

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #4

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY 19-16A

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12D

TITLE OF RULE BEING AMENDED: Regulations to Govern the Aerial
Application of Herbicides to Rights of Way (repeal and replace).

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



TITLE 61
WEST VIRGINIA LEGISLATIVE RULE
WEST VIRGINIA DEPARTMENT OF AGRICULTURE
SERIES XIID

Title: Aerial Application of Herbicides to Utility Rights-of-Way

61-12D-1. General

1.1 Scope - This legislative rule establishes the minimum standards governing the aerial application of herbicides to utility rights-of-way.

1.2 Authority - W. Va. Code 19-16A-4

1.3 Filing Date -

1.4 Effective Date -

1.5 Repeal of Former Rule - This legislative rule repeals and replaces West Virginia Department of Agriculture Administrative Regulations Series XIID effective September 1, 1981.

61-12D-2. Definitions

2.1 "Utility rights-of-way" means those rights-of-ways maintained by persons providing public service to the citizens of the state and may include but is not limited to electric companies, gas companies, communication companies and railroads.

61-12D-3. Prior Notification

3.1 Persons intending to aerially apply herbicides on utility rights-of-way, except on rights-of-way specifically excepted by laws held by the Attorney General of West Virginia to be preemptory, shall notify to the following persons, in writing at least 60 days and no more than 120 days prior to the anticipated beginning of the aerial spray program: the commissioner of the West Virginia Department of Agriculture, all news media within the counties where the aerial herbicide application program is to be conducted, all persons in the spray area on the hypersensitivity registry maintained by the West Virginia Department of Agriculture; and all property owners, tenants or other persons in control of land adjacent to the rights-of-way, who have made a written request to the utility for special advance notification. A written request for special advance notification shall include the name, mailing address, property location and telephone number, if any, of the person making the request.

3.1.a The notice shall include, but is not limited to:

- 3.1.a.A. a description of the area(s) to be aerial sprayed;
- 3.1.a.B. a toll-free telephone number and an address of a utility office to which people can call or write to alert the utility to sensitive areas - including, but not limited to springs, wells, streams, lakes, ponds, orchards, crop areas, gardens, pastures, meadows, year around dwellings, public recreation areas, and Christmas tree plantations. A caller should, whenever possible, reference the location they are calling about to pole or tower numbers on the rights-of-way;
- 3.1.a.C. information describing how a land owner or tenant can enter into a rights-of-way maintenance agreement with the utility;
- 3.1.a.D. the location of a county or area office of the utility where individuals can inspect maps showing the location of rights-of-way that are to be sprayed;
- 3.1.a.E. the herbicides to be used in the project, and
- 3.1.a.F. the procedures to be followed in lodging a complaint with either the utility or with the West Virginia Department of Agriculture.

3.1.b. The utility shall, on a weekly basis, provide the contemplated aerial spray program for the following week to the commissioner of the West Virginia Department of Agriculture and to a radio or TV station serving each county in which the aerial application of herbicides is planned. The utility shall make the initial notice each year on each of two weeks immediately

proceeding the proposed beginning of the aerial herbicide spray program.

61-12D-4 Procedural Prohibitions and Restrictions

4.1 The aerial application of herbicides is prohibited when:

4.1.a. the wind velocity in the local area exceeds five (5) miles per hour;

4.1.b. the spray may come into contact with fog banks;

4.1.c. there are periods of temperature inversion and air stagnation;

4.1.d. the air temperature exceeds 90 degrees Fahrenheit - except that the application of herbicides containing low-volatile amines and chemicals whose volatility is known to not be a problem will not be prohibited at temperatures above 90 degrees Fahrenheit;

4.1.e. it is raining or reasonably apparent that it will rain within two hours, or;

4.1.f. the distance between the transmission line(s) at maximum design sag and the ground is greater than 100 feet.

4.2 Before herbicides are applied, the applicator shall fly a reconnaissance flight over the area to be sprayed and shall not apply herbicides if humans or domestic animals are visible in areas subject to the intended application of herbicides.

4.3 The applicator for the utility shall not apply herbicides to any body of water during aerial spraying of rights-of-way to control woody vegetation.

61-12D-5. Minimum Spray Distances

5.1 The applicator for the utility shall not apply herbicides within the distance specified in the tables contained in this section of the rule. The following minimum spray distances shall be adhered to unless greater distances are specified on the label of the pesticide.

5.1.a. Formulations Containing Picloram or Dicamba
herbicides:

AREA

Ponds	100 feet
Year Around Flowing Water (including wells, springs, and other water areas used for domestic purposes)	200 feet
Cultivated Land, Except Tobacco fields	100 feet
Tobacco fields	500 feet
Christmas Tree Plantations	100 feet
Pasture Lands	100 feet
Public Recreation Areas	100 feet
Residential Structures (used as year-around homes)	150 feet
Barns and Other Outbuildings Where People or Livestock Might Ordinarily Be Expected	150 feet
County, State, and Federal, Graveled or Paved Road Crossovers and Lines paralleling such Roads	50 feet

5.1.b. Other Herbicide Formulations Not Listed in sub
division 5.1.a. of this rule.

AREA

Ponds	100 feet
Year Around Flowing Water (including wells, springs, and other water areas used for domestic purposes)	200 feet
Cultivated Land, except Tobacco fields	100 feet
Tobacco fields	200 feet
Pasture Lands	100 feet
Christmas Tree Plantations	100 feet
Residential Structures (used as year around homes)	100 feet
Barns & Other Outbuildings Where People or Livestock Might Ordinarily Be Expected	150 feet
Public Recreation Areas	150 feet
County, State, and Federal, Graveled or Paved Road Crossovers and lines Parallelling such Roads	50 feet

5.2. Application Spray System.

The minimum spray distance listed in sub-divisions 5.1.a. and 5.1.b. of this rule applies to applications utilizing a drift control system such as a microfoil spray boom or its equivalent. Persons using non-drift control technology in the aerial application of herbicides shall notify the commissioner of the West Virginia Department of Agriculture in writing and shall specify minimum spray distances at least double those listed in sub-divisions 5.1.a. and 5.1.b. of this rule.

5.3. Measured Tolerance - The commissioner will use a tolerance of ten (10) percent in the minimum spray distances to assess acceptability with this section.

61-12D-6. Company Monitoring of Herbicide Applications to their Rights-of-Way

6.1.a. Utility personnel shall inspect their rights-of-way which have been sprayed with herbicides to insure that applicable standards have been adhered to and shall keep a log of such inspections on file for at least two (2) years. The log shall contain the following information.

6.1.a.A. the inspector's name;

6.1.a.B. the date of the inspection;

6.1.a.C. a description or identification of the area inspected; and

6.1.a.D. a record of compliance or deviation from this rule.

61-12D-7. Exceptions

7.1 When a person owns a right-of-way wholly on his private or corporate property, he may ask the commissioner for an exception from the prior notification requirements of section 3 of this rule. The commissioner may grant an exception from these requirements in situations where prior notification does not serve to protect the public interest. The commissioner shall consider each request for an exception on a case by case basis.

7.2 Persons requesting a deviation from Section 3 of this rule shall provide the Commissioner with the following information.

7.2.1.a. the location of the rights-of-way to be sprayed;

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- 7.2.1.b the distance from the rights-of-way to residences, public highways, agricultural lands or navigatable rivers; and
- 7.2.1.c. the herbicides to be sprayed, including application rates.



FILED

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WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Room M-152, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Senator William R. Wooton, Co-Chairman
Delegate David Grubb, Co-Chairman

Debra A. Graham, Counsel
Michael McThomas, Associate Counsel
Marie Wickerson, Admr. Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 30, 1991

TO: Ken Hechler, Secretary of State, State Register

TO: The Honorable Cleve Benedict
Commissioner
Department of Agriculture
State Capitol
Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Regulations to Govern the Aerial Application of
Herbicides to Rights of Way

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 X
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 rule be withdrawn; a statement of
reasons for such recommendation is attached. _____

Pursuant to Code 29A-3-11(c), this notice has been filed in the State
Register and with the agency proposing the rule.

cc: Mr. Robert Frame
Director, Pesticide Division
Ms. Barbara Smith
Compliance Division