

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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FILED
1998 MAR 29 AM 9:50
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

Department of Commerce, Labor and Environmental
AGENCY: Resources, Division of Natural Resources TITLE NUMBER: 47

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

EMERGENCY 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 RULE BEING FILED AS AN EMERGENCY: 4

TITLE OF RULE BEING FILED AS AN EMERGENCY: _____

"Assessment of Civil Administrative Penalties"

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Please see attached sheets.

Use Additional Sheets If Necessary.


J. Edward Hamrick III
Director

DATE: March 29, 1990
TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: West Virginia Department of Natural Resources
EMERGENCY RULE TITLE: Assessment of Civil Administrative Penalties

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1. Emergency rule was filed on: March 29, 1990

2. Statutory authority for promulgating the emergency rule:
West Virginia Code, Chapter 20, Article 5E, Section 16 and
West Virginia Code, Chapter 20, Article 5F, Section 6

3. Proposed legislative rule was filed on: December 5, 1989

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?

The emergency rule adopts new language.

5. Has the same or similar emergency rule previously been filed and expired?

No similar rule was filed previously.

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety, or welfare.

Not applicable.

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

Not applicable.

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

Substantial harm to the public interest may occur if this rule is not approved for emergency promulgation. The State will lose \$100,000 or more, if promulgation is delayed, due to a loss of Federal grant dollars and the inability to collect civil administrative penalties. In order for West Virginia to offset the cost of implementing the civil administrative penalty program, the State must begin implementation before March 30, 1990. Although promulgation of this rule is being pursued through the normal rule-making channels, the necessary deadline will most likely be missed by approximately four months.

Failure to meet the March 30, 1990 deadline will result in the loss of \$50,000 in Federal grant monies and the income to be derived by the civil administrative penalty program. The money collected by the program is directed by statute to be used in the remediation of uncontrolled hazardous waste and solid waste dumps. Clearly, the loss of Federal monies to offset implementation costs and funds to protect the public from the health hazards posed by uncontrolled solid and hazardous waste constitutes a substantial harm to the public interest.

EMERGENCY RULE

TITLE 47
LEGISLATIVE RULES
DIVISION OF NATURAL RESOURCES
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES

SERIES 4
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

§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. -- March 29, 1990.

1.4. Effective Date. -- March 29, 1990.

§47-4-2. Definitions.

2.1. "Acts" means the West Virginia Hazardous Waste Management Act (W. Va. Code §20-5E-1, et seq.) and the West Virginia Solid Waste Management Act (W. Va. Code §20-5F-1, 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 Division 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:

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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 initial 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 within fifteen (15) calendar days of the date inspection.

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

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 point of generation, treatment, storage, or disposal at which the violation occurred, if appropriate.

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§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 initial 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 initial civil 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 request, in writing, an informal hearing before the assessment officer. If a hearing is requested, the assessment officer will hold the hearing to deduce the actual facts and circumstances regarding the violation and, based thereon, will make a final recommendation of civil administrative penalty assessment to the director. 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 inspector or other authorized

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representative of the director 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 fifteen (15) calendar days prior to the time of the hearing.

5.2.3. The assessment officer may continue the informal hearing only for good cause shown.

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) calendar days following the informal hearing, the director shall issue and furnish to the violator a written decision affirming, increasing, decreasing, or dismissing the initial civil administrative penalty assessment and giving the reasons therefor.

5.5. Request for Formal Hearing. Within thirty (30) calendar 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. If no hearing is requested the director'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.

§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, or any other person, 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.

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

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

6.3.3. A statement of the amount of the individual civil administrative penalty to be imposed;

6.3.4. A copy of the underlying notice of violation;
and

6.3.5. A statement of the individual's right to an informal hearing.

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 request, in writing, an informal hearing before the assessment officer. 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. The informal hearing, if requested, will be scheduled and conducted pursuant to Section 5 of these regulations.

§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, the type of facility, 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

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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. Adjustment Factor. The director shall take into account the type of facility by assigning an adjustment factor in accordance with Table G of these regulations. The subtotal calculated pursuant to Sections 7.1 and 7.2 of these regulations shall be multiplied by the adjustment factor.

7.4. 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 facility during the twenty-four (24) 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 H and I of these regulations. Table H of these regulations shall be used for hazardous waste violations. Table I of these regulations shall be used for solid waste violations.

7.5. 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), multiplying that product by the adjustment factor (established from the adjustment factor pursuant to Section 7.3 of these regulations) and then adding to that product a dollar amount (established from the history of noncompliance pursuant to Section 7.4 of these regulations) through the use of Table J of these regulations.

7.6. The civil administrative penalty assessed may not exceed the maximum assessments prescribed by the Acts. The maximum assessment for hazardous waste violations shall not exceed seven thousand five hundred dollars (\$7,500) per day per violation, up to a maximum of twenty-two thousand five hundred

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dollars (\$22,500) total penalty. The maximum assessment for solid waste violations shall not exceed five thousand dollars (\$5,000) per day per violation, up to a maximum of twenty thousand dollars (\$20,000) total penalty.

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.

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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 human health 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 human health 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 human health or the environment.

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

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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

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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

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

2 to 4 -- 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 begun but not completed current actions to correct the violation.

5 to 7 -- 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.

8 to 10 -- 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 pertaining to the same requirement.

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TABLE F
Negligence/Good Faith

Negligence/Good Faith	Multiplying Factor
1	0.5
2	0.6
3	0.7
4	0.8
5	1.0
6	1.2
7	1.4
8	1.6
9	1.8
10	2.0

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TABLE G
Adjustment Factor

Type of Facility	Multiplying Factor
Conditionally Exempt Small Quantity Hazardous Waste Generator; Hazardous Waste Transporter	0.5
Small Quantity Hazardous Waste Generator; Class C Solid Waste Facility; Class D Solid Waste Facility; Transfer Station; Open Dump	0.75
Hazardous Waste Generator; Class B Solid Waste Facility; Class E Solid Waste Facility	1.0
Hazardous Waste Treatment, Storage, or Disposal Facility; Class A Solid Waste Facility; Class F Solid Waste Facility	1.5

TABLE H

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

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TABLE I

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 J

Calculation of Civil Administrative Penalty Assessment

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

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
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Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE May 10, 1990
ADMINISTRATIVE LAW DIVISION

May 10, 1990

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Natural Resources

RULE: New Rule, Series 4; Assessment of Civil Administrative Penalties

DATE FILED AS AN EMERGENCY RULE: March, 29, 1990

NO. 5-90

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

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
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STATE OF WEST VIRGINIA

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(Plus all the volunteer
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DECISION EMERGENCY RULE DECISION (ERD 5-90)

AGENCY : Division of Natural Resources
RULE: New Rule, Series 4, Assessment of Civil Administrative
 Penalties
FILED AS AN EMERGENCY RULE: March 29, 1990

- par. 1 The Division of Natural Resources (DNR) has filed the above new rule as an emergency.
- par. 2 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 DNR has filed this emergency rule with supporting documents with the Secretary of State on March 29, 1990, and with the LRMRC on March 29, 1990.

par. 7 It is the determination of the Secretary of State that DNR has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §20-5E-16 reads:

§20-5E-16. Civil penalties and injunctive relief.

(a)(1) Any person who violates any provision of this article, any permit or any rule, regulation or order issued pursuant to this article shall be subject to a civil administrative penalty, to be levied by the director, of not more than seventy-five hundred dollars for each day of such violation, not to exceed a maximum of twenty-two thousand five hundred dollars. In assessing any such penalty, the director shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements as well as any other appropriate factors as may be established by the director by rules and regulations promulgated pursuant to this article and article three (§29A-3-1 et seq.) chapter twenty-nine-a of this code. No assessment shall be levied pursuant to this subsection until after the alleged violator has been notified by certified mail or personal service. The notice shall include a reference to the section of the statute, rule, regulation, order or statement of permit conditions that was allegedly violated, a concise statement of the facts alleged to constitute the violation, a statement of the amount of the administrative penalty to be imposed and a statement of the alleged violator's right to an informal hearing. The alleged violator shall have twenty calendar days from receipt of the notice within which to deliver to the director a written request for an informal hearing. If no hearing is requested, the notice shall become a final order after the expiration of the twenty-day period. If a hearing is requested, the director shall inform the alleged violator of the time and place of the hearing. The director may appoint an assessment officer to conduct the informal hearing and then make a written recommendation to the director concerning the assessment of a civil administrative penalty. Within thirty days following the informal hearing, the director shall issue and furnish to the violator a written decision, and the reasons therefor, concerning the assessment of a civil administrative penalty. Within thirty days after notification of the director's decision, the alleged violator may request a formal hearing before the water resources board in accordance with the provisions of section nineteen of this article. The authority to levy an administrative penalty shall be in addition to all other enforcement provisions of this article and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied: Provided, That no combination of assessments against a violator under this section shall exceed twenty-five thousand dollars per day of each such violation: Provide, however, That any violation for which the violator has paid a civil administrative penalty assessed under this section shall not be the subject of a separate civil penalty action under this article to the extent of the amount of the civil administrative penalty paid. All administrative penalties shall be levied in accordance with rules and regulations issued pursuant to subsection (a) of section six of this article. The net proceeds of assessments collected pursuant to this subsection shall be deposited in the Hazardous Waste Emergency Response Fund established pursuant to section three, article five-g of this chapter.

(2) No assessment levied pursuant to subdivision (1) subsection (a) above shall become due and payable until the procedures for review of such assessment as set out in said subsection have been completed.

b) Any person who violates any provision of this article, any permit or any rule, regulation or order issued pursuant to this article shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each day of such violation, which penalty shall be recovered in a civil action either in the circuit court wherein the violation occurs or in the circuit court of Kanawha County.

(c) The chief may seek an injunction, or may institute a civil action against any person in violation of any provisions of this article or any permit, rule, regulation or order issued pursuant to this article. In seeking an injunction, it is not necessary for the chief to post bond nor to allege or prove at any stage of the proceeding that irreparable damage will occur if the injunction is not issued or that the remedy at law is inadequate. An application for injunctive relief or a civil penalty action under this section may be filed and relief granted notwithstanding the fact that all administrative remedies provide for in this article have not been exhausted or invoked against the person or persons against whom such relief is sought.

(d) Upon request of the chief, the attorney general or the prosecuting attorney of the county in which the violation occurs, shall assist the chief in any civil action under this section.

(e) In any action brought pursuant to the provisions of this section, the state, or any agency of the state which prevails, may be awarded costs and reasonable attorney's fees.

par. 9 §20-5F-6 further reads:

§20-5F-6. Orders, inspections and enforcement; civil and criminal penalties.

(a) If the director or chief upon inspection, investigation or through other means observes, discovers or learns of a violation of this article, its rules, article five-a of this chapter or its rules, or any permit or order issued under this article, he may:

(1) Issue an order stating with reasonable specificity the nature of the alleged violation and requiring compliance immediately or within a specified time. An order under this section includes, but is not limited to, any or all of the following: Orders suspending, revoking or modifying permits, orders requiring a person to make remedial action or cease and desist orders;

(2) Seek an injunction in accordance with subsection (e) of this section;

(3) Institute a civil action in accordance with subsection (e) of this section or

(4) Request the attorney general, or the prosecuting attorney of the county wherein the alleged violation occurred, to bring a criminal action in accordance with subsection (b) of this section.

(b) Any person who willfully or negligently violates the provisions of this article, any permit or any rule, regulation or order issued pursuant to this article shall be subject to the same criminal penalties as set forth in section nineteen, article five-a, chapter twenty of this code.

(c)(1) Any person who violates any provision of this article, any permit or any rule, regulation or order issued pursuant to this article shall be subject to civil administrative penalty, to be levied by the director, of not more than five thousand dollars for each day of such violation, not to exceed a maximum of twenty thousand dollars. In assessing any such penalty, the director shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements as well as any other appropriate factors as may be established by the director by rules and regulations promulgated pursuant to this article and article three, chapter twenty-nine-a of the code. No assessment shall be levied pursuant to this subsection until after the alleged violator has been notified by certified mail or personal service. The notice shall include a reference to the section of the statute, rule, regulation, order or statement of permit conditions that was allegedly violated, a concise statement of the facts alleged to constitute the violation, a statement of the amount of the administrative penalty to be imposed and a statement of the alleged violator's right to an informal hearing. The alleged violator shall have twenty calendar days from receipt of the notice within which to deliver to the director a written request for an informal hearing. If no hearing is requested, the notice shall become a final order after the expiration of the twenty-day period. If a hearing is requested, the director shall inform the alleged violator of the time and place of the hearing. The director may appoint an assessment officer to conduct the informal hearing and then make a written recommendation to the director concerning the assessment of a civil administrative penalty. Within thirty days following the informal hearing, the director shall issue and furnish to the alleged violator a written decision, and the reasons therefor, concerning the assessment of a civil administrative penalty. Within thirty days after notification of the director's decision, the alleged violator may request a formal hearing before the water resources board in accordance with the provisions of section seven of this article. The authority to levy a civil administrative penalty shall be in addition to all other enforcement provisions of this article and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied: Provided, That no combination of assessments against a violator under this section shall exceed twenty-five thousand dollars per day of each such violation: Provided, however, That any violation for which the violator has paid a civil administrative penalty assessed under this section shall not be the subject of a separate civil penalty action under this article to the extent of the amount of the civil administrative penalty paid. All administrative penalties shall be levied in accordance with rules and regulations issued pursuant to subsection (a) of section four of this article. The net proceeds of assessments collected pursuant to this subsection shall be deposited in the Solid Waste Reclamation and Environmental Response Fund established in subdivision (3), subsection (h), section five-a of this article.

(2) No assessment levied pursuant to subdivision (1) subsection (c) above shall become due and payable until the procedures for review of such assessment as set out in said subsection have been completed.

(d) Any person who violates any provision of this article, any permit or any rule, regulation or order issued pursuant to this article shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each day of such violation, which penalty shall be recovered in a civil action either in the circuit court wherein the violation occurs or in the circuit court of Kanawha County.

(e) The director or chief may seek an injunction or may institute a civil action against any person in violation of any provisions of this article or any permit, rule, regulation or order issued pursuant to this article. In seeking an injunction, it is not necessary for the director or chief to post bond nor to allege or prove at any state of the proceeding that irreparable damage will occur if the injunction is not issued or that the remedy at law is inadequate. An application for injunctive relief or a civil penalty action under this section may be filed and relief granted notwithstanding the fact that all administrative remedies provided for in this article have not been exhausted or invoked against the person or persons against whom such relief is sought.

(f) Upon request of the director or chief, the attorney general or the prosecuting attorney of the county in which the violation occurs shall assist the director in any civil action under this section.

(g) In any civil action brought pursuant to the provisions of this section, the state, or any agency of the state which prevails, may be awarded costs and reasonable attorney's fees.

par. 10 It is the determination of the Secretary of State that DNR has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13 The facts and circumstances as presented by DNR are as follows:

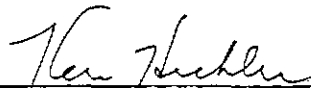
Substantial harm to the public interest may occur if this rule is not approved for emergency promulgation. The State will lose \$100,000 or more, if promulgation is delayed, due to a loss of Federal grant dollars and the inability to collect civil administrative penalties. In order for West Virginia to offset

the cost of implementing the civil administrative penalty program, the State must begin implementation before March 30, 1990. Although promulgation of this rule is being pursued through the normal rule-making channels, the necessary deadline will most likely be missed by approximately four months.

Failure to meet the March 30, 1990 deadline will result in the loss of \$50,000 in Federal grant monies and the income to be derived by the civil administrative penalty program. The money collected by the program is directed by statute to be used in the remediation of uncontrolled hazardous waste and solid waste dumps. Clearly, the loss of Federal monies to offset implementation costs and funds to protect the public from the health hazards posed by uncontrolled solid and hazardous waste constitutes a substantial harm to the public interest.

par. 15 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency.

par. 16 This decision shall be cited as Emergency Rule Decision 5-90 or ERD 5-90 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with DNR, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
SECRETARY OF STATE

Entered May 10, 1990

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE May 10, 1990
ADMINISTRATIVE LAW DIVISION