

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

Do Not Mark In this Box

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug. 8, 1991
ADMINISTRATIVE LAW DIVISION

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY 19-16A

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 NEW RULE BEING PROPOSED: 12F

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

(Rule originally filed as 12E has been changed to 12F)

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



DATE: August 8, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Department of Agriculture

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

1. Authorizing statute(s) citation 19-16A

2. a. Date filed in State Register with Notice of Hearing:
June 26, 1991
- b. What other notice, including advertising, did you give of the hearing?
Press release to all newspapers in the state; Fred Butler and Steve Hannah of WV Farm Bureau; George Carenbauer, Steptoe and Johnson; WV PCOA
- c. Date of hearing(s): July 30, 1991 10am

- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached X No comments received
- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
August 8, 1991

- f. Name and phone number(s) of agency person(s) to contact for additional information:
Robert Frame 348-2209

Barbara J. Smith 348-2226

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing: _____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached _____

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

Clare Benedict

Summary of Legislative Rule 61 - 12F

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.

TITLE 61 LEGISLATIVE RULES
SERIES XIIF

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

§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 regulations.

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).

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 a 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, assessment and procedure contained in these rules.

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 characterized by 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 Acts, or any rule, regulation, order, or permit condition imposed pursuant to the Act.

§61-12F-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 case reviewer 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 West Virginia Pesticide Control Act of 1990 §19-16A-21. Once a violation is discovered the enforcement officer shall determine;

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

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

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

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

- 3.2.c.A The gravity of the violation;
- 3.2.c.B The degree of the violators's culpability;
- 3.2.c.C The degree of the violator's effort to comply; and
- 3.2.c.D The history of prior violations.

3.2.d 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.

§61-12F-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 a hearing. The violator has the option of requesting an informal hearing or may proceed to contested cases, request for formal hearing as prescribed under sub-section 4.6 of this rule. During an informal hearing the violator has the opportunity to offer to the compliance officer 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 compliance officer shall schedule such a hearing in accordance with the following procedures:

4.3.a 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. In scheduling the location of the informal hearing, the compliance officer shall take into consideration the location of the violation and the business. The hearing may be scheduled anywhere in the state of West Virginia.

4.3.b Such communication shall be provided 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 and shall be conducted in the following manner:

4.4.a The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence shall not be strictly applied.

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 may be made by a 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.d 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 commissioner 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. As provided in sub-section 4.2 of this rule or within thirty (30) calendar days after notification of the decision rendered as a result of an informal hearing, the violator may request a formal hearing before the commissioner in accordance with the provisions of the Act. Any such hearing shall be conducted by an administrative hearing officer and 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 61-12F-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	E3
PC-2 Adverse effects Unknown	E2	E3	E4
PC-3 Adverse effects probable or demonstrated.	E3	E4	E5

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

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 61-12F-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

ASSESSMENT OF CIVIL PENALTIES AND PROCEDURES
FOR CONSENT AGREEMENTS OR NEGOTIATED SETTLEMENT

AGENCY RESPONSE TO COMMENTS RECEIVED

The agency amended sub-sections 2.2, 2.3., 4.2, 4.3.a., 4.4.a., 4.4.b. and 4.6 as a result of written and oral comments received.

Sub-section 2.2 was amended to add a definition of "Administrative Hearing Officer" to the rule. Subsection 2.3, the definition of "commissioner" was also added to this rule.

Sub-section 4.2 was amended to add the statement "The violator has the option of requesting an informal hearing or may proceed to contested cases, request for formal hearing as prescribed under sub-section 4.6 of this rule."

Part 4.3.a. was amended to add the statement "In scheduling the location of the informal hearing, the compliance officer shall take into consideration the location of the violation and the business. The hearing may be scheduled anywhere in the state of West Virginia."

Part 4.4.a. was amended to change the words "...Evidence shall not apply." to "...Evidence shall not be strictly applied."

Part 4.4.b. was added to the rule, and the last two parts in the section were maintained after it (but renumbered).

Sub-section 4.6 was amended to reference the procedures added in sub-section 4.2 and to add the statement that the hearing will be conducted by an administrative hearing officer.



STATE OF WEST VIRGINIA
DEPARTMENT OF AGRICULTURE

State Capitol
Charleston, WV 25305

Cleve Benedict
Commissioner

M E M O R A N D U M

TO: The Record

FROM: Robert E. Frame, Director, Pesticide Division *R.E.F.*

SUBJECT: Public Hearing for Rules Titled "Assessment of Civil Penalties and Procedures for Consent Agreements or Negotiated Settlement"

DATE: August 5, 1991

A public hearing was held on July 30, 1991 at 10:00 a.m. in the conference room of the Guthrie Agriculture Center, to receive comments on the proposed rules titled "Assessment of Civil Penalties and Procedures for Consent Agreements or Negotiated Settlement". A Notice of Public Hearing was filed with the Secretary of State's office on July 26, 1991. A notice of hearing and summary of the proposed rule was sent to 365 known pesticide businesses and dealers. A general press release was also issued to announce the hearing. A copy of the proposed rule was given to all persons or parties making requests.

At 10:00 a.m., seven (7) people were present for the hearing. All seven were members of the Pest Control Operators Association of West Virginia. Mr. Will Chave of Orkin Exterminating Company served as their spokes person and read a prepared statement. A copy of that statement is attached. Mrs. Sue Spiroff of Tri-State Exterminating Company, Morgantown, WV, then spoke to make additional comments towards the rule. The attached hearing transcript contains Mrs. Spiroff's comments, as well as Mr. Chaves' reading of the prepared statement.

Public Hearing
August 5, 1991
Page 2

The comments by both Mr. Chave and Mrs. Spiroff were concerns about the manner in which informal hearings were to be conducted, and to some extent, their lack of understanding concerning the requirements for formal hearings under the Administrative Procedures Act. Their comments were considered and incorporated where it was deemed appropriate. Those incorporations can be noted in sub-sections 2.2, 4.2 and 4.6; and in paragraphs 4.3.a, 4.4.a, and 4.4.b. Other suggestions made by the two individuals would have transformed an informal hearing into a formal hearing. As such, the informal hearing portion was not further modified. However, the violator was given the option to by-pass an informal hearing and go directly a formal hearing, if they so desired.

One written letter was received regarding the proposed rules. It was also from the Pest Control Operators Association of West Virginia. The letter was received on July 25, 1991. They had a Board of Directors meeting scheduled on that same day in Cross Lanes. A member of the Department attended their meeting and devoted over one hour addressing their concerns and answering their questions. A copy of their letter is attached.

Proposed Rule Title 61 Series XIIF
Assessment of Civil Penalties and Procedures
for Consent Agreements or Negotiated Settlement
JULY 30, 1991
10:00 A.M.

Attendees:

Barbara Smith
Robert Frame
Kathy Martin
Cecil Taylor
Sue Spiroff
Glenn R. Cozzen
James Spiroff
Will Chave
Timothy Russell
Dexter Owsley

Barbara Smith: Good morning and thank you all for coming. This hearing is now in order. The hearing today is called so that oral comments on the proposed rule can be received for the regulation call The Assessment of Civil Penalties and Procedures for Consent Agreements or Negotiated Settlements. The date and the time of the hearing is July 30, 1991 at 10 a.m. The notice of this hearing was filed in the Secretary of State's on June 26, 1991 and published in the State Register, volume 8, number 25. This proposed 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 the consent agreement negotiated settlement by way of informal hearing or a formal administrative hearing. The rule is based on a law called The West Virginia Pesticide Control Act of 1990, effective March 30, 1990.

My name is Barbara Smith. I am the Director of the Compliance Division. I am holding the hearing. You all know Bob Frame the Director of the Pesticide Division and Kathy Martin is his secretary, who will be preparing this transcript.

After this hearing, all the comments will become public record, that is why we have this tape recorder. All the written and oral comments are reviewed and taken into consideration. If the Commissioner agrees to amend the rules subsequent to the hearing, then the changed amendment will be made before the rule is refiled. This proposed regulation as amended or originally proposed along with a summary of all the comments received, the transcript and any written comments received are filled again with the Secretary of State and with the Legislative Rule Making Review Committee. This committee reviews all the documents, holds their own hearing to see if they want to pass this rule on to the full Legislative session. If they do pass it on then the full Legislature also reviews this rule.

There are some rules in the hearing. All the comments made during this hearing will be limited to the proposed rule. It is really only an opportunity for comments to be made about this rule. There won't be any debate during this hearing. If you have any questions to ask Bob, we can ask those after the hearing is over. If you feel that you want to have comments made after you have talked to Bob, what I will do is I will recess the hearing after we do the first set of comments. If after discussions with Bob you feel you want to make additional comments, I will reconvene the hearing.

I do reserve the right to limit the length of comments during the first round, but in any case you will have an opportunity to give you full statement. As you come up to speak, -- and I will need to have you sit here so I can get you on record -- please begin your comments by introducing yourself and the firm that you are representing.

The first on here is Cecil Taylor. Cecil do you want to give a comment?

Cecil Taylor: The Association has appointed a spokesperson --

Barbara: The Association has appointed a spokesperson and is that Sue?

Will Chave: I am going to speak first.

Barbara: Alright. Why don't you sit right here, so that we can get you on record.

Will Chave: Good morning I am Will Chave. I am the Regional Manager for Orkin Exterminating Company. I am here today wearing the hat of Vice President of West Virginia Pest Control Operators Association of West Virginia. We have a prepared statement that I would like to read into the record if that's alright.

Barbara: You have the option of reading it into the record or we can just accept it into the written comment and include that verbatim.

Will Chave: Well, we'd like to read it if that's alright.

Barbara: That's fine.

Will Chave: The West Virginia Pest Control Operator's Association, recognizing the inevitability of more and more rules and regulations, has worked closely with the State to develop the rules and the regulations for the West Virginia Pesticide Control Act of 1990. Most of our ideas and opinions have been incorporated, and for that we are grateful to Mr. Bob Frame and his department. Along the way, there have been some compromises, however, and concessions as well by our Association. Some of these have been in what to us are critical areas of concern, such as registration of technicians, licensing procedures and pesticide drift sensitivity listings. Yet, most of our concerns were addressed to the point that we have not appeared at any previous regulation hearings.

Now, comes the hearing on Penalties and Procedures. Here again we have already made one major concession to a previous position that we held, and that is the inclusion of consent agreements and negotiated settlements as part of the procedure. So, that is not why we are here today.

As recently as our W.V.P.C.O.A Board meeting of last Thursday, we had major concerns that the "Formal Hearing," section 4.6, portion of the procedure was a substitute for our "Right" to an appearance in Magistrate's Court. Upon review with Counsel for our Association, our concerns in this area have eased. so, that is not why we are here today.

We are here today, however, to express our concerns about how this regulation might impact any of our business operations from a two fold point of view. We feel the procedure to be followed must consider the following:

1. must be affordable for the PCO.
2. must insure that the final judgement results from an "impartial" hearing process.

To this end, it is not what the proposed regulation states, but more what is not stated that is of concern to us.

We seek the following changes to, or additions to the proposed regulation:

1. Under 3.2.4. Change the last sentence to read, "For the express purpose of pursuing unlicensed companies, there shall be no time limit for licensing violations."
2. Under 4.2 Add the following to the end, "The accused violator will be permitted to continue his business operation during the appeal period; that a 'cease and desist' order will only apply in cases of unlicensed operations or public endangerment."
3. Under 4.3 The term "enforcement officer" should be changed to "compliance officer".
4. Under 4.4.1. The sentence should be changed to read as follows, "The West Virginia Rules of Civil Procedures shall not apply. The West Virginia Rules of Evidence shall not be strictly applied." You would insert the word not there that was an omission in our written notes.

Barbara: OK

Will Chave:

5. Under 4.4. The informal hearing procedures should include and state the following additional provisions:

I might insert here that the we have listed here follows closely to a procedure that is used by Workman's Compensation in their hearing process.

- a. The enforcement officer and the compliance officer shall not discuss the case "ex-parte".

- b. The Inspector and the compliance officer shall not discuss the case "ex-parte".
- c. The compliance officer is the judge. He should be a neutral officer. There should be no discussion with others prior to the hearing.
- d. The compliance officer shall be appointed and should be an outside lawyer. He would be paid by the State, and only works when there is a hearing.
- e. The hearing should be held in the county seat where the most witnesses are available. There should be at least 4 compliance officers, paid on a per diem (1/2 day) basis. The location of the compliance officers should be Morgantown, Wheeling, Charleston and Morgantown.
- f. The accused violator can be represented by Counsel if so desired.

Again, what we seek here today through these changes is that we have a hearing process that is affordable for any company to pursue, and that any company can be assured of receiving an impartial review.

Overall, if there has to be a regulation for the assessment of penalties and a procedure for agreements and settlements, then the mechanism established in this proposed regulation is deemed to be fair and equal. It is, in fact, better in that regard than similar regulations in states around us. We respectfully request that the changes and additions that we have herein suggested be incorporated in the regulation to further enhance the "fairness" of the regulation to all West Virginia Pest Control Operators.

Thank you for the opportunity to present our point of view. We are as a group here representing the Pest Control Operators Association of West Virginia. Thank you.

Barbara: Is there anyone else here who wishes to speak on this issue at this point, or is this statement representing all of your views?

Sue Spiroff: I think I just have a couple additional comments to make.

Barbara: OK You are?

Sue Spiroff: My name is Sue Spiroff and I am with Tri-State Exterminating of Morgantown. As Will has already pointed out, an example of this system would be Worker's Compensation. We feel that this would be fair and this system has already proven its self as a practical solution to this type of a problem. I think that we would find it out that it would be cost effective for the small businesses in West Virginia, in that it would reduce our travel time and expenses to bring witnesses and counsel to hearings in Charleston verses the other portions of the State. In addition, it should be cost effective for the Department. Because it is on a pay as you go basis. So if you don't have hearings then you obviously don't have expenses. I think and feel that with the

current system the Department has put itself in a rather peculiar situation in that has put itself in as judge, jury and executioner. I don't think that's a real comfortable position. So we're simply asking for fairness and partiality.

Barbara: Thank you Sue. Is there anyone else here who would like to make a statement at this time? If not, then I will adjourn the meeting and continue it until after there are any questions from the audience. If at that time, after you have a chance to discuss anything, if anyone else wants to make an additional statement, we will reconvene. Our time now is 10:15 a.m.

Barbara: We have had a chance now for some discussion. It is now 11:08 and I will reopen this hearing for any additional comments. Is there anyone in the room that wants to make an additional comment for the record? That's it. They all say they have said it all so this hearing is now closed. Thank you all for coming.

NAME	ADDRESS	AFFILIATION	DO YOU WISH TO SPEAK?
<i>David Taylor</i>	<i>Chas</i>	<i>Bruce Johnson</i>	<i>YES</i>
<i>Gene Smith</i>	<i>154 Green Kn 237 Morgantown, WV 26505</i>	<i>Joe - State Agr.</i>	<i>Yes</i>
<i>William R. Boyce</i>	<i>1106 main St. Bolivar Ohio 45714</i>	<i>Eastern / Buckholts Agr</i>	<i>YES</i>
<i>Tom Hill</i>	<i>424 main lane Bol. W. 2516</i>	<i>The Hill Co</i>	<i>YES</i>
<i>Will Stone</i>	<i>5038 W. Washington Cross Roads, WV 25313</i>	<i>Cabin</i>	<i>YES</i>
<i>Tommy R. Russell</i>	<i>PO Box 706 Bridgesport, WV</i>	<i>Prescription Knowledge</i>	<i>YES</i>
<i>Mark Quinby</i>	<i>5901 Pine CREEK AVE CO. MORGANTOWN WV</i>	<i>HOUSE MORGANTOWN</i>	<i>YES</i>

CIVIL PENALTIES and PROCEDURES
HEARING NOTES
JULY 30, 1991

The W.V.P.C.O.A., recognizing the inevitability of more and more rules and regulations, has worked closely with the State to develop the rules and the regulations for the West Virginia Pesticide Control Act of 1990. Most of our ideas and opinions have been incorporated, and for that we are grateful to Mr. Bob Frame and his department. Along the way, there have been some compromises, however, and concessions as well by our Association. Some of these have been in what to us are critical areas of concern, such as registration of technicians, licensing procedures, and pesticide drift sensitivity listings. Yet, most of our concerns were addressed to the point that we have not appeared at any previous regulation hearings.

Now, comes the hearing on Penalties and Procedures. Here again we have already made one major concession to a previous position that we held, and that is the inclusion of consent agreements and negotiated settlements as part of the procedure. So, that is not why we are here today.

As recently as our W.V.P.C.O.A. Board meeting of last Thursday, we had major concerns that the "Formal Hearing," section 4.6, portion of the procedure was a substitute for our "Right" to an appearance in Magistrate's Court. Upon review with Counsel for our Association, our concerns in this area have eased. So, that is not why we are here today.

We are here today, however, to express our concerns about how this regulation might impact any of our business operations from a two fold point of view. We feel the procedure to be followed must consider the following:

1. must be affordable for the PCO.
2. must insure that the final judgment results from an "impartial" hearing process.

To this end, it is not what the proposed regulation states, but more what is not stated that is of concern to us.

We seek the following changes to, or additions to the proposed regulation:

1. Under 3.2.4. Change the last sentence to read, "For the express purpose of pursuing unlicensed companies, there shall be no time limit for licensing violations."

2. Under 4.2 Add the following to the end, "The accused violator will be permitted to continue his business operation during the appeal period; that a 'cease and desist' order will only apply in cases of unlicensed operations or public endangerment."
3. Under 4.3. The term "enforcement officer" should be changed to "compliance officer."
4. Under 4.4.1. The sentence should be changed to read as follows, "The West Virginia Rules of Civil Procedure shall not apply. The West Virginia Rules of Evidence shall be strictly applied."
5. Under 4.4. The informal hearing procedures should include and state the following additional provisions:
 - a. The enforcement officer and the compliance officer shall not discuss the case "ex-parte."
 - b. The Inspector and the compliance officer shall not discuss the case "ex-parte."
 - c. The compliance officer is the judge. He should be a neutral officer. There should be no discussion with others prior to the hearing.
 - d. The compliance officer shall be appointed and should be an outside lawyer. He would be paid by the State, and only works when there is a hearing.
 - e. The hearing should be held in the county seat where the most witnesses are available. There should be at least 4 compliance officers, paid on a per diem (1/2 day) basis. The location of the compliance officers should be Morgantown, Wheeling, Charleston, and Martinsburg.
 - f. The accused violator can be represented by Counsel if so desired.

Again, what we seek here today through these changes is that we have a hearing process that is affordable for any company to pursue, and that any company can be assured of receiving an impartial review.

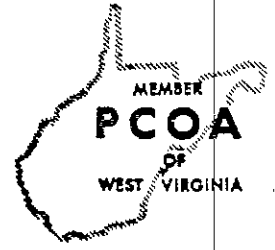
Overall, if there has to be a regulation for the assessment of penalties and a procedure for agreements and settlements, then the mechanism established in this proposed regulation is deemed to be fair and equal. It is, in fact, better in that regard than similar regulations in states around us. We respectfully request that the changes and additions that we have herein suggested be incorporated in the regulation to further enhance the "fairness" of the regulation to all West Virginia Pest Control Operators.

Thank you for the opportunity to present our point of view.

The Board of Directors
Representing the Pest Control
Operators Association of
West Virginia



PEST CONTROL OPERATORS ASSOCIATION
OF
WEST VIRGINIA



DEXTER OWLSLEY, Secretary-Treasurer

P. O. Box 9445, South Charleston, W. Va. 25309

Department of Agriculture
State Capitol Building
Charleston, W.Va. 25305

Cleve Benedict
Commissioner of Agriculture

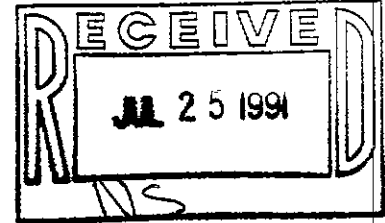
July 23, 1991

Dear Mr. Benedict,

We of the P.C.O.A. of West Virginia would like to go on record as to our strong objections to the Title 61 Legislative Rules State Department of Agriculture Series Xlle. Our following objections are:

1. Nowhere in these regulations is there a provision for a third party such as the Peoples Court, or known as the Magistrate Court system here in West Virginia. We feel that this will take away our rights of due process of the law. The Magistrate Court is the less costly of our court system, so if we don't have this right then the Circuit Court is our only choice and more costly.
2. There is no time limit for licensing violations which we don't fully understand why.
3. We also feel that section 4-4.1 infringes on our civil rights. It states that the West Virginia rules of civil procedure and West Virginia rules of evidence shall not apply.
4. Our members of the association feel that we were not properly notified of the hearing on this proposed regulation. Bob Frame stated to me that he mailed the notice out Friday and the only one who received the notice today was Cecil Taylor with Terminix. In the regulation they require at least 15 day notice of a pending hearing on a violation. We should have had this time period to prepare for our objections if it really does any good to object.
5. We also feel that the proposed matrix will cost all of us dollars for mistakes that our certified and especially our non-certified applicators make. Next year it will cost us additional dollars to operate our business if we have two violations.

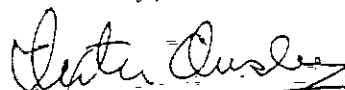
Will all these regulations that we will have to abide by really do away with the fly-by-nite operators in our industry or just regulate us all for regulations sake only. Do we really need all this to solve the departments problems with us.



Please find enclosed our suggestions to Bob Frame which had the discussed third party Magistrate Court proposal that we could live with and would allow Bob to have the consent agreement he wanted. We thought that we were in agreement on this issue.

Thank you for allowing us to submit our feelings on the proposed regulations.

Sincerely,



Dexter Owsley, Sec./Treas.

DO/ro

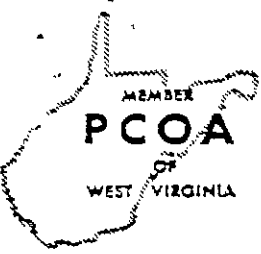
CC: Johnny Raschella, President

Sue Spiroff, 1st. Vice President

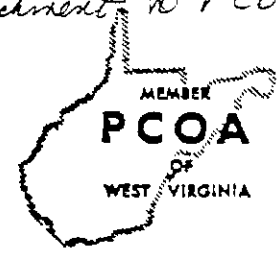
Will Chave, 2nd. Vice President

All Board Members

P.S. Commissioner Benedict, due to the urgency to this matter please respond before the July 30th, 1991 hearing date.



PEST CONTROL OPERATORS ASSOCIATION
OF
WEST VIRGINIA



DEXTER OWSLEY, Secretary-Treasurer

P. O. Box 9445, South Charleston, W. Va. 25309

PROPOSED
WEST VIRGINIA LEGISLATURE REGULATIONS
STATE DEPARTMENT OF AGRICULTURE
Chapter 19-16A

TITLE: West Virginia Pesticide Control Act - Enforcement Procedures

Section 1. General

1.1 Scope - These legislative regulations establish procedures to provide for penalty assessment in dealing with violations of the West Virginia Pesticide Control Act and promulgated regulations.

1.2 Authority - W.Va. Code 19-16A-4, 19-16A-22, as amended March 30, 1990.

1.3 Filing date.

1.4 Effective date.

Section 2. Procedure

2.1 This document sets forth the procedures and criteria that will be used to determine the appropriate enforcement response for violations of the West Virginia Pesticide Control Act (WVPCA). The WVPCA response policy is designed to provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations. The policy is designed for swift resolution of environment problems and to deter future violations of WVPCA by the respondent as well as other members of the regulated community.

2.2 The following penalty assessment guidelines are designed to include most violations encountered of the Act by licensed pesticide application businesses, certified applicators and non-certified applicators. However, there may be situations which arise that are not adequately covered by these guidelines. In such cases, the Director of the Plant Pest Control Division and the Program Leader of the Pesticide Section shall determine the appropriate course of action, and shall proceed as outlined in Section 3.

Section 3. Enforcement Mechanisms for Penalty Assessment

3.1 Consent agreements or negotiated settlements are intended as a mechanism to settle violations without expensive costs to both parties for administrative or criminal hearings. Such violations are characterized by acts which are recognized by the alleged violator, and settlement is desired without a hearing. The alleged violator is informed of the violation (s) and a level of enforcement action is proposed. If the alleged violator agrees with the intended level of action, a consent agreement form is signed and returned with payment of the assessed penalty and/or the alleged violator's certification or licensing documents are surrendered for the scheduled time period.

3.2 In the event that the alleged violator disagrees with either the findings of the investigation or with the level of enforcement action recommended, the alleged violator may elect one of the following options in response:

- 3.2.1 Sign a revised agreement of the negotiated settlement which has been changed based on mitigating circumstances as submitted by the alleged violator and accepted as cause by the Department, or...
- 3.2.2 Notify the Department to schedule an administrative hearing, or...
- 3.2.3 Notify the Department to schedule a Magistrate Court appearance.

3.3 In the event of an administrative hearing, the hearing officer may assess any new penalty up to, but not exceeding, the original Department penalty assessment.

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.

Section 4. Penalty Assignment Schedule

4.1 This section lists the unlawful acts specified in the WVPCA and assigns such acts into two classifications. The classification, or type of unlawful act will help determine the penalty as assigned in Section 5.

4.2 Class I Use/Misuse Violations - Violations in Class I are infractions involving or related to pesticide use that result from flagrant misuse, negligence or failure to comply with the law or regulations, or that are imminently dangerous to public health or safety.

Class I Use/Misuse Violations

- 4.2.1 Made a pesticide use recommendation or application inconsistent with the labeling as registered by the United States Environmental Protection Agency or Commissioner's State Restrictions for the use of that pesticide;
- 4.2.2 Applied unknown or improper pesticides;
- 4.2.3 Operated faulty or unsafe equipment;
- 4.2.4 Failed to provide necessary safety equipment to employees;
- 4.2.5 Operated in a faulty, careless or negligent manner;
- 4.2.6 Engaged in the business of applying a pesticide on the lands of another without having a licensed pesticide application business license;
- 4.2.7 Engaged in the business of applying a restricted use pesticide on the lands of another without having a licensed certified applicator in direct supervision;
- 4.2.8 Failed to observe all precautions in the handling, use, storage, and disposal of pesticides and their containers;
- 4.2.9 Failed to follow Termite Regulations as set forth in WVPCA;
- 4.2.10 Failed to comply with any provision of this article or any regulation issued thereunder as relates to the use or misuse of pesticides.

4.3 Class II Non Use Violations - Violations in Class II are infractions that do not directly involve the use of a pesticide but rather involve a failure to comply with the law or regulation with respect to licensing, certification, inspection requirements, or record keeping. Other Class II infractions may involve obstructing or impeding officials in the performance of their investigative duties.

Class II Non Use Violations

- 4.3.1 Made false or fraudulent claims through any media misrepresenting the effect of pesticides or methods to be utilized;
- 4.3.2 Refused or neglected to keep and maintain the records required by this article, or to make reports when and as required;
- 4.3.3 Made false or fraudulent records, invoices or reports;

- 4.3.4 Used fraud or misrepresentation in making an application for, or renewal of, a license, permit or certification;
- 4.3.5 Refused or neglected to comply with any limitations or restrictions on or in a duly issued license, permit or certification;
- 4.3.6 Aided or abetted a licensed or an unlicensed person to evade the provisions of this article or allowed one's license, permit or certification to be used by another person;
- 4.3.7 Made false or misleading statements during or after an inspection, concerning any infestation or infection of pests found on land;
- 4.3.8 Impersonated any federal, state, county or city inspector or official;
- 4.3.9 Advertised as proof of professionalism in securing business, that the licensee is certified or licensed by the Department of Agriculture or the Commissioner of Agriculture;
- 4.3.10 Neglected or, after notice, refused to comply with the provisions of this article, the rules adopted hereunder, or of any lawful order of the Commissioner.

4.4 Concerning requests for the production of any records or documents related to a Department investigation, "reasonable effort" should be made to make such request directly to the owner/manager, and to provide "reasonable time (24 to 48 hours)" for the production of any such requested material.

Section 5. Schedule of Penalty Assessments

5.1 This section lists the Schedule of Penalty Assessments to be used in determining a level of enforcement action. Once an investigation is concluded and the necessity for a penalty is determined, the case review officer should refer to the Schedule to determine the appropriate level of fine to be assigned or the appropriate punitive action to be taken.

5.2 The Schedule reflects penalties that are a MAXIMUM for each category. The case review officer may assign, based on circumstances discovered in the investigation, a lesser amount as a penalty.

5.3 The case review officer should consider the following criteria to determine the proper penalty "range" from the Schedule, and to determine where in the "range" the appropriate remedy may lie:

- 5.3.1 "Classification", or type of violation, as reviewed in Section 4;

- 5.3.2 "Seriousness of the violation" taking into consideration any harm to the environment and/or any hazard to public health and safety;
- 5.3.3 The "culpability of the violation", taking into consideration whether the violation was inadvertent, was it negligent, or was it with knowledge and awareness of the actions involved;
- 5.3.4 "A repeat violation", taking into consideration any re-occurrence of the same type of violation within the past 2 years for use/misuse violations, or within 1 year for non use violations.
- 5.3.5 "Good faith demonstrated", taking into consideration whether the person or firm attempted to achieve rapid compliance after notification of the violation.

5.4 As indicated on Schedule 5.5, the case review officer may elect a suspension of license and/or certifications for individuals or firms for specific violation categories. A person or firm will be restricted from the solicitation of any new business during the suspension period. The person or firm may continue, however, to perform services for which it is legally held by contracted obligation.

5.5 Schedule of Penalty Assessment.
See the form attached.

5.5 SCHEDULE OF PENALTY ASSESSMENTS
Class I Use/Misuse Violations

	<u>A</u> No Adverse Effects	<u>B</u> Adverse Effects Undetermined	<u>C</u> Documented Adverse Effects Excluding Humans	<u>D</u> Documented Adverse Effects Including Humans
1. First Offense	letter of warning up to \$100	letter of warning up to \$150	letter of warning up to \$300	letter of warning up to \$500
2. Second Offense within 2 year period	up to \$200	up to \$300	up to \$500 and/or *administrative action #1	up to \$1000 and/or *administrative action #2
3. Each repeat offense within 2 year period				

Class II Non Use Violations

	<u>A</u> License or Regulation	<u>B</u> Involving False or Misleading Statements or Reports	<u>C</u> Intentional or Deliberate False or Misleading Statements or Reports
1. First Offense - No prior notice or knowledge	letter of warning up to \$100	letter of warning up to \$150	letter of warning up to \$250
2. First Offense - With prior notice or knowledge	up to \$200	up to \$300	up to \$500
3. Repeat Offense within 1 year period			

* #1 Administrative Action = 15 day suspension

* #2 Administrative Action = 30 day suspension



STATE OF WEST VIRGINIA
DEPARTMENT OF AGRICULTURE

State Capitol
Charleston, WV 25305

Cleve Benedict
Commissioner

**NOTICE OF PUBLIC HEARING TO RECEIVE
COMMENTS ON PESTICIDE REGULATIONS**

Proposed regulations titled "Certified Pesticide Applicator Rules" and "Assessment of Civil Penalties and Procedures for Consent Agreements or Negotiated Settlements" have been filed with the Secretary of State. Hearings have been scheduled to receive comments on July 30, 1991 in the J. T. Johnson Conference Room, Building 2 of the Guthrie Agriculture Complex, Charleston, WV 25312. The hearing to consider rules for the civil penalties, consent agreements and negotiated settlements is scheduled for 10:00 a.m.

Comments for the Certified Pesticide Applicator Rules are scheduled to be received at 1:00 p.m. Comments on either series of proposed rules will be accepted by oral presentation, written or both. Persons desiring to submit written comments in lieu of attending a hearing may send them to the West Virginia Department of Agriculture, Pesticide Division, 1900 Kanawha Boulevard E., Charleston, WV 25305. An individual desiring to discuss the proposed rules, or needing more information may call 348-2209.

Section 22 of the Pesticide Control Act of 1990 provides civil penalties for violations of the Act and provides authority to promulgate rules to allow for consent agreements or negotiated settlement of these penalties. The proposed rule titled **Assessment of Civil Penalties and Procedures for Consent Agreement or Negotiated Settlement** provides a framework for civil penalty amounts based on the type of violation, potential harm and the frequency of the violation. The consent agreement, negotiated settlement portion of the rule, specifies a mechanism by which a proposed penalty can be settled, discussed and/or amended through informal hearings. Such an arrangement can be advantageous to all practices in settling minor violations, without the time and expense of a formal hearing process.

Certified Pesticide Applicator Rules - This regulation continues under the Pesticide Control Act of 1990 the previous regulations regarding the certification and training of pesticide applicators, record keeping, reciprocity, recertification and

equipment. The changes from the old regulations include an update of certification standards to meet those published by EPA, the creation of criteria for technician training programs, the establishment of a continuing certification credit system for recertification, the requirement for back flow prevention systems and at all mixing loading sites.

There are 16 proposed categories for commercial applicator, as opposed to 14 previous categories. The category changes are: 1) the consolidation of the Public Health-related sub-category with Public Health, 2) the consolidation of the Vegetation Management sub-category with Right of Way, and 3) the creation of a new category Ornamental Pest Control Indoors, Pesticide Storage and Distribution, and Miscellaneous. The Pesticide Storage and Distribution is for dealers of restricted-use pesticides and mirrors the old dealer examination requirements. The Miscellaneous category is reserved for those instances where a special category or certification is needed and none exists.

JUL 0 8 1991



Cleve Benedict
Commissioner of Agriculture

NEWS RELEASE

July 8, 1991

Charleston, West Virginia 25305

Public hearings scheduled for new regulations

Agriculture Commissioner Cleve Benedict announced a series of public hearings on new regulations and encouraged public participation in the process.

Benedict said the public hearings give the West Virginia Department of Agriculture (WVDA) the opportunity to modify regulations after taking public input into consideration.

In addition to the public hearings, written comments will be accepted until the time of the hearing. The public hearings will be held on the following days:

July 12, 1 p.m.	Licensing of Pesticide Business
July 12, 3 p.m.	Regulations to Govern Aerial Application of Herbicides to Right of Way
July 29, 10 a.m.	Frozen Desserts and Imitation Frozen Desserts
July 29, 2 p.m.	Commercial Feed
July 30, 10 a.m.	Assessment of Civil Penalties for Consent Agreement or Negotiated Settlements (Pesticides)
July 30, 1 p.m.	Certified Pesticide Applicator
July 31, 10 a.m.	Licensing of Livestock Dealers
August 1, 10 a.m.	Disposal of Dead Poultry

All hearings will be held in the J. T. Johnson Conference Room in Building 2 of the Guthrie Agricultural Center, Charleston, W.Va., except for the Disposal of Dead Poultry hearing. The Dead Poultry hearing will be held at the Moorefield Agricultural Center.

Comment period deadlines for the following regulations (there are no public hearings) will be July 29 at noon:

Plant Pest Act
West Virginia Apiary Law of 1991
Animal Disease Control

For more information on how to comment on the new regulations, contact Barbara Smith, Director of Compliance, WVDA, at 304/348-2226.