

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Department of Agriculture TITLE NUMBER: 61

RULE TYPE: Legislative; CITE AUTHORITY 19 - 16A

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 12e

TITLE OF RULE BEING PROPOSED: Assessment of Civil Penalties and Procedures
for Consent Agreements or Negotiated Settlement

DATE OF PUBLIC HEARING: July 30, 1991 TIME: 10:00 a.m.

LOCATION OF PUBLIC HEARING: West Virginia Department of Agriculture
J. T. Johnson Conference Room, Bldg. 2
Guthrie Agriculture Center
Charleston, WV 25312

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: WV Dept. of Agriculture
Pesticide Division
1900 Kanawha Blvd., East
Charleston, WV 25305

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



3.20

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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Rule Title: Assessment of Civil Penalties and Procedures for Consent Agreements
or Negotiated Settlement

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 PROCEDURAL

Type of Rule: X Legislative Interpretive Procedural

Agency Dept. of Agriculture Address Capitol Building Room 28
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

No increase or decrease is expected as the regulations apply to ongoing program activities.

3. Objectives of these rules:

To establish a penalty mechanism that is firm and equitable to all persons being regulated.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None - These regulations are a continuation of program enforcement efforts.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

None - These regulations are a continuation of program enforcement efforts.

C. Economic Impact on Citizens/Public at Large.

None - These regulations are a continuation of program enforcement efforts.

Date: June 21, 1991

Signature of Agency Head or Authorized Representative



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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Summary of Legislative Rule 61 - 12E

This rule establishes procedures and a matrix for the levy of civil penalties for violations of the Pesticide Control Act of 1990. Procedures are established to allow penalty settlement of such penalties through a consent argument negotiated settlement by way of an informal hearing or a formal administrative hearing.

Statement of Circumstance

These rules are necessary to implement provisions of the Pesticide Control Act of 1990 establishing levels of civil penalties and allowing for procedures to settle penalties through consent agreement or negotiated settlement.

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TITLE 61 LEGISLATIVE RULES
STATE DEPARTMENT OF AGRICULTURE
SERIES XIie

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TITLE: Assessment of Civil Penalties and Procedures for
Consent Agreements or Negotiated Settlement.

\$61-12E-1 General

1.1 Scope - These legislative rules establish procedures to provide for consent agreements or negotiated settlement of civil penalties assessed in dealing with violations of the West Virginia Pesticide Control Act and promulgated regulations.

1.2 Authority - WV Code \$19-16A-4, \$19-16A-22

1.3 Filing Date -

1.4 Effective Date -

\$61-12E-2 Definition

2.1 "Act" means the West Virginia Pesticide Control Act of 1990 (West Virginia Code \$19-16A).

2.2 "Compliance Officer" means a person appointed by the commissioner to preside over an informal hearing arising as a result of these rules.

2.3 "Consent Agreement" means a document executed between the commissioner and another party affirming a level of a proposed penalty for an alleged violation or violations.

2.4 "Enforcement Officer" means a person appointed by the commissioner to carry out the review, assessment and procedure contained in these rules.

2.5 "Inspector" means an authorized representative of the commissioner who as a normal function of his responsibilities conducts inspections, investigations, or sampling of activities regulated by the Act.

2.6 "License Violation" means any violation of the Act related to the requirements for the licensing or registration of pesticide businesses, applicators or technicians.

2.7 "Negotiated Settlement" means any written document executed between the commissioner and another party affirming an agreement to a penalty as a result of an informal hearing.

2.8 "Non-Use Violation" means any violation of the Act characterized by requirements for records, supervision, special regulations or misrepresentation of goods and service.

2.9 "Product Violation" means any violation of the Act related to requirements of product registration, labeling, coloration, product integrity or guaranteed analysis.

2.10 "Use Violation" means any violation of the Act related to requirements for the use of pesticides.

2.11 "Violator" means the person who is alleged to have violated the Acts, or any rule, regulation, order, or permit condition imposed pursuant to the Act.

\$61-12E-3 Procedure

3.1 These penalty assessment rules are designed to include most violations encountered of the Act by licensed pesticide businesses, certified applicators and non-certified applicators. However, there may be situations which arise that are not adequately covered by these rules. In such cases, the enforcement officer shall determine an appropriate course of action and make a recommendation for such action to the commissioner. After review of the circumstances, the commissioner may concur with the recommendation or give direction for other appropriate action as prescribed under the authority of the Act.

3.2 The enforcement officer reviewing a case will prepare a finding of facts surrounding any discovered violation of the Act. Once a violation is discovered the enforcement officer shall determine;

3.2.1 The appropriateness of civil penalty or criminal enforcement action;

3.2.2 The character of the violation and the appropriate enforcement level as contained in schedule of penalty codes contained in Table 61-12E-A. The violation shall be categorized into the following types:

3.2.2.1 Licensing violations;

3.2.2.2 Non-Use violations;

3.2.2.3 Use violations;

3.2.2.4 Product violations

3.2.3 Once a penalty code is established, the enforcement officer will refer to the schedule of penalty levels contained in Table 61-12E-B to determine a monetary assessment. In determining the level of penalty the enforcement office shall consider:

3.2.3.1 The gravity of the violation;

3.2.3.2 The degree of the violators's culpability;

3.2.3.3 The degree of the violator's effort to comply; and

3.2.3.4 The history of prior violations.

3.2.4 The time interval between the first offense and each repeated offense, beyond which no enforcement action may be taken and which shall clear the applicators record, will be limited to two years for all use, non-use or product violations. There shall be no time limit for licensing violations.

3.3 Any denial, suspension, revocation or modification of a license, permit or certification shall comply with the requirements of §19-16A-18. The offender will be notified of the alleged violations and offered an opportunity for a formal hearing prior to such action.

3.4 Any consent agreement or negotiated settlement agreed upon and signed by the violating party and the duly appointed representative of the commissioner shall be deemed as a penalty levied through an administrative hearing for purposes of collection and such other action as deemed proper and included in the consent agreement or negotiated settlement.

§61-12E-4 Consent Agreement/Negotiated Settlement

4.1 Consent agreements or negotiated settlements are intended as a mechanism to settle violations without expensive costs to both parties for administrative or criminal hearings. The violations cited are capable of being recognized by the violator and the penalty settlement could be accomplished without a hearing. The violator is provided a written notice of violation, by certified mail or personal service, including a finding of fact and a proposed level of enforcement action. If the violator agrees with the intended level of action, a consent agreement form is signed and returned with payment of the assessed penalty.

4.2 Right to informal hearing. In the event that the violator disagrees with the findings of the investigation and/or level of enforcement action, the violator shall have 20 calendar days from his receipt of the notice of civil penalty to request an informal hearing with the compliance officer to offer any mitigating circumstances as to why the investigative findings or level of enforcement action should be altered.

4.3 Notice and Scheduling of Informal Hearing. If the violator requests an informal hearing within the twenty day period, the enforcement officer shall schedule such a hearing in accordance with the following procedures:

4.3.1 The time and place the informal hearing is to be held shall be communicated to any inspector or other authorized representative of the commissioner who was involved in the investigation of the violation bringing about the informal hearing and to the violator.

4.3.2 Such communication shall be provided at least fifteen (15) calendar days prior to the time of the hearing.

4.3.3 The compliance officer may continue the informal hearing only for good cause shown.

4.4 Informal Hearing Procedures. An informal hearing, as provided by these regulations, is intended to be an informal discussion of the facts which gave rise to the issuance of a notice of violation and shall be conducted in the following manner:

4.4.1 The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence shall not apply.

4.4.2 A record of the informal hearing is not required but may be made by any party to the hearing at that party's expense. Any other party to the hearing may obtain copies thereof at the expense of the party requesting such copy.

4.4.3 At formal review proceedings which may ensue, no evidence as to any statement made by one party at the informal hearing may be introduced as evidence by another party, nor may any statement be used to impeach a witness, unless the statement is or was available as competent evidence independent of its introduction during the informal hearing.

4.5 Written decision. Within thirty (30) calendar days following the informal hearing, the compliance officer shall issue and furnish to the violator a written decision affirming, decreasing, or dismissing the initial civil administrative penalty assessment and giving the reasons therefor.

4.6 **Contested Cases, Request for Formal Hearing.** Within thirty (30) calendar days after notification of the compliance officer's decision, the violator may contest that decision by requesting a formal hearing before the commissioner in accordance with the provisions of the Act. Any such hearing conducted shall also comply with the Administrative Procedures Act §29A-5-1 et seq. If no hearing is requested the compliance officer's decision shall become a final order after the expiration of the thirty day period and the civil administrative penalty shall become due and payable.

TABLE 61-12E-A
Schedule of Penalty Codes

License Violations.

A First Offense, No Prior Knowledge, Written Notice	B Prior Knowledge	C Each Repeat Offense or Non- Compliance after Notice
PC-1 Adverse effects not probable	E1	E2
PC-2 Adverse effects Unknown	E2	E3
PC-3 Adverse effects probable or demonstrated.	E3	E4

Non-Use Violations

A First Offense	B Second Offense	C Each Repeated Offense
PC-4 Regulations with no adverse effects or records statements	E1	E2
PC-5 Special regulations or regulations resulting in adverse effects	E1	E2
PC-6 Each repeated offense	E2	E3

Use Violations

	A First Offense	B 2nd Offense or Knowing 1st Offense	C Each Repeated Offense
PC-7 Adverse effect not probable	E1	E3	E4
PC-8 Adverse effects Unknown	E2	E4	E5
PC-9 Adverse effects on plants or animals probable or demonstrated	E3	E5	E6
PC-10 Adverse effects to known probable or demonstrated	E4	E6	E7

Product Violations

	A First Offense Offense	B Each Repeated Offense
PC-11 No probable adverse effects	E1	E3
PC-12 Unknown Adverse effects	E2	E4
PC-13 Adverse effects probable or demonstrated	E3	E5
PC-14 Cross Contamination	E3	E5

TABLE 61-12E-B
Schedule of Penalty Levels

<u>Level</u>	<u>Level of Penalty</u>
E1	Letter of Warning
E2	\$50 - \$200
E3	\$200 - \$300
E4	\$350 - \$500
E5	\$500 - \$650
E6	\$650 - \$800
E7	\$800 - \$1,000