

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Form #7

Effective Date

Oct. 21, 1991

NOTICE OF AN EMERGENCY RULE

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY: 19-16A

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 12F

TITLE OF RULE BEING FILED AS AN EMERGENCY: Assessment of Civil

Penalties and Procedures for Consent Agreement or Negotiated Settlement  
(rule originally filed as 12E has been changed to 12F)

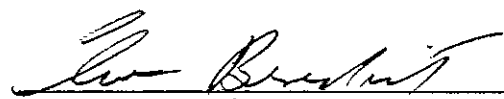
THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

This rule is being filed as an emergency for the immediate preservation of the public health, safety or welfare. This rule will allow the Department of Agriculture to assess civil penalties against violators of the Pesticide Control Act of 1990. The assessment of penalties, or the threat of such, serves to achieve compliance with the law by the industry, and therefore, acts to ensure that pesticides are used in a safe and effective manner. The implementation of this provision is needed immediately in order to achieve these goals.

9.50

Use Additional Sheets If Necessary.

  
Signature

DATE: 9-26-91

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Barbara Smith, Director of Compliance, WV Dept. of Agriculture

EMERGENCY RULE TITLE: Assessment of Civil Penalties and Procedures for  
Consent Agreement or Negotiated Settlement

1. Date of filing: 10-2-91
2. Statutory authority for promulgating the emergency rule:  
19-16A
3. Date of filing of proposed legislative rule: August 8, 1991  
(agency approval)
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
This is a new rule.
5. Has the same or similar emergency rule previously been filed and expired?  
No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare  
This rule is being filed as an emergency for the immediate preservation of the public health, safety or welfare. This rule will allow the Department of Agriculture to assess civil penalties against violators of the Pesticide Control Act of 1990. The assessment of penalties, or the threat of such, serves to achieve compliance with the law by the industry, and therefore, acts to ensure that pesticides are used in a safe and effective manner. The implementation of this provision is needed immediately in order to achieve these goals.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

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APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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

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

*Clive Benedict*

TITLE 61 LEGISLATIVE RULES  
SERIES XIIF

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

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§61-12F-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 rules.

1.2 Authority - WV Code §19-16A-4, §19-16A-22

1.3 Filing Date -

1.4 Effective Date -

§61-12F-2 Definition

2.1 "Act" means the West Virginia Pesticide Control Act of 1990 (West Virginia Code §19-16A-1 et seq.).

2.2 "Administrative Hearing Officer" means a person contracted by the commissioner to preside over a formal hearing.

2.3 "Commissioner" means the Commissioner of the West Virginia Department of Agriculture or his authorized representative.

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

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

2.6 "Enforcement Officer" means a person appointed by the commissioner to carry out the review of alleged violations, assessment of the penalty and the procedure contained in these rules.

Department of Agriculture  
Leg. Rules 19-16A  
Series XIIF, Sec. 2

2.7 "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.

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

2.9 "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.

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

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

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

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

§61-12F-3 Procedure

3.1 These civil penalty assessment rules are designed to include most violations of the Act encountered by 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 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 is no time limit for licensing violations.

3.3 The enforcement officer reviewing a case shall prepare a finding of facts surrounding any discovered violation of Section 21 of the Act. Once a violation is discovered the enforcement officer shall determine:

3.3.a The appropriateness of a civil penalty or criminal enforcement action;

3.3.b The character of the violation and the appropriate enforcement level as contained in the schedule of penalty codes contained in Table 61-12F-A of this rule. The violations are categorized into the following types:

- 3.3.b.A Licensing violations,
- 3.3.b.B Non-Use violations
- 3.3.b.C Use violations
- 3.3.b.D Product violations

3.4 Upon establishing a penalty code, the enforcement officer shall refer to the schedule of penalty levels contained in Table 61-12F-B of this rule to determine a monetary assessment. In determining the level of penalty the enforcement officer shall consider the following factors:

- 3.4.a The gravity of the violation;
- 3.4.b The degree of the violator's culpability;
- 3.4.c The degree of the violator's effort to comply with the Act and rules promulgated under the Act;
- 3.4.d. The violators history of prior violations.

3.5 Any denial, suspension, revocation or modification of a license, permit or certification shall comply with the requirements of Section 18 of the Act. The commissioner shall notify the violator of the alleged violation and offer the violator an opportunity for a formal hearing prior to any such action.

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

#### §61-12F-4 Consent Agreement and 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 in the notice of violation are capable of being recognized by the violator and the penalty settlement can be accomplished without a hearing. The enforcement officer shall provide the violator a written notice of violation, by certified mail or personal service, which includes a finding of fact and a proposed level of enforcement action. If the violator agrees with the proposed level of action, he shall sign a consent agreement form and return it with payment of the assessed penalty.

4.2 Negotiated Settlement - Right to informal hearing. In the event that the violator disagrees with the findings of the investigation and/or the level of enforcement action, the violator has 20 calendar days from his receipt of the notice of civil penalty to request a hearing. The violator has the option of requesting an informal hearing or may request a formal hearing as prescribed under sub-section 4.7 of this rule. During an informal hearing the violator may submit to the compliance officer any mitigating circumstances as to why the compliance officer should alter the investigative findings or level of enforcement action.

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

4.3.a The compliance officer shall notify any inspector or other authorized representative of the commissioner who was involved in the investigation of the violation bringing about the informal hearing and the violator of the time and place of the informal hearing. In scheduling the location of the informal hearing, the compliance officer shall consider the location of the violation and the violator. The compliance officer may schedule the hearing anywhere in the state of West Virginia.

Department of Agriculture  
Leg. Rule 19-16A  
Series XIIF, Sec. 4

4.3.b The compliance officer shall notify the parties at least fifteen (15) calendar days prior to the time of the hearing.

4.3.c 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. The compliance officer shall conduct the hearing in the following manner:

4.4.a The compliance officer shall not strictly apply The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence.

4.4.b The compliance officer shall not discuss the case "ex parte" with either the enforcement officer or other department employees involved in the case.

4.4.c A record of the informal hearing is not required but any party may request that a record be made at that party's expense. Any other party to the hearing may obtain copies of the record at his expense.

4.4.d At any formal review proceedings which may occur later, 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 Negotiated Settlement - Any settlement of the alleged violation based on agreement between the compliance officer and the violator is a negotiated settlement. The violator and the compliance officer shall sign the negotiated settlement document.

#### 4.6 Written Decision

4.6.a If the violator and the compliance officer are unable to reach an agreement, the compliance officer shall recommend a penalty to the commissioner.

4.6.b Within thirty (30) calendar days following the informal hearing, the commissioner shall issue and furnish to the violator a written decision affirming, decreasing, or dismissing the initial civil administrative penalty assessment and give the reasons for his decision.

#### 4.7 Contested Cases, Right to a Formal Hearing.

4.7.a. As provided in sub-section 4.2 of this rule or within thirty (30) calendar days after notification of a written decision rendered as a result of an informal hearing, the violator may request a formal hearing before the commissioner in accordance with Section 18 of the Act. An administrative hearing officer shall conduct the hearing and the hearing shall comply with the Administrative Procedures Act, West Virginia Code §29A-5-1 et seq.

4.7.b 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 is due and payable.

TABLE 61-12F-A

Schedule of Penalty Codes

License Violations.

A		B		C
First Offense, No Prior Knowledge, Written Notice		Prior Knowledge		Each Repeat Offense or Non-Compliance after Notice
PC-1 Adverse effects not probable	E1		E2	E3
PC-2 Adverse effects Unknown	E2		E3	E4
PC-3 Adverse effects probable or demonstrated.	E3		E4	E5

Department of Agriculture  
Leg. Rule 19-16A  
Series XIIIF

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	E3
PC-5 Special regulations or regulations resulting in adverse effects	E2	E3	E4
PC-6 Each repeated offense	E3	E4	E5

Department of Agriculture  
Leg. Rule 19-16A  
Series XIIF

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

Department of Agriculture  
Leg. Rule 19-16A  
Series XIIF

Product Violations

	A	B
	First Offense Offense	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

Department of Agriculture  
Leg. Rule 19-16A  
Series XIIF

TABLE 61-12F-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

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

ROBERT E. WILKINSON  
Deputy Secretary of State

CATHERINE FREROTTE  
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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

SHEREE COHEN  
Special Assistant

(Plus all the volunteer  
help we can get)

October 21, 1991

#### NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Agriculture

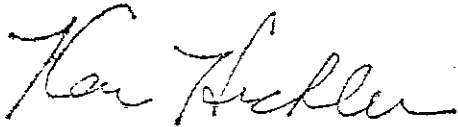
RULE: New Rule, Series 12F, Assessment of Civil Penalties and  
Procedures for Consent Agreement or Negotiated Settlement

DATE FILED AS AN EMERGENCY RULE: October 2, 1991

DECISION NO. 95-91

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Oct. 21, 1991  
ADMINISTRATIVE LAW DIVISION

  
KEN HECHLER  
Secretary of State

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## STATE OF WEST VIRGINIA

### SECRETARY OF STATE

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(Plus all the volunteer  
help we can get)

#### DECISION

#### EMERGENCY RULE DECISION (ERD 95-91)

AGENCY: Agriculture  
RULE: New Rule, Series 12F, Assessment of Civil Penalties and  
Procedures for Consent Agreement or Negotiated Settlement  
FILED AS AN EMERGENCY RULE: October 2, 1991

- par. 1 The Department of Agriculture (Department) has filed the above new rule as an emergency.
- par. 2 West Virginia Code 29A-3-a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-a(a))].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

- par. 6 The Department filed this emergency rule with supporting documents with the Secretary of State October 2, 1991 and with the LRMRC October 2, 1991.
- par. 7 It is the determination of the Secretary of State that the Department has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority --- WV Code §19-16A-22(c) reads:  
  
(c) Notwithstanding any other provision of law to the contrary, the commissioner may promulgate and adopt rules which permit consent agreements or negotiated settlements for the civil penalties assessed as a result of violation of the provisions of this article.
- par. 9 It is the determination of the Secretary of State that the Department has not exceeded its statutory authority in promulgating this emergency rule.
- par. 10 (C) Emergency WV Code 29A-3-15(g) defines "emergency" as follows:  
  
(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.
- par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories. . .

par. 12 The facts and circumstances as presented by the Department are as follows:

This rule is being filed as an emergency for the immediate preservation of the public health, welfare, safety or welfare. This rule will allow the Department of Agriculture to assess civil penalties against violators of the Pesticide Control Act of 1990. The assessment of penalties, or the threat of such, serves to achieve compliance with the law by the industry, and therefore, acts to ensure that pesticides are used in a safe and effective manner. The implementation of this provision is needed immediately in order to achieve these goals.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(g). . . "immediate preservation of public peace, health, safety or welfare."

par. 14 This decision shall be cited as Emergency Rule Decision 95-91 or ERD 95-91 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Department of Agriculture, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER  
Secretary of State

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
Entered \_\_\_\_\_ THIS DATE OCT. 2, 1991  
ADMINISTRATIVE LAW DIVISION