

# Variances and Case-by-Case Determinations

OAC 3745-300-12

Certified Professional  
8-Hour Training



# Changes to rule

- Variances (existing)
- Case-by-Case Determinations (new)
- Fees (change)
- Withdrawals (new)
- Examples of variance and case-by-case situations.



# Purpose

- The overall purpose of this rule and the proposed changes is to provide volunteers flexibility to address complex technical issues where existing VAP tools do not help.
- The new rule language completely replaces the existing rule. It was easier to completely rewrite it to be more understandable and easier to follow.



# Variations – Authority and Scope

- In existing rule. Authority under ORC 3746.04(B)(11) and 3746.09.
- A variance can only vary or change an applicable standard (i.e. soil generic standards, UPUS, VI and other risk-based standards) and replaces it with another standard.
- Applies to all environmental media.



# Variations – Approval Criteria

- Technically infeasible to comply with applicable standard, or costs exceed economic benefit; and
- Alternate standard improves environmental conditions and protects public health and safety; and
- Alternate standard promotes or preserves employment opportunities or reuse of the property.



# Case-by-Case Determinations

- Authority under ORC 3746.04(B)(12).
- It renders a generic numeric or risk derived ground water standard inapplicable to a property. It does not apply to other media or standards; only ground water.



# Case-by-Case – Approval Criteria

- Rendering the ground water standard inapplicable must still ensure that public health and safety is and will continue to be protected. An alternate standard or special site-specific terms will be proposed and/or imposed to meet this criteria.
- Director must consider public comments.



# Quick Comparison

Variance (existing rule)	Case-by-Case (new)
Applies to any applicable standard (soil, GW, SW, sediment, and VI).	Only applies to ground water standards.
Varies an existing standard and replaces it with an alternate standard.	Renders a ground water standard inapplicable. An alternate standard or conditions will be proposed.
Criteria – technically infeasible, economic benefits, protective of public health and safety, employment opportunities and must consider public comments.	Criteria – must ensure public health and safety is and will continue to be protected, and must consider public comments.





# Application Process (existing rule)

- Variance and case-by-case processes are nearly identical.
- Name of applicant, CP, CL, property description, applicable standard, proposed alternate standards, Phase I info, Phase II info, adjacent property owners, and demonstration meeting approval criteria.
- Forms will be developed for consistency.



# Application review process (existing rule)

- Director determines complete application; may request additional information.
- Director sets up public meeting and notice.
- Director issues proposed action (approval/denial).
- Director issues final action.



# Application review process (existing rule)

- Must be approved before issuance of an NFA Letter that relies upon the new standard.
- Approval time of 6-8 months, minimum. This is based on the extensive and detailed public process outlined in statute. May take longer depending on complexity of technical review.



# Proposed Administrative fee (change)

- New fee structure applies to both variance and case-by-case applications.
- Old flat fee = \$26,120 for a variance.
- New = actual costs incurred as part of a technical assistance account.



# Application withdrawal option (new)

- Withdrawal applies to both variance and case-by-case applications.
- Applicant may request to withdraw at anytime prior to a final action by the director (approval/denial).
- Any costs incurred to that point are non-refundable.



# Variance example

- Brownfield property with contaminated soil and ground water located in a Village.
- TCE is migrating off-property above UPUS at 127  $\mu\text{g/L}$ .
- Ground water is Class A.
- Down-gradient receptors include commercial and residential properties.



## Variance example (continued)

- Contaminated soil excavated.
- (2) Rounds of in-situ chemical oxidation performed on ground water.
- Off-property wells and soil-gas probes.
- (4) Rounds of post-remedy ground water sampling.



## Variance example (continued)

- TCE in GW significantly reduced to 8 µg/L, but still exceeds UPUS at the property line.
- Both on and off-property vapor intrusion pathways are incomplete.
- Community is on municipal water.
- Additional remedial actions are not expected to yield additional reduction in TCE.
- Village not eligible for USD.





# Variance example (continued)

- Volunteer can seek a variance.
- Prior to issuance of an NFA Letter, a request for a variance from the TCE standard at the property line on the basis of technical infeasibility (UPUS = 5  $\mu\text{g/L}$ ).
- Public hearings and comment taken prior to director issuing variance.
- Alternate standard of 8  $\mu\text{g/L}$  is proposed.



# Variance example (continued)

## Threshold Criteria :



- Additional reduction in TCE levels is not technically feasible (or is not cost effective).
- Current/reasonably anticipated receptors are protected & environmental conditions are improved.
- Approval of a variance allows the property to go through the VAP which will enhance its reuse.

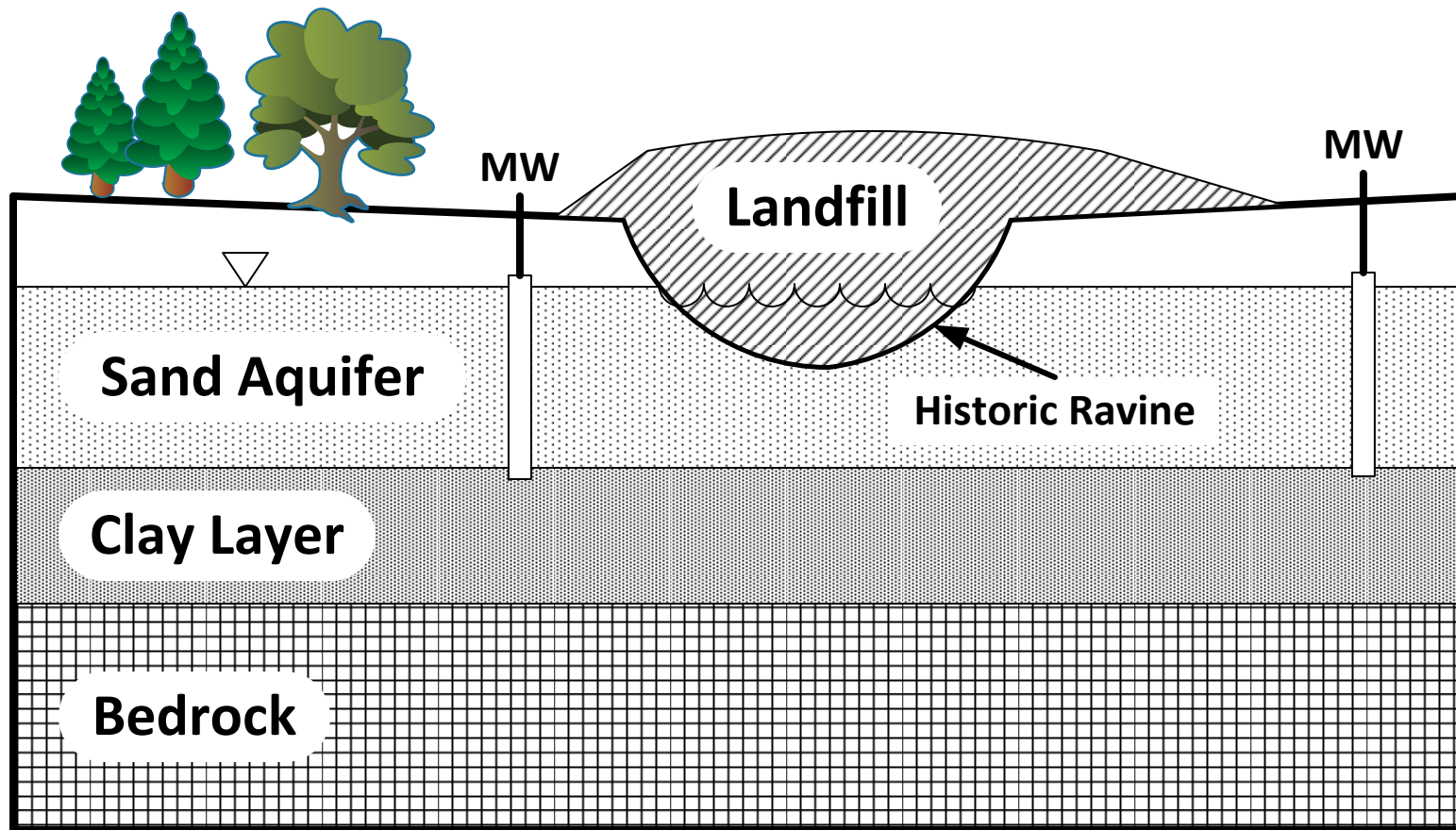


# Case-by-case groundwater example

- Brownfield that contains an unregulated landfill.
- Landfill is known to contain hazardous substances at depths in contact with upper ground water zone.
- Ground water sampled near the landfill in the upper zone meets UPUS.
- Protection requirements apply to the upper ground water zone.



# Cross-section



## Case-by-case example – situation:

- Landfill leachate is in direct communication and part of the upper zone.
- It is not practical to excavate the landfill.
- No potable use of ground water in the upper zone.
- A USD does not relieve the requirement to protect a clean ground water zone.



## Case-by-case example (continued)

- ORC 3746.06 states that if ground water under a property meets “residential use” standards, the voluntary action must ensure compliance with those standards into the future (i.e. POGWMUPUS).
- For this landfill scenario where ground water meets UPUS, making this demonstration may be difficult, and the existing VAP tools can’t help.



# Case-by-case example (continued)

- Protecting this zone is unreasonable.
- Prior to issuance of an NFA Letter, the volunteer requests a case-by-case determination to render the “residential use” std. of POGWMUPUS inapplicable to the property.
- Must go through public hearing and comment.
- All non-potable pathways must still be evaluated



# Case-by-case example (continued)

- All other non-potable pathways were evaluated and found to be protective.
- Public hearing and comments were considered.
- Potable ground water use restriction required to ensure protectiveness going forward.
- The groundwater standards are replaced by new standards or conditions that makes sense for the specific set of circumstances.

