation for a specific site, activity or facility or for a class of activities or facilities which have impacts which are substantially similar and exist in a defined geographic area. The Director's reasons for granting or denying such a deviation shall be set forth in writing. To insure that applicable groundwater quality standards are not violated, the Director shall evaluate the cumulative impacts of all facilities and activities on the groundwater resources in question prior to granting any such a deviation and shall include such evaluation in this written report.

5.4. Terms and Conditions -- The Director shall have the exclusive authority to determine the terms and conditions to be applicable to the Director's decision to grant a deviation and the Director shall have the exclusive authority to determine the terms and conditions of such a deviation. The groundwater regulatory agency shall take such alternative action as may be necessary to assure that the facilities and activities which are subject to the deviation maintain and protect applicable groundwater quality standards. In maintaining and protecting such groundwater quality standards, such agency shall establish preventative action limits which, once reached, shall require action to control a source of contamination to assure that such standards are not exceeded.

5.5. Notice -- The Director or Chief of the Office of Water Resources of the Division of Environmental Protection of the Department of Commerce and Labor and Environmental Resources shall provide notice of any decisions to approve an application for a deviation to the applicant and to any person that has submitted a written request for such information to such Director or Chief.

§47-57-6. Variance From Groundwater Quality Standards and Preventative Action Limits.

6.1. Application -- Upon petition by any person, the Director may identify a

single source or class of sources which by their nature cannot be conducted or operated in compliance with the groundwater quality standards or preventative action limits, or both, established pursuant to the Act and may grant a variance for a single source or class of sources. In the case of a petition on behalf of a class of sources, the petition may be filed by any person. In the case of a petition on behalf of a single source, the petition may only be filed by the owner or operator of that source. Any person who petitions for such variance must give contemporaneous notice of the petition by Class I advertisement in a newspaper of general circulation in the area to be affected by the requested variance. If the petitioner seeks a variance which would apply throughout the state, a Class I advertisement must be placed in a newspaper of state-wide circulation. Any advertisement must identify the name, address, and telephone number of the person requesting the variance, the area in which the variance would be effective (note: include a map if appropriate), and the source or class of sources for which the variance is requested and the constituents for which the variance is requested.

6.2. Contents -- An application for a variance from preventative action limits or groundwater quality standards, or both, must contain the following information:

6.2.1. name, mailing address, and phone number of the person requesting the variance, and the name of the individual to be contacted regarding the application;

6.2.2. a description of the source or class of sources and constituents for which the variance is being requested;

6.2.3. the levels of constituents for which the variance is being requested.

6.2.4. ~~6.2.3.~~ a description of the area for which the variance is proposed, including an analysis of the geology and hydrology of the area;

6.2.5. ~~6.2.4.~~ a description of current groundwater quality and uses in the area to be affected by the variance, and the predicted long-term effect of the variance on the groundwater quality and uses;

6.2.6. ~~6.2.5.~~ a list of other sources which may have an effect on groundwater quality in the area for which the variance is requested;

6.2.7. ~~6.2.6.~~ the alternate limits or standards and mitigation measures proposed by the applicant if the variance is granted, and any proposed variance conditions;

~~6.2.8.~~ ~~6.2.7.~~ a statement describing why the source or class of sources by their nature cannot be altered or modified to avoid violating preventative action limits or water quality standards;

~~6.2.9.~~ ~~6.2.8.~~ a statement of the nature and extent of the benefits of the proposed variance including, but not limited to, benefits associated with economics, employment opportunities, health and safety, and the environment;

~~6.2.10.~~ ~~6.2.9.~~ a description of alternatives to the variance, and an explanation of why the benefits of the proposed action outweigh the benefits of each considered alternative course of action, including not granting a variance, and an explanation of why none of the considered alternatives is reasonable and prudent;

~~6.2.11.~~ ~~6.2.10.~~ a statement explaining why the proposed action is more in the public interest than the protection of groundwater quality standards or preventative action limits; and

~~6.2.12.~~ ~~6.2.11.~~ a certificate of publication.

6.3. Rulemaking -- If, after considering the variance petition for a single source or class of sources, the Director concludes that a variance is appropriate, in whole or in part, the Director shall initiate legislative rulemaking as provided in Article 3, Chapter 29A of the W.Va. Code. The proposed rule shall set forth:

6.3.1. a description of the single source or class of sources to be granted the variance and the constituents for which the variance is requested;

6.3.2. the geographical area for which the variance is allowed;

6.3.3. any appropriate terms and conditions; and

6.3.4. the Director's preliminary findings pursuant to subsection 6.7 with respect to which public comment is to be solicited.

6.4. The proposed rule shall be accompanied by a statement of the Director's grounds for proposing the variance ~~rule~~. In addition to all other rulemaking requirements, the Director shall hold a public hearing, following 30 days notice, at which oral comments may be received from any interested person, and the Director must allow at least 10 days after such hearing for the submission of written comments. Notice of the public hearing

shall also be filed with the state capitol press office. The Director shall issue a determination as to whether such a variance is or is not appropriate within 45 days of the close of the comment period and, if determined to be appropriate, shall take such further steps as may be appropriate to have the variance promulgated as a legislative rule.

6.5. Denials -- If the Director determines that a variance for a single source or class of sources shall not be allowed, he shall publish a denial decision stating the reasons for the denial and provide a copy of the denial decision to the petitioner along with a notification of the petitioner's appeal rights by certified mail, and by regular mail to any other person who requests a copy of the denial decision. Notice of the denial decision shall also be published in the State Register.

6.6. Appeal -- Any person who is adversely affected by the Director's decision to deny a variance may appeal that decision to the Water Resources Board within 30 days of the date of publication of a denial decision in the State Register.

6.7. Variance Criteria -- The Director shall promulgate a ~~variance~~ rulemaking for a variance for a single source or class of sources, if the Director finds that:

6.7.1. a single source or class of sources by their very nature cannot be conducted in compliance with the requirements of W.Va. Code §20-5M-5(g).

6.7.2. ~~6.7.1.~~ the benefits of granting the variance clearly outweigh the benefits of complying with the preventative action limits, or groundwater quality standards, or both;

6.7.3. ~~6.7.2.~~ the variance is more in the public interest than the protection of groundwater quality standards or preventative action limits; and

~~6.7.3. the variance applicant has not made any prior irreversible or irretrievable commitment of resources with the intent of foreclosing reasonable and prudent alternatives to the variance; and~~

6.7.4. there is no reasonable and prudent alternative to the variance.

6.8. The Director's findings pursuant to the foregoing subsection shall include a statement of basis in support of each finding.

6.9. Terms and Conditions -- The Director may propose the variance through the

initiation of rulemaking upon such reasonable terms or conditions as may be necessary to protect human health and the environment, to satisfy all requirements of the Act (other than compliance with groundwater quality standards or preventative action limits, or both as specified in the variance), and to minimize adverse impact to groundwater consistent with granting the variance. Such terms and conditions shall include, where the Director deems it to be appropriate, alternative groundwater water standards, alternative preventative action limits, monitoring and reporting requirements, and enforcement provisions. To the extent that such terms and conditions include alternative groundwater quality standards, the Director shall consult with the Water Resources Board in establishing such alternative standards.

6.10. Initial Variance -- ~~All sources shall be deemed to be in compliance~~ All sources, except for those sources operating pursuant to Subsection 4.2 of this rule, shall be granted a waiver of the requirements to comply with all groundwater quality standards and preventative action limits until January 1, 1994. Any source, whether single or class, which has filed with the Director on or before December 31, 1993, a statement declaring an intent to make application for a variance shall be granted a waiver of the requirements to comply for only those deemed to be in compliance with all groundwater quality standards and preventative action limits, specific to the variance application, until July 1, 1995. The letter of intent shall include, but not be limited to, identification of the constituent(s) for which a variance is requested, a statement of the nature of the activity requesting the variance, and the geographical area to be affected, by the variance, if granted. Notwithstanding any other provisions of this subsection, such sources may be subject to such other standards or conditions as may be established by an agency to protect human health and the environment and to satisfy all requirements of the Act other than compliance with groundwater quality standards or preventative action limits, or both as specified in the variance. Any waiver granted pursuant to this Subsection will be extinguished upon the issuance of the Director's denial of the entire variance. In those instances where a portion of the variance application has been denied, the waiver for that portion is extinguished.

6.11. Variance From New Standards -- All sources, except for those sources operating pursuant to Subsection 4.2 of this rule, shall be granted a waiver from the requirements to comply deemed to be in compliance with any groundwater quality standards and associated preventative action limits not in effect on August 30, 1993, until six months following the effective date of such standards and associated preventative action limits. Any source, whether single or class, which has filed with the Director, within six months following the effective date of such standards and associated preventative action limits, a statement declaring an intent to make application for a

variance shall be granted a waiver of the requirements to comply for only those deemed in compliance with all such groundwater standards and preventative action limits as specified in the letter of intent for an additional 18 months. The letter of intent shall include, but not be limited to, identification of the constituent(s) for which a variance is requested, a statement of the nature of the activity requesting the variance, and the geographical area to be affected, by the variance, if granted. Notwithstanding any other provisions of this subsection, such sources may be subject to such other standards or conditions as may be established by an agency to protect human health and the environment and to satisfy all requirements of the Act other than compliance with groundwater quality such standards or preventative action limits, or both as specified in the variance. Any waiver granted pursuant to this Subsection will be extinguished upon the issuance of the Director's denial of the entire variance. In those instances where a portion of the variance has been denied, the waiver for that portion is extinguished.

6.12. Periodic Review -- No less frequently than every five years the Director shall review all prior decisions granting deviations and variances to determine their continued consistency with this series. Should the Director determine that any modification of such a decision is appropriate, the Director shall initiate rulemaking pursuant to Article 3, Chapter 29A of the West Virginia Code.

DEPARTMENT OF COMMERCE LABOR AND ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

RESPONSIVENESS SUMMARY
August 1993

Proposed Rule: "Groundwater Quality Standard Variances"

The West Virginia Division of Environmental Protection (DEP) has received thoughtful criticism during the public comment period on proposed "Groundwater Quality Standard Variances" Title 47, Series 57. This rule establishes criteria for obtaining deviations and variances from either existing groundwater quality or the groundwater quality standards.

To comply with federal and state public participation requirements the DEP issued on July 9, 1993 a notice announcing the beginning of a thirty one day public comment period. The notice was published in eight newspapers, representative of various geographic areas across the state. Copies of the public notice were also sent to state agencies affected by the rule, the U.S. Environmental Protection Agency, the members of the Water Quality Advisory Committee, and other interested parties. The notice included an announcement of a public hearing for the proposed rule which was held on August 9, 1993, at the DEP's Nitro office.

The DEP received 7 written statements by August 10, 1993, the date on which the official record was closed. One oral comment was offered at the public hearing. The following is this agency's response to the recommendations and concerns raised.

Written Comment/Response

Several commentators stressed an urgent need for the Division to file this proposed rule as an emergency rule. They stated that since the Requirements Governing Groundwater Quality Standards will become effective August 25, 1993, numerous liability questions will arise for facilities that are suddenly required to adhere to a new set of regulations. Also as the rule is drafted, the dates set forth in Subsection 6.10 would become meaningless, as the normal legislative process would keep the rule from becoming effective until the spring of 1994.

The Division recognizes the concerns raised by the commentators as having serious implications, and will therefore seek the Secretary of States approval to file this proposed rule under the emergency rule provisions of 29A of the Code.

SECTION 2

One commentor noted that the definition of constituent had been expanded to include radiological parameters. The commentor pointed out that this modification went beyond what was provided for in the statutory definition and urged its deletion.

The Division acknowledges the commentors concern, and will strike the term radiological from the definition of constituent. However, the Division would like to state that radiological parameters are considered to be chemical in nature. The deviation and variance procedures would still apply if these parameters are causing contamination.

One commentor requested the Division modify the definitions of "release" and "source" in such a way that they do not become retroactive. The commentor states that the Act uses the present tense with regards to spills, contamination, etc. and therefore so should the rule.

The Division's best way of responding to this issue is by referring to how the terms are used in the rule. The term "release" appears only in the definition of "source" & "Class of sources" and in Subsection 4.1. If the term release was defined so as to exclude spills or contamination that have already occurred we would be limiting ourselves to what action we could require to effectively clean up and/or mitigate past offenses. The Division maintains that although the Act stresses pollution prevention, it does not immediately forgive past wrongs. Similar logic can be applied to the term "source", and therefore the Division elects not to change either definition.

Two commentors suggested that a definition of "coal extraction and earth disturbing activities directly involved in coal extraction" be defined and one of the commentors offered three possible definitions for the term.

The Division acknowledges that this term is used in the regulation without definition. However the Division refrains from using any of the commentors definitions as they raise a much larger issue than those addressed by this proposed rule. The definitions offered would serve to expand the statutory exemption for coal mining to include areas/activities that are not a direct part of the coal removal operations (i.e. preparation plants, refuse piles, material storage, etc.). The Division understands the significance of this issue, but maintains the legislative intent was not to include associated activities in the exemption. Relief from this issue should be addressed by the Legislature and therefore

the Division will not add the requested language to this rule.

Two commentors suggested an alternative definition for the term "deviation". The commentors' offered definitions vary but all indicate that a "waiver" or "relief" is better language than the proposed language which "modifies an agency action".

The Division has given much thought to how the definition for deviation could be improved. All commentors were effectively trying to define the same logic, but each had minor problems. Therefore, by incorporating the pro's of each offered definition the Division has modified the definition of "deviation" as follows: "Deviation means an action of the Director relieving a single source or class of sources, for one or more specific constituents, of the requirement to maintain and protect groundwater at existing quality, where existing quality is better than that required to maintain and protect applicable groundwater quality standards."

SECTION 3

One commentor requested that the language in the Act which was restated in Subsection 3.1. of the proposed rule should be modified in such a way as to change the requirement from facilities which are subject to W.V. Code 22A, Article 3 and/or W.V. Code Chapter 20, Article 5A to facilities which are subject to "the permitting requirements" of W.V. Code 22A, Article 3 and/or W.V. Code Chapter 20, Article 5A.

The Division responds by stating that if this were changed we would only be clouding the issue raised in the response to comments for the proposed definition of "coal extraction and earth disturbing activities directly involved in coal extraction". Therefore for reasons stated in the definitions response the Division will not include the commentor's suggested language.

SECTION 4

One commentor urged insertion of language into Subsection 4.1. that would clarify that those persons who have obtained a variance for the constituents of concern are not subject to the requirements of this Subsection.

The Division concurs with the commentor and has added the commentor's suggested language, with slight modification, to the beginning of Subsection 4.1. The new language is:

"Except for any source or class of sources which has been granted a variance for the particular contaminant at issue..."

Another commentor stated that as written Subsection 4.1. conceivably could require all persons to mitigate groundwater contamination and suggested that only those persons subject the Certification requirements of Section 8 of the Act should be required to mitigate.

The Division responds by stating that if only those persons subject to the Certification requirements of Section 8 of the Act were required to mitigate, conceivably an individual could do irreparable harm to groundwater, and then not be subject to the requirements of this Subsection. The Act applies to any person who may impact groundwater, therefore, the Division will not limit its authority by modifying this Subsection as requested.

Another comment received on Subsection 4.1 seeks clarification as to whether "cease further release" means stop the initial spill, or can it also mean, stop further releases as would be the case if soils are saturated from the initial release and continue to leach contaminants into the groundwater.

The Division understands the issue raised, but believes the suggested modification (making this Subsection only apply to "initial" releases) would limit our regulatory ability in worst case scenarios. In most instances, once the "classic" source has been removed, the Division would not treat contaminated soils as a source. In addressing this issue the Division would like to state "nonclassic" releases will likely occur and stopping only the initial release would not be following the intent of the Act which is to be protective of groundwater. Furthermore adding the suggested language would be altering language found verbatim within the Act.

Therefore the Division will not adopt the commentor's suggested language.

Finally the commentor requested that sources only be responsible for contamination which is under the sources control.

The Division responds by giving two possible arguments that could arise if the requested language were to be included in the rule. First, if a person had a release that went off-site, an argument could be made that since this contamination is off-site, it is not under the sources control. A second scenario would be that if Company A contaminated a site, and Company B bought the property, Company B could argue that the prior contamination is not under their control and avoid certain requirements of the Act and this rule. Neither of the above scenarios is acceptable

to the Division and therefore no changes to the rule will be made.

Two commentors stated that Subsection 4.2. of the proposed rule should be modified so that only those sources which are not only operating pursuant to, but also complying with an order, administrative order... should be deemed to be in compliance with the Act.

The Division concurs with the commentor and has changed the beginning of Subsection 4.2. as follows: "Sources which are operating in full compliance with and pursuant to an agreement..."

One commentor stated that this Subsection is too broad and would allow anyone under an order to be in compliance with the Act, for any provision (i.e. not paying Groundwater Protection Act Fees).

The Division acknowledges the commentors concern and has added the following language to Subsection 4.2. to eliminate the given scenario: "shall be deemed to be in compliance with W.Va. Code 20-5M-4(b)..."

One commentor requested that a new Subsection be added to make clear that sources which have already contaminated groundwater may obtain a variance.

The Division responds by stating that in some cases a variance for past activities that have contaminated groundwater is appropriate, especially when modern designs can still not be protective of groundwater standards. If technology cannot allow for the protection of standards, and a variance is sought for this activity, it is possible for the variance to cover similar existing activities. The Division further responds by stating that the variances as proposed are not intended to be a solution to past practices. Orders requiring cleanup/long term monitoring would be more appropriate and therefore the Division will refrain from adopting the commentors suggested Subsection as it appears to invite variances for any contamination event.

SECTION 5

One commentor suggested changing the last sentence in Subsection 5.1. to read as follows: "Such petition may be independently filed, or may be made in conjunction with other matters pending before the Director. If such other matters

require public notice, then the request for a deviation shall be clearly identified in such notice."

The Division responds, based on other comment which requested more public notice be given to the process of granting a deviation, that it would not be unreasonable to require notice of a deviation request to be included when public notice is required by another Act or regulation, and therefore will adopt the commentors suggestion.

One commentor suggested that descriptors such as reasonable or appropriate should be used throughout paragraphs 5.2.3. through 5.2.7. Furthermore the commentor stated the word "known" should be included in paragraph 5.2.4. so that only known uses of groundwater would have to be reported in a deviation application.

The Division responds by stating that insertion of the terms reasonable or appropriate may make the Subsection less clear, and thus more arguable. Each individuals definition of reasonable differs, and the Division believes if the term is left out of the paragraphs the competent professionals who will be completing the deviation application will be able to determine, via phone calls or correspondence with the Division, what is required for a complete and thorough deviation application. With respect to use of the word "known" in paragraph 5.2.4. the Division offers similar logic. If known were included, a question such as known to whom would soon arise (i.e. known to the facility, known to the Division, known to the local county health departments, etc.). The Division believes in absence of the word known in paragraph 5.2.4. all information that can be obtained should be supplied, and if "holes" exist they can be addressed via dialogue between the parties who submit and who review the application.

One commentor stated that paragraph 5.2.5. should be changed to read as follows: "a list of other known sources which may reasonably be expected to contaminate groundwater in the area for which the deviation is being sought.

The Division, for reasons stated above will refrain from inserting the words reasonable and known in the offered modification, but does concur that "may be expected to contaminate" is more appropriate than "may have an effect on the groundwater" and will make the appropriate change to the rule.

One commentor suggested changing the language in 5.2.4. to read as follows: "a report of the existing groundwater quality and uses in the area to be affected by the deviation,

including, but not limited to the levels of constituents for which the deviation is being requested.

The Division believes the commentors suggestion to be useful. As written Subsection 5.2.4. is not specific as to the types of constituents which a deviation is being sought for. The Division does not view a deviation as a blanket provision which is valid for all constituents. Therefore, the Division will adopt the commentors suggested language as it more clearly expresses the Divisions intent.

One commentor suggested that in paragraphs 5.2.6. and 5.2.7. "a demonstration" should be changed to "a statement describing why" stating that it is both more consistent with the Act and paragraph 6.2.7. of this rule.

The Division concurs with the commentor and will make the requested change.

One commentor suggested that the following language be added to the end of Subsection 5.3.: "and shall include such evaluation in this written report."

The commentor is effectively asking the Division to document and report that it has in fact evaluated the cumulative effects of all facilities and activities in the affected areas. While the Act does not necessarily require a report to be written, the Division believes a document describing the logic behind granting a deviation is both needed and valuable. Therefore, the Division will adopt the commentors suggested language.

One commentor stated that Subsection 5.4. limits the Director's ability to determine the terms and conditions of the deviation, and deviates from the statutory language.

The Division recognizes the commentors concern. As written the Director "shall have the exclusive authority to determine the terms and conditions to be applicable to the Director's decision to grant a deviation". The statute states that the "Director shall have the exclusive authority to determine the terms and conditions of such a deviation". The Division believes that both statements are valid and need to be in the rule. Therefore the first sentence in Subsection 5.4. has been changed as follows: "The Director shall have the exclusive authority to determine the terms and conditions to be applicable to the Director's decision to grant a deviation and the Director shall have the exclusive authority to determine the terms and conditions of such a deviation."

One commentor stated that Subsection 5.5. should only make one position, either the Chief or the Director, provide notice of the decision. Furthermore the commentor stated that it is not clear who is to receive the decision, and pointed out that as no public notice is required no one else will likely know of a decision to issue a deviation.

The Division responds by stating that the Act, 20-5M-5(g) specifically requires either the Director or the Chief to provide notice of any deviations. The commentors second concern is valid, the rule does not clearly define who receives notice of the decision. The following change has been made to eliminate this concern: "...shall provide notice of any decisions to approve an application for a deviation to the applicant and to any person...".

With respect to the lack of requirements for public notice, either for intent to issue a deviation or for notice that a deviation has been issued, the Division states that the Act made no specific provisions for a public notice. Freedom of Information Act requirements do make information regarding deviations reasonably available, and the modified Subsection 5.1. will make the deviation application known if the person has other matters requiring public notice before the Director.

SECTION 6

One commentor suggested that a map be required as part of the requirements for a variance request application.

The Division responds by stating that the current language requires the applicant to give notice of the area in which the variance would be effective. This arguably could be descriptive as opposed to visual. The Division would prefer that maps be published in the advertisement when they are appropriate (i.e. one facility). In some instances a variance request may be for statewide coverage. It would be unusual to see a state map published in a legal advertisement, therefore the Division slightly modify the language in Subsection 6.1. as follows: "...the area in which the variance would be effective (note: include a map if appropriate), and the source...".

One commentor offered the following language for paragraph 6.2.4. The language offered is as follows: "a report of the existing groundwater quality and uses in the area to be affected by the variance, including but not limited to the levels of constituents for which the variance is being requested. The report shall also include the predicted long

term effects of the variance on groundwater quality and uses."

The commentor is actually raising two issues with regards to this paragraph. One issue is that a variance is not necessarily open ended. By having the variance petitioner state what level of constituent concentration a variance is being sought for the Division would be better able to allow a variance that is agreeable to all parties. The Division believes the commentors concern can be addressed by inserting the following paragraph: "the levels of constituents for which the variance is being requested;".

The second issue raised is that the long term effects of the variance should be addressed in the contents of the variance application. The Division concurs with this idea as the long term effect of a variance must be weighed against the short term benefits. The Division will include the last portion of the commentors suggestion verbatim at the end of paragraph 6.2.5.

One commentor suggested insertion of additional language into Subsection 6.2 which would include a requirement in the application for the applicant to show that he or she has not made any prior irreversible or irretrievable commitment of resources with the intent of foreclosing reasonable and prudent alternatives to the variance.

The Division after considerable discussion has determined that regardless of whether an irreversible or irretrievable commitment of resources has been made, the variance application should be considered on its own merits, and therefore the Division elects to delete Subsection 6.7.3. from the rule.

One commentor suggested a rewording of paragraph 6.3.1 to include a single source as well as a class of sources.

The Division concurs with this commentor that since the variance process accounts for both single sources and classes of sources that the languages needs to be incorporated into the rule. Therefore, the Division will reword paragraph 6.3.1 to include single sources as well as classes of sources.

One commentor suggested striking the last word in the first sentence of Subsection 6.4, because it is redundant.

The Division concurs with the commentor that the last word in the first sentence of Subsection 6.4 is redundant and will strike the word "rule" from the text.

Two commentors requested that Subsection 6.4. be expanded to more clearly define the procedure of how public hearings, notice and rulemaking will occur.

Briefly, a person would apply for a variance, the Director would give 30 days notice of a public hearing, receive comments for at least ten days after the hearing and then would issue a determination as to whether or not the variance is valid, within 45 days. If valid, the Director would initiate legislative rulemaking pursuant to 29A of the Code. One issue that needed clarification is whether or not two hearings would be required, one for the Act, and one for the rulemaking process. The Division will clarify this issue by stating that 29A of the Code does not mandate a public hearing to be held, while the Act specifically states that for variance proceedings a hearing must be held. The Division does not intend to hold two hearings for the same variance application and believes if strict interpretations of both Acts are followed no confusion will result.

One commentor stressed that the Act does not provide appeal rights to persons who have been denied a variance request.

The Division acknowledges that the Act does not specifically provide appeal rights for denial of variance requests. However, due process must be provided to any person who is affected by a decision made by the Director or any public official. If the legislature believes the Division's interpretation is incorrect, and denial of variances is not appealable, action should be taken to strike this Section of the rule.

One commentor suggested that striking the wording in Subsection 6.7 "variance rulemaking for a" because the language is redundant.

The Division partially concurs with the commentor and will strike a portion of the wording in Subsection 6.7 to read "The Director shall promulgate rulemaking for a variance...".

One commentor suggested that statutory language be inserted into this section as paragraph 6.7.1 to read "the activity, by its nature cannot be conducted in compliance with the requirements of 5M-5(g)."

The Division concurs with the commentor that the statutory requirement for granting a variance for a source or a class of sources is that, by its nature the source or sources cannot comply with the standards requirement in the Act. Therefore, the Division will adopt the suggested language

into paragraph 6.7.1. A minor modification will also be made by deleting the word "activity" from the suggested language and replacing it with "a single source or class of sources" for the purpose of clarity throughout the rule. The Division will also renumber paragraphs 6.7.1 and 6.7.2 to 6.7.2 and 6.7.3 to reflect the change.

The same commentor suggested the adoption of a new Subsection to more clearly illustrate a criteria to be used for Variance Denial. The commentor suggested deleting present paragraphs 6.7.3 and 6.7.4 and renumber those paragraphs under a new Subsection entitled "Variance Denial", also the commentor suggested alternative language to these Subsections.

The Division disagrees with the commentor that separating the variance criteria Subsection into two individual Subsections would serve to more clearly outline to the applicant what is acceptable criteria for a variance and what is not acceptable. The Division believes that separating the two Subsections would not serve to further clarify the rule. Therefore, Division will not make this change to the rule. Based on a prior comment, the Division has decided that an application for a variance should stand on its own merit regardless of whether or not a prior irreversible or irretrievable commitment of resources has been made.

Two commentors suggested deleting the word "clearly" from Subsection 6.7.1. One commentor suggested deleting entirely and not replacing it with alternative language because the term implies a standard of proof necessary to justify the issuance of a variance, the other commentor suggested replacing it with alternative language as such "are not outweighed by".

The Division concurs with both commentors that the wording should be changed. However, the Division also agrees that the Director's decision should be based upon the criteria established in this rule and not on a standard of proof that has not been established in this rule or the Act. Therefore, the Division will adopt the one commentors suggestion and delete the word "clearly" from the text. Thus the variance will more likely be granted if it simply outweighs the benefits of compliance.

One commentor suggests that paragraph 6.7.2 be modified so that a variance need only be "no less" in the public interest than protection of groundwater quality standards, instead of "more".

The Division does not concur with this commentor. The Division believes that a negative connotation to the rule as

suggested by the commentor is confusing and difficult to interpret. It is much clearer to an applicant if he or she can demonstrate that his or her request for a variance is more in the public interest, than no less in the public interest.

One commentor suggests deleting the wording "irreversible or irretrievable" and "with the intent of foreclosing reasonable and prudent alternatives to the variance" in Subsection 6.7.3, and replacing the first part with the word "significant" and leaving the remainder of the sentence deleted. The commentor believes that the language is confusing and would be extremely difficult for the Director to make a defensible decision.

The Division agrees with the commentor and for reasons stated previously in this summary the Division has chosen to delete this language from the rule.

One commentor suggest modifying language in Subsection 6.7.4 to require that there only be a finding that "there is no more reasonable and prudent alternative than the granting of the variance".

The Division does not concur with the commentor. As stated previously the Division feels that a negative connotation in the language of this rule is confusing to the applicant and would be difficult to determine. It is much clearer to an applicant if he or she can demonstrate in his or her application that there is no reasonable and prudent alternative to the variance.

One commentor suggested adding the following language to Subsection 6.9 "which are subject to the variance" before the words "or both". The commentor stated that by adopting the proposed language those requirements of the Act that are to be satisfied with the granting of a variance are made more clear.

The Division concurs with the commentor that a source or a quality standards and/or preventative action limits that are specified in the granting of the variance. Therefore, the Division will add language to emphasize this point. The sentence will read "... (other than compliance with groundwater quality standards or preventative action limits, or both as specified in the variance.)"

One commentor states that they strongly support the reasonableness and necessity of Subsection 6.10, Initial Variance, because the failure to include an automatic

variance period would place many sources in jeopardy of being instantly in violation on the groundwater quality standards.

The Division partially concurs with the commentor that an initial variance period is necessary for the reasons stated above. However, the Division believes that a blanket exemption for all groundwater quality standards and preventative action limits is beyond the intent of the Act and this rule. The Division agrees that an initial variance should be extend to a person who submits a letter of intent. The Division does not agree that by merely submitting a letter of intent a source is given a blanket variance for all groundwater quality standards and preventative actions limits. The Division contends that the letter of intent should identify those constituents for which the application is being made, and it is those constituents that will be given the initial variance. The letter of intent shall include a statement of the nature of the activity requesting the variance, and the geographical area to be affected, if the variance is granted. Therefore, the Division will insert language into Subsection 6.10 that requires the letter of intent to contain those items listed above. The Division in making this change to Subsection 6.10 will also delete the word "all" from the text in the fifth line of the Subsection.

One commentor suggested that the letter of intent be expanded to include other factors relative to granting an initial variance. The commentor suggested that: "a statement of the nature of the activity which renders it unable to be carried out in compliance with the standards" and "the geographical area which may be affected by the variance, if granted" be included as part of the letter of intent.

The Division concurs with this commentor that is not unreasonable to require more information than a simple letter declaring a person's intent to apply for a variance before granting an initial variance. The concept of the variance process is to identify those source(s) that cannot by their nature comply with groundwater quality standards and preventative action limits and grant them relief, not to give blanket exemptions for sources to contaminate groundwater.

One commentor suggested the wording "deemed to be in compliance with" be changed to "granted a waiver of the requirement to comply with" because the wording is too broad and confusing as to what exactly the source is being deemed in compliance with.

The Division concurs with this commentor and will revise the wording in the first sentence and the second sentence of Subsection 6.10 to read that "All sources shall be grant a waiver of the requirement to comply with", delete the

previous language. The Division believes that the adoption of this language is more specific to the intent of the rule and is less confusing as to what requirements of the Act the sources are in compliance with.

The Division will also adopt stronger language in the rule to provide that only those legitimate constituents specific to the variance application will be granted a waiver. With this language in place the Division believes that a person(s) applying for a variance will not list all groundwater quality standards or preventative action limits in an attempt to get blanket coverage for all standards or limits. This decision by the Division is in keeping with the intent of the Act that only those sources by their nature cannot comply with a specific groundwater quality standard(s) or preventative action limit(s) be granted a variance.

One commentor suggested that a time frame be adopted into Subsection 6.10 that would be required when an application for a variance be submitted after the letter of intent. The commentor suggested three (3) months in order to give the Director sufficient time to make his review and still comply with the legislative time lines for rulemaking procedures.

The Division admits that it is conceivable that depending upon when a letter of intent is filed and the actual application is presented that a source could be exempt for as much as one and half years. However, the Division would like to point that in order for a source to comply with the July 1, 1995 deadline their application for a variance must be submitted shortly after their letter of intent is submitted in order for the Director to review and initiate rulemaking before their waiver expires. Therefore, the Division will not adopt the suggested comment.

By incorporating the above comments pertaining to Subsection 6.10. the Division has rewritten Subsection 6.10. as follows:

"All sources, except for those sources operating pursuant to Subsection 4.2., shall be granted a waiver of the requirements to comply with all groundwater quality standards and preventative action limits until January 1, 1994. Any source, whether single or class, which has filed with the Director on or before December 31, 1993, a statement declaring an intent to make application for a variance shall be granted a waiver of the requirements to comply for only those groundwater quality standards and preventative action limits, specific to the variance application until July 1, 1995. The letter of intent shall include, but not be limited to, identification of the constituent(s) for which a variance is requested, a statement of the nature of the activity requesting the variance, and the geographical area to be affected by the variance, if granted. Notwithstanding any

other provisions of this Subsection, such sources may be subject to such other standards or conditions as may be established by an agency to protect human health and the environment and to satisfy all requirements of the Act other than compliance with groundwater quality standards or preventative action limits, or both as specified in the variance. Any waiver granted pursuant to this Subsection will be extinguished upon the issuance of the Director's denial of the entire variance. In those instances where a portion of the variance application has been denied, the waiver for that portion is extinguished."

One commentor suggested that the language in 6.10 and 6.11 be expanded to provide not only for the automatic 18 month extension but also for an alternative that a source will be deemed in compliance during the pendency of a variance application even if the process is not completed within the 18 months. And that the Director should be given discretion to extend such period of deemed compliance for such time as the Director considers necessary in the interest of justice.

The Division concurs with the commentor that it is possible that the variance process could extend beyond the 18 month limit and for reasons not the responsibility of the applicant that the process could put the applicant in jeopardy of enforcement. The Division believes that with the adoption of the language into Subsection 6.10 made by the Division to previous commentors concerns that this aspect of the rule will be provided for. The Division contends that a waiver granted from the requirements to comply as specified in Subsection 6.10 will remain in force until a variance is granted or denied, or a denial is issued by the Director for a specific groundwater quality standard or preventative action limit.

One commentor stated that "granting a variance to all sources for new groundwater quality standards is unwarranted" because the groundwater standards are required to be promulgated through legislative rulemaking, and a source would have ample notice of a potential change in groundwater standards prior to such change becoming effective.

The Division agrees with this commentor that ample time is given for a source to know what standards are being promulgated and to file a letter of intent. The Division also recognizes that the applicant will not have the luxury of knowing whether a new standard is passed by the legislature or not until it actually takes place. Therefore, the Division believes that a six month period is not unreasonable for the filing of an application after a new standard is adopted given the complexity of the application process, and will not adopt the suggested language. The

Division will also incorporate the same provisions for a letter of intent as in Subsection 6.10.

The Division states that it is not the intent of the variance rule of the Act to exempt sources with complying with other laws and regulations, therefore the Division will amend the inference to any water quality standard to emphasize that this Subsection only applies to new groundwater quality standards promulgated after August 30, 1993, and not to any other water quality standard in effect as of that date.

By incorporating the above comments pertaining to Subsection 6.11. and the comments offered for Subsection 6.10. the Division has rewritten Subsection 6.11. as follows:

"All sources, except for those sources operating pursuant to Subsection 4.2., shall be granted a waiver from the requirements to comply with any groundwater quality standard and associated preventative action limit not in effect on August 30, 1993, until six months following the effective date of such standards and associated preventative action limits. Any source, whether single or class, which has filed with the Director, within six months following the effective date of such standards and associated preventative action limits, a statement declaring an intent to make application for a variance shall be granted a waiver from all such groundwater standards and preventative action limits as specified in the letter of intent, for an additional 18 months. The letter of intent shall include, but not be limited to, identification of the constituent(s) for which a variance is requested, a statement of the nature of the activity requesting the variance, and the geographical area to be affected by the variance, if granted. Notwithstanding any other provisions of the Subsection, such sources may be subject to such other standards or conditions as may be established by an agency to protect human health and the environment and to satisfy all requirements of the Act other than compliance with groundwater quality standards or preventative action limits, or both as specified in the variance. Any waiver granted pursuant to this Subsection will be extinguished upon the issuance of the Director's denial of the entire variance. In those instances where a portion of the variance has been denied, the waiver for that portion is extinguished."

One commentor suggested that the Division consider a three year review period of the variance similar to the review period for variances granted by the Water Resources Board for surface water quality standards.

The Division is aware of the three year review period of surface water quality variances by the Water Resources Board.

The Division is also aware that this three review period is mandated by the Environmental Protection Agency (EPA) and that the EPA is considering altering that frequency to five years. The Division would also like to coincide the review period with the permit renewal period which is every five years. This would alleviate premature review of a permitted facility/activity for a variance and then two years later a review for permit reissuance. For reasons of resource management at the review level the Division will not adopt the suggested three year review period and will stay with the original language of a five year review period for granted variances.

One commentor suggested that the fiscal note be changed from "sources with a potential for causing groundwater contamination, when desiring a variance, will expend monies to scientifically justify the need for the variance." to "any person with a potential for causing groundwater contamination....", because the DEP Director and others may request a variance.

The Division concurs with this commentor. The DEP Director and others do not fit the description of a source. Any person may request a variance, and therefore the inference to source in the fiscal note has been changed to any person.

One commentor pointed out that the term "water quality standards" was inappropriately used as it could infer surface water standards.

With respect to the commentors concern of water quality standards versus groundwater quality standards the Division concurs and will make the necessary changes throughout the rule.

One commentor stated that persons operating pursuant to Subsection 4.2. should not be allowed to make application for intent to obtain a variance.

Person's undertaking remedial action are granted relief from further enforcement via Subsection 4.2. The variance procedure is mainly only for new sources which cannot be conducted in compliance with groundwater quality standards. The Division's rewrite of Subsections 6.10. and 6.11. incorporate this commentors concern.

Oral Comment/Response

One commentor made a public statement at the public hearing. The commentor basically posed a question to the Division. He asked if a risk assessment would be acceptable to the Division as part of an application to obtain a deviation or variance.

The Division responds by answering "yes" to the question. While the proposed rule never mentions "risk assessment" the use of this methodology is acceptable and would be considered by the Director to determine whether or not a deviation or variance is appropriate.

August 16, 1993

The following individuals were in attendance at the public hearing on proposed regulations to establish criteria on obtaining variances or deviations from Groundwater Protection Act requirements on August 9, 1993.

Bill Rainey, 1301 Laidley Tower, Charleston, WV 25301

Patrick Pearlman, Jackson and Kelley, P.O. Box 553, Chas, WV 25322

Jean Fish, 2KH Lakeshore Drive, Charleston, WV 25313

Libby Chatfield, Water Resources Board, 1615 Washington Street East, Chas, WV 25311

John Frankenthal, Ground Water Technology, Inc., 4200 First Ave. Suite 110, Nitro, WV

Roland Huson, P.O. Box 1791, Chas., WV 25326

David Yaussy, P.O. Box 1791, Chas., WV 25302

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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JUN 7 4 11 PM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: DCL&ER, Division of Environmental Protection TITLE NUMBER: 47

RULE TYPE: Legislative; CITE AUTHORITY \$20-5M-1 through 6

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 57

TITLE OF RULE BEING PROPOSED: Groundwater Quality Standard Variances

DATE OF PUBLIC HEARING: August 9, 1993 TIME: 7:00 pm

LOCATION OF PUBLIC HEARING: Division of Environmental Protection's training room, #10 McJunkin
Road, Nitro, West Virginia

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Office of Water Resources, 1201
Greenbrier Street, Charleston, West Virginia 25311-1088

The Division requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments. The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



David C. Callaghan, Director
Division of Environmental Protection

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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JUL 7 4 11 PM '93

Form #2

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

AGENCY: DCL&ER, Division of Environmental Protection TITLE NUMBER: 47

RULE TYPE: Legislative; CITE AUTHORITY \$20-5M-1 through 6

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

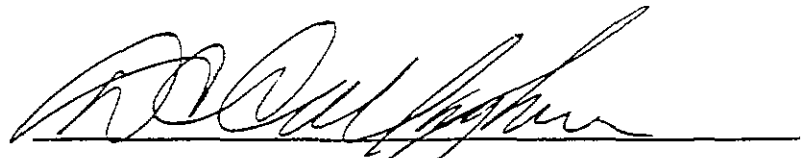
IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 57

TITLE OF RULE BEING PROPOSED: Groundwater Quality Standard Variances

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON Tuesday, August 10, 1993 AT 4:00 pm

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS Division of Environmental Protection, Office of Water Resources, 1201 Greenbrier Street, Charleston, West Virginia 25311-1088

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THE PROPOSED RULE.



David C. Callaghan, Director
Division of Environmental Protection

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY
State Capitol, Room M-146
Charleston, West Virginia 25305-0310
Telephone: (304) 558-0400
Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

July 6, 1993

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

JUL 7 4 12 PM '93

FILED

David C. Callaghan
Director
Division of Environmental Protection
#10 McJunkin Road
Nitro, West Virginia 25143-2506

Re: Proposed Rule - Title 47, Series 57 - Groundwater Quality
Standard Variances

Dear Director Callaghan:

Pursuant to West Virginia Code Section 5F-2-2(a)(12), I hereby
consent to the proposal of the rule specified above.

You may attach a copy of this letter to your filing with the
Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
John M. Ranson
Cabinet Secretary

JMR\lab
cc: Dave Watkins

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DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1201 Greenbrier Street
Charleston, WV 25311-1088

Gaston Caperton,
Governor
John M. Ranson
Cabinet Secretary

David C. Callaghan
Director
Ann A. Spaner
Deputy Director

Memorandum

To: John M. Ranson, Secretary
Department of Commerce, Labor
and Environmental Resources

From: David C. Callaghan, Director
Division of Environmental Protection

Date: July 6, 1993

Subject: Division Approval of Proposed Rules and Request for
Department Consent to File.

The proposed new rule, Groundwater Quality Standard Variances, 47 C.S.R. 57 has my approval to be proposed pursuant to the West Virginia Administrative Procedures Act. Your approval is requested.

A handwritten signature in cursive script, appearing to read "David C. Callaghan".

David C. Callaghan, Director
Division of Environmental Protection

PREAMBLE TO A PROPOSED RULE
CONCERNING
GROUNDWATER PROTECTION ACT FEE SCHEDULE

AGENCY: Department of Commerce, Labor, and Environmental Resources; Division of Environmental Protection.

REGULATION: Title 47, Series 57, "Groundwater Quality Standard Variances."

ACTION: Filing of a Proposed Rule, Notice of a Public Hearing and Notice of a Thirty Day Public Comment Period.

SUMMARY: The proposed rule provides criteria for variances and deviations from the requirements of The Groundwater Protection Act, W.Va. Code, §20-5M-1 et seq. that would otherwise obligate sources to assure compliance with existing quality, groundwater quality standards of the state Water Resources Board and preventative action limits imposed by groundwater regulatory agencies.

A Public Hearing will be held on Monday, August 9, 1993 at 7:00 pm in the Division of Environmental Protection's Training Room, #10 McJunkin Road, Nitro, West Virginia

Written comments with postmarks prior to 4:00 pm Tuesday, August 10, 1993 will be accepted. Written comments should be sent to:

Laidley Eli McCoy, Chief
Division of Environmental Protection
Office of Water Resources
1201 Greenbrier Street
Charleston, West Virginia 25311

FISCAL NOTE FOR PROPOSED RULE

Rule Title: Groundwater Quality Standard Variances, 47 C.S.R. 57

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Environmental Protection, Office of Water Resources

Address: 1201 Greenbrier Street, Charleston, West Virginia 25311-1088

	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$N.A.		N.A.	N.A.	N.A.
Personal Services	\$				
Current Expenses	\$				
Repairs & Alterations	\$				
Equipment	\$				
Other	\$				

2. Explanation of above estimates: All costs related to the implementation of this rule have been provided for through the Groundwater Protection Act Fee Schedule, 47 C.S.R. 55.

3. Objectives of this rule: Provide a means of relief from existing groundwater quality standards/preventative action limits where appropriate.

4. Explanation of Overall Economic Impact of Proposed Rule.

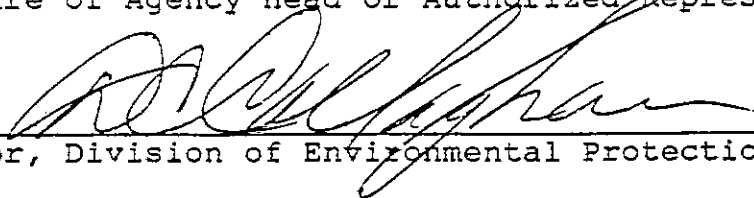
A. Economic Impact on State Government. None, see item #2 above.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens. Sources with a potential for causing groundwater contamination, when desiring a variance, will expend monies to scientifically justify the need for the variance.

C. Economic Impact on Citizens/ Public at Large. None.

Date:

Signature of Agency Head or Authorized Representative



Director, Division of Environmental Protection

TITLE 47
DIVISION OF NATURAL RESOURCES
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL
RESOURCES

SERIES 57
GROUNDWATER QUALITY STANDARD VARIANCES

§47-57-1. General.

1.1. Scope -- This legislative rule establishes criteria for variances and deviations from the requirements of W.Va. Code, §20-5M-1 et seq. that would otherwise obligate sources to assure compliance with existing quality, groundwater quality standards of the state Water Resources Board and preventative action limits imposed by groundwater regulatory agencies.

1.2. Authority -- W.Va. Code, §20-5M-1 through 6.

1.3. Filing Date --

1.4. Effective Date --

§47-57-2. Definitions.

The definitions set forth in W.Va. Code, §20-5M-3 shall apply to this series along with the following definitions unless the context clearly indicates otherwise.

2.1. "Act" means the West Virginia Groundwater Protection Act, W.Va. Code §20-5M-1 et seq.

2.2. "Agency" means any branch, section, division, department or unit of the state, county or local government, however designated or constituted, which has the authority pursuant to W.Va. Code §20-5M-1 et seq. to regulate facilities or activities which have the potential for adversely impacting groundwater.

2.3. "Agency action" means the issuance, renewal or denial of any permit, license or other required agency approval, or any terms or conditions thereof, or any order or other directive issued by the division of environmental protection, division of health, department of agriculture or any other agency of the state or a political subdivision to the extent that such action relates directly to the implementation, administration or

enforcement of the Act.

2.4. "Class of sources" means a group of sources which engage in similar types of activities and release, or have the potential to release, similar types of pollutants to the groundwater.

2.5. "Constituent" means any chemical, radiological or biological substance found in groundwater due to either natural or man-made conditions.

2.6. "Deviation" means an action of the Director modifying an agency action taken, or to be taken, for one or more specific constituents to assure that a single source or class of sources maintain and protect groundwater at existing quality, where existing quality is better than that required to maintain and protect applicable groundwater quality standards.

2.7. "Director" means the Director of the Division of Environmental Protection of the Department of Commerce, Labor and Environmental Resources.

2.8. "Existing quality limits" means the existing quality of groundwater that is better than groundwater quality standards and which must be maintained and protected pursuant to section 5(e) of the Act.

2.9. "Groundwater" means the water occurring in the zone of saturation beneath the seasonal high water table, or any perched water zones.

2.10. "Groundwater quality standards" means the standards of purity and quality for groundwater of the state promulgated by the State Water Resources Board pursuant to section 4 of the Act.

2.11. "Preventative action limit" means a numerical value expressing the concentration of a substance in groundwater that, if exceeded, shall cause action to be taken to assure that standards of purity and quality of groundwater are not violated.

2.12. "Release" means any act or omission that results in the spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of materials or contaminants in a manner that has caused or is reasonably likely to cause the entry of a constituent to groundwater.

2.13. "Source" means any facility or activity which has caused a release or is

reasonably likely to cause a release.

2.14. "Variance" means a legislative rule modifying groundwater quality standards or preventative action limits, or both, for a source or class of sources, for one or more specific constituents.

§47-57-3. Statutory Exemptions.

3.1. The requirements of subsections 5(e), 5(f) and 5(g) of the Act related to groundwater quality standards, preventative action limits or existing quality limits shall not apply to coal extraction and earth disturbing activities directly involved in coal extraction that are subject to either or both Article 3, Chapter 22A of the W.Va. Code or Article 5A, Chapter 20 of the W.Va. Code. All other provisions of the Act are applicable to such exempt activities.

3.2. The Act is not applicable to groundwater within areas of geologic formations which are site specific to the production or storage zones of crude oil or natural gas and which are utilized for the exploration, development or production of crude oil or natural gas permitted pursuant to Chapter 22B of the W.Va. Code nor to the injection zones of Class II or III wells permitted pursuant to the statutes and regulations governing the underground injection control program. All groundwater outside such areas shall remain subject to the Act. An agency has the right to require the submission of data with respect to the nature of such exempt activities.

3.3. The Director has the authority to modify the requirements of subsection 5(g) of the Act with respect to non-coal mining activities subject to Article 4, Chapter 22A of the W.Va. Code. Such modification shall assure protection of human health and the environment. Those agencies regulating such activities shall retain their groundwater regulatory authority as provided for in the relevant statutes and regulations governing such activities other than the Act.

§47-57-4. Contamination in Excess of Groundwater Quality Standards.

4.1. Any person who owns or operates a source subject to the Act which has caused, in whole or in part, the concentration of any constituent to exceed any applicable groundwater quality standard subject to the Act, must cease further release of that contaminant and must make every reasonable effort to identify, remove or mitigate the source of such contamination and strive where practical to reduce the level of contamination over time to support drinking water use of such groundwater.

4.2. Sources which are operating pursuant to an agreement, administrative order, permit, or other authorization of an agency requiring remedial action to be undertaken to address groundwater contamination shall be deemed to be in compliance with the requirements of the Act for the duration of such order, permit or other authorization.

§47-57-5. Deviation from Existing Quality.

5.1. Application -- Any person may apply to the Director to obtain a deviation from an agency action taken, or to be taken, to assure that a single source or class of sources maintain and protect groundwater at existing quality, where the existing quality is better than that required to maintain and protect applicable groundwater quality standards. Such petition may be made in conjunction with other matters pending before the Director or may be independently filed.

5.2. Contents -- An application for a deviation must contain:

5.2.1. name, mailing address and phone number of the person requesting the deviation and the name of the individual to be contacted regarding the application;

5.2.2. a description of the source or class of sources and constituents for which the deviation is being requested and, in the case of a request for a class of sources, a description of how such sources are substantially similar and the geographic area to be covered by such class;

5.2.3. a description of the area for which the deviation is proposed, including an analysis of the geology and hydrology of the area;

5.2.4. a description of the current groundwater quality and uses in the area to be affected by the deviation;

5.2.5. a list of other sources which may have an effect on groundwater in the area for which the deviation is requested;

5.2.6. a demonstration that the measures necessary to preserve existing quality are not technically feasible or economically practical; and

5.2.7. a demonstration that a change in groundwater quality is justified based upon economic or societal objectives.

5.3. ... Director Action -- The Director may grant or deny a deviation for a specific site, activity or facility or for a class of activities or facilities which have impacts which are substantially similar and exist in a defined geographic area. The Director's reasons for granting or denying such a deviation shall be set forth in writing. To insure that applicable groundwater quality standards are not violated, the Director shall evaluate the cumulative impacts of all facilities and activities on the groundwater resources in question prior to granting any such a deviation.

5.4. Terms and Conditions -- The Director shall have the exclusive authority to determine the terms and conditions to be applicable to the Director's decision to grant a deviation. The groundwater regulatory agency shall take such alternative action as may be necessary to assure that the facilities and activities which are subject to the deviation maintain and protect applicable groundwater quality standards. In maintaining and protecting such groundwater quality standards, such agency shall establish preventative action limits which, once reached, shall require action to control a source of contamination to assure that such standards are not exceeded.

5.5. Notice -- The Director or Chief of the Office of Water Resources of the Division of Environmental Protection of the Department of Commerce and Labor and Environmental Resources shall provide notice of any decisions to approve an application for a deviation to any person that has submitted a written request for such information to such Director or Chief.

§47-57-6. Variance From Groundwater Quality Standards and Preventative Action Limits.

6.1. Application -- Upon petition by any person, the Director may identify a single source or class of sources which by their nature cannot be conducted or operated in compliance with the groundwater quality standards or preventative action limits, or both, established pursuant to the Act and may grant a variance for a single source or class of sources. In the case of a petition on behalf of a class of sources, the petition may be filed by any person. In the case of a petition on behalf of a single source, the petition may only be filed by the owner or operator of that source. Any person who petitions for such variance must give contemporaneous notice of the petition by Class I advertisement in a newspaper of general circulation in the area to be affected by the requested variance. If the petitioner seeks a variance which would apply throughout the state, a Class I advertisement must be placed in a newspaper of state-wide circulation. Any advertisement must identify the name, address, and telephone number of the person requesting the variance, the area in which the variance would be effective, and the source or class of

sources for which the variance is requested and the constituents for which the variance is requested.

6.2. Contents -- An application for a variance from preventative action limits or groundwater quality standards, or both, must contain the following information:

6.2.1. name, mailing address, and phone number of the person requesting the variance, and the name of the individual to be contacted regarding the application;

6.2.2. a description of the source or class of sources and constituents for which the variance is being requested;

6.2.3. a description of the area for which the variance is proposed, including an analysis of the geology and hydrology of the area;

6.2.4. a description of current groundwater quality and uses in the area to be affected by the variance, and the predicted long-term effect of the variance on the groundwater;

6.2.5. a list of other sources which may have an effect on groundwater quality in the area for which the variance is requested;

6.2.6. the alternate limits or standards and mitigation measures proposed by the applicant if the variance is granted, and any proposed variance conditions;

6.2.7. a statement describing why the source or class of sources by their nature cannot be altered or modified to avoid violating preventative action limits or water quality standards;

6.2.8. a statement of the nature and extent of the benefits of the proposed variance including, but not limited to, benefits associated with economics, employment opportunities, health and safety, and the environment;

6.2.9. a description of alternatives to the variance, and an explanation of why the benefits of the proposed action outweigh the benefits of each considered alternative course of action, including not granting a variance, and an explanation of why none of the considered alternatives is reasonable and prudent;

6.2.10. a statement explaining why the proposed action is more in the

public interest than the protection of groundwater quality standards or preventative action limits; and

6.2.11. a certificate of publication.

6.3. Rulemaking -- If, after considering the variance petition for a single source or class of sources, the Director concludes that a variance is appropriate, in whole or in part, the Director shall initiate legislative rulemaking as provided in Article 3, Chapter 29A of the W.Va. Code. The proposed rule shall set forth:

6.3.1. a description of the class of sources to be granted the variance and the constituents for which the variance is requested;

6.3.2. the geographical area for which the variance is allowed;

6.3.3. any appropriate terms and conditions; and

6.3.4. the Director's preliminary findings pursuant to subsection 6.7 with respect to which public comment is to be solicited.

6.4. The proposed rule shall be accompanied by a statement of the Director's grounds for proposing the variance rule. In addition to all other rulemaking requirements, the Director shall hold a public hearing, following 30 days notice, at which oral comments may be received from any interested person, and the Director must allow at least 10 days after such hearing for the submission of written comments. Notice of the public hearing shall also be filed with the state capitol press office. The Director shall issue a determination as to whether such a variance is or is not appropriate within 45 days of the close of the comment period and, if determined to be appropriate, shall take such further steps as may be appropriate to have the variance promulgated as a legislative rule.

6.5. Denials -- If the Director determines that a variance for a single source or class of sources shall not be allowed, he shall publish a denial decision stating the reasons for the denial and provide a copy of the denial decision to the petitioner along with a notification of the petitioner's appeal rights by certified mail, and by regular mail to any other person who requests a copy of the denial decision. Notice of the denial decision shall also be published in the State Register.

6.6. Appeal -- Any person who is adversely affected by the Director's decision to deny a variance may appeal that decision to the Water Resources Board within 30 days

of the date of publication of a denial decision in the State Register.

6.7. Variance Criteria -- The Director shall promulgate a variance rulemaking for a variance for a single source or class of sources, if the Director finds that:

6.7.1. the benefits of granting the variance clearly outweigh the benefits of complying with the preventative action limits, or groundwater quality standards, or both;

6.7.2. the variance is more in the public interest than the protection of groundwater quality standards or preventative action limits;

6.7.3. the variance applicant has not made any prior irreversible or irretrievable commitment of resources with the intent of foreclosing reasonable and prudent alternatives to the variance; and

6.7.4. there is no reasonable and prudent alternative to the variance.

6.8. The Director's findings pursuant to the foregoing subsection shall include a statement of basis in support of each finding.

6.9. Terms and Conditions -- The Director may propose the variance through the initiation of rulemaking upon such reasonable terms or conditions as may be necessary to protect human health and the environment, to satisfy all requirements of the Act (other than compliance with groundwater quality standards or preventative action limits, or both, and to minimize adverse impact to groundwater consistent with granting the variance. Such terms and conditions shall include, where the Director deems it to be appropriate, alternative groundwater water standards, alternative preventative action limits, monitoring and reporting requirements, and enforcement provisions. To the extent that such terms and conditions include alternative groundwater quality standards, the Director shall consult with the Water Resources Board in establishing such alternative standards.

6.10. Initial Variance -- All sources shall be deemed to be in compliance with all groundwater quality standards and preventative action limits until January 1, 1994. Any source, whether single or class, which has filed with the Director on or before December 31, 1993, a statement declaring an intent to make application for a variance shall be deemed to be in compliance with all groundwater quality standards and preventative action limits until July 1, 1995. Notwithstanding any other provisions of this subsection, such sources may be subject to such other standards or conditions as may be established by an agency to protect human health and the environment and to satisfy all requirements of the Act other than compliance with groundwater quality standards or preventative action

limits, or both.

6.11. Variance From New Standards -- All sources shall be deemed to be in compliance with any water quality standards and associated preventative action limits not in effect on August 30, 1993, until six months following the effective date of such standards and associated preventative action limits. Any source, whether single or class, which has filed with the Director, within six months following the effective date of such standards and associated preventative action limits, a statement declaring an intent to make application for a variance shall be deemed in compliance with all such water standards and preventative action limits for an additional 18 months. Notwithstanding any other provisions of this subsection, such sources may be subject to such other standards or conditions as may be established by an agency to protect human health and the environment and to satisfy all requirements of the Act other than compliance with such standards and associated preventative action limits, or both.

6.12. Periodic Review -- No less frequently than every five years the Director shall review all prior decisions granting deviations and variances to determine their continued consistency with this series. Should the Director determine that any modification of such a decision is appropriate, the Director shall initiate rulemaking pursuant to Article 3, Chapter 29A of the West Virginia Code.

LAW OFFICES
ROBINSON & McELWEE
P. O. BOX 1791
CHARLESTON, WEST VIRGINIA 25326

CLARKSBURG OFFICE
P.O. BOX 128
CLARKSBURG, WEST VIRGINIA 26302
TELEPHONE (304) 622-5022
TELEFAX (304) 622-5065

TELEPHONE (304) 344-5800
TELEFAX (304) 344-9566

LEXINGTON OFFICE
P.O. BOX 1580
LEXINGTON, KENTUCKY 40592
TELEPHONE (606) 231-8131
TELEFAX (606) 255-1168

600 UNITED CENTER
500 VIRGINIA STREET, EAST
CHARLESTON, WEST VIRGINIA 25301

DAVID M. FLANNERY
DIRECT DIAL NO. (304) 347-8352

August 17, 1993

Mr. Kenneth Hechler
Secretary of State
Room 157
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Hechler:

The Division of Environmental Protection of the Department of Commerce, Labor and Environmental Resources has filed proposed 47 CSR 57, Groundwater Quality Standard Variances, with your office on August 16, 1993 as a legislative and emergency rule. As a member of the Groundwater Task Force that negotiated the Groundwater Protection Act and this rule, I urge you to approve the Groundwater Quality Standard Variance rule as an emergency rule, as I believe that the rule is within the agency's scope of authority and an emergency exists which justifies the promulgation of the rule.

The variance rule sets the standards for allowing exceptions to the Water Resources Board's groundwater quality standards, which will take effect on August 25, 1993. Unless this rule, with its provision for a temporary waiver of the standards, is in effect, regulatory agencies will be forced to take action after that date to implement groundwater quality standards in a permit, even though the permitted activity is expected to receive a variance under this rule. The result would be conditions imposed on facilities and activities that they could not meet, and would not have to meet once a final variance is granted. For example, approvals are regularly issued for septic systems, which in many cases cannot meet groundwater quality standards. Without a temporary variance such as provided in Section 6.10 of this rule, septic systems might not qualify for permits without expensive upgrades, which would be unneeded once a final variance is granted.

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

AUG 20 4 07 PM 1993

FILED

ROBINSON & McELWEE

Mr. Kenneth Hechler
August 17, 1993
Page 2

The groundwater variance rule provides a further waiver from groundwater quality standards for any person who has filed an application for a variance prior to December 31, 1993. However, unless the groundwater variance rule is filed as an emergency rule, this deadline will pass before the rule becomes effective, which would be some time in the Spring of 1994 at the earliest. Even those with the foresight to file a petition for a variance prior to the December 31, 1993 deadline could not file a valid petition because no rule would be in effect allowing the petitions at the time the deadline passed. If, on the other hand, the groundwater variance rule is put into effect as an emergency rule before that date, valid petitions for variances could be filed, and those applying for the variances could obtain a waiver from the groundwater quality standards while the final variance was being processed.

The Division of Environmental Protection is filing the rule in emergency form at this time because it wanted to wait for public comment before proposing it. I believe that waiting for such comment was appropriate, given the far-reaching effect of this rule and the groundwater quality standards. By waiting until comments were received the Division was able to address the concerns of interested parties, making it more likely that the rule will avoid any unintended effects or cause substantial disruption to anyone.

Approval of the Groundwater Quality Standards Variance rule as an emergency rule will allow the groundwater quality standards to take effect with a minimum of disruption to industry and homeowners in the state of West Virginia. I urge you to approve the rule as an emergency rule.

Very truly yours,

David M. Flannery
David M. Flannery

DMF/kjd

Circumstances Resulting in this Filing

47 C.S.R. 57

Groundwater Quality Standard Variances
Legislative Rule

This is a new rule which sets forth the conditions and procedures for the application and granting of variances for groundwater standards of purity and quality, and deviations from the requirement to maintain existing groundwater quality as authorized by §20-5M-5.

TRANSCRIPT OF PUBLIC HEARING
TITLE 47, SERIES 57
AUGUST 09, 1993

GROUNDWATER QUALITY STANDARD VARIANCES

THIS IS TO DISCUSS PROPOSED REGULATIONS ON VARIANCES OR DEVIATIONS WITH THE GROUNDWATER PROTECTION ACT. WE WILL HANDLE THIS HEARING IN TWO PARTS. THE FIRST PART IS A FORMAL HEARING IN WHICH ANYONE WISHES TO MAKE A COMMENT FOR THE RECORD, WE WILL RECEIVE THE COMMENT, THEN AFTER THE COMMENTS ARE RECEIVED WE WILL CLOSE THE FORMAL PART OF THE HEARING AND ANSWER ANY QUESTIONS. WITH THAT WE WILL PROCEED WITH THE FORMAL PART OF THE HEARING.

IT LOOKS LIKE WE ONLY HAVE ONE PERSON WISHING TO MAKE A COMMENT TONIGHT. JOHN FRANKINCAL PLEASE COME HERE AND MAKE YOUR STATEMENT.

COULD YOU PLEASE COME HERE AND MAKE YOUR STATEMENT.

ACTUALLY THIS IS MORE OF A QUESTION THAN ANYTHING ELSE.

COME UP HERE AND RECORD YOUR VOICE.

OK MY NAME IS JOHN FRANKINCAL. I'M THE OPERATIONS MANAGER WITH GROUND WATER TECHNOLOGY, NITRO OFFICE. AND IN REVIEWING THE REGULATIONS (PROPOSED REGULATIONS I GUESS) THIS IS MORE OF A QUESTION THAN A STATEMENT. YOU MAKE SEVERAL REFERENCES IN HERE REGARDING DEVIATIONS OR THE POTENTIALS FOR A VARIANCE. WHILE MY QUESTION HAS TO DO WITH IF YOU CAN DEMONSTRATE THAT THERE IS A LEVEL ABOVE THE EXISTING QUALITY LEVEL BUT IF YOU CAN COME AT THE APPROACH TO THE STATE USING RISK ASSESSMENT, IS THAT AN ACCEPTABLE WAY OF APPROACHING A DEVIATION OR VARIANCES THROUGH THE UTILIZATION OF A RISK ASSESSMENT AND A FATE AND TRANSPORT MODEL SUCH AS THOSE TYPES OF METHODS. CAN YOU ALSO GO AFTER A NO ACTION SCENARIO OR PERHAPS A DEVIATION. THAT'S ALL THE QUESTION.

AFTER THE FORMAL PART I'M SURE THEY WILL BE MORE THAN HAPPY TO ANSWER YOU.

DOES ANYONE ELSE HAVE A QUESTION?

OK WELL IF NO ONE WISHES TO MAKE A STATEMENT THEN I WILL CLOSE THE FORMAL PART OF THE HEARING BY ANNOUNCING THAT THE COMMENT PERIOD ENDS TOMORROW WHICH IS TUESDAY AUGUST 10TH, IT ENDS AT 4:00 P.M.. IF YOU HAVE ANY WRITTEN STATEMENTS THAT YOU WANT TO SUBMIT, I RECOMMEND THAT YOU SUBMIT THEM TO DAVE WATKINS OR PAT CAMPBELL AT THE OFFICE AT WATER RESOURCES ON GREENBRIER STREET, CHARLESTON AND I CAN GIVE YOU THAT ADDRESS HERE IN A MINUTE.

I WOULD JUST LIKE TO ADD THAT WE ARE USUALLY LAIDBACK ABOUT THE TIME PERIOD WHEN RECEIVING THESE COMMENTS BUT WE HAVE A RATHER TIGHT TIME

FAME WE HAVE TO MEET WITH THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE SO THAT FOUR O'CLOCK DEADLINE TOMORROW WILL BE CARVED IN STONE PRETTY MUCH.

SO A DEADLINE WILL MEAN A DEADLINE THIS TIME, IT'S AT 4 P.M.. AND GREG WE PLAN FILE THESE PROPOSED REGULATIONS ON AUGUST THE 12TH.

NO ON AUGUST THE 16TH.

OK AUGUST THE 16TH WHICH IS A WEEK FROM TODAY. OK I THANK YOU VERY MUCH FOR COMING TO NITRO AND WE WILL CLOSE THE FORMAL PART OF THE HEARING AND HAVE THEN HAVE THE INFORMAL QUESTION AND ANSWER PERIOD.



WEST VIRGINIA
MANUFACTURERS ASSOCIATION

SUITE 503
405 CAPITOL STREET
CHARLESTON, WV 25301
TELEPHONE (304) 342-2123

August 10, 1993

RECEIVED
AUG 10 1993

WATER RESOURCE SECTION

L. Eli McCoy, Ph.D.
Chief, Water Resources Section
West Virginia Division of Natural Resources
1201 Greenbrier Street
Charleston, West Virginia 25311

Re: Groundwater Quality Standard Variance Regulations

Dear Eli:

Enclosed please find the original and three copies of the West Virginia Manufacturers Association's comments on the Division of Environmental Protection's proposed Groundwater Quality Standard Variances, Title 47, Series 57.

Please contact me if you have any questions.

Sincerely yours,


Robert L. Foster

Enclosures

**COMMENTS ON
PROPOSED REGULATIONS FOR
GROUNDWATER QUALITY STANDARD VARIANCES
TITLE 47, SERIES 57**

**SUBMITTED ON BEHALF OF
WEST VIRGINIA MANUFACTURERS ASSOCIATION**

Prepared by

**ROBINSON & McELWEE
Post Office Box 1791
Charleston, WV 25326
(304) 344-5800**

**COMMENTS ON PROPOSED REGULATIONS
FOR GROUNDWATER QUALITY STANDARD VARIANCES
TITLE 47, SERIES 57**

**PREPARED BY
WEST VIRGINIA MANUFACTURERS ASSOCIATION**

Introduction.

On July 7, 1993 the West Virginia Division of Environmental Protection (DEP) proposed a new rule on criteria for granting deviations from existing water quality levels and variances from groundwater quality standards, to be placed at Title 47, Series 57 of the Code of State Regulations.

The West Virginia Manufacturers Association (WVMA) strongly supports the promulgation of groundwater deviation and variance rules and offers the following specific comments regarding the proposed regulations.

A. Emergency Rulemaking.

Considering the effective date of the Groundwater Quality Standards of the Water Resources Board, DEP should undertake emergency rulemaking to bring the groundwater variance rule into immediate effect. Absent a variance rule, and the provisions of sections 6.10 and 6.11, the state will either have to stop processing permits until these rules are adopted or will have to impose the groundwater quality standards in all permits processed pending adoption of these variance rules. Obviously neither is desirable nor the intent of the DEP.

Further, the variance rule contains a variance filing deadline, in §6.10, which will pass before promulgation of the regulation through ordinary process. Obviously it is not the intention of the DEP to foreclose application for a variance by imposition of a retroactive deadline. Nonetheless, unless these rules are adopted as emergency rules, there will be no official deadline except retroactively.

B. Definitions.

The definition of the term "constituent" in the proposed regulation has been expanded from the statutory definition to include not only "chemical or biological substances found in groundwater..." but also "radiological" substances. The WVMA objects to expansion of this definition beyond what is clearly expressed as the statutory meaning and urges the word "radiological" be deleted from the regulatory definition.

C. §47-57-4 Contamination in Excess of Groundwater Quality Standards.

Section 4.1 provides:

[A]ny person who owns or operates a source subject to the Act which has caused, in whole or in part, the concentration of any constituent to exceed any applicable groundwater quality standard subject to the Act, must cease further release of that contaminant and must make every reasonable effort to identify, remove, or mitigate the source of such contamination and strive where practical to reduce the level of contamination over time to support drinking water use of such groundwater.

WVMA notes §4.1 is stated in the past tense, "has caused," and urges that additional language be inserted to clarify that §4.1 does not apply to any source or class of sources granted a variance for the contaminant in question.

Further, the WVMA urges clarification that any obligation to "cease further release" is applicable only to active or original releases, as opposed to possible continuing "releases" from contaminated soils which would be subject only to the requirement to "make every reasonable effort to identify, remove, or mitigate the source of such contamination."

Finally, since the rule applies to anyone who "in whole or in part" has caused a groundwater quality standard violation, the WVMA suggests that the requirements for addressing a source of contamination be limited to only those sources over which a person has control.

Thus, the WVMA suggests changing the section to read:

"Except for any source or class of sources which are granted a variance for the particular contaminant at issue,
any person who owns or operates a source subject to the Act which has caused, in whole or in part, the concentration of any constituent to exceed any applicable groundwater quality standard subject to the Act, must cease further initial release of that contaminant from that source and must make every reasonable effort to identify, remove, or mitigate the source of such contamination which is under such person's control and strive where practical to reduce the level of contamination over time to support drinking water use of such groundwater.

In the event that each of these points is contemplated within the proposal being advanced by DEP, we urge that such intended interpretation be stated in response to public comments.

D. §47-57-5. Deviation from Existing Quality.

In Sections 5.2.3, 5.2.4, 5.2.5, 5.2.6 and 5.2.7, relative to information required in a deviation application, modifiers such as "reasonable" or "appropriate" should be inserted to provide a "reasonableness" standard for the amount of information required to support a deviation.

Specifically, the WVMA proposes:

5.2.3. a description of the area for which the deviation is proposed, including a reasonable analysis of the geology and hydrology of the area;

5.2.4. a reasonable description of the current groundwater quality and known uses in the area to be affected by the deviation;

5.2.5. a list of other known sources which may reasonably be expected to contaminate ~~may have an effect on~~ the groundwater in the area for which the deviation is requested;

5.2.6. a reasonable demonstration that the measures necessary to preserve existing quality either are not technically feasible or are not economically practical; and

5.2.7. a reasonable demonstration that a change in groundwater quality is justified based upon economic or societal objectives."

These changes are suggested for the following reasons. The word "known" should be inserted in §§5.2.4 and 5 to clarify that an applicant need not guarantee discovery of every other use of groundwater nor of every other possible source which may contaminate groundwater. Further, the language in §5.2.5 should be changed from "may have an effect" to "may reasonably be expected to

contaminate" since this latter phrase is consistent with the language in §5.11.1 of the Groundwater Protection Regulations, relative to the mandatory contents of a Groundwater Protection Plan, and is more reflective of the real concerns to be addressed. For example, a large office building with subterranean space would clearly be expected to "have an effect" on groundwater but would not be of concern as a source of contamination which should be listed in an application.

Section 5.4, Terms and Conditions, provides "the Director shall have the exclusive authority to determine the terms and conditions to be applicable to the Director's decision to grant a deviation." (Emphasis added.) This is a change from the statutory provisions, in W. Va. Code §20-5M-5(f), that "the Director shall have the exclusive authority to determine the terms and conditions of such a deviation" (Emphasis added.) The change, which we presume was unintentional, can be misread to change the nature of the Director's exclusive authority to being authority over the criteria for granting a deviation as opposed to exclusive authority over restrictions and conditions to be contained in a deviation, especially in light of the second sentence of 5.4.

The second sentence of §5.4 of Rule 57 states "[t]he groundwater regulatory agency shall take such alternative action as may be necessary to assure that the facilities and activities **which are subject to the deviation** maintain and protect applicable groundwater quality standards." However, the statute, in W. Va. Code § 20-5M-5(g), says "the groundwater regulatory agencies shall take such alternative

action as may be necessary to assure that facilities and activities within their respective jurisdictions maintain and protect the standards of purity and quality promulgated by the Board to support the present and future beneficial uses for that groundwater."

The statutory language would allow imposition of alternative action requirements on any or all facilities or activities which are subject to the Act and are impacting groundwater in a given area. On the other hand, the language of Rule 5.4 would allow imposition of alternative action requirements only on the facilities or activities subject to the deviation. Aside from the fact that the regulatory language impinges on the Director's exclusive authority under the statute to determine the terms and conditions of a deviation, the WVMA believes the flexibility granted the agencies by the statute is preferable to the limiting language of the regulations. Thus, the WVMA believes the statutory language and intent are clear and recommends the language of the regulation be made to conform to the statute.

E. §47-57-6. Variance From Groundwater Quality Standards and Preventative Action Limits.

Section 6.4 requires that "in addition to all other rulemaking requirements," when granting a variance the director must, after thirty (30) days notice, hold a public hearing at which oral comments may be received and then must allow ten (10) additional days after the hearing for submission of written comments.

In §6.7.1 the words "clearly outweigh" should be changed to reflect that a variance shall be granted if the benefits of the variance "are not outweighed by" the benefits of not granting a variance. Thus the requirement would be that the Director find "benefits of granting the variance ~~clearly outweigh~~ are not outweighed by the benefits of complying with the preventative action limits, or groundwater quality standards, or both."

The WVMA suggests §6.7.2 be modified so that a variance need only be "no less" in the public interest than protection of groundwater quality standards, instead of "more."

And, we suggest §6.7.4 be amended to require only that there be a finding that "there is no more reasonable and prudent alternative than the granting of the variance."

The WVMA strongly supports the reasonableness and necessity of §§ 6.10, Initial Variance, and 6.11, Variance From New Standards. Failure to include an automatic variance period, with an extension during pendency of a specific variance request, would place many sources in jeopardy of being instantly in violation of the groundwater quality standards, both now and as new standards are adopted.

Because of possible delays inherent in the variance granting procedure, the WVMA urges the language of §§6.10 and 6.11 be expanded to provide not only for the automatic 18 month extension but also for an alternative that a source will be deemed in compliance during the pendency of a variance application even if the

process is not completed within the 18 months. Finally, the Director should be given discretion to extend such period of deemed compliance for such time as the director considers necessary in the interest of justice.

F. Fiscal Note:

The proposed regulation's Fiscal Note states "[s]ources with a potential for causing groundwater contamination, when desiring a variance, will expend monies to scientifically justify the need for the variance." Since the DEP Director and others may request a variance, the phrase "sources with a potential for causing groundwater contamination" should be changed to read "any person."

CONCLUSION

The WVMA appreciates the opportunity to provide these comments regarding the DEP's proposed Groundwater Quality Standard Variance rule. We look forward to working with you on this rule.

Submitted this 10th day of August, 1993.

WEST VIRGINIA MANUFACTURERS ASSOCIATION



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1356 Hansford Street
Charleston, WV 25301-1401

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

August 10, 1993

Dr. Laidley EH McCoy
Division of Environmental Protection
Office of Water Resources
1201 Greenbrier Street
Charleston, West Virginia 25311

Re: Comments to Groundwater Quality Variances

Dear Dr. McCoy:

The Site Investigation and Response Section of the Office of Waste Management deals with the remediation of hazardous waste sites being addressed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

It is foreseeable that some sites may not be able to remediated to current groundwater standards. Therefore, this sections supports the concept of delegating the authority of a variance to the Director and stands in support of the proposed rule .

Respectfully

A handwritten signature in cursive script that reads "Peter Costello".

Peter Costello
Remedial Project Officer
Office of Waste Management/SIR



West Virginia Mining & Reclamation Association

1624 Kanawha Boulevard, East
(304) 346-5318

Charleston, West Virginia 25311
FAX 346-5310

August 10, 1993

Division of Environmental Protection
Office of Water Resources
1201 Greenbrier Street
Charleston, West Virginia 25311-1088

Gentlemen:

RE: Groundwater Quality Standard Variances

On behalf of our more than 350 companies, both directly and indirectly involved in the mining of coal, may we provide the following comments for your consideration.

The variances procedure, as proposed, is much needed to cover major classes of activities to include:

1. Highway construction.
2. Quarries and other mineral removal activities.
3. Use of chemicals in the treatment of hazardous winter road conditions.
4. Power substations, electric poles, telephone poles and other kinds of poles, posts, decks, etc. that have been pressure treated and will be in constant contact with the ground.
5. All other types of major excavation.

As proposed, the rule must be filed on an emergency basis immediately or all of the dates, as spelled out in Section 47-57-6, will have to be changed if we are to limit the water quality standards to be implemented later this month.

OFFICERS

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Division of Environmental Protection
Office of Water Resources
Page 2
August 10, 1993

As a final note, the definition "surface mine," "surface mining," or "surface mining operations," as spelled out in Section 22A-3-3(w), should be incorporated in the variances definitions as set forth again in 47-57-2.

This Association endorses the comments, both oral and written, as filed by the West Virginia Coal Association and its various representatives.

We appreciate the opportunity to comment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ben C. Greene".

Benjamin C. Greene
President



WEST VIRGINIA COAL ASSOCIATION

August 10, 1993

Dr. L. Eli McCoy, Chief
Office of Water Resources
West Virginia Division of Environmental Protection
1201 Greenbrier Street
Charleston, West Virginia 25311-1088

RE: Comments to Proposed Groundwater Quality Standard Variances,
C.S.R. Section 47-57-1 et seq.

Dear Dr. McCoy:

Attached are the comments on behalf of the West Virginia Coal Association to the proposed Groundwater Quality Standard Variances regulations. I trust you will find them to be self explanatory and in proper form.

Should you have any questions whatsoever regarding the text of these comments, please do not hesitate to notify me immediately.

Sincerely,

William B. Raney
President

WBR/sjd
Enclosure

1301 Laidley Tower • Charleston, West Virginia 25301 • Telephone (304) 342-4153

WEST VIRGINIA COAL: MORE IMPORTANT THAN EVER

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WEST VIRGINIA COAL ASSOCIATION

Comments to Proposed Groundwater Quality Standard Variances, C.S.R. § 47-57-1 et seq.

The West Virginia Coal Association (the "Association") is pleased to submit comments on the proposed groundwater quality standard variances regulations to be promulgated pursuant to the West Virginia Groundwater Protection Act (the "GWPA"), W. Va. Code § 20-5M-1 to -16. Although the Association represents coal companies whose activities are, for the most part exempted under § 5(h) of the GWPA, from the groundwater quality standards and the requirement to maintain existing groundwater quality where such quality exceeds the groundwater quality standards, we still welcome the opportunity to submit comments. We also congratulate the agency on promulgating these regulations which should go far to making it possible for groundwater in the State to be protected from the harmful effects of pollution, yet providing business and industry the means to remain viable.

As a general comment, the Association urges the Division of Environmental Protection ("DEP") to promulgate these regulations on an emergency basis, in accordance with the provisions of W. Va. Code § 29A-3-1 et seq. This action is made necessary because the water quality standards promulgated by the Water Resources Board have been approved by the Legislature and become effective August 25, 1993. The subject regulations contain an initial, automatic variance until January 1, 1994, for all sources impacting groundwater from these standards, to avoid sources being in violation of such standards immediately without an opportunity to obtain a variance and while DEP is in the process of promulgating groundwater regulations. This initial variance can be extended upon request prior to December 31, 1993. However, if the subject regulations do not take effect before August 25, 1993, the initial variance provision will be meaningless and sources which the agency had intended to be free from liability will face substantial risk of exposure to liability. The Association cannot overemphasize the undesirability of this result. DEP should promulgate the regulations in their entirety, or at least the automatic variance provisions of the regulations, on an emergency basis immediately.

On a related matter, the Association believes that DEP must promulgate regulations to take into account the provisions of § (8)(c) of the GWPA. This section authorizes the Director to provide general groundwater certification or a waiver from certification for classes or categories of activities or approvals subject to the Act. The Association believes that the general groundwater certification/waiver provisions of the GWPA are significant and need to be addressed in the regulations. During the informal discussion following the August 9, 1993 public hearing, agency representatives indicated that the variance regulations were not the appropriate place for regulations implementing this section of the statute, but that general certification/waiver regulations would be promulgated at a later time. The Association does not disagree with this statement, but welcomes proposed regulations on this subject in the not-too-distant future.

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COMMENTS

(Additions are indicated by underscoring, deletions by strike-out).

47-57-2. Definitions.

2.5. "Coal extraction and earth disturbing activities directly involved in coal extraction" means any source, facility or activity which would be defined as "surface mining" under W. Va. Code § 22A-3-3(w).

The terms utilized by § 5(h) of the GWPA and § 3.1 of the proposed regulations are nearly identical to the terms defined under the West Virginia Surface Coal Mining & Reclamation Act ("WVSCMRA"). The WVSCMRA defines "surface mining operations" as "activities conducted on the surface of land for the removal of coal," certain "surface impacts incidental to an underground mine" and "the areas where such activities occur". W. Va. Code § 22A-3-3(w)(1). This provision is quite similar to, and the Association believes, coextensive with, the GWPA exemption for "earth disturbing activities directly involved in coal extraction". The Association recommends two alternative definitions for this term:

Option 1: "Coal extraction and earth disturbing activities directly involved in coal extraction" means any activity conducted on the surface of lands for the removal of coal; or, subject to W. Va. Code § 22A-3-14, surface operations and surface impacts incidental to an underground coal mine, including the drainage and discharge therefrom; and the areas upon which the above activities occur or where such activities disturb the natural land surface, including any adjacent land, the use of which is incidental to any such activities or other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

Option 2: "Coal extraction and earth disturbing activities directly involved in coal extraction" means any activity conducted on the surface of lands for the removal of coal or the surface operations and surface impacts incidental to an underground coal mine, as well as structures, facilities, property or materials on the surface resulting from or incident to such activities.

2.67. "Deviation" means an action of the Director ~~relieving modifying an agency action taken, or to be taken, for one or more specific constituents to assure that a single source or class of sources~~ of the requirement to maintain and protect groundwater at existing quality, where existing quality is better than that required to maintain and protect applicable groundwater

WEST VIRGINIA COAL ASSOCIATION

quality standards, and where the source or class of sources demonstrate that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives.

This change clarifies the definition of "deviation" and makes the term consistent with its use in § 5(f) of the GWPA.

2.4213. "Release" means any act or omission that results in the spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of materials or contaminants in a manner that causes ~~has caused~~ or is reasonably likely to cause the entry of a constituent to groundwater.

The Association has amended the definition of "release" to be consistent with the GWPA's use of the present tense throughout to refer to facilities or activities which impact groundwater, have the potential to impact groundwater, or to refer to owners or operators of facilities or activities whose conduct violates the GWPA. The use of the term "has caused" in the definition of release would, inappropriately, render the requirements and standards of the GWPA retroactive and not tied to an owner or operator's conduct of an activity or facility to minimize impacts on groundwater.

2.4314. "Source" means any facility or activity which causes ~~has caused~~ a release or is reasonably likely to cause a release.

Same rationale as modification to § 2.13.

47-57-3. Statutory Exemptions.

3.1. The requirements of subsections 5(e), 5(f) and 5(g) of the Act related to groundwater quality standards, preventative action limits or existing quality limits shall not apply to coal extraction and earth disturbing activities directly involved in coal extraction that are subject to the permitting requirements in either or both Article 3, Chapter 22A of the W. Va. Code or Article 5A, Chapter 20 of the W. Va. Code. All other provisions of the Act are applicable to such exempt activities.

The Association has added language to clarify the nature of the operations qualified for the coal mining exemption created by the Legislature in § 5(h) of the GWPA. In order to obtain a permit, coal mining operations must comply with a number of statutory and regulatory requirements which are protective of both surface and groundwater, both on- and off-site.

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47-57-4. Contamination in Excess of Groundwater Quality Standards.

4.1. Any person who owns or operates a source ~~subject to the~~ or class of sources subject to the requirement to obtain groundwater certification under § 8 of the Act and which has caused, in whole or in part, the concentration of any constituent to exceed any applicable groundwater quality standard subject to the Act, must cease further release of that contaminant and must make every reasonable effort to identify, remove or mitigate the source of such contamination and strive where practical to reduce the level of contamination over time to support drinking water use.

The added language makes clear that the requirement to mitigate contamination in excess of groundwater quality standards applies to those sources or activities which, because of their potential to impact groundwater, are required to obtain groundwater certification. The mitigation requirement must be read consistently with the purposes of the GWPA. These purposes include the development of regulatory programs to address the diverse array of human activities which can adversely impact groundwater, and the streamlining of these programs to assure that groundwater is maintained and protected through an appropriate groundwater protection program. W. Va. Code § 20-5M-2(7) & (8). To read the mitigation provisions of the GWPA as requiring all persons to mitigate groundwater contamination, even if that person did nothing to contaminate the groundwater and even if that person engages in no activity which impacts upon groundwater, would exceed the purposes of the Act and the regulatory agencies' jurisdiction.

4.3. Sources which are identified by the Director pursuant to § 4.1 may apply to the Director for a variance for a single source or for a class of sources, as provided in §§ 6.1 through 6.12 herein.

New section 4.3 has been added by the Association to make it clear that sources which the Director identifies as having contaminated groundwater in excess of any applicable groundwater quality standard may apply for a variance from such standard(s). During the informal discussion between the agency and attendees which followed the August 9, 1993 public hearing, agency representatives indicated that while the variance provisions of the GWPA had been viewed as being available prospectively for on-going or proposed activities, based on the agency's interpretation of the terms "source" and "release," there was no reason for not making the variance provisions available to sources subject to the remediation requirements of section 4 of the regulations. The GWPA does not preclude allowing such sources to obtain a variance, and permitting variances for such sources does not appear to be inconsistent with the GWPA since on-going activities which may impact groundwater may obtain a variance from the groundwater quality standards.

WEST VIRGINIA COAL ASSOCIATION

47-57-5. Deviation from Existing Quality.

5.2.6. a ~~demonstration~~ statement describing why ~~that the~~ measures necessary to preserve existing quality are not technically feasible or economically practical;

This change makes the regulatory provision more consistent with the language and intent of the Act, and also makes it consistent with its analogue in the regulations, § 6.2.7.

5.2.7. a ~~demonstration that~~ statement describing why a change in groundwater quality is justified based upon economic or societal objectives.

Same rationale as modification to § 5.2.6.

47-57-6. Variance From Groundwater Quality Standards and Preventative Action Limits.

6.3.1. a description of the source or the class of sources to be granted the variance and the constituents for which the variance is requested.

This section of the regulations is drafted in terms of single sources and classes of sources. The proposed modification makes clear that the variance applies to both.

6.4. The proposed rule shall be accompanied by a statement of the Director's grounds for proposing the variance ~~rule~~. . . .

The stricken language is redundant.

6.7. Variance criteria--The Director shall promulgate a ~~variance rulemaking for a~~ variance for a single source or class of sources, if the Director finds that:

The stricken language is redundant.

6.7.1. the benefits of granting the variance ~~clearly~~ outweigh the benefits of complying with the preventative action limits, or groundwater quality standards, or both;

The use of the term "clearly" implies a standard of proof necessary to justify the issuance of a variance which is not set forth anywhere in the Act. The burden of proof necessary to obtain a variance, to the extent one applies, should be based on a preponderance of the evidence standard generally applicable to civil and administrative actions. Under this standard a variance would be appropriate if it is more likely than not that a variance outweighs the benefits of compliance.

WEST VIRGINIA COAL ASSOCIATION

6.7.2. the variance applicant has not made any prior ~~irreversible or irretrievable significant commitment of resources with the intent of foreclosing reasonable and prudent alternatives to the variance;~~ and

The stricken language is confusing and would be extremely difficult for the Director to make a defensible decision based upon. The Association is unsure when a commitment of resources becomes "irreversible or irretrievable" for purposes of the Director's finding. Arguably, there are few circumstances when financial or legal commitments are irreversible; reversal may simply be extremely costly or increase a person's exposure to lawsuits. In addition, the element of determining a person's "intent" in entering into a commitment would necessitate the Director investing time and effort into ascertaining the business motives of an applicant for a variance. This would invite an inappropriate invasion by the agency into the business decision-making process which is unnecessary for carrying out the GWPA. The stricken elements appear to be "red herrings" which would likely confuse and confound the variance procedure rather than add anything of substance.

PWP
AEE0204C



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1201 Greenbrier Street
Charleston, WV 25311-1088

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spaner
Deputy Director

July 21, 1993

Laidley E. McCoy, Chief
Office of Water Resources
1201 Greenbrier Street
Charleston, WV 25311-1088

Dear Dr. McCoy:

The attached constitutes my comments on the proposed Title 47, Series 56 Groundwater Quality Standard Variances, currently in public notice.

I trust my comments will be given due consideration prior to any final regulations being promulgated.

Sincerely,

OFFICE OF WATER RESOURCES

A handwritten signature in cursive script that reads "Jerry L. Ray".

Jerry L. Ray
Assistant Chief, Permits

JLR/gjs

the requirements to obtain a variance and not make such referenced commitment until the variance is acted upon.

- 6.8. This section provides an initial variance, specifically that "All sources shall be deemed in compliance with all water quality standards and preventative action limits until January 1, 1994." It also provides that any source "which has filed with the Director on or before December 31, 1993, a statement declaring an intent to make application for a variance shall be deemed to be in compliance with all water quality standards and preventative action limits until July 1, 1995. As is currently proposed conceivably every source could get until July 1, 1995 to obtain compliance. Such statement declaring an intent should be required to obtain some specifics, in order to discourage all sources from submitting a request and delaying compliance requirements for another two years. The statement should include at a minimum the parameters of concern, the area involved and the general analysis of the geology and hydrology of the area. Both of these provisions in 6.8. as stated, conflict with the provisions of Section 4.2. Any initial variance that would be granted must include a statement excluding sources operating in compliance with the provisions of section 4.2. Furthermore, this variance language should only refer to groundwater quality standards, not water quality standards in general.

AUGUST 05, 1993

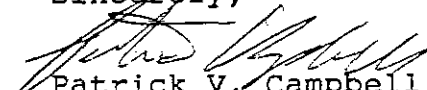
LAIDLEY E. MCCOY
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES
1201 GREENBRIER ST.
CHARLESTON, WV 25311

RECEIVED
AUG 11 1993
WATER RESOURCES
PROGRAM MANAGEMENT

Dear Mr. McCoy:

I am writing to offer brief comment on the the proposed rule for variances from groundwater standards. (Title 47, Series 57). My comment is as follows: In Subsection 4.2., sources which are operating pursuant to an order, permit, etc. are deemed to be in compliance with the Act. This statement is far too broad, and possibly could allow facilities operating under a cleanup order relief from groundwater fees, groundwater protection practices, etc. I suggest that the Section limit its scope to only that which applies to groundwater standards.

Sincerely,


Patrick V. Campbell
Elkview, WV 25071



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

1356 Hansford Street
Charleston, WV 25301-1401

Gaston Caperton
Governor

John M. Ranson
Cabinet Secretary

David C. Callaghan
Director

Ann A. Spamer
Deputy Director

August 10, 1993

Dr. Laidley Ell McCoy
Division of Environmental Protection
Office of Water Resources
1201 Greenbrier Street
Charleston, West Virginia 25311

Re: Comments to Groundwater Quality Variances

Dear Dr. McCoy:

The Site Investigation and Response Section of the Office of Waste Management deals with the remediation of hazardous waste sites being addressed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

It is foreseeable that some sites may not be able to remediated to current groundwater standards. Therefore, this sections supports the concept of delegating the authority of a variance to the Director and stands in support of the proposed rule.

Respectfully

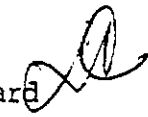
A handwritten signature in cursive script that reads "Peter Costello".

Peter Costello
Remedial Project Officer
Office of Waste Management/SIR

RECEIVED
AUG 11 1993

WATER RESOURCES
PROGRAM MANAGEMENT

MEMORANDUM

TO: Dave Watkins, Groundwater Coordinator
FROM: Libby Chatfield, Technical Advisor, State Water Resources Board 
DATE: August 11, 1993
RE: Proposed Groundwater Quality Standards Variance Rule, Title 47, Series 57

This memorandum contains comments regarding the proposed groundwater quality standards variance rule. I file these comments in my capacity as a member of the variance rule drafting subcommittee of the Groundwater Coordinating Committee. The final meeting scheduled for that subcommittee was not convened due to last minute schedule changes. There were a few sections of the rule which I had intended to discuss in that meeting before filing the proposed rule. I submit these comments to ensure the agency's consideration of these issues in the event that there is insufficient time for a final meeting of the drafting subcommittee before the proposed rule is filed with the Legislative Rule Making Review Committee. Mary Wimmer, who is also a member of the drafting subcommittee has reviewed these comments and concurs with them.

Section 2. A suggested alternative of the term "deviation" follows:

"Deviation" means a decision by the Director to allow a specific site, activity of facility or class of activities or facilities a waiver of the requirement to maintain and protect groundwater at existing quality subject to the requirements of section 20-5M-5(g) of the Act.

Section 4.2. In line one, replace the words "pursuant to" with the words "in full compliance with".

Section 5.1. Suggested charge to last sentence in that section: "Such petition may be independently filed, or may be made in conjunction with other matters pending before the director. If such other matters require public notice, then the request for a deviation shall be clearly identified in such notice."

Section 5.2.4 In order to ensure filing of sufficient information in the application for a deviation, this section should be amended as follows: "a report of the existing groundwater quality and uses in the area to be affected by the deviation, including, but not limited to the levels of constituents for which the deviation is being requested."

Section 5.3. Proposed addition to the end of the last sentence: "and shall include such evaluation in this written report."

Section 6.1 In order to help identify the area for which the variance is requested, amend the last sentence to read: "...the area, including a map, in which the variance would be effective,..."

Section 6.2.4. Amend section to read as follows: "a report of the existing groundwater quality and uses in the area to be affected by the variance, including, but not limited to the levels of constituents for which the variance is being requested. The report shall also include the predicted long term effects of the variance on the groundwater quality and uses."

Section 6.2.10. Insert the following language in that section, then renumber existing 6.2.10 and 6.2.11: "a showing that the applicant has not made any prior irreversible or irretrievable commitment of resources with the intent of foreclosing reasonable and prudent alternatives to the variance."

Section 6.7.1. Insert the following language in that section, then renumber the existing sections 6.7.1 and 6.7.2: "the activity, by its nature cannot be conducted in compliance with the requirements of 5M-5(g).

Sections 6.7.3 and 6.7.4. Delete both sections

Add the following after section 6.7.4:

The variance petition shall be denied if the Director finds that

1. a technically feasible alternative exists to to activity which will allow the activity to be carried out in compliance with the groundwater quality standards; or
2. the variance applicant has made a prior irreversible or irretrievable commitment of resources with the intent of foreclosing reasonable and prudent alternatives to the variance.

Section 6.9. In line 4 add "which are subject to the variance" before the words "or both".

Section 6.10. Delete "deemed to be in compliance with" and replace with "granted a waiver of the requirement to comply with". Make the same change in line 5 of that section. Include a requirement that the variance application must be filed within 3 months of the letter of intent. We need to allow enough time for the Director to make a decision and comply with the public notice requirements before submitting the rule to the Legislative Rule Making Review Committee to be considered in the 1995 session. See comments in Section 6.11 for recommended contents for a letter of intent.

Section 6.11. Granting such variance to all sources seems unwarranted. Because the groundwater standards are required to be promulgated through legislative rulemaking, a source would have ample notice of a potential change in groundwater standards prior to such change becoming effective.

One possible way to handle this is to require that sources file a letter of intent to apply for a variance within 30 days of the effective date of the standards rule. That letter must provide some basis for such request -

including, but not limited to, identification of the constituent(s) for which a variance may be requested, a statement of the nature of the activity which renders it unable to be carried out in compliance with the standards, and the geographical area which may be affected by the variance, if granted. Any type of waiver granted to any source in this situation would be extinguished upon the issuance of a denial of the variance by the Director.

Section 6.12. Consider a three year review period - similar to the review period for variances granted by WRB for surface water quality standards.

Please feel free to call me with any questions or comments you may have about these comments.

c Eli McCoy
Ann Spaner
Dave Flannery
Mary Wimmer