

# WEST VIRGINIA SECRETARY OF STATE

KEN HECHLER

## ADMINISTRATIVE LAW DIVISION

Form #2

FILED

1989 DEC -5 PM 3:56

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

### NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Department of Natural Resources TITLE NUMBER: 47

RULE TYPE: Legislative; CITE AUTHORITY W. Va. Code §§20-5E-16  
and 20-5F-6

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: 4

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

"Assessment of Civil Administrative Penalties"

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON January 5, 1990 AT 4:00 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

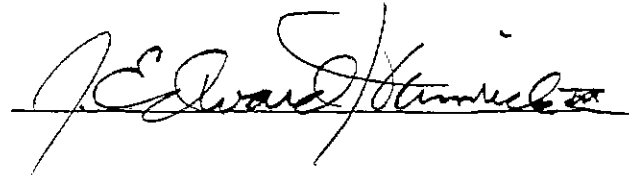
DNR Rule Comments

Room 712, Building 3

State Capitol Complex

Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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1969 DEC -5 PM 3:56

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

MEMORANDUM OF CONSENT

TO: J. Edward Hamrick III, Director  
Division of Natural Resources

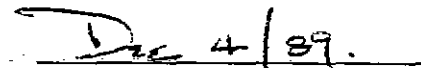
FROM: Leonard A. Harvey, Secretary  
Department of Commerce, Labor,  
and Environmental Resources

SUBJECT: Approval of Regulatory Proposal

RE: Assessment of Civil Administrative Penalties

I have reviewed the proposed rule and authorize its filing for public comment in accordance with the provisions of the West Virginia Administrative Procedures Act.

  
\_\_\_\_\_  
Leonard A. Harvey  
Secretary

  
\_\_\_\_\_  
Date

FISCAL NOTE FOR PROPOSED RULES

FILED

Rule Title: Assessment of Civil Administrative Penalties <sup>1989 DEC -5 PM 3:56</sup>

Type of Rule:  X  Legislative       Interpretive <sup>OFFICE OF WEST VIRGINIA SECRETARY OF STATE</sup> Procedural

Agency: West Virginia Department of Natural Resources

Address: Building 3, State Capitol Complex, Charleston, West Virginia

1. Effect of Proposed Rule (Estimated Total Cost)	ANNUAL			FISCAL YEAR	
	Increase \$	Decrease \$	Current \$	Next \$	Thereafter \$
Personal Services	45,000		0	47,250	49,612
Current Expense	2,000		0	2,000	2,000
Repairs and Alterations					
Equipment	2,000		0	500	500
Other					

2. Explanation of Above Estimates:

A secretary and an attorney to act as the assessment officer will be hired to implement this rule.

3. Objectives of These Rules:

This rule implements civil administrative penalty assessment and collection as provided by W. Va. Code §§20-5E-16 and 20-5F-6.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government: \$150,000 per year.

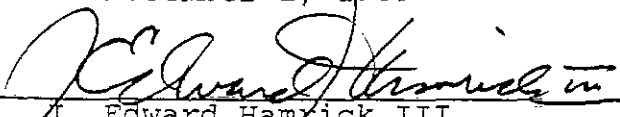
B. Economic Impact on Political Subdivisions: No impact.

Economic Impact on Specific Industries: \$150,000 per year in violator penalties.

Economic Impact on Specific Groups of Citizens: No impact.

C. Economic Impact on Citizens/Public at Large: No impact.

Date: December 1, 1989

  
 J. Edward Hamrick III  
 Director

**PREAMBLE TO A NEW LEGISLATIVE RULE  
CONCERNING CIVIL ADMINISTRATIVE PENALTIES**

**STATE AGENCY:** West Virginia Department of Natural Resources

**REGULATIONS:** "Assessment of Civil Administrative Penalties"

**AUTHORITY:** W. Va. Code §§20-5E-16 and 20-5F-6

**ACTION:** Proposed Rule; Notice of Public Comment Period

**SUMMARY:** The Department is proposing a new legislative rule (47 C.S.R. 4) concerning the criteria and procedures that shall be followed in the assessment of civil administrative penalties imposed under West Virginia's Hazardous Waste Management and Solid Waste Management Acts. A public comment period for the proposed rule commences with today's filing and ends at 4:00 p.m. on Friday, January 5, 1990. Written comments on this rule may be mailed or delivered to: DNR Rule Comments, Room 712, Building 3, State Capitol Complex, Charleston, West Virginia 25305.

SERIES 4  
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

OFFICE OF WEST VIRGINIA  
GOVERNMENT OF STATE

§47-4-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes the criteria and procedures that shall be followed in the assessment of civil administrative penalties imposed under the provisions of W. Va. Code §20-5E-16 or W. Va. Code §20-5F-6.

1.2. Authority. -- W. Va. Code §§20-5E-16 and 20-5F-6.

1.3. Filing Date. --

1.4. Effective Date. --

§47-4-2. Definitions.

2.1. "Acts" means the West Virginia Hazardous Waste Management Act (W. Va. Code §20-5E, et seq.) and the West Virginia Solid Waste Management Act (W. Va. Code §20-5F, et seq.).

2.2. "Assessment Officer" means a person appointed by the director to carry out the review, assessment, and hearing procedures outlined in these regulations.

2.3. "Civil Administrative Penalty Referral" means a written document that includes the observations made by the inspector relative to the seriousness of the alleged violation and any good faith efforts made to comply with applicable requirements as well as any other appropriate factors established by these regulations.

2.4. "Director" means the director of the West Virginia Department of Natural Resources or his authorized representative.

2.5. "Facility" means the site of the alleged violation.

2.6. "Inspector" means an authorized representative of the director who as a normal function of his responsibilities conducts inspections, investigations, or sampling at facilities regulated under either of the Acts.

2.7. "Notice of Civil Administrative Penalty" means a written notification provided to a violator by the assessment officer, by means of certified mail or personal service, assessing a civil administrative penalty. A notice of civil administrative penalty shall include:

2.7.1. A reference to the section of the statute, rule, regulation, order, or permit condition allegedly violated;

2.7.2. A concise statement of the facts alleged to constitute the violation;

2.7.3. A statement of the amount of the civil administrative penalty to be imposed; and

2.7.4. A statement of the alleged violator's right to an informal hearing.

2.8. "Notice of Dismissal" means a written notification provided to a violator by the assessment officer or the director, by means of certified mail or personal service, dismissing and vacating the enforcement action. A notice of dismissal may be issued at any time during the proceedings.

2.9. "Notice of Violation" means a written notification provided to an alleged violator by the inspector at the time of inspection.

2.10. "Violator" means the person who is alleged to have violated the statute, rule, regulation, order, or permit condition.

2.11. "Written Decision" means a written decision furnished to the violator concerning the director's final decision regarding the assessment of a civil administrative penalty and the reasons therefor.

#### **§47-4-3. Notice of Violations.**

3.1. General. An inspector or other authorized representative of the director may issue a notice of violation for any violation he observes.

3.2. Notice Procedures. A notice of violation shall be in writing, shall be signed by the inspector or other authorized representative of the director, and shall set forth with reasonable specificity:

3.2.1. The nature of the violation with a reference to the section of the statute, rule, regulation, order, or permit condition that was allegedly violated;

3.2.2. The time and date of the observance of the violation; and

3.2.3. A reasonable description of the facility where the violation is observed, where within that facility the violation was observed, and the stage of processing at which the violation occurred, if appropriate.

**§47-4-4. Penalty Assessment Procedures.**

4.1. Review of Notice of Violation and Penalty Calculation. The assessment officer shall review each notice of violation referred to him for civil administrative penalty assessment to determine:

4.1.1. The appropriateness of a civil administrative penalty;

4.1.2. The amount of penalty, if any, based upon the rates and methods given in these regulations;

4.1.3. The appropriateness of assessing a daily civil administrative penalty for continuing violations;

4.1.4. The total administrative penalty assessment; and

4.1.5. The appropriateness of assessing a civil administrative penalty against an individual.

4.2. Notice of Civil Administrative Penalty. The assessment officer shall provide the violator with:

4.2.1. A notice of civil administrative penalty which shall include procedures for requesting an informal hearing and a notification of applicable time constraints; or

4.2.2. A notice of dismissal.

**§47-4-5. Hearings and Appeals.**

5.1. Right to Informal Hearing. The violator shall have twenty (20) calendar days from his receipt of the notice of civil administrative penalty within which to deliver to the director a written request for an informal hearing. If no hearing is requested, the notice of civil administrative penalty shall become a final order after the expiration of the twenty-day period and the civil administrative penalty shall become due and payable.

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

5.2.1. The time and place the informal hearing is to be held shall be communicated to any person who filed a notice of violation bringing about the informal hearing and to the violator.

5.2.2. Such communication shall be provided at least ten (10) calendar days prior to the time of the hearing.

5.3. 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:

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

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

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

5.4. Written Decision. Within thirty (30) days following the informal hearing, the director shall issue and furnish to the violator a written decision affirming, increasing, decreasing, or dismissing the civil administrative penalty assessment and giving the reasons therefor.

5.5. Request for Formal Hearing. Within thirty (30) days after notification of the director's decision, the violator may request a formal hearing before the State Water Resources Board in accordance with the provisions of the Acts.

#### **§47-4-6. Individual Civil Administrative Penalties.**

6.1. The director may assess an individual civil administrative penalty against any corporate director, officer, agent, or employee of a violator who authorizes, orders, or carries out a violation of the statute, rule, regulation, order, or permit condition or who fails or refuses to follow an order from the director or the chief.

6.2. In determining the amount of a civil administrative penalty to be assessed against an individual, consideration shall be given to the criteria specified in Section 7 of these regulations.

6.3. The director shall serve on each individual to be assessed an administrative penalty a notice of individual civil administrative penalty assessment. For purposes of Section 6.3 of these regulations, service shall be deemed to be sufficient if it satisfies Rule 4 of the West Virginia Rules of Civil Procedure for service of a summons and complaint. A notice of individual civil administrative penalty assessment shall include:

6.3.1. A brief narrative explanation of the reasons for the penalty;

6.3.2. A copy of the underlying notice of violation;

6.3.3. The amount of the penalty; and

6.3.4. A notice of the individual's right to request a formal hearing before the State Water Resources Board.

6.4. The individual shall have thirty (30) calendar days from his receipt of the notice of individual civil administrative penalty assessment within which to deliver to the State Water Resources Board a written petition for a formal hearing. If no hearing is requested, the notice of individual civil administrative penalty shall become a final order after expiration of the thirty-day period and the individual civil administrative penalty shall become due and payable.

6.5. If the individual named in a notice of individual civil administrative penalty assessment files a petition for review in accordance with Section 6.4 of these regulations, the penalty shall become due upon the issuance of a final administrative order affirming, increasing, or decreasing the proposed penalty.

#### **§47-4-7. Civil Administrative Penalty Calculation Procedures.**

7.1. The director shall calculate a civil administrative penalty by taking into account the seriousness of the alleged violation, negligence or good faith on the part of the violator, and any history of noncompliance by the violator.

7.1.1. Seriousness of Violation. The director shall take into account the seriousness of the violation by assigning a rating for the extent of deviation from the requirement of the statute, rule, regulation, order, or permit condition in accordance with Table A of these regulations and a rating for the potential harm which may have resulted from the alleged violation in accordance with Table B of these regulations. These seriousness of violation ratings shall be used to determine the base penalty amount of the civil administrative penalty assessment through the use of Tables C and D of these regulations. Table C of these regulations shall be used for hazardous waste violations. Table D of these regulations shall be used for solid waste violations.

7.2. Negligence/Good Faith. The director shall take into account the negligence or good faith which the violator displayed with regard to the alleged violation by assigning a rating in accordance with Table E of these regulations. The negligence/good faith rating shall be used to determine the multiplying factor to be applied to the base penalty amount through the use of Table F of these regulations.

7.3. History of Noncompliance. The director shall take into account the violator's history of noncompliance by determining the number of previous enforcement actions (administrative, civil, or criminal) which have been taken against the violator during the thirty-six (36) months prior to the violation. Those enforcement actions which were withdrawn, dismissed, or vacated shall not be included in this determination. The number of previous enforcement actions shall be used to determine the dollar amount to be added to the penalty through the use of Tables G and H of these regulations. Table G of these regulations shall be used for hazardous waste violations. Table H of these regulations shall be used for solid waste violations.

7.4. The civil administrative penalty shall be calculated by multiplying the base penalty amount (established from the seriousness of violation pursuant to Section 7.1 of these regulations) by the multiplying factor (established from the negligence/good faith ratings pursuant to Section 7.2 of these regulations) and then adding to that product a dollar amount (established from the history of noncompliance pursuant to Section 7.3 of these regulations) through the use of Table I of these regulations.

## TABLE A

### Ratings for Deviation from Requirements

1 to 3 -- The violator had completed nearly all requirements of the statute, rule, regulation, order, or permit condition in question. However, there were some aspects of the requirements which were clearly not accomplished or the requirements were completed in most, but not all, areas of the facility.

4 to 6 -- The violator had completed approximately one-half of the requirements of the statute, rule, regulation, order, or permit condition in question or the requirements were not completed in approximately one-half of the areas of the facility.

7 to 9 -- The violator has completed almost none of the requirements of the statute, rule, regulation, order, or permit condition in question. However, some aspects of the requirements clearly were accomplished or the requirements were not completed in most, but not all, areas of the facility.

10 -- The violator had not completed any of the requirements of the statute, rule, regulation, order, or permit condition in question or the requirements were not completed in any area of the facility.

TABLE B

Ratings of Potential for Harm

1 to 3 -- The violation is of an administrative nature and could not result in a potential for harm to employees, the public, or the environment.

4 to 6 -- The violation is of an administrative or a physical nature and may result in a minor potential for harm to employees, the public, or the environment.

7 to 9 -- The violation is of an administrative or a physical nature and may result in a moderate potential for harm to employees, the public, or the environment.

10 --The violation is of an administrative or physical nature and may result in a major potential for harm to employees, the public, or the environment.

**TABLE C**  
**Seriousness of Hazardous Waste Violation**

	Deviation from Requirement									
	1	2	3	4	5	6	7	8	9	10
Potential for Harm										
1	1100	1200	1300	1400	1500	1600	1700	1800	1900	2000
2	1350	1450	1550	1650	1750	1850	1950	2050	2150	2250
3	1600	1700	1800	1900	2000	2100	2200	2300	2400	2500
4	1850	1950	2050	2150	2250	2350	2450	2550	2650	2750
5	2100	2200	2300	2400	2500	2600	2700	2800	2900	3000
6	2350	2450	2550	2650	2750	2850	2950	3050	3150	3250
7	2600	2700	2800	2900	3000	3100	3200	3300	3400	3500
8	3100	3200	3300	3400	3500	3600	3700	3800	3900	4000
9	3600	3700	3800	3900	4000	4100	4200	4300	4400	4500
10	4100	4200	4300	4400	4500	4600	4700	4800	4900	5000

**TABLE D**  
**Seriousness of Solid Waste Violation**

	Deviation from Requirement									
	1	2	3	4	5	6	7	8	9	10
Potential for Harm										
1	350	450	550	650	750	850	950	1050	1150	1250
2	600	700	800	900	1000	1100	1200	1300	1400	1500
3	850	950	1050	1150	1250	1350	1450	1550	1650	1750
4	1100	1200	1300	1400	1500	1600	1700	1800	1900	2000
5	1350	1450	1550	1650	1750	1850	1950	2050	2150	2250
6	1600	1700	1800	1900	2000	2100	2200	2300	2400	2500
7	1850	1950	2050	2150	2250	2350	2450	2550	2650	2750
8	2100	2200	2300	2400	2500	2600	2700	2800	2900	3000
9	2350	2450	2550	2650	2750	2850	2950	3050	3150	3250
10	2600	2700	2800	2900	3000	3100	3200	3300	3400	3500

TABLE E

Ratings for Negligence/Good Faith

0 -- The violation is not the result of negligence and the violator expended all possible effort to comply with requirement in question or the violator has completed all actions to correct the violation.

1 to 3 -- The violation is the result of an oversight by the violator and could have been avoided if a more conscientious effort had been made in the operation of the facility or the violator has not completed current actions to correct the violation.

4 to 6 -- The violation is obvious and a result of a lack of reasonable care by the violator or the violator has taken inadequate action to correct the violation.

7 to 9 -- The violation is the result of a complete disregard for the requirement in question or the violator failed to respond to a previous enforcement action.

TABLE F  
Negligence/Good Faith

Negligence/Good Faith	Multiplying Factor
0	0.7
1	0.8
2	0.9
3	1.0
4	1.1
5	1.2
6	1.4
7	1.6
8	1.8
9	2.0

TABLE G

History of Hazardous Waste Noncompliance

Number of Previous Enforcement Actions	Dollar Amount
1	\$250.00
2	\$500.00
3	\$1000.00
4	\$1750.00
5	\$2750.00
6	\$4000.00
7 and greater	\$5500.00

TABLE H

History of Solid Waste Noncompliance

Number of Previous Enforcement Actions	Dollar Amount
1	\$100.00
2	\$200.00
3	\$350.00
4	\$550.00
5	\$850.00
6	\$1250.00
7	\$1650.00
8	\$2150.00
9	\$2750.00
10 and greater	\$3350.00

TABLE I

Calculation of Civil Administrative Penalty Assessment

Seriousness of Violation	_____
Negligence/Good Faith	x _____
Subtotal:	_____
History of Noncompliance	+ _____
Total:	_____