Chapter 692 Siting of Oil Storage Facilities

Basis Statement

The requirements of the rule support the implementation of Maine's new wellhead protection law, Wellhead Protection 38 MRSA §§1391-1399. The purpose of the law as stated in section 1391 is "to protect the health, safety and welfare of Maine's citizens by establishing a coordinated statewide program to protect drinking water wells from contamination by oil or hazardous substances." The law accomplishes this purpose mainly by restricting the siting of facilities that, by their nature, pose an unacceptable risk to groundwater quality and therefore should be kept away, if at all possible, from drinking water supplies, including sand and gravel aquifers mapped by the Maine Geological Survey. These aquifers are the most cost effective potential future public water sources for Maine communities fortunate enough to have them but they are particularly vulnerable to contamination because of their inherent permeability. Chapter 692 furthers the purpose of the law by establishing the siting restrictions that apply to oil storage facilities.

The rule establishes provisions for variances in a number of instances: 1) when it has been demonstrated that there is no hydrological connection between the facility and the water supply at issue; 2) when it has been affirmatively demonstrated that the aquifer has been incorrectly mapped; 3) when it has been affirmatively demonstrated that the aquifer has a potentially low use or is polluted; or 4) when an applicant has demonstrated that the facility will be designed and installed to further reduce the risk of discharges of oil and the likelihood of future ground water contamination.

The variance provisions of the rule include specific engineering, siting and monitoring criteria to ensure that the intent of the enabling legislation is met. The rule also establishes application, public notice and public meeting requirements as otherwise set forth in Rules Concerning the Processing of Applications and Other Administrative Matters, 06-096 CMR 2 (last effective date April 1, 2003).

The Board of Environmental Protection received a number of comments on this rule during a public hearing held August 6, 2009 in Augusta, Maine. Written comments were accepted in the record until 5:00 P.M. on August 17, 2009.

RESPONSE TO COMMENTS

List of Commentators

Ben Gilman, Director of Government Affairs, Maine Oil Dealers Association (MODA)

1) The language "including the installation of an aboveground heating oil supply tank" seems to be redundant to the first part of the sentence. MODA would recommend the removal of the language after the word including.

Response: The Department agrees, and has amended the language in Section 3(A)(4) as recommended.

2) There are several references in the proposed rules to "application by the owner of a proposed facility," MODA proposes to change the language of owner to "applicant" or "or owner or applicant." There could be situations that arise when someone other than an owner might apply for a variance for a proposed facility at a location that they do not own. For example the sale of the location could be dependent of approval of the variance and the person applying for the variance is the purchaser and not the owner. This change in language would help address this case. MODA would recommend changing the term "owner" to "applicant."

Response: The Department agrees and has eliminated the definition of "owner" and replaced the term owner with the term "applicant" as it applies to application requirements throughout the rule. Section 5 of the rule requires that an application meet the requirements of the 06-096 CMR 2(11)(D) that sets forth the application requirements for title, right or interest, including but not limited to, ownership, an option to buy or a leasing agreement. This change is consistent with other Department rules governing application requirements.

3) Under the high potential aquifers, variance prohibited section there should be language inserted to reflect a "correctly" mapped aquifer. The mapping of aquifers has been very well done but in a case where the mapping has not been done 100% correctly there should be a way in the rules to address this issue. Under the current rule, once "mapped" it cannot be corrected even if it was mapped in error. MODA would recommend inserting the word "correctly" in the 3rd sentence before the word mapped to read "correctly mapped aquifer."

Response: According to Robert Marvinney, State Geologist and Director of the Maine Geological Survey, mapped high yield aquifers represent only 3.5% of the mapped aquifer areas in the State. In almost every instance, they have been identified by the

presence of high yield wells. There is actual empirical evidence that these areas can support wells with yields > 50 gallons per minute. Given the small percentage of mapped aquifers that are designated as high yield and the relationship of mapped high yield areas to existing high yield wells, the department considers it prudent to restrict development in these areas.

The department does not feel it is the appropriate entity to render decisions on the accuracy of high yield aquifers mapped by the Maine Geological Survey or ground water resource protection zones as designated in municipal ordinances or LURC zoning rules.

To address the comment, the department has included a note in this section that directs an applicant to those entities responsible for the mapping or identification regarding appropriate changes.

4) The department should include the ability to allow a variance under 4(E) when the mapping has not been done correctly. MODA would recommend inserting "4(E) under a section that a variance can be sought.

Response: As discussed in the response to comment # 3 above, the department does not believe it is in the best interests of protecting Maine's most important groundwater resources, i.e. high potential aquifers, to allow for variances. The inclusion of the added note should clarify that potential errors in the mapping or identification process should be directed to those entities responsible for the mapping or identification. Any changes that may arise from that effort may provide the relief that the commenter is seeking.

While the department stands by its position to disallow variances under section 4(E), language has been added to address an apparent conflict with section 4(B), Variance for incorrectly mapped aquifer. The phrase "Notwithstanding section 4(B)," has been added to the beginning of the first paragraph in section 4(E). This is to clarify that no variances are allowed in high potential aquifers.