

**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: \_\_\_\_\_

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 Agreement or Negotiated Settlement.

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

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.

  
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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.

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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.

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 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

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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

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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

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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

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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

