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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

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

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



David C. Callaghan, Director
Division of Environmental Protection

4.20

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, or biological substance found in groundwater due to either natural or man-made conditions.

2.6. "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 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 W.Va. Code §20-5M-4(b).

§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. 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 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 be expected to contaminate in the area for which the deviation is requested;

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

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

6.7.3. the variance is more in the public interest than the protection of groundwater quality standards or preventative action limits; 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, 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~~ November 1, 1994. Any source, whether single or class, which has filed with the Director on or before ~~December 31, 1993~~ October 31, 1994, 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~~ July 1, 1996. 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 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 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 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.

