

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #3

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JAN 28 8 54 AM '93

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-5(d)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

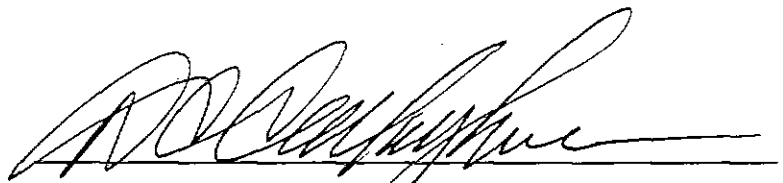
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 59

TITLE OF RULE BEING PROPOSED: Monitoring Well Regulations

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

5.80

FISCAL NOTE FOR PROPOSED RULE

FILED

JUN 10 PM 4:14

OFFICE OF THE CLERK
OF THE HOUSE OF DELEGATES

Rule Title: Monitor Well Regulations 47 C.S.R. 59

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: Division of Natural Resources

Address: Building 3, State Capitol Complex, Charleston, West Virginia

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		Thereafter
	Increase	Decrease	Current	Next	
Estimated Total Cost	N.A.	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 implementation of this rule have been provided for through the Groundwater Protection Act Fee Schedule regulation, 47 C.S.R. 55.

3. Objectives of this rule: This rule provides for a certification program for monitor well drillers.

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. None, see item 2 above.

C. Economic Impact on Citizens/ Public at Large. None, see item 2 above.

Date:

Signature of Agency Head or Authorized Representative

J. Edward Hamrick
Director, Division of Natural Resources

DATE: January 21, 1993

TO: Legislative Rule-Making Review Committee

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

LEGISLATIVE RULE TITLE: Monitoring Well Regulations

1. Authorizing statute (s) citation: § 20-5M-5(d)
- 2.a. Date filed in State Register with Notice of Hearing: 6/16/92
- 2.b. What other notice, including advertizing, did you give of the hearing? notice published in five newspapers, affected state agencies, U.S. EPA, Water Quality Advisory Committee, WV Chamber of Commerce, and other interested parties
- 2.c. Date of hearing (s): 7/28/92
- 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: 1/25/93
- 2.f. Name and telephone of agency contact: Frank Pelurie,
558-1052.
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: N.A.
- 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).



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol, Room R-151
Charleston, West Virginia 25305-0310
Telephone: (304) 558-3255
Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

June 15, 1992

J. Edward Hamrick III, Director
Division of Natural Resources
Building 3, Room 669
Charleston, West Virginia 25305

RE: Proposed Rules - Title 47, Series 59 (Monitor Well
Regulations)

Dear Ed:

Pursuant to West Virginia Code §5F-2-2(a)(12), I hereby
consent to the proposal of the rules 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:cjb
B:RUL-DNR.CJB

PREAMBLE TO A PROPOSED RULE
CONCERNING
MONITOR WELL REGULATIONS

FILED

1992 JUL 16 PM 4:14

OFFICE OF THE
SECRETARY OF STATE

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

REGULATION: Title 47, Series 59, "Monitor Well Regulations."

ACTION: Filing of a Proposed Rule, Notice of a Public
Hearing, and acceptance of written comments.

SUMMARY: This legislative rule establishes a certification
program for well drillers that install and alter
monitor wells.

A Public Hearing will be held on the date and at
the location as follows:

July 28, 1992, 5:00 p.m.

Air Pollution Control Building
Conference Room
1558 Washington Street, East
Charleston, West Virginia

Written comments received on or before 4:00 pm July
29, 1992 will be accepted. Written comments should
be sent to:

Laidley Eli McCoy, Chief
DNR, Water Resources Section
1201 Greenbrier Street
Charleston, West Virginia 25311
Attention: Patrick Campbell

FILED

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

JAN 28 8 54 AM '93
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 59
MONITORING WELL REGULATIONS

§ 47-59-1. General.

1.1. Scope - This legislative rule establishes the certification of monitoring well drillers and monitoring well installations and alterations.

1.2. Authority - W. Va. Code § 20-5M-5(d).

1.3. Filing Date -

1.4. Effective Date -

1.4.1. Compliance with section 4 and 5 of this rule is not required until such time as 47 C.S.R. 60 (Monitoring Well Design Standards) becomes effective.

§ 47-59-2. Definitions.

2.1. "Application" - The state department of health's division of environmental protection's standard form(s) for applying for monitoring well driller certification, including any additions, revisions or modifications to the form(s).

2.2. "Certified Monitoring Well Driller" - An individual granted a written certificate by the ~~commissioner~~ director to drill, construct, alter or abandon monitoring wells and who meets the requirements of this rule.

~~2.3. "Chief" - Chief of the Water Resources Section, Division of Natural Resources or his lawful designee.~~

~~2.4. "Commissioner" - Commissioner of the West Virginia Bureau of Public Health or his lawful designee.~~

~~2.3. 2.5.~~ "Design Standards" - Those specifications, drawings and other details promulgated by the ~~chief~~ director to ensure proper location, design, construction, completion and abandonment of monitoring wells.

2.4. "Director" means the director of the division of environmental protection or lawful

designee.

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

2.6. "Person" - An individual, partnership, association, syndicate, company, firm, trust, corporation, government corporation, institution, department, division, bureau, agency, federal agency or any other entity recognized by law.

2.7. "Monitoring Well" — ~~Reserved~~ means any cased excavation or opening into the ground made by digging, boring, drilling, driving, jetting or other methods for the purpose of determining the physical, chemical, biological or radiological properties of groundwater. The term 'monitoring well' includes piezometers and observation wells which were installed for purposes other than those listed above, but does not include wells whose primary purpose is to provide a supply of potable water.

2.8. "Monitoring Well Driller" - ~~An individual that engages in monitor well drilling, construction, alteration, or abandonment or who supervises these activities.~~ means the individual operating the drilling rig when drilling, altering or abandoning (i.e., properly or improperly closing) a monitoring well(s).

2.9. "Piezometer" means a groundwater monitoring well sealed below the water table and which is installed for the specific purpose of determining the potentiometric surface or the physical, chemical, biological or radiological properties of groundwater, or both.

§ 47-59-3. Application and Enforcement.

3.1. Application - This rule shall apply to all monitoring well drillers.

3.2. Enforcement - The enforcement of this rule is vested with the chief director of the West Virginia Division of ~~Natural Resources~~ Environmental Protection, ~~Office of Water Resources Section~~ or his lawful designee.

§ 47-59-4. Certification of Monitoring Well Drillers.

4.1. There shall be a certified monitoring well driller ~~on-site in direct charge of actively drilling, construction constructing, altering or abandonment of a~~ abandoning any monitoring well.

4.2. ~~To be~~ eligible for certification, the applicant must be able to demonstrate a minimum of two (2) years of monitoring well drilling experience under the supervision of a certified monitoring well driller.

4.3. Monitoring well drillers actively engaged in a monitoring well drilling business ~~as a monitor well driller on or before~~ on or before the effective date of this rule shall be exempt

from the minimum experience requirements.

4.4. An application for certification as a monitoring well driller shall be made in writing to the ~~commissioner~~ director on a form prescribed by the ~~commissioner~~ director. Information required on the form may include, but not be limited to: name, address, education, experience, business name and references.

4.5. The ~~commissioner~~ director may suspend, revoke or deny certification if the information on the application form is incomplete, inaccurate, false or misleading, or ~~indicates that the provisions of this rule cannot be met. if the provisions of this rule, or any other rule pertaining to monitoring wells are willfully or negligently violated.~~

4.6. Certification shall not be transferable or assignable and shall automatically become invalid upon suspension or revocation.

4.7. Certification shall expire one (1) year after date of issuance and may be renewed thirty days (30) before such expiration date.

4.8. When certification has been denied, suspended or revoked, the ~~person~~ individual thereby affected shall immediately discontinue the drilling, altering, constructing and abandonment of monitoring wells.

4.9. Any ~~person~~ individual whose application for certification has been denied, or whose certification has been suspended or revoked, may request a hearing in accordance with ~~Section 7, Administrative Due Process, of this rule. The applicant must submit a written request for hearing within thirty (30) days from receipt of denial, suspension, or revocation of certification.~~ the provisions of W Va code§20-5M-11.

4.10. Denial, suspension or revocation of certification shall be in writing from the ~~commissioner~~ director and shall state specific reasons for the denial, suspension or revocation.

4.11. Suspension or revocation of certification shall be preceded by a written notice from the ~~commissioner~~ director, at least ten (10) days prior to actual revocation or suspension.

4.12. In addition to filing an application for becoming certified to drill, construct, alter or abandon monitoring wells, the applicant must pass an oral or written examination to assure the ~~commissioner~~ director that the applicant is thoroughly familiar with all requirements of applicable laws, regulations and design standards pertaining to monitoring well drilling and construction. Examinations shall be administered by personnel of the West Virginia division of environmental protection or their appointees. A passing grade of seventy per cent (70%) must be obtained before becoming certified. An applicant who has failed an examination must wait thirty (30) days before again taking the examination.

§ 47-59-5. Identification Numbers of Monitor Well Rigs and Monitor Well Head: Monitoring Well Driller Identification.

~~5.1. It shall be the duty of all monitor well contractors to see that all monitor well rigs used by them or their employees in the monitor well drilling business are marked with legible and plainly visible identification numbers at all times.~~

~~5.2. The identification number to be used on monitor well rigs shall be the certification number of the monitor well driller at the well site who is responsible for the monitor well drilling operations.~~

~~5.3. Certification numbers shall be printed upon each side of every monitor well rig in numerals of not less than two inches high and such numerals shall be in a color sufficiently different from the color of the vehicle or equipment so that the certification number shall be plainly legible.~~

~~5.4. Monitor well contractors shall see that all monitor well rigs used by them or their employees in the monitor well drilling business are marked as provided in Sections 5.2 and 5.3 of this rule.~~

All monitoring well drillers shall have proof of certification available for inspection at all times when actively engaged in drilling, altering, or closing/abandoning a monitoring well(s).

§ 47-59-6. Advisory Board.

6.1. The ~~chief~~ director may establish an advisory board and designate the chairman of said board.

6.2. The advisory board membership shall consist of, but not necessarily be limited to, the following members:

Certified monitoring well drillers:	3 members
State health department:	1 member
<u>Office of water resources section:</u>	1 member
West Virginia geological survey:	1 member.

6.3. The duties of the advisory board shall be assigned by the ~~chief~~ director.

6.4. The ~~chief~~ director may establish other boards, committees and commissions to assist in carrying out the provisions of this rule.

§ 47-59-7. Administrative Due Process.

Those persons adversely affected by the enforcement of this rule desiring a contested case

hearing to determine any rights, duties, interests or privileges shall do so in a the manner prescribed in the ~~Rules of Procedure for Contested Case Hearings and Declaratory Rulings,~~ West Virginia Department of Health Procedural Rules, 64 C.S.R. 1. W Va code § 20-5M-11

§ 47-59-8. Severability.

If any provisions of this rule or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions or the application of this rule which can be given effect without the invalid provisions or application, and to this end the provisions of this rule are declared to be severable.

DEPARTMENT OF COMMERCE LABOR AND ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

RESPONSIVENESS SUMMARY
October 1992

Proposed Rule: "Monitor Well Regulations"

The West Virginia Division of Environmental Protection (DEP) has received thoughtful criticism during the public comment period on proposed "Monitoring Well Regulations", Title 47, Series 59. The regulations set forth a certification program for any person who drills, alters, constructs or abandons monitoring wells.

To comply with federal and state public participation requirements the DEP issued on June 24, 1992 a notice announcing the beginning of a thirty day public comment period and a public hearing on the proposed rule. The notice was published in five 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, the WV Chamber of Commerce and other interested parties.

12 people attended the public hearing that was held July 28, at 5:00 p.m. in the Air Pollution Control Building, in Charleston, West Virginia.

In addition to 2 oral comments, the DEP received 6 written statements by July 28, the date on which the official record was closed. All public comments were reviewed in developing the final draft regulations.

The following is this agency's response to recommendations and concerns raised in oral and written comments.

GENERAL

To correct a grammatical error, the term "monitor well" has been changed to "monitoring well" throughout this rule.

Realizing that compliance with this rule requires drillers to be familiar with the state's monitoring well design standards, it became essential that a new Section, 1.4.1., be added which delays the certification requirements until such time that monitoring well design standards are promulgated.

One commenter questioned the Division's authority to promulgate this rule based on language in Chapter 20, Article 5M, Section 5(d).

RESPONSE: The Division disagrees with the commenter, and contends that 20-5M-5(d) gives the Division specific authority to promulgate these rules.

One commenter questions why authority for implementation of this rule appears to shift between DEP and DHHR, and insists that this may cause considerable confusion to the regulated community. The commenter suggested that regulatory activities be conducted by one specific agency. Another commenter stated there appears to be no accountability for administration of the examination/certification process between the two groundwater regulatory agencies and was concerned that OWR had no oversight authority on the program.

RESPONSE: After close examination of the issues raised by the commenters, The Division has determined the Certification Program would be more accountable, controllable, and less confusing to the regulated community if only one agency was responsible for the Program. Therefore the Division has re-drafted the rule in such a manner as to remove all references to DHHR. The Division may, through contractual agreements, allow another agency to conduct portions of the program, but will maintain overall control of the program.

One commenter requests that the division demonstrate under which federal code sections that a certification of monitoring well drillers program is required. Two commenters contend these rules are unnecessary and require an inordinate amount of resources, especially if the program draws on Groundwater Protection Fund monies.

RESPONSE: At this time there is no federal requirement for this rule. However, in EPA's Draft State Comprehensive Ground Water Protection Program Guidance (Spring 1992), under Strategic Activity 4, Section B: Additional Factors To Be Considered, certification programs for drillers are recommended. Regardless of the absence of a federal mandate for this regulation, the Division maintains that based on it's historical association with monitoring wells, this regulation is not only desirable, but needed to assure quality control of groundwater monitoring samples. All too frequently in the past, the Division has been faced with unreliable data as a result of poor monitoring well installation, resulting in increased expense to both the regulated facility and the Division, not to mention the potential for groundwater contamination that may have gone undetected. Therefore, the Division contends this rule is necessary and the additional fiscal burden is justified. Also the Division would like to state that the program is

projected to be self-supporting from its allocated portion of Groundwater Protection Fund monies.

Two commenters observed that the terms person and individual are used interchangeably, resulting in confusion as to the meaning of certain sections of the rule.

RESPONSE: The Division concurs and has changed "person" in subsections 4.8 and 4.9 to "individual".

One commenter suggested the term water and groundwater be defined.

RESPONSE: The Division contends that since "water" is not used in the rule, it need not be defined. However, the Division concurs that a definition of "groundwater" needs to be added and has addressed this deficiency in the comments for Subsection 2.7.

Two commenters state that Monitoring Well Construction Standards should be incorporated into the rule.

RESPONSE: The Division is working on Monitoring Well Design Standards. Due to the differing nature of design standards and certification procedures, the Division intends to develop the design standards under a separate rule.

One commenter believes there is no technological or scientific evidence that monitoring wells in the mining industry have been installed unsatisfactorily.

RESPONSE: Although exact figures are not currently available, the experience of this Agency, in the Office of Water Resources, the Office of Waste Management and the Office of Mining and Reclamation, has been, for a substantial number of monitoring wells, that samples, representative of the groundwater, have been impossible to obtain. By standardizing the construction standards (in a future rule), and by insuring, through a certification program, the monitoring well drillers understand and apply those standards, the Division maintains the percentage of unreliable monitoring wells will decrease.

One commenter believes the most appropriate way to ensure correct construction of monitoring wells is to require the installer to certify that construction meets applicable requirements. Furthermore the commenter believes the regulation should be withdrawn.

Response: The Division maintains that the best way to ensure the proper construction of monitoring wells is to regulate the drillers' training and ensure they are following current state regulations via a certification program. This method eliminates the possibility of an unscrupulous driller

certifying that a well is constructed properly when he may have little knowledge of how to properly construct a monitoring well, or has simply made an error in installation.

SPECIFIC SECTIONS

Section 2.7: Four commenters stated that "Monitoring Well" needs to be defined, in part to avoid confusion with oil and gas wells.

RESPONSE: The Division concurs. However, to avoid any possible confusion, the Division also will add definitions for both groundwater and piezometer. The following definitions have been added:

2.7 "Monitoring Well" means any cased excavation or opening into the ground made by digging, boring, drilling, driving, jetting or other methods for the purpose of determining the physical, chemical, biological or radiological properties of groundwater. This definition includes piezometers and observation wells which were installed for purposes other than those listed in this definition, but does not include wells whose primary purpose is to provide a supply of potable water.

2.9 "Piezometer" means a groundwater monitoring well sealed below the water table installed for the specific purpose of determining either the elevation of the potentiometric surface or the physical, chemical, biological or radiological properties of groundwater, or both.

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

Section 2.8: Four commenters question the reference to "supervisor" and "on site", and request clarification of these concepts. Additionally one commenter asked for a tighter restriction than "site" in section 4.1.

RESPONSE: The Division's intent has been to require certification of the individual who is actually operating the drilling rig. The Division acknowledges that the reference to supervisor in the definition of monitoring well driller is inconsistent with the original intent. Therefore the Division has modified the definition as follows: "Monitoring Well Driller" means the individual operating the drilling rig when drilling, altering or abandoning (i.e., properly closing) a monitoring well(s).

The Division also believes a change is necessary in Section 4.1 to more accurately specify who must be directly in charge of the drilling operation. The following change

has been made: "4.1 There shall be a certified monitoring well driller actively drilling, constructing, altering or abandoning any monitoring well."

4.2 One commenter inquires whether these rules are intended to apply to mining industry monitoring well drillers, as that industry has been drilling this type of well since the adoption of the Federal Surface Mining Act in 1977.

RESPONSE: The Division states that these regulations are intended for all monitoring well drillers, regardless of past experience.

4.3 One commenter stated that, with regards to the mining industry, monitoring wells are not drilled 'as a business'. Therefore the section as drafted could exclude those drillers, who are employed by the mining industry, from being exempt from the minimum experience requirements for initial certification.

RESPONSE: The Division replies this was not the original intent of the subsection, but agrees that the intent is not clear as originally written, and has modified the subsection as follows: "4.3 Monitoring Well Drillers actively engaged in monitoring well drilling on or before the effective date of this rule, shall be exempt from the minimum experience requirements."

4.5: One commenter stated that it is not clear if actions such as falsification of records, deliberate disregard for directives, or regulations, etc. are grounds for revocation of suspension of certification. The commenter also stated that the regulations should include provisions for enforcement actions, fines, and/or penalties to be enacted against noncompliant drillers.

Response: The Division agrees with this commenter's observation that certain actions, in addition to those set forth in the proposed regulation, may necessitate the revocation of certification. Therefore the Division has made the following change to Subsection 4.5. The new language is "...application form is incomplete, inaccurate, false or misleading, or if the provisions of this rule, or any other rule pertaining to monitoring wells are willfully or negligently violated."

With regards to the commenters request to include penalty provisions in the regulation, the Division maintains that Chapter 20, Article 5M, Section 10 clearly states that penalties may be issued for any violation of the act, or rules promulgated thereunder. Restating those provisions in the rule would serve no real purpose.

5.1 through 5.4: One commenter states the requirements for identification numbers on rigs, and the display of the certified monitoring well drillers' certification number, serve no real purpose and impose an unreasonable burden on the operators. Another commenter questioned the need for "Monitor Well Head" in the Section title.

RESPONSE: The Division concurs with the first comment and has deleted sections 5.1 through 5.4 as originally written. As no reference to monitor well head identification numbers were made within the section the Division has changed the Section title. Section 5. has been rewritten as follows:

"5. Monitoring Well Driller Identification.

All monitoring well drillers shall have proof of certification available for inspection at all times when actively engaged in drilling, altering, or abandoning monitoring wells."

4.12 One commenter states there is considerable opposition to the testing requirement, and that the passing figure of 70% is arbitrary. Furthermore, they believe the 30 day waiting period between examinations may impose a financial penalty on monitoring well drillers who are currently engaged in the business and do not pass the examination. Another commenter indicated that the 70% passing grade is insufficient to demonstrate a thorough knowledge of the requirements.

RESPONSE: The Division believes the written or oral examination will be the instrument by which a minimum level of competency will be assured in monitoring well drillers. The Division maintains that if a monitoring well driller actually understands the technology and proper procedures involved in all facets of monitoring wells, he/she should have no difficulty in passing the examination. In addition, the examination should serve as a learning tool, by which the examinee can identify those areas where he/she needs additional study.

The Division agrees that any percentage of correct answers chosen for a passing grade will be arbitrary. Even within the Division, various percentages have been advocated, ranging from 50% to 90%. It is the Division's final consensus, however, that the 70% figure is the best compromise between insuring a minimum amount of knowledge and understanding in monitoring well drillers, and making allowance for the impreciseness inherent in any test. If, under ideal conditions, the test accurately measured a person's knowledge and understanding, and if that person only scored a 70%, then 30% of the time that person would be doing something wrong when installing, altering or abandoning a monitoring well. However, the Division realizes that no test is the perfect instrument for measuring understanding and

knowledge. Chance factors, that vary from person to person, and which have no relationship on the person's knowledge or understanding of the subject, such as misreading the question, or being distracted by a loud noise, or marking the wrong box on an answer sheet, or having an argument with the boss just before the test, etc., etc., may adversely affect a person's performance on a test. The 70% figure will allow for these variations in performance and will still give a reasonable assurance that the individual in question is sufficiently knowledgeable on the subject of monitoring wells.

The Division recognizes the 30 day waiting period may, in infrequent cases, result in the loss of revenues to a person engaged in the monitoring well business. However, the resources available to the Division preclude offering the examination 'on demand'. Setting a schedule of examinations 30 days apart is a viable solution to the requirement for testing, and is not without precedent in other regulatory agencies of both the State and Federal government.

Therefore, the Division will retain the language of the subsection as it was originally written.

7. Two commenters stated the Administrative Due Process, as proposed in the original rule, would be cumbersome, unwieldy, and would lead to confusion because of the uncertain areas of responsibility among the agencies.

RESPONSE: The Division, for reasons stated in the GENERAL COMMENTS section of this responsiveness summary, has removed all references to DHHR, necessitating the following change:

47-59-7 Administrative Due Process.

Those persons affected by the enforcement of this rule desiring a contested case hearing to determine any rights, duties, interests or privileges shall do so in a manner prescribed in Chapter 20, Article 5M, Section 11 of the West Virginia Code.

A similar modification was necessary in Section 47-59-4.9.

ATTENDEES AT PUBLIC HEARING ON
TITLE 47 SERIES 59

<u>Name</u>	<u>City</u>
David Yaussy	Charleston, WV
Libby Chatfield	Charleston, WV
Barbara Smith	Charleston, WV
Mike McThomas	Charleston, WV
Ben Greene	Charleston, WV
Chris Hamilton	Charleston, WV
Jerome E. Cibrik	So. Charleston, WV
Timothy P. Mallan	Roanoke, VA
James Smith	Charleston, WV
Lonnie Mills	Mount Carbon, WV
Ken Peace	Mount Carbon, WV
Chris Grose	Charleston, WV

GROUNDWATER PUBLIC HEARING
July 27, 1992

Introduction: "Good evening ladies and gentlemen. I believe it's a little after five and time to get our public hearing, concerning proposed legislature establishing procedures for the certification of monitor well drillers, underway. Gentlemen, are we ready to begin?"

"The Department of Environmental Protection (DEP) has filed with the Secretary of State's office proposed regulations defining the procedures for the certification of monitor well drillers. The filing initiates the required public comment period and it is the first step in seeking legislative approval of the rules. The new regulations are designed to ensure monitor wells are properly drilled, constructed, altered and/or abandoned.

"Monitor wells provide data used to determine if ground water contamination has occurred and monitor progress of site-specific mediation efforts. The proposed rules have been developed as a result of the implementation of the Groundwater Protection Act, which provides for the protection of public health and ground water aquifers.

"We are here this evening to take statements concerning the proposed regulations. We will entertain public comment until tomorrow at 4 p.m., July 29. The reason for the short comment period in this case is we need time to prepare a presentation for the legislative rule-making committee and hopefully get the proposed regulations introduced into the legislature come January.

"At this time, we'd like to invite anyone who chooses to make statements to come to the podium and deliver them. I see here, through the sign-up sheet, Mr. David Yassey has comments concerning these proposed regulations. Mr. Ben Greene has also indicated he would like to speak. Mr. Greene, would you come forward at this time?"

Ben Greene: "For the record, my name is Ben Greene. I'm representing the West Virginia Mining and Reclamation Association and the WV Coal Association. Together, we compromise more than 400 companies. We make up more than 90% of the coal production and some other mineral production around the state.

"The purpose is to express our comments, observations and views on Title 47, Rule 59 that has been proposed for monitoring well drilling certification. It is ironic, when you review the rules, in our judgement, that we see the Department of Health (DHHR) proposing a

monitoring well certification program when we have not seen any septic tank or other known ground water influences that are more important, in our judgement, than the certification program.

"Though I question whether a \$225 fee is of economic significance in terms of the individual, when you compare that to the more than \$20 million that has been estimated in the insecticide, pesticide and fertilizer regulations that public comment has already been taken on, to the individual it does become very significant.

"For the coal industry this raises several questions. The authority for issuing seems to come from 5M5b where the word 'monitoring' does appear. It does not appear beyond that that I can find in this statute. It does seem to question maybe the length and breadth of the regulation is a little bit of overkill.

"As you begin the review of these regulations, it tends to vest certain authority in the DHHR and then it invests certain additional authority in the Chief of the Office of Water Resources (OWR). In the definition section, the Water Resources chief is given designed standards and locations by definition authority, whereas the DHHR commissioner is given application and certification form duty. And then track over to the enforcement at 3.2 and there there seems to be a transfer from the DHHR back to OWR.

"Now if you can find all that and go back to what the act itself says, the act says those regulating agencies that have ongoing programs will continue those programs. Of course all of our ground water monitoring experience has been under the former Department of Energy, now the DEP, and specifically in their mine and reclamation sections.

"So if I could make a recommendation, it would be that there needs to be at least a coordinated effort, site specific and agency specific, that is clear cut in these regulations.

"A certifying monitor well driller has an on site reference. On site, in terms of the mining industry, you could talk permit, you could talk the operation or you could talk actual drilling site.

"If you take registered, professional, engineering kind of experience where you're talking supervision, you're talking somebody who looks over multiple permits and multiple areas. I'm not quite sure what was intended here by on site. If you go back to the previous regulation at 2.13, they are already in effect. There you're talking about the individual that is actually operating the drilling rig. I think that could be the individual that's standing there either pushing the buttons, holding the wire or manning the rotary drill, which is the most common in the mining industry.

"And then if you go to 2.8, 'an individual that engages in monitor well drilling construction, alteration or abasement or who

supervises these activities.' And that is by far the most preferable definition. Although there seems to be an interchanging, and I don't know whether that is fault or a flaw in the regulation or a fault or flaw in my research. But there seems to be a possible interchanging of certified monitoring well driller and just monitoring well driller. It may be intended, it may not. It certainly seems, in my judgement, to need to be clarified.

"You go down to 4.2, '2 years under the supervision of a certified mine driller.' If you take that to the mining industry, we've been drilling monitoring wells since the passage of the Federal Surface Mining Act in 1977, and more particularly since the permanent program in WV granted primacy on January 21, 1981. So we have a long history of drilling monitoring wells under our regulated program, if you will. I don't know whether we intend to jump over that now with a new agency and a different program or not. I simply raised the question.

"There is a second experience qualification at 4.3 in the proposed regulation. It talks about having drilled several wells as a business. We in the mining industry do not do it as a business, but as a requirement of obtaining permits and as a requirement of both federal and state law. I would hope that experience would be as good as somebody that is out there on the commercial market. I would think that it would be.

"Again, another observation about a certified program is I don't know of anything technically, technologically or scientifically that is wrong with the ongoing program. I'd like if anybody'd show any scientific fact that there is in fact a huge program here in how monitoring wells are being drilled, particularly in relation to the mining industry.

"4.5 gives the commissioner, and here the DHHR has a new name in terms of public health I believe comes in, and it seems the commissioner can suspend or revoke or he has certain powers, yet you go back to the definitions and those powers, I don't think, are properly conferred. Nor do I see how he can revoke something when he has transferred the enforcement to OWR or out to the other Division of Environmental Protection, being mines and reclamation. So, we need to, in my judgement, be clear in who and what agency is really in charge.

"One that I've had the most feedback and one that needs to be rethought and given additional consideration should these regulations go forth is 4.12, the oral and written examination requirement. When you're dealing with the mining industry, again you're dealing with a group of people who are scared to death of written examinations. It would also seem to me that the 70% is a very arbitrary figure. The 30

day waiting period requirement again may be penal.. If a guy is employed and he's a driller, in particular if he's a contract driller, the possibility he may have to be off for 30 days while he waits to take another oral exam could be a very penal regulation. I'm sure it wasn't intended that way but as written and as I interpret it, it certainly could have that kind of power. But I would urge your proper attention and study of 4.12, the oral and written examination part.

"Part 5 of the rig identification, I fail to find any statutory authority or any requirement that says the drilling rigs have to have the numbers of the certified drillers on the side in numbers 2" high that are plainly legible and visible from a distance. Again a mining industry scenario of a rotary drill where you may have 3 or 4 drillers who are certified who operate the same piece of equipment 3 shifts a day. It's not unusual. You could be drilling monitoring wells generally in the daylight hours on any two shifts. So you could have a series of numbers that might be deemed a requirement that is more detrimental to what you're trying to establish here than not. It would seem to me the proper direction of this regulation would be dwelling more in the hydrogeology and the how and what you've encountered and how you protect it. It would need identification in the surface facility, the concrete pad and some of the other things that seem to be creeping in on the certification.

"And finally, my comments will be on #7, the due process part. And here it provides for a DHHR hearing and declaratory ruling procedure. I take you back through the scenario that enforcement had already been turned over to OWR back in #3. OWR, in turn, looks to Mines and Minerals, who actually carry out the program. So I wonder what good that tedious procedure would be unless it would only have application, and I believe it goes beyond that, to the procedure of testing and certification to begin with.

"Mr. Chairman that concludes my comments on Rule 59, Title 47. If there are any questions I'll be happy to respond. If not, I thank you for the opportunity to participate in the hearing."

Chairman: "Thank you Mr. Greene. I would be amiss in not identifying the participants in the hearing. Most of the people do know each other, but we'll go ahead for the sake of the record and identify the OWR representatives.

"I am Jim Waycaster. I'm with the public information office of OWR. To my right is Dave Watkins. He's the program leader of ground water. Dr. Eli McCoy, chief of OWR, is in the audience as well.

"Mr. Yassey, are you ready at this time to make your remarks?"

David Yassey: "My name is Dave Yassey. I'm an attorney with the law firm of Robinson and McElwee in Charleston. I'm here today on behalf of the WV Manufacturer's Association. The WVMA is an organization comprised of over 200 businesses in the industrial sector. It has a history of constructively commenting on the environmental regulations that are put forth by the DEP and other agencies. It wishes to continue with that history this evening.

"The WVMA opposes promulgation of these monitor well certification regulations because it believes they are unnecessary and unduly expensive. A disproportionate amount of the funds that are dedicated to the ground water program of the ground water fees that are regulated under the ground water fee regulations are going to be dedicated to the certification program.

"WVMA believes all available funds should be directed to identifying and/or mediating ground water contamination. We understand there is some belief the Environmental Protection Agency (EPA) will require a monitoring well certification program. But we do not believe there are any current well driller certification regulations that have been proposed by the EPA. Nor do we expect it will be occurring in the near future.

"We think that if any type of monitoring well regulations are appropriate at this time, it would be a regulation which would establish regulations for monitoring wells in their construction and the way they are put into the ground, rather than a new program for certifying monitoring well drillers.

"If, despite the WVMA's concerns, this regulation is adopted, the WVMA is concerned about requiring certification for all supervisors. It was alluded to by Mr. Greene, not everyone who supervises at a monitoring well drilling site should be required to have certification. We're thinking of situations in which a company would have a geologist present, either as an employee of the company or as a consultant, who would be involved in directing well placement and actually supervising, but not directly supervising, the drilling of the monitoring wells themselves. In that situation, as long as there is someone present who is certified for monitoring well drilling, it should not matter if there are additional people participating in the supervision as long as someone is responsible under the act.

"Also we feel there is a need to clarify what certification applies to individuals and what certification applies to persons. The terms are often used interchangeably in the act, whereas they may have very different legal meanings. A person, of course, can include such things as a corporation or a partnership, where an individual would presumably mean a single person.

"Furthermore, we believe there is a need to define the term 'monitoring well.' Any certification program which will be applying to those who drill monitoring wells should have some definition of that term included.

"I have no further comments at this time, unless there are any questions. Thank you."

Chairman: "Would anyone else at this time like to make a statement regarding the proposed regulations? If not, we'd like to reiterate that the agency will be accepting comments until tomorrow at 4 p.m. regarding these proposed regulations. I'd also like to point out that when these were drafted all references to DNR will be changed through the proclamation to DEP.

At this point we would like to close the formal portion of the hearing and agency people will remain to answer questions regarding these proposed regulations. Thank you very much for attending."

Chairman: "I open the record for this evening's public hearing concerning two proposed rules that implement the requirements of the Groundwater Protection Act Chapter 20-5M-10. Now we're going to talk about these two rules separately in the statements portion of the hearing this evening.

"The first proposed rule we'll be speaking about establishes civil administrative penalties for Groundwater Protection Act violations. The rule also sets forth the procedure and criteria to be used in assessing the civil administrative penalties. These proposed penalties may be used instead of civil action to address violations of the act. However, they do not inhibit or prohibit due process because the violator retains the option of accepting or refusing the penalty order.

"First, I would like to indicate the first proposed rule of the governor's proclamation all the references to DNR is changed to DEP.

"At this point we would like to begin the statement portion addressing the civil administrative penalty rule. On the sign-up sheets, Mr. Norm Stenstra indicated his desire to speak concerning these proposed rules. Mr. Stenstra. . ."

Norman Stenstra: "Being first is always a bummer. To start I'd kind off like to set the background in prospective of what happened with the groundwater bill and where we're going, particularly with regulations that came out of that legislation.

"I think it's wise to look at this as a rough experiment in cooperation between industry, the regulatory agencies and the environmental community. Particularly what happened this time that

was different was the formation of working groups. Those were groups of people that tried to get together on specific topics and look at and identify the issues and, if possible, rub out some of the rough points. But, at no point in time, was it ever meant by any party, I believe, to be a consensus. I think we need to look at it as a preamble to the process.

"That's what I wanted to talk about a bit was the regulatory process that the legislature, in their wisdom, have created. This is the beginning of the ground water process, to come to the hopes and dreams and expectations we all had about ground water.

"As I said, it was an experiment. It was a rough one. It sometimes worked and sometimes didn't. Getting citizens down here or citizens at different places in the state to meet on specific issues--be it solid waste, be it electric power, was difficult. They were volunteers that worked on their own terms. I think the idea was to get the issues out and begin the process.

"But that process has to be taken in context with the legislative intent of that bill. Having been identified with this issue now for 4 years, and it being the #1 priority of the environmental community, you have seen and will continue to see meetings. In Morgantown there were specific environmental comments. You'll hear some tonight, yet, after my speech.

"We intend to continue to define and refine these regulations and go through the entire process, that involves not only legislative review on the committee, but also the legislative session in 1993.

"So I just wanted to set that as a tone that we all kind of decided to throw the dice on this and sit down and talk.

"In many ways this has been a very fruitful endeavor for people to try to solve, a tough and complicated issue. This is the beginning. So I leave you with that. Okay?"

Chairman: "Thank you Mr. Stenstra."

David Yasse: "My name is Dave Yasse. I am an attorney with the law firm of Robinson and McElwee. I am here tonight on behalf of the WVMA. The WVMA is composed of about 200 companies with emphasis in the manufacturing sector.

"The civil administrative penalties that have been proposed are a matter of great interest to the membership and we appreciate this opportunity to comment on them.

"We have several issues we would like to bring out tonight. There will also be a written comment. This will be filed tomorrow. But I'd like to hit some highlights tonight.

"The first concern is the matter of duplication of penalties. WVMA is not sure how the civil administrative penalties will be implemented by the DEP, especially in light of those civil administrative penalties which currently exist 47CSR4 which address solid waste and hazardous waste violations.

"We would oppose operating under both systems if, for example, there's a ground water violation at a solid waste facility. Both this regulation and all other civil administrative penalty regulations, including the one for the air caps, should provide the payment of one civil administrative penalty and prevent assessment of any other cap by the DEP.

"In reference to Section 3, we do not feel there is any need to provide authority in this rule for issuances of notices of violations. This rule should only deal with civil administrative assessment procedures rather than establishing which actions or activities for emissions constitute penalties. We believe those should be handled in a separate regulation such as the ground water protection regulations, which we'll be addressing later.

"If an NOV can be issued, there's separate authority for issuing an NLV under this regulation. Then there ought to be a separate appeal provision which isn't provided by Section 3.

"Next, we believe the DEP should structure its rules in the following fashion. First, after notice of violation is received by the assessment officer, he will determine whether a civil administrative penalty should be recommended to the director. Notice, at that time, would be given to the alleged violator, who would be given the opportunity to request the informal hearing, this referenced by the regulation. If there is no request, the civil administrative penalty recommendation would go to the director, who would decide whether to assess it or not. If it was assessed, the director would give notice of the assessment to the alleged violator and give an opportunity to appeal to the Water Resources Board within 30 days.

"If an informal hearing is requested on the other hand, it would be held and a recommendation for withdrawal or issuance would be made to the director, who would again decide whether the assessment should be lowered or issued as recommended. And there would again be an appeal period of 30 days.

"Now it may be this is only a restatement of what the Division intended. If so, we recommend the rule be redrafted and set out in a little clearer fashion.

"Again, the penalties for minor violations in the Table C matrix are higher for minor violations than those assessed under the matrix C for the solid waste and hazardous waste civil administrative penalties. We do not believe violations of ground water requirements

should result in greater penalties under the Groundwater Act than they would under the Hazardous Waste or Solid Waste for minor violations.

As I said, the WVMA will be submitting more detailed comments tomorrow. However, these represent the highlights. I hope they will be given consideration. Thank you."

Chairman: "Thank you. Would anyone else like to make a statement regarding the civil administrative penalties portion?

"If not, we'll move on to the second rule which is the proposed series of practices which must be followed by any person who owns or operates facilities or conducts activities subject to provisions of the Groundwater Protection Act.

"The practices are designed to prevent ground water contamination from facilities or activities that are already subject to regulatory requirements by the DNR, or now DEP. These facilities or activities include generators of electrical power and industrial establishments such as refineries, tanneries, paper or pulp mills and chemical plants. The proposed rule would not apply to facilities or activities that, although under the jurisdiction of the DEP, are regulated by other agencies through valid agreements. Class II injection wells would be included in this category. At this time we would like to open up for statements regarding the proposed rule. Mr. Freshorn. .
."

Mr. Freshorn: "I don't really have any statements to say right now. Except if there were questions it would be appropriate to ask at this time."

Chairman: "There are no questions at this time. Mr. Degen, would you like to speak at this time?"

Tom Degen: "My name is Tom Degen. I'm on the Board of Directors of the WV Environmental Council. I was also in one of the work groups. We dealt with solid waste, which is where my emphasis is. I have some written comments about specifics. I won't go over all of them now, but I do have some highlights I'd like to go over.

"Section 47-58-12, pre-emissions. I think the '/or' where it says 'and/or' needs to be removed. Otherwise the sentence appears to allow the contamination of ground water by any facility or activity with a valid permit. I feel this is contradictory with the provisions of the Groundwater Act. Also, it should be a permit that specifically allows the contamination of ground water, not just a permit.

"Under remediation, I feel the provision should have not just the authority, but the duty to order remedial actions as provided in the Groundwater Protection Act, Section 5E.

"I find that throughout the regulation much of the language is vague to the point of rendering the regulations unenforceable. Phrases and words like 'inspected regularly,' 'maintained regularly,' 'should,' 'appropriate measures,' 'may,' are not terms that provide a basis for enforcement action. These things should be spelled out.

"Along the same lines, there are references throughout to contamination 'prevention practices,' 'skill prevention practices,' 'run-off and/or infiltration control systems,' etc. . . . If there is a standardized body of practices like that, they should be referenced. Otherwise, you don't really know what's being talked about here. If there is not a standardized body that can be referenced, then it should developed.

"There isn't enough detail in these regulations for an applicant or an operator to really know how to comply. Section 5.7.4 mentions, well actually it doesn't mention, I feel their should be requirements for review and approval of the ground water protection practices and the BMPs. To issue ground water certification is meaningless if the agency doesn't review the BMPs and ground water protection programs and issue some kind of approval.

"In Section 6.1.2, I assume here that it is referring to, among other things, coal combustion byproduct's surface impoundments. If that's true, I feel they're fairly inadequate, even though I understand the regulations which are more protective of ground water could be applied. That would be Title 47, Series 38, the solid waste regulations. But even in those regulations, coal combustion byproduct's facilities are not subject to the same requirements as other solid waste facilities.

"In the Groundwater Protection Act, Subsection H of Section 5, states that E,F and G of the Groundwater Protection Act 'shall not apply to coal extraction and earth disturbing activities directly involved in coal extraction.' It should be remembered that a coal combustion byproduct facility is not a coal extracting activity or an earth disturbing activity directly involved in coal extraction.

"With this in mind, it is unclear why these facilities are regulated differently from other solid waste facilities. For example, in 5.5.2AH in the Title 47 Series 38 regulations, coal combustion byproduct's facilities are exempted from the provisions of Section 483CB, which are the liner requirements for surface impoundments. They are also not subject to any of the ground water monitoring requirements.

"I feel this is irresponsible. Without ground water monitoring wells, how will it be known these impoundments do not need to meet the same requirements that other solid waste facilities must meet? I think I'll leave off the specifics right now.

"I also want to address the process. I was a member of one of the work groups. I want to discuss some of the problems I had with the work group. I was in another work group which had a secretary of minutes. This work group had no secretary, no minutes, no record. Reports came out of the committee that were not seen by the other members of the committee, voted on and approved, like minutes would be.

"As a volunteer, I felt I was at a distinct disadvantage. I have to leave my work and miss pay to go down and then I have to pay gas, phone, meals out of my pocket. So I'm paying twice to participate in this project.

"I've been in other work groups where compensation was offered and expenses. I was invited to be on the work group to help develop practices that would eventually be formulated under regulations. Yet when I submitted comments on the drafted solid waste regulations, I was told we weren't going to address them. I don't feel that's appropriate. I feel that was the perfect time and place to address those regulations.

"Our group did not finish at the last meeting we had. We hadn't finished going over comments that another member and myself had submitted, yet another meeting was not called. I didn't even receive notices the regulations were promulgated and out to public notice. I found out on my own, more or less by accident, and had to ask for a copy of the regulations.

"I guess in summary, the first person that says the environmentalists had input into this process is going to get a bit of an argument from me. I feel we were given just enough input so that someone could say that, but we really don't feel that the input was really seriously considered. Thank you."

Chairman: "Mr Yassey. . ."

David Yassey: "Again I'm Dave Yassey here on behalf of the WVMA. The WVMA believes the DEPs proposed ground water protection regulations are a reasonable attempt to set standards for facility design or activities which will prevent ground water contamination. However, the WVMA does have some concerns about the rule.

"First and foremost, it is somewhat confusing as drafted. We would appreciate clarification of, for example, the application of Sections 8, 9 and 10. Are the intended to imply the facilities which

are not electric generating stations or industrial establishments or do they apply to new types of sources at those facilities which are not currently covered by the regulations? This needs to be clarified somewhat before the WVMA may comment on the extent and scope of the sections.

"Another problem that is presented is difficulty in determining what constitutes contamination under the rule. Under the Act we believe that existing natural background water quality is to be protected. And therefore, any discharge which does not increase the natural concentration of a constituent in ground water should not be considered contamination.

"Furthermore, increase of a constituent above natural background levels should not be considered contamination if it is allowed by a permit, deviation or variance, as provided by the act.

"The WVMA believes that the definition of industrial establishment, which establishes the scope of the facilities which are covered by the act, should be similar to the language used in the act itself. By defining industrial establishment in terms of facilities and activities which may adversely affect ground water, which are not otherwise regulated by the DHHR or the department of agriculture. The DEP will be extending its jurisdiction to the limits allowed by the act without exceeding those limits.

"I would contrast the DEP's definition which extends DEP's authority to any activity which causes a waste, which would include our houses.

"We encourage putting BMPs and Groundwater Protection Plan requirements together in the same section to eliminate redundancies and make the GPP the centerpiece of the DEP's Groundwater Protection Program.

"The motivation for prevention of ground water contamination is already provided by the Act. A means to accomplish it should be left to each facility through the use of the GPP. There are already many ground water protections in place as a result of the Underground Storage Tank Act, Spill Prevention Control Countermeasures Program, NPDES program, RICRA and the Solid Waste Program, just to name a few.

"Each of these requires BMPs or design standards as part of those regulations in order to prevent ground water contamination. The GPP should be used to fill in the gaps in the coverage already provided by those acts, depending on what requirements already apply to each facility. There is no need for a regulation which attempts to duplicate. It may actually contradict the requirements of those environmental programs.

"We do have some concerns about the specifics of the regulation that's been put forth. We will address those in written comments. We

are basically looking for a consolidation and a different grouping to make the regulations clearer and more easily applied. We also will be proposing an expressed ground water monitoring section which would provide authority for the director to require ground water monitoring where he believes it is appropriate.

"As I say, we will be filing written comments tomorrow. We look forward to working with the DEP further on this rule. Thank you."

Chairman: "Would anyone else like to make a statement concerning the proposed practices and regulations? If not, the agency will be receiving comment until 4 o'clock tomorrow afternoon on both the civil administrative penalties and the proposed practices regulation. At this time I would like to close the statement portion of the hearing and representatives of DEP's OWR will remain here to answer your questions."



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JUL 31 1992

DIVISION OF WATER RESOURCES
GROUND WATER OFFICE

July 28, 1992

Laidley Eli McCoy, Chief
DEP, Office of Water Resources
1201 Greenbrier Street
Charleston, WV 25311

RE: Groundwater Protection Act
Proposed Rules, Title 47,
Series 56, 58 and 59

Dear Eli,

My ever increasing work load at the clinic precludes my being at the public hearing on the proposed regulations implementing the Groundwater Protection Act for Civil Administrative Penalties (Series 56), Groundwater Protection Practices (Series 58), and Monitoring Wells (Series 59).

However, I do have several questions and observations on each of the proposals and submit the following three pages of comments on behalf of myself and the West Virginia Highlands Conservancy.

This is restating the obvious, but please know that WVHC, and I personally, remain intensely interested in the development and implementation of all phases of the Groundwater Protection Act.

Most disturbing to us at this point in time are indications in these DNR proposed regulations for groundwater protection practices and in the Water Resource Board proposed groundwater standards that we are backsliding from the intent of the Act where existing sources of pollution are concerned. It is, was, and always has been my understanding of those tortuous task force meetings that Section 4 of the Act contemplated the elimination of current polluting activities. Timing and extent of reducing levels of contamination back to drinking water standards was left open, and flexible language about basing the level of remediation on "practical" measures was painfully allowed in the final draft, but the words "no further contamination" clearly meant that existing facilities would be required make efforts to revise, retrofit, or to take some action to improve the situation.

Current proposals both from DNR and WRB appear to bless, condone and allow existing sites to continue polluting with little or no regard to requiring improvements at those facilities.

Sincerely,
Cindy Rank
Cindy Rank, President

Section 9.2 Although this section allows for a generous amount of discretion on the part of the director, i.e. in providing schedules of compliance, evaluating the level of protection, etc., it, more than any other section of the proposed regulations, states most clearly the intent of the 1991 Groundwater Protection Act.

Similar language must be adopted for all facilities addressed in sections 5 and 6 of these regulations, e.g. add a new 6.1.1.b. which reads "Where evaluation of an existing facility shows that contamination is occurring, a schedule of compliance must be submitted by the facility or director and approved by the director whereby the facility or activity must retrofit or improve or discontinue existing systems, activities, or procedures to make them, to the satisfaction of the director, protective of groundwater. Furthermore the facility or activity may be directed to begin remedial actions."

Section 13

13.1.1. When talking in terms of "preferred" solutions, the use of permanent solutions to the maximum extent "possible" is more appropriate language than "practical" as now proposed. The word "preferred" already allows sufficient flexibility for any lawyer, wordsmith, or industry mogul.

13.1.2. "If active remedial measures are technically and economically feasible", cleanup actions should not rely at all on dilution and dispersion. Forget the "primarily" altogether if there is a feasible, workable alternative.

13.2. It is not altogether clear to me just what this section says, but I assume it means that if, in fact, any required remediation does not fully restore the quality of the groundwater, then the director may order the facility or activity to mitigate for the loss of use, or for any significant adverse impact to groundwater. In some instances the director should even be required to order that mitigation (including replacement where loss of use is involved).

Title 47 Series 56: Assessment of Civil Administrative Penalties

Section 3.2. This section prescribes the procedures and content of Notices of Violations. There should be added a new section 3.2.4 that reads "Suggested corrective actions to be taken and a compliance schedule setting forth a time frame for accomplishing these corrective actions."

Section 6 Individual Civil Administrative Penalties are appropriate enforcement mechanisms to protect the groundwater resources of the state and are wisely included in these regulations.

Title 47 Series 59: Monitoring Well Regulations

Section 2.7 A definition for "monitoring well" is missing. This is an interesting approach, to say the least, but is it not important to include a definition here for clarity in applying the rest of the regulation?

Section 2.8 "Monitoring Well Driller" is defined as an individual who engages in monitor well drilling...or who supervises such activities. This is not sufficient or acceptable. The definition must be limited to the responsible individual at the drilling site, not to someone who could supervise say, from her home in Rock Cave.

Section 4.1. This section requires that a certified monitor well driller be "on site", but if that site is large, eg. hundreds of acres, it is not sufficient to have the certified driller at one end while drilling proceeds at the other. The certified driller must be on the well site itself.

Section 4.10 Denial, suspension or revocation of a certification is required to be in writing, and is to state specific reasons for the action, but reasons for suspension, etc. are only mentioned in Section 4.5 where incorrect information on an application can lead to suspension, etc.

a) It is not clear if or what other actions on the part of the driller, i.e. failure to act in accordance with the requirements of the law or regulation, falsification of records, deliberate disregard for DEP/DNR/DOH directives, etc., are grounds for revocation or suspension.

b) The Regulations should also include provisions for other enforcement orders, action, fines and/or penalties that can be taken against non-compliant drillers.

Sections 4.12 and 7 I realize that we have a Groundwater law that bends over backwards to encourage interagency cooperation and coordination, but in these Water Resource/DNR/DEP rules there is apparently no accountability to Water/DNR/DEP for the quality or administration of the examination for certification or for the Administrative Due Process afforded persons aggrieved by enforcement of the regulation. Should there not be required some typical contractual agreement, MOU, etc. between Water and Health that spells out expectations, standards, requirements, etc.????

Section 4.12 It is unclear why 70% on the required examination would be sufficient to demonstrate a thorough knowledge of the requirements of the Groundwater Act or regulations. Perhaps the content of the examination or the methods of evaluating the results of that process should/could be clarified in the cooperative agreement suggested in the previous comment.

TITLE ??
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION

SERIES ??
GROUNDWATER PROTECTION ACT PROCEDURES

??-??-1. GENERAL.

1.1 Scope and Purpose. This rule establishes a series of practices which must be followed by any person who owns or operates facilities or conducts activities subject to the provisions of Chapter 20-5M-1 et seq. of the West Virginia Code and is subject to regulations by the Division of Environmental Protection.

1.2 Authority West Virginia Code 20-5M-5(d).

1.3 Filing date

1.4 Effective date

??-??-2. Definitions

2.1 "Practice" means any regulation, rule, policy, permit requirement, or other appropriate regulatory action which is protective of groundwater.

2.2 "Existing facility" means any facility that submitted an application to obtain a Chapter, 20, Article 5A, or a Chapter 22A, Article 3 permit before six months after the effective date of these regulations, and is not defined as a new facility.

2.3 "New facility" means any facility that submits an application to obtain a Chapter 20, Article 5A, or a Chapter 22A, Article 3 permit six months after the effective date of these regulations.

2.4 "Director" means the Director of the Division of Environmental Protection or his duly authorized representative.

??-??-3. Groundwater Protection Practices subject to coal mining activities.

3.1 Groundwater protection practices contained in or created under the authority of Chapter 20, Article 5A, Chapter 22A, Article 3, and the legislative rules promulgated thereunder, were enacted in part to protect groundwater and therefore are incorporated into this rule. In cases where such legislative rules are more restrictive or is in conflict with these legislative rules, the more stringent rule shall apply.

3.2. Each facility shall prepare and submit a groundwater protection plan on the forms prescribed by the Director.

3.2.a. The plan shall detail what groundwater protection practices, procedures, methods, and equipment to be implemented or installed to prevent groundwater contamination from the facility, including the requirements of other statutory programs. The plan shall also detail, but not be limited to, the methods of spill detection, the procedures for timely cleanup, and the method of disposal, or treatment of the spilled material. Each plan shall contain a written commitment of manpower, equipment and materials required to expeditiously control and remove any spilled material. The plan shall designate a spill coordinator. Each plan shall identify and provide an inventory of sources or materials that may impact groundwater quality.

3.2.b. The plan shall also contain a groundwater monitoring program. The groundwater monitoring program shall assure that the facility and the groundwater protection practices are protective of groundwater. The program shall specify the parameters to be monitored, the frequency of monitoring, and the frequency of reporting. All groundwater monitoring reports shall be submitted to the Director.

3.3. Protection practices applicable to new facilities.

3.3.a. New facilities shall be designed to be protective of groundwater.

3.3.b. New facilities shall provide sufficient groundwater information prior to facility operation, to determine representative background groundwater quality.

3.3.c. Impoundments which receive waste that may impact groundwater quality shall be designed, constructed,

and maintained in such a manner which will prevent contamination of groundwater.

3.3.d. Secondary containment is required for any process or storage activity in which materials are stored, or used that may impact groundwater quality. Such containment structures shall be adequately designed and constructed to contain for a time sufficient to allow removal and disposal without contamination of groundwater.

3.3.e. Submit a groundwater protection plan in accordance with Section 3.2.

3.4. Protection practices applicable to existing facilities.

3.4.a. Existing facilities shall take such action as necessary to prevent groundwater contamination. Each facility shall submit a demonstration to the Director no earlier than six months of the effective date of these regulations, and no later than the mid-term review date or the expiration date, whichever is earlier, of the Chapter 22A, Article 3 Permit.

3.4.b. Where it can be demonstrated, by groundwater monitoring, that an existing facility design is such that no groundwater contamination is occurring, continued groundwater monitoring is all that is required. Provided that if major alterations occur to the facility or if activities change they shall be accomplished in a manner which complies with Section 3.3. Furthermore, notification to the Director must be made in writing, ninety days prior to any operational modifications that may impact the groundwater quality.

3.4.c. Where it can not be demonstrated, by groundwater monitoring, that an existing facility design is such that groundwater contamination is not occurring, the facility shall submit a groundwater protection plan in accordance with Section 3.2. The groundwater protection plan shall be submitted within one hundred twenty days of notification by the Director.

3.4.d. Where it is determined by the Director, that an existing facility is contaminating groundwater the facility must submit a groundwater protection plan, in accordance with Section 3.2, along with a groundwater remediation plan upon notification by the Director. The groundwater remediation plan shall detail improvements to existing systems, activities, or procedures to make them

protective of groundwater. The Director may provide a schedule of compliance for completing the work if necessary. Upon notification from the Director, the facility must begin remedial actions pursuant to Section 4.

4. Remedial actions.

4.1. The division has the authority to take remedial actions or to order persons to conduct remedial actions. The division encourages agreements for investigation and cleanups in appropriate cases. These agreements can be agreed orders or consent decrees.

4.2. Upon a facility being ordered to take remedial action the following guidelines shall be complied with at a minimum;

4.2.a. Treatment shall be used to reduce the levels to the maximum extent practicable.

4.2.b. Groundwater containment, including barriers or hydraulic control through groundwater pumping or both, shall be implemented to the maximum extent practicable to avoid lateral and vertical expansion of the groundwater volume affected by the substance.

4.2.c. Source control measures shall be implemented to prevent or minimize additional releases to the groundwater.

4.2.d. Adequate groundwater monitoring shall be conducted to demonstrate control and containment of the substance.

4.2.e. The potentially liable person shall provide an alternate water supply or treatment for persons with water supplies rendered unusable by the releases.

4.2.f. If sufficient justification is demonstrated, the operator may request, from the director, an evaluation of the practicability of achieving groundwater cleanup levels by the currently employed system at any time.

4.2.g. If background quality cannot be determined on site, and the facility owner/operator can demonstrate beyond a reasonable doubt that certain constituents found in groundwater underlying the site were not used, handled, manufactured or stored on the facility, then the Director

may waive the facility's remediation liability for the constituents in question.

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WRITER'S DIRECT DIAL NO. 347-8308

July 29, 1992

L. Eli McCoy, Ph.D.
Chief
Section of Water Resources
WV Division of Natural Resources
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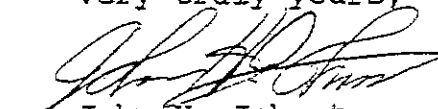
Re: WVMA Comments to Certification
of Monitor Well Drillers

Dear Eli:

Please find attached comments of the West Virginia Manufacturer's Association regarding proposed 47 C.S.R. 59, Certification of Monitor Well Drillers.

If you have questions or I can be of further assistance, please don't hesitate to call.

Very truly yours,


John H. Johnston

cc: David Yaussy
Bob Foster
James Waycaster

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
TO THE PROPOSED REGULATION OF THE
DEPARTMENT OF NATURAL RESOURCES
47 C.S.R. SERIES 59**

I. INTRODUCTION

On June 15, 1992, the Department of Commerce, Labor and Environmental Resources, Division of Natural Resources, filed with the Secretary of State a proposed rule, 47 C.S.R. Series 59, covering Certification of Monitoring Well Drillers in West Virginia. Accompanying the proposed rule was a notice requesting both written and oral comments. Pursuant to this notice, the WVMA has undertaken a review of the proposed rule, and files these comments.

The WVMA represents a broad cross-section of large and small industrial concerns throughout West Virginia. In keeping with the WVMA's supportive position regarding the development of West Virginia's regulatory program, the WVMA offers these comments as a means to facilitate development of a reasonable and protective program.

II. COMMENTS

1. General

WVMA requests that the Division of Natural Resources demonstrate under which federal code sections that a certification of monitoring well driller program is required. Absent

such a requirement, the WVMA would recommend that monitor well drilling certification regulations are unnecessary and require an inordinate amount of resources.

2. A question exists as to who is a supervisor and required to be certified under the regulations.

The regulation should be changed to clarify the fact that not every person on site is required to be a certified monitor well driller. For example, a hydrogeologist on site should be able to direct some aspect of the activities of monitor well placement and drilling without being required to be certified. If the intent of the regulations is to make certain that at least one individual on site is a certified monitor well driller, then the regulations should state that clearly.

3. Confusion exists as to whether certification is required for an "individual" or a "person."

The regulations use the terms "individual" or "person" interchangeably and should be changed to clarify that fact that only natural persons and not other legal entities, such as corporations or companies, are required to be certified monitor well drillers.

4. Section 47-59-2.7 - "Monitor Well."

"Monitor Well" needs defined. The term should be defined to assure that the rule only applies to the monitor wells and not to other wells, such as oil or gas wells.

5. Existing Definitions or Additions.

Reference existing definitions in W.Va. Code §20-5M-3, the definitional section of the West Virginia Groundwater Protection Act. In the alternative, include the definition of "groundwater" (20-5M-3(f)), and the definition of "water" (20-5M-3(k)) in the rules.

6. Adopt Monitor Well Construction Standards.

The WVMA recommends that the DNR incorporate monitor well construction standards into the Rule. Without the establishment of standards, monitor well driller certification alone serves only a limited purpose.

III. RECOMMENDATIONS

The West Virginia Manufacturers Association encourages the Division of Natural Resources to not adopt the proposed regulations absent federal requirements for the establishment of a monitor well driller certification program. In the event that the Department of Natural Resources adopts the monitor well regulations, then the WVMA encourages the DNR to amend the regulations as per the "Comments" section of this submission.

IV. CONCLUSION

The WVMA expresses its appreciation to the Department of Natural Resources for this opportunity to offer our input to the proposed revisions to Series 59 of the DNR's regulations. If you wish, we would welcome the opportunity to discuss these comments at your convenience. Please contact Robert L. Foster at 342-0161 with any questions or comments.

Respectfully submitted this 29th day of July, 1992.

WEST VIRGINIA MANUFACTURERS ASSOCIATION

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MEMORANDUM
DIVISION OF NATURAL RESOURCES
WATER RESOURCES SECTION

TO: Pat Campbell

DATE: July 8, 1992

FROM: David Chaney

SUBJECT: Comments on proposed
Groundwater regulations

Title 46 Series 12

Section 3.3 - The definition in 2.3 defines constituents as any natural or man made substance found in groundwater. Since the impacts by nature can not be controlled I suggest that section 3.3 should be changed to reflect human influence only.

Section 3.5 - Monitoring for dissolved metals conflicts with Title 47 Series 38 Solid Waste Management Regulations (SWMR). Section 3.8.4.e.A of the SWMR requires that all metals be reported as total unless otherwise specified by the chief. Also be advised that total metals is required monitored by Title 46 Series 2 Legislative Rules, West Virginia Water Resources Board (NPDES REGS) see Section 7.3.

Appendix A - Why are there no MCL for Arsenic, Barium, Copper, and sulfate. The information I have indicates that there are MCLs for these parameters (Drinking Water Regulations and Health Advisories by EPA April 1991). Also noted were differences in Standards vs MCLs.

Section 2.4 - The definition for groundwater should also consider waters of the state that are located in the vadose zone. If this were done then contamination if found could be remediated before possibly impacting waters in the saturated zone.

Title 47 Series 58

Section 2.6 - Definition not needed if you want to say coal just say coal, besides there are allot of other "Naturally Occurring Substances" other than COAL! I believe that this definition would confuse it for the other mining industries.

Section 2 - Why is groundwater not defined. Again I request that the definition include the vadose zone as well as the saturated zone.

Section 5.7.5. - Should add a condition that would require that the BMP plans be updated when the facility adds and or starts operations other then those listed in their plan.

Page 2
Pat Campbell

Section 5.8.2 - Should read "If closure is to be performed with waste in place then such closure shall be performed in a manner acceptable to the chief so as to prevent ground water contamination." This could require that the impoundment be closed as required by the SWMR.

Section 5.9 - Site location criteria suggest that this section be worded similar to that of Sections 3.1 and 3.2 of the SWMR.

Section 5.4,2 - What is the criteria to be used to determine potential for groundwater pollution. Shouldn't it be spelled out in the regulations.

Section 5.5.3.e - This requirement concerning subsurface borings should be placed in it own section not as a subsection for BMP.

Section 6, 7, 8, 9 and 10 - these section are unnecessary as specific requirement for individual facilities could be spelled out under single section spelling out any necessary waivers or modification. These regulation are confusing with all repetition in them.

Title 47 Series 59

Section 2.7 - Based on the definition for water well in the Board of Health Interpretive Rule 16-1 Series III and the definition for monitoring well in the National Water Well's "Handbook of Suggested Practices for the Design and Installation of Ground-Water Monitoring Wells", I suggest the following definition:

An excavation or penetration in the ground, that is constructed by a variety of techniques for the purpose of extracting groundwater for physical, chemical or biological testing or for measuring water levels.