

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #4

**FILED**  
Oct 26 11 38 AM '95

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

AGENCY: West Virginia Department of Agriculture TITLE NUMBER: 61

CITE AUTHORITY Chapter 19, Article 12, Section 3

AMENDMENT TO AN EXISTING RULE: YES  NO

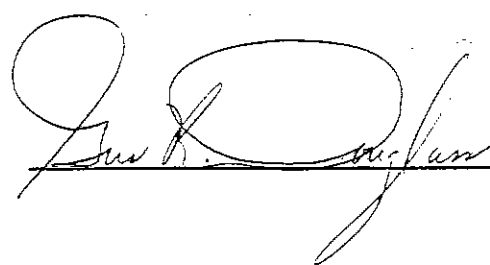
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 14

TITLE OF RULE BEING AMENDED: West Virginia Plant Pest Act

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

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

  
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STATE OF WEST VIRGINIA  
DEPARTMENT OF AGRICULTURE

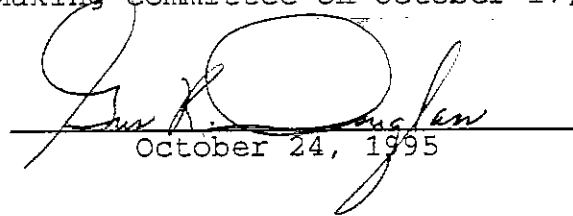
Gus R. Douglass  
Commissioner

1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0170  
(304) 558-3550

Robert G. Morris  
Assistant Commissioner

NOTICE OF AGENCY APPROVAL

The West Virginia Department of Agriculture approves the filing of the West Virginia Plant Pest Act Rule as modified by the Legislative Rule Making committee on October 17, 1995.

  
October 24, 1995

TITLE 61  
LEGISLATIVE RULES  
DEPARTMENT OF AGRICULTURE

SERIES 14  
WEST VIRGINIA PLANT PEST ACT REGULATIONS RULE

§61-14-1. General.

1.1. Scope. ~~--- These~~ This legislative ~~regulations rule~~ establishes general operating procedures for the Plant Industries Division.

1.2. Authority. -- W. Va. Code §19-12-3, 5, and 6, and 16

1.3. Filing Date. --

1.4. Effective Date. --

§61-14-~~112~~. Definitions.

~~11.1. The definition of infested or infected shall be interpreted as "Actually Infested or Infected with a Pest or so Exposed to Infestation that it would be reasonable to believe that Infestation Exists."~~

2.1 "Act" means the West Virginia Plant Pest Act (West Virginia Code 19-12-1 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 this Rule.

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 this Rule.

2.7 "Infected" or "Infested" means contaminated with a pest, or so exposed, that it would be reasonable to believe that infection or an infestation exists.

2.8 "Insect, Noxious Weed and Plant Pest Dissemination Violation" means any violation of West Virginia Code 19-12-14, which requires that a permit be issued for the introduction or

distribution of live insects, noxious weeds or plant pests.

2.9 "Inspection Violation" means any violation of West Virginia Code §§19-12-11, 19-12-8 or 19-12-10 or Section 8 of this Rule related to the discharge of an inspector's duties.

2.10 "Plant Certification Violation" means any violation of Sections 9 or 10 of this Rule that relate to the certification of plant material.

2.11 "Quarantine Violation" means any violation of the White Pine Blister Rust Quarantine, Black Stem Rust Quarantine, West Virginia Gypsy Moth Quarantine, or any other plant protection quarantine or administrative order established under authority of West Virginia Code 19-12-6.

2.12 "Registration Violation" means any violation of West Virginia Code 19-12-9 or Sections 2, 3, 4, 5, or 9 of this Rule related to the requirements for registering a nursery or nursery dealer.

2.13 "Violator" means the person who is alleged to have violated West Virginia Code 19-12-1 et seq., or any rule, order or permit condition imposed pursuant to West Virginia Code 19-12-1 et seq..

§61-14-23. Sale of Nursery Stock.

23.1. No nurseryman within the State shall sell or offer for sale any nursery stock or deliver any nursery stock within or without the State until it has been inspected and a certificate issued.

§61-14-34. Display of Certificates.

34.1. The certificate of registration issued to any nursery that has been inspected and found to be apparently free of dangerously injurious insects and plant diseases shall be conspicuously displayed to the public at the location where the nursery stock is being offered for sale.

§61-14-45. Multiple Sales Locations.

45.1. A registered nursery with one or more sales locations separated from the parent nursery shall ~~is~~ not be required to register each sales location, but shall have a copy of the registration displayed at each separate sales location.

§61-14-56. ~~Dealer Registration~~ Revealing of Sources and Posting Certificates.

56.1. All dealers in nursery stock must inform the Commissioner of the sources of his or her nursery stock and the Commissioner must be satisfied that nursery stock obtained from these sources is free of dangerously injurious insects and plant

diseases before a dealer's certificate is issued. The dealer may make amendments to the original list of sources can be made at any time prior to the purchase of stock.

~~5.2. The application for registration must be accompanied by a list of the names and addresses of all salesmen or agents operating in the State of West Virginia.~~

56.32. It is unlawful for any dealer in nursery stock within the State to offer for sale any nursery stock unless a copy of the current dealer's certificate of registration is conspicuously displayed to the public at the place of business and unless the certificate of inspection or tag which accompanied the order from the registered nursery is available for inspection upon request.

#### §621-14-67. Reciprocal Registration.

~~67.1. All nurserymen, dealers, or other persons residing or doing business outside of West Virginia who desire to ship nursery stock into the State shall file once each year with the West Virginia Department of Agriculture, previous to shipment, a signed copy of their current resident state certificate of inspection or dealer's registration and a list of the names and addresses of all salesmen or agents operating in the State of West Virginia providing that their resident state accepts West Virginia on a reciprocal basis, must be registered with the department of agriculture in the state in which their business is located. The West Virginia Department of Agriculture will accept as proof of registration the directory of certified nurseries and dealers published by their resident state department of agriculture, provided their state accepts West Virginia's directory on a reciprocity basis. In those instances where there is no reciprocity, the out-of-state business must file a copy of their current, valid certificate of registration with the Commissioner, prior to shipment.~~

#### §61-14-7. Agent Regulation.

~~7.1. Agent's application for registration will be processed only if that agent's name has been filed with the Department by the registered firm or firms which such agent proposes to represent.~~

~~7.2. The agent's permit shall be carried on his or her person at all times.~~

~~7.3. Agents must leave a copy of the purchase order or contract with each customer.~~

#### §61-14-8. Hinderance To Nursery Inspection.

~~78.1. When such conditions as the presence of trash, weeds, crowding of stock or other conditions prevent a thorough examination of a nursery, the inspector shall provide a statement in writing to the nurseryman setting forth the treatment to be given. Upon written response from the nurseryman, that the instructions have been carried out, the inspection will be made.~~

the Commissioner shall provide the nurseryman with a written statement describing the procedures necessary to correct the problem which prevented a thorough examination of the nursery. After receiving a written response from the nurseryman that the corrective procedures have been carried out, the Commissioner shall cause an inspection to be made.

**§61-14-9. Collection Of Native Nursery Stock.**

9.1. Any person collecting native nursery stock in West Virginia shall apply for and receive a dealer's certificate of registration prior to actually digging and/or selling any ~~such~~ collected stock, unless ~~such~~ that person is already certified as a nurseryman.

9.2. Any person who anticipates the digging and/or offering for sale of collected native nursery stock shall make proper application to the Commissioner for inspection, prior to collecting each individual shipment. ~~Inspectors~~ The Commissioner shall designate a time or times and a place or places where the dug plants are to be assembled for inspection. Uninspected plants shall not be moved from the property where they are collected without a specific written directive from the ~~inspector~~ Commissioner designating the place to which ~~such~~ the plants are to be moved for inspection. Notice shall be given to the ~~inspector~~ Commissioner when ~~such~~ the plants are ~~so~~ assembled. It is a violation to transport native nursery stock without first obtaining a written directive from the ~~nursery inspector~~ Commissioner making provisions for inspection.

9.3. The Commissioner shall issue A a certificate of inspection ~~will be given~~ to the collector for the movement and sale of each shipment of ~~such~~ collected plants found to be free of plant pests. This certificate shall cover only the plants inspected and passed at the time of inspection. Plants not passing inspection shall be destroyed or treated as directed by the ~~inspector~~ Commissioner.

**§61-14-10. Vegetable Plants.**

10.1. All vegetable plants shipped into the State of West Virginia must be certified to have been grown under an official certification program of the State of origin, or to have been inspected and certified to be apparently free of injurious insects, nematodes, and plant diseases on the basis of any inspection no more than three (3) days prior to removal from the soil.

**61-14-11. Assessment of Civil Penalties and Procedures for Consent Agreements and Negotiated Settlements.**

11.1. Procedure

11.1.a. The civil penalty assessment procedures in this section are designed to include most violations of West Virginia Code 19-12-1 et seq. committed by nurseries and nursery dealers. However, there may be situations which arise that are not

adequately covered by this section. In such cases, the enforcement officer shall determine an appropriate course of action and make a recommendation for that 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 West Virginia Code 19-12-1 et seq.

11.1.b. The time interval between the first offense and each repeated offense, beyond which the Commissioner will take no enforcement action and clear the violator's records, will be limited to two years for all inspection and plant certification violations. There is no time limit for registration, quarantine, administrative order, and insect, noxious weed and plant pest dissemination violations.

11.1.c The enforcement officer reviewing a case shall prepare a finding of facts surrounding any discovered violation of West Virginia Code 19-12-1 et seq. Once a violation is discovered the enforcement officer shall determine:

11.1.c.A. The appropriateness of a civil penalty or criminal enforcement action; and

11.1.c.B. The character of the violation and the appropriate enforcement level as stated in the schedule of penalties contained in Table 61-14-A of this Rule. The violations are categorized into the following types:

11.1.c.B.(a) Registration Violations;

11.1.c.B.(b) Inspection Violations;

11.1.c.B.(c) Plant Certification Violations;

11.1.c.B.(d) Quarantine Violations; and

11.1.c.B.(e) Insect, Noxious Weed and Plant Pest Dissemination Violations.

11.1.d. Upon establishing a level of violation, the enforcement officer shall refer to the schedule of penalty levels contained in Table 61-14-A of this rule to determine a monetary assessment. In determining the level of penalty, the enforcement officer shall consider the following factors:

11.1.d.A. The gravity of the violation;

11.1.d.B. The degree of the violator's culpability;

11.1.d.C. The degree of effort put forth by the violator to comply with West Virginia Code 19-12-1 et seq. and Rules promulgated under the Act; and

11.1.d.D. The violator's history of prior

violations.

11.1.e. Any denial, suspension, revocation or modification by the Commissioner of a permit, compliance agreement or certificate of registration shall be based on satisfactory evidence that the action taken will help protect the State's agricultural interests from plant pests and/or noxious weeds or that any of the provisions of the permit, compliance agreement, West Virginia Code 19-12-1 et seq., or its Rules have been violated.

11.1.f. 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 purpose of collection and for the purposes of such other action as determined proper and included in the consent agreement or negotiated settlement.

## 11.2 Consent Agreements and Negotiated Settlements.

11.2.a. 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 or she shall sign a consent agreement form and return it with payment of the assessed penalty.

11.2.b. 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 twenty (20) calendar days from 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-division 11.2.g. 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.

11.2.c. 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:

11.2.c.A. The compliance officer shall notify any 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;

11.2.c.B. The compliance officer shall notify the parties at least fifteen (15) calendar days prior to the time of the hearing; and

11.2.c.C. The compliance officer may continue the informal hearing only for good cause shown.

11.2.d. Informal Hearing Procedures. An informal hearing, as provided by this Rule, 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:

11.2.d.A. The compliance officer shall not strictly apply The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence;

11.2.d.B. The compliance officer shall not discuss the case "ex parte" with either the enforcement officer or other department employees involved in the case;

11.2.d.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 their expense; and

11.2.d.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.

11.2.e. 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.

11.2.f. Written Decision

11.2.f.A. If the violator and the compliance officer are unable to reach an agreement, the compliance officer shall recommend a penalty to the Commissioner.

11.2.f.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 or her decision.

11.2.g. Contested Cases, Right to a Formal Hearing.

11.2.g.A. As provided in Sub-division 11.2.B. 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. 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.

11.2.g.B. If no hearing is requested, the compliance officer's decision becomes a final order after the expiration of the thirty-day period and the civil administrative penalty is due and payable.

**TABLE 61-14-A**

**SCHEDULE OF PENALTIES**

**Registration Violations**

Violation - Exposing or offering for sale, selling, delivering, or giving away plants or parts of plants commonly known as nursery stock without having first secured from the Commissioner a certificate of registration. Nursery - (West Virginia Code 19-12-9 and Section 3 of this Rule). Nursery Dealer - (West Virginia Code 19-12-9).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense, No Prior Knowledge</u>	<u>Written Notice</u>
<u>First Offense, Prior Knowledge</u>	<u>\$50 - \$100</u>
<u>Second Offense</u>	<u>\$100 - \$250</u>
<u>Third offense and each repeat offense thereafter.</u>	<u>\$500</u>

Violation - Failure to post the certificate of registration in a conspicuous location at the place of business. Nursery - (Section 4 of this Rule). Nursery Dealer - (Section 6 of this Rule).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense</u>	<u>Written Notice</u>
<u>Second Offense</u>	<u>\$25 - \$50</u>
<u>Third Offense and each repeat offense thereafter.</u>	<u>\$50 - \$100</u>

Violation - Failure of a Nursery Dealer to inform the West Virginia Department of Agriculture about the source(s) of their nursery stock. (Section 6 of this Rule).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense. Adverse effects not probable.</u>	<u>Written Notice</u>

<u>First Offense. Adverse effects probable or demonstrated.</u>	<u>\$100 - \$250</u>
<u>Second offense and each repeat offense thereafter. Adverse effects not probable.</u>	<u>\$100 - \$250</u>
<u>Second Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.</u>	<u>\$500 - \$1000</u>

Inspection Violations

Violation - Interfering with an inspector's ability to perform their duties. (West Virginia Code 19-12-8).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense</u>	<u>Written Notice</u>
<u>Second Offense</u>	<u>\$100 - \$250</u>
<u>Third Offense and each repeat offense thereafter.</u>	<u>\$500 - \$1000</u>

Violation - Failure to comply with a plant pest control order. (West Virginia Code 19-12-10).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense. Adverse effects not probable.</u>	<u>Written Notice</u>
<u>First Offense. Adverse effects probable or demonstrated.</u>	<u>\$100 - \$250</u>
<u>Second Offense and each repeat offense thereafter. Adverse effects not probable.</u>	<u>\$250 - \$500</u>
<u>Second Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.</u>	<u>\$500 - \$1000</u>

Violation - Maintaining conditions which prevent a thorough plant pest examination. (Section 8 of this Rule).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense</u>	<u>Written Notice</u>
<u>Second Offense</u>	<u>\$50 - \$100</u>
<u>Third Offense and each offense thereafter.</u>	<u>\$100</u>

Plant Certification Violations

Violation - Transporting nursery stock without a valid certificate of inspection. (West Virginia Code 19-12-11).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense. Adverse effects not probable.</u>	<u>Written Notice</u>
<u>First Offense. Adverse effects probable or demonstrated.</u>	<u>\$100 - \$250</u>
<u>Second Offense. Adverse effects not probable.</u>	<u>\$50 - \$100</u>
<u>Second Offense. Adverse effects probable or demonstrated.</u>	<u>\$250 - \$500</u>
<u>Third Offense and each repeat offense thereafter. Adverse effects not probable.</u>	<u>\$100 - \$250</u>
<u>Third Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.</u>	<u>\$500 - \$1000</u>

Violation - Distributing native nursery stock without proper inspection and certification. (Section 9 of this Rule).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense. Adverse effects not probable.</u>	<u>Written Notice</u>
<u>First Offense. Adverse effects probable or demonstrated.</u>	<u>\$250 - \$500</u>
<u>Second Offense. Adverse effects not probable.</u>	<u>\$100 - \$250</u>
<u>Second Offense. Adverse effects probable or demonstrated.</u>	<u>\$500 - \$750</u>
<u>Third Offense and each repeat offense thereafter. Adverse effects not probable.</u>	<u>\$250 - \$500</u>
<u>Third Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.</u>	<u>\$750 - \$1000</u>

Quarantine Violations

Violation - Failure to comply with the provisions of an administrative order or quarantine. (West Virginia Code 19-12-6).

<u>Level of Violation</u>	<u>Level of Penalty</u>
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<u>First Offense. Adverse effects not probable.</u>	<u>Written Notice</u>
<u>First Offense. Adverse effects probable or demonstrated.</u>	<u>\$100 - \$500</u>
<u>Second Offense. Adverse effects not probable.</u>	<u>\$300 - \$700</u>
<u>Second Offense. Adverse effects probable or demonstrated.</u>	<u>\$700 - \$1000</u>
<u>Third Offense and each repeat offense thereafter. Adverse effects not probable.</u>	<u>\$500 - \$700</u>
<u>Third Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.</u>	<u>\$1000</u>

Insect, Noxious Weed and Plant Pest Dissemination Violations

Violation - Selling, transporting or distributing plant pests, noxious weeds or insects without a valid permit. (West Virginia Code 19-12-14).

<u>Level of Violation</u>	<u>Level of Penalty</u>
<u>First Offense. Adverse effects not probable.</u>	<u>Written Notice</u>
<u>First Offense. Adverse effects probable or demonstrated.</u>	<u>\$100 - \$500</u>
<u>Second Offense and each repeat offense thereafter. Adverse effects not probable.</u>	<u>\$250 - \$500</u>
<u>Second Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.</u>	<u>\$500 - \$1000</u>



FILED

Oct 26 11 33 AM '95

West Virginia Legislature  
Legislative Rule-Making Review Committee

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Room MB47-State Capitol  
Charleston, West Virginia 25305  
(304) 347-4840

Senator Mike Ross, Co-Chair  
Delegate Vickie Douglas, Co-Chair

Debra A. Graham, Counsel  
Joe Altizer, Associate Counsel  
Marie Nickerson, Admr. Assistant

October 17, 1995

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Mr. Robert G. Morris  
Asst. Commissioner  
Dept. of Agriculture  
Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: West Virginia Plant Pest Act

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative Rule
  - (a) as originally filed
  - (b) as modified by the agency   X
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.
- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
- 5. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached.

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

cc: Gary W. Gibson  
Assistant Director  
Plant Industries Division