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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

2001 OCT 24 A 10: 22

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October 23, 2001

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NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Joe Manchin, Secretary of State, State Register

TO: Rita Pauley
DEP-Director's Office
1356 Hansford Street
Charleston, WV 25301

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Voluntary Remediation and Redevelopment Rule, 60CSR3**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule
 - (a) as originally filed
 - (b) as modified by the agency
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached.

SCANNED

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Department of Environmental Protection
Subject: Voluntary Remediation Redevelopment Rule
CSR Cite: 60CSR3
Counsel: JAA

FILED
2001 OCT -2 A 9:57
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PERTINENT DATES

Filed for public comment: June 22, 2001
Public comment period ended: July 23, 2001
Filed following public comment period: July 26, 2001
Filed LRMRC: July 26, 2001
Filed as emergency: n/a

Fiscal Impact: None.

ABSTRACT

This rule establishes reclamation standards for "Brownfields" which are polluted industrial and commercial sites which are being reclaimed for further use. This rule is being amended to modify the de minimis standard to allow that standard to be applied to a broader range of sites.

Section 9.1.a.5. is new and provides that if "free product" is found at a site, remediation is required.

Section 9.2.a., the de minimis standards for soil is amended to allow an exceedence of the de minimis standard if it is shown to

the satisfaction of the Director that no migration of contaminants to groundwater will occur.

Section 9.2.a.1. is amended by specifically defining risk-based concentrations for human health direct exposures as "ingestion, dermal and inhalation."

Section 9.2.a.2. is amended to provide that natural background levels are determining by utilizing Director approved methods for sampling and statistical analyses.

Section 9.2.f. is amended to reflect the de minimis standards exceptions created in Section 9.2.a.

Table 3B has been revised to adopt a new spreadsheet that allows adjustable policies and procedures for toxicity and physical chemical property data analysis, allowing analysis of probabilities of migration of contaminants to groundwater.

AUTHORITY

Statutory authority: W.Va. Code, §22-22-3, which provides:

Within one year after the effective date of this section, the director, in accordance with chapter twenty-nine-a of this code, shall propose, and subsequently may amend, suspend or rescind, rules that do the following:

(a) Establish an administrative program for both brownfield revitalization and voluntary remediation, including application procedures;

(b) Establish procedures for the licensure of remediation specialists, including, but not limited to establishing licensing fees, testing procedures, disciplinary procedures and methods for revocation of licenses;

(c) Establish procedures for community notification and involvement;

(d) Establish risk-based standards for remediation;

(e) Establish standards for the remediation of property;

(f) Establish a risk protocol for conducting risk assessments and establishing risk-based standards. The risk protocol shall:

(1) Require consideration of existing and reasonably anticipated future human exposures based on current and reasonably anticipated future land and water uses and significant adverse effects to ecological receptor health and viability;

(2) Include, at a minimum, both central tendency and reasonable upper bound estimates of exposure;

(3) Require risk assessments to consider, to the extent practicable, the range of probabilities of risks actually occurring, the range or size of populations likely to be exposed to risk, and quantitative and qualitative descriptions of uncertainties;

(4) Establish criteria for what constitutes appropriate sources of toxicity information;

(5) Address the use of probabilistic modeling;

(6) Establish criteria for what constitutes appropriate criteria for the selection and application of fate and transport models;

(7) Address the use of population risk estimates in addition to individual risk estimates;

(8) To the extent deemed appropriate and feasible by the director considering available scientific information, define appropriate approaches for addressing cumulative risks posed by multiple contaminants or multiple exposure pathways;

(9) Establish appropriate sampling approaches and data quality requirements; and

(10) This protocol shall include public notification and involvement provisions so that the public can understand how remediation standards are applied to a site and provide for clear communication of site risk issues, including key risk assessment assumptions, uncertainties, populations considered, the context of site risks to other risks and how the remedy will address site risks;

(g) Establish chemical and site specific information, where appropriate for purpose of risk assessment. Risk assessments should use chemical and site specific data and analysis, such as toxicity, exposure and fate and transport evaluations in preference to default assumptions. Where chemical and site specific data are not available, a range and distribution of realistic and plausible assumptions should be employed;

(h) Establish criteria to evaluate and approve methods for the measurement of contaminants using the practical quantitation level and related laboratory standards and practices to be used by certified laboratories;

(i) Establish standards and procedures for the utilization of certificates of completion, land use covenants and other legal documents necessary to effectuate the purposes of this article; and

(j) Establish any other rules necessary to carry out the requirements and the legislative intent of this act.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has a technical change to recommend.