

STATE OF WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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IN RE: PROPOSED LEGISLATIVE RULES FOR 2020 RULE 33CSR20, RULE 60CSR3

PUBLIC HEARING

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BEFORE: Terry Fletcher, Chair

Erin Brittain

Ross Brittain

Casey Korbini

Joe Sizemore

Julie Wandling

HEARING: Tuesday, August 11, 2020

6:00 p.m.

LOCATION: Zoom (<https://us02web.zoom.us/j/85680933629>)

## PROCEEDINGS

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CHAIR: Good evening. My name is Terry Fletcher, and I'm with the West Virginia Department of Environmental Protection's Public Information Office.

Welcome to the virtual public hearings on the proposed rules for the 2021 West Virginia Legislature: 33CSR20 – Hazardous Waste Management System and 60CSR3 – the Voluntary Remediation and Redevelopment Rule.

With me tonight is Joe Sizemore and Julie Wandling with the DEP's Hazardous Waste Division, and Casey Korbini and Erin and Ross Brittain with the DEP's Office of Environmental Remediation. The purpose for our public hearings is to give you the opportunity to share your comments or information about these rules with the DEP.

We will begin the evening with the public hearing on proposed rule 33CSR20 – Hazardous Waste Management Systems. Once those who wish to speak or comment on this rule have done so, we will close the hearing and the record.

We will then begin the hearing on proposed rule 60CSR3 – the Voluntary Remediation and Redevelopment Rule. Once those who wish to speak or comment on this rule have done so, we will close the hearing and the record.

Tonight's hearings are being recorded so that the comments you share can be taken into consideration and entered into the public record for these rules. A decision will not be made this evening. The transcript will be reviewed and considered by the staff, and you will receive notification once a decision is made.

Please note that written comments can also be submitted in addition to oral comments via email to [DEP.Comments@wv.gov](mailto:DEP.Comments@wv.gov). I'll put that in the chat box here in case anyone needs that for reference.

Because we are here to hear your comments and get them on record, this is not a forum to engage the DEP in open discussion or debate about these rules, and we cannot answer questions about these rules during the hearing portion.

To ensure that we successfully achieve the purpose of these hearings, we ask that everyone be respectful and considerate of each other by refraining from using foul language; refraining from name calling; and keeping your comments on the topic of these rules so that our time together is used efficiently.

Before we get started, we want to make sure that we have an accurate record of everyone in attendance this evening and also have a way for us to contact you so that you may receive the agency's final decision on the rule.

To do this, we're asking for everyone to make sure your name is visible in the participants list and to type in your email addressing using the Zoom "group chat" function.

Please note that similar to in-person public hearings, your name and email address will become part of the public record for these hearings and can be made available to others upon request via the Freedom of Information Act.

In order to make sure your name is visible, click on the "participants" icon at the bottom center of your screen. At the bottom of the window on the right side of the screen, click on the button labeled "rename" to update your in-room display name.

Once your name is visible, please click the “chat” icon at the bottom of your screen. Type in your email address at the bottom of the chat window and hit enter. This group chat will be saved as part of the public record for the hearing.

So now that we have everyone’s name visible and we have your contact information, we’ll go over the process for identifying those who wish to speak. If you wish to speak, you’ll need to utilize the “raise hand” function. To do this, click on the “participants” icon at the bottom of the window on the right side of your screen, click the “raise hand” icon. Your digital hand is now raised, indicating that you wish to speak.

You may have noticed that you were muted upon entering this meeting. Once I call your name, I will unmute you and indicate when to proceed with your comments. Once you have finished with your comments, please say that you are done speaking, so that I can mute your microphone and proceed to the next speaker. This is to ensure that we do not cut someone off before finishing their comments.

Once the last speaker has finished their comments, I will ask for anyone who we may have missed or joined the hearing late to indicate in the group chat whether or not they wish to speak. We want to ensure we do not miss any comments.

Thanks everyone for bearing with me on those instructions. As I’ve said before, this format is somewhat new to us and our agency and can be new to some of you as well. So, we just want to make sure that we’re all on the same page and this is as easy as possible for everyone.

All that being said, we will now begin the public hearing for proposed rule 33CSR20 – Hazardous Waste Management System. If you wish to comment on this proposed rule, please utilize the “raise hand” function now.

I’ll give it a few more minutes, but I’m not seeing anyone who’s wishing to speak.

So, it looks like there are no commenters this evening for the proposed rule 33CSR20. If there are no further comments, we will now close the record for proposed rule 33CSR20.

At this time, we will now begin the public hearing for proposed rule 60CSR3 – the Voluntary Remediation and Redevelopment Rule. If you wish to comment on this proposed rule, please utilize the “raise hand” function now.

We have one speaker, Angie Rosser. Angie, I’m going to unmute you. Go ahead with your comments.

MS. ROSSER: Alright, and if I start breaking up, Terry, please interrupt me, and I’ll try it without the video; we’ll try it with for now. I’m Angie Rosser with the West Virginia Rivers Coalition, and I really want to, again, express our gratitude and congratulations for adapting to this virtual platform so well and quickly... really a model for other state agencies, so good job, Terry.

And thanks to OER for serving a really important function of the agency, in environmental remediation. By going through a 107-page rule gave me a little bit more appreciation for how highly technical and important this is in terms of restoring degraded facets of our environment to a way they can be used again and used safely.

I’ve got two questions that I hope could be addressed in a responses to comments. The first dealing with the de minimis standards and I can really appreciate the, I think the intent behind this to make sure that the standards are updated in a timely fashion based on the best available science. It is going to be a different process and my questions revolve around our members’ interest in transparency and decision making processes, especially when they come to things like human health, and I’m wondering if the agency has contemplated how the annual review process will be shared in terms of what data was reviewed and what decisions were come

to. I assume that updates will be made via the guidance manual, but I guess what I'm getting at is, I'm more familiar in the water standards world where we're also looking at human health criteria and the latest science that informs updates in water quality standards. There are some arguments about methodology and sources of data and how those are modeled and calculated, so I'm curious the level of the review that will be conducted and how that process will be shared with the public and stakeholders moving forward. So, that's a thought on the de minimis standards.

On the change to go from sampling, from, how I'm reading it, is going from a four-year semi-annual monitoring regimen now to a two-year quarterly. I'm just curious if there's any suggestion or evidence from the agency's experience where that year three and four has shown up anything different than years one and two and what we might be missing if we condense that time period. Certainly, the more frequent monitoring is something that we would support, but are we going to miss anything by not extending it to that four-year period and making it a shorter period?

So those are our comments on Rule 60CSR3. Thanks for the opportunity.

CHAIR: Thank you, Angie. Is there anyone else who would like to comment on proposed rule 60CSR3?

It's not looking like we have any more commenters. So, at this time, we will now close the record for proposed rule 60CSR3.

This concludes the scheduled public hearings for this evening. I want to thank everyone for your interest for your interest and for taking the time to attend these hearings. Have a good evening.

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HEARING CONCLUDED AT 6:15 P.M.

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## Korbini, Casey E

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**From:** Fletcher, Terry A  
**Sent:** Tuesday, August 11, 2020 6:23 PM  
**To:** Korbini, Casey E  
**Subject:** FW: [External] OER 2021 Rule Comments

**Importance:** High

Hi Casey,

This came in a few minutes ago.

Thanks,

Terry Fletcher  
Acting Communications Director

West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

Phone: 304-926-0499 ext. 49720 <- *New extension*

Facebook: @DEPWV  
Twitter: @DEPWV  
Youtube: Environment Matters

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**From:** Rebecca McPhail <rebecca@wvma.com>  
**Sent:** Tuesday, August 11, 2020 6:17 PM  
**To:** DEP Comments <DEP.Comments@wv.gov>  
**Cc:** 'Dana Burns (dlburns@potesta.com)' <dlburns@potesta.com>; Harkins, Clayton <Clayton.Harkins@DINSMORE.COM>  
**Subject:** [External] OER 2021 Rule Comments  
**Importance:** High

CAUTION: External email. Do not click links or open attachments unless you verify sender.

August 11, 2020

### Via Email Only

West Virginia Department of Environmental Protection  
Attn.: Casey Korbini  
131A Peninsula Street  
Wheeling, WV 26003  
[dep.comments@wv.gov](mailto:dep.comments@wv.gov)

**Re: Interested Party Comments of the West Virginia Manufacturers Association**

**Voluntary Remediation and Redevelopment Rule**  
**W. Va. Code §§ 22-22-3 and 22-22-4(c)**

Dear Sir/Madam,

The West Virginia Manufacturers Association (“WVMA”) respectfully submits the following public comment regarding the WVDEP’s proposed changes to Legislative Rule 60 CSR 3, titled “Voluntary Remediation and Redevelopment Rule.”

The WVMA was formed in 1915 to improve the health and well-being of the manufacturing industry in West Virginia. WVMA members represent the quality and diversity of products made in the Mountain State. WVMA serves as the voice for industry at the State Capitol and federally as the state partner of the National Association of Manufacturers and the American Chemistry Council.

**Comment 1. Removal of De Minimis Table From The VRP.**

On July 2, 2020, the WVDEP posted a notice of public comment period for Legislative Rule 60 CSR 3. The most significant proposed change is the removal of the *de minimis* criteria from the regulation. The proposed rule removes the De Minimis Table from the rule so that voluntary remediation standards can be updated annually or immediately following significant regulatory changes without requiring the WVDEP to run a new legislative rule each session.

The VRP cleanup *de minimis* criteria are often used when reviewing contaminated soils or groundwater. The *de minimis* criteria are risk-based numbers that generally set a floor for no further action in the State. The WVMA is concerned that setting the *de minimis* criteria separate from the rule gives WVDEP extraordinary discretion in establishing those numbers without public comment or Legislative review. It substantially increases the agency’s authority while reducing input from the public and regulated community. An individual WVDEP toxicologist could have far too much discretion in exercising the agency’s responsibility for calculating the *de minimis* criteria. At any given time, a VRP could adjust these numbers with little to no warning to the regulated community, and with no opportunity for the public to review and provide input on the new criteria. For these reasons, the WVMA objects to the proposed removal of the De Minimis Table from Legislative Rule 60 CSR 3.

On behalf of the WVMA, I thank you for the opportunity to submit this Comments. I look forward to the opportunity to discuss our concerns and otherwise participate in the legislative rulemaking process.

Best regards,  
Rebecca McPhail

Rebecca R. McPhail, President  
West Virginia Manufacturers Association  
2001 Quarrier Street  
Charleston, WV 25311  
304-342-2123 (O)  
304-767-5189 (M)  
[www.wvma.com](http://www.wvma.com)

**60CSR3**  
**VOLUNTARY REMEDIATION AND REDEVELOPMENT RULE**

**RESPONSE TO COMMENTS**

The WV Department of Environmental Protection (WVDEP), Office of Environmental Remediation (OER) commenced the public comment period for proposed legislative rule 60CSR3 on July 2, 2020. The public comment period concluded on August 11, 2020, after satisfying the minimum 30-day period. On August 11, 2020, at 6PM, a public hearing was held virtually to prevent the spread of COVID-19 in accordance with the Governor’s Safer at Home Order and the WVDEP COVID-19 Policy. Members of the public were invited to participate online (<https://us02web.zoom.us/j/85680933629>) or via telephone (929-205-6099) to provide oral comments regarding the proposed revisions to legislative rule 60CSR3.

One (1) written comment was received regarding proposed revisions to rule 60CSR3, and one (1) attendee present at the public hearing provided verbal comments. A summary of the comments is provided below, along with the agency’s responses. The full comments can be found within the public hearing transcript and attached written comments, also part of the formal rulemaking record.

As a result of the public comments, WVDEP-OER added subdivision 9.2.d. “Revisions to the De Minimis Standards”, which outlines a detailed, formal process for calculating the De Minimis Standards, including preferential sources of toxicity data, chemical-specific data, and exposure factors; contracting with a third-party environmental risk assessor to review and verify calculations for correctness; communicating proposed updates; accepting, reviewing, and considering public comments; implementing finalized updates; and providing a means for appeal. This addition does not change how De Minimis Standards have been calculated; however, the proposed new requirements for communicating specific information used to calculate each De Minimis Standard provides an even more robust and transparent De Minimis Standards update process than what is currently required.

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**TOPIC 1:            Removal of the De Minimis Table from 60CSR3**

**COMMENT A (WV Rivers Coalition):**

*I’ve got two questions that I hope could be addressed in a responses to comments. The first dealing with the de minimis standards and I can really appreciate the, I think the intent behind this to make sure that the standards are updated in a timely fashion based on the best available science. It is going to be a different process and my questions revolve around our members’ interest in transparency and decision making processes, especially when they come to things like human health, and I’m wondering if the agency has contemplated how the annual review process will be shared in terms of what data was reviewed and what decisions were come to. I assume that updates will be made via the guidance manual, but I guess what I’m getting at is, I’m more familiar in the water standards world where we’re also looking at human health criteria and the latest science that informs updates in water quality standards. There are some arguments about*

*methodology and sources of data and how those are modeled and calculated, so I'm curious the level of the review that will be conducted and how that process will be shared with the public and stakeholders moving forward. So, that's a thought on the de minimis standards.*

**COMMENT B (WV Manufacturers Association):**

*The VRP cleanup de minimis criteria are often used when reviewing contaminated  
The VRP cleanup de minimis criteria are often used when reviewing contaminated soils or groundwater. The de minimis criteria are risk-based numbers that generally set a floor for no further action in the State. The WVMA is concerned that setting the de minimis criteria separate from the rule gives WVDEP extraordinary discretion in establishing those numbers without public comment or Legislative review. It substantially increases the agency's authority while reducing input from the public and regulated community. An individual WVDEP toxicologist could have far too much discretion in exercising the agency's responsibility for calculating the de minimis criteria. At any given time, a VRP could adjust these numbers with little to no warning to the regulated community, and with no opportunity for the public to review and provide input on the new criteria. For these reasons, the WVMA objects to the proposed removal of the De Minimis Table from Legislative Rule 60 CSR 3.*

**RESPONSE:**

WVDEP-OER appreciates these comments. It was never the intent of the agency to reduce transparency and/or remove public participation and stakeholder input from this process. WVDEP-OER attempted to address any concerns with transparency by specifying the sources of information that the agency must use to develop De Minimis Standards in the original proposed changes to subsection 9.2. However, WVDEP-OER understands that the rule could better define sources for equations, toxicity information, chemical-specific data, and exposure factors used for calculation of De Minimis Standards. Additionally, WVDEP-OER is committed to regularly communicating with all stakeholders, including the regulated community, environmental advocacy groups, and Licensed Remediation Specialists about proposed programmatic changes for additional input; however, WVDEP-OER understands that a legislative mandate for a public comment period is important to ensure this occurs over time.

Based on these comments, WVDEP-OER has added subdivision 9.2.d. "Revisions to the De Minimis Standards", which outlines a detailed, formal process for calculating the De Minimis Standards, including preferential sources of toxicity data, chemical-specific data, and exposure factors; contracting with a third-party environmental risk assessor to review and verify calculations for correctness; communicating proposed updates; accepting, reviewing, and considering public comments; implementing finalized updates; and providing a means for appeal. This addition does not change how De Minimis Standards have been calculated; however, the requirements for communicating the specific information used to calculate each De Minimis Standard provides an even more robust and transparent De Minimis Standards update process than what is currently required.

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**TOPIC 2: Change of Sampling Requirements for Monitored Natural Attenuation**

**COMMENT A (WV Rivers Coalition):**

*On the change to go from sampling, from, how I'm reading it, is going from a four-year semi-annual monitoring regimen now to a two-year quarterly. I'm just curious if there's any suggestion or evidence from the agency's experience where that year three and four has shown up anything different than years one and two and what we might be missing if we condense that time period. Certainly, the more frequent monitoring is something that we would support, but are we going to miss anything by not extending it to that four-year period and making it a shorter period?*

RESPONSE:

There is no suggestion or evidence in the agency's experience that a statistical trend demonstrated over two (2) years changes significantly in years three (3) or four (4). Reducing the minimum data requirements from four (4) years of semiannual samples to eight (8) quarterly samples allows data collected more frequently over a shorter period to be used in a statistical demonstration of attenuation. However, it is important to emphasize that the proposed new data requirements for demonstrating natural attenuation are provided only as a minimum. Regardless of the frequency, the amount of data used to demonstrate natural attenuation must be adequate to satisfy a statistical trend analyses, such as Mann-Kendall.

Natural attenuation takes time, and it is very likely that sites using two (2) years of quarterly data will not have enough data over that length of time to demonstrate attenuation is occurring. Sometimes, the aquifer chemistry at a site coupled with the contaminant chemistry are amenable to natural attenuation, and data can clearly demonstrate this in a fairly short period of time. At most sites, however, a longer period is required, and program participants will be required to collect data over a longer period of time to provide a satisfactory statistical demonstration. WVDEP-OER will review natural attenuation reports, and any site that cannot demonstrate natural attenuation is occurring with just two (2) years of quarterly samples will continue sampling until they have enough data to statistically verify attenuation. In all cases, a groundwater withdrawal restriction must be in place while attenuation is occurring.

Reducing the minimum data requirements provides program flexibility and prevents unnecessary collection of data when the available data is adequate to make a satisfactory statistical demonstration, ultimately resulting in more efficient remediation projects.