

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

FILED
1990 MAR 29 AM 9:50
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

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

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

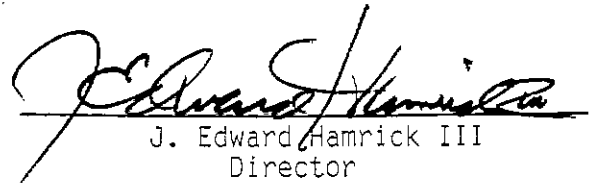
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: _____

"Assessment of Civil Administrative Penalties"

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


J. Edward Hamrick III
Director

FILED

1989 DEC -5 PM 3:57

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

MEMORANDUM OF CONSENT

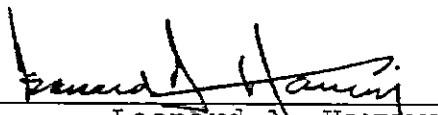
TO: J. Edward Hamrick III, Director
Division of Natural Resources

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

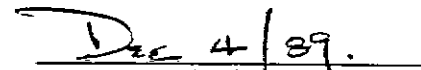
SUBJECT: Approval of Regulatory Proposal

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 1989 050 -5 04 3:57

Type of Rule: Legislative Interpretive 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)	Increase \$	ANNUAL		FISCAL YEAR	
		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.

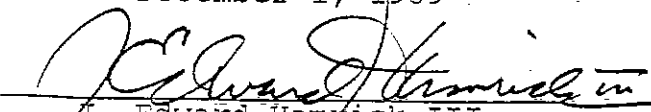
B. Economic Impact on Political Subdivisions: No impact.

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

DATE: March 29, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Department of Commerce, Labor and Environmental Resources,
Division of Natural Resources

FILED
1990 MAR 29 AM 9:50
OFFICE OF THE CLERK
STATE OF WEST VIRGINIA

LEGISLATIVE RULE TITLE: Assessment of Civil Administrative Penalties

1. Authorizing statute(s) citation:

West Virginia Code Chapter 20, Article 5E, Section 16 and
West Virginia Code Chapter 20, Article 5F, Section 6

2. a. Date filed in State Register with Notice of Public
Comment Period: December 5, 1989

b. What other notice, including advertising, did you
give of the public comment period?

None.

c. Public Comment Period: December 5, 1989 - January 5, 1990

d. Attach list of persons who appeared at the hearing,
comments received, amendments to the proposed rule,
and the reasons for those amendments.

Attached X No comments received _____

The comments received and the Division's responses appear
in the preamble filed with the agency-approved rule.

e. Date you filed in State Register the agency-approved
proposed Legislative Rule following public hearing:

March 29, 1990

f. Name and phone number of agency person to contact for
additional information:

Ms. Jennifer J. Costello, Esquire
Office of Environmental & Regulatory Affairs
348-2761

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

NOT APPLICABLE

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

- b. Date of hearing: _____

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

- d. Attach findings and determinations and reasons:

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

STATE AGENCY: Department of Commerce, Labor and Environmental Resources, Division of Natural Resources

REGULATIONS: "Assessment of Civil Administrative Penalties"

AUTHORITY: West Virginia Code §§20-5E-16 and 20-5F-6

ACTION: Agency-Approved Rule

SUMMARY: The Division received comments from two commentators during the public notice and comment period on these regulations. Many of the comments have been incorporated, in whole or in part, in the revision of these regulations. Comments which have been incorporated herein will generally not be addressed in this preamble.

These regulations effectuate specific statutory authority, and are intended by the Division to provide a quick and simple process to address common, minor violations. Such violations usually do not merit the use of more expensive and time-consuming enforcement mechanisms such as civil or criminal litigation, nor the imposition of the larger penalties provided thereby. The regulations, therefore, provide an efficient mechanism by which a standardized, calculated penalty for common or minor violations may be imposed. An inspector observing a violation will determine whether the violation should be referred to the assessment officer (appointed by the Director) for civil administrative penalty assessment, or whether some other action should be taken. Should the inspector refer the violation, the inspector will send a Notice of Violation and a referral form to the assessment officer. The assessment officer will review those documents and determine whether an assessment is appropriate. If so, the officer will calculate an initial civil administrative penalty assessment based on the rates and methods set forth in Section 7 of these regulations. The officer will then send to the violator a Notice of Civil Administrative Penalty, noting each violation and the penalty calculated therefor. The violator then has twenty days in which to request an informal hearing on the assessment. If the violator does not request the informal hearing, the assessment becomes due and payable at the end of the twenty-day period.

When an informal hearing is requested, the assessment officer will schedule a hearing and notify the violator and the inspector at least fifteen days in advance. The informal hearing will be a conference between the violator, the inspector and the assessment officer. Witnesses will not be sworn, rules of evidence will not apply, and the proceedings will not be transcribed. The parties are expected to engage in an informal discussion of the facts surrounding the violation and the ratings applied to the

violation.

Within thirty days of the informal hearing, a final written decision affirming, increasing, decreasing, or dismissing the assessment will be provided. If the violator chooses to appeal the order to the Water Resources Board within thirty days, the matter proceeds as a typical administrative order appeal. If the violator does not appeal, the written decision becomes a final order, and the penalty becomes due and payable at the end of the thirty-day period.

One commentor strenuously objected to Section 5.3.3 of these regulations, arguing that sworn, certified statements should be allowed to be used at formal review proceedings. The Division believes that the commentor may have misread the regulatory section, or may not understand the purpose served by it. Section 5.3.3 of the regulation is intended to encourage full and frank discussion at the conference which serves as an informal hearing. The informal hearing is emphatically not intended to be a full-blown evidentiary hearing. The parties need not be represented by counsel, nor bring numerous persons to testify. It is an opportunity for discussion, at which each side may air its views.

The Division believes that Section 5.3.3 will assist full and frank discussion by freeing the individuals present from fear that their words must be guarded. The parties will not be testifying under oath at the informal hearing; they will merely discuss the case. Thus, there will be no sworn statements to be used at formal proceedings later. However, a party to the informal hearing may not hide otherwise admissible evidence merely by referring to it at the informal hearing. Evidence, including statements, which would be available for use in formal evidentiary hearings if no informal hearing existed will still be available. Thus, if one party obtains a sworn affidavit from an individual, that party may use the affidavit in formal evidentiary hearings, even if the individual made the same representations at the informal hearing. However, comments made by a person during the informal conference may not be used in a formal evidentiary hearing, unless independent evidence thereof is obtained outside the context of the informal hearing. Because the Division believes that Section 5.3.3 is vital to free discussion at the informal hearing, the provision has not been changed.

The same commentor also requested that a preassessment conference be provided. Again, the Division believes that the comment reflects a misunderstanding of the assessment process. Since the violations addressed by civil administrative penalty assessments will generally be minor, cut-and-dried violations, the Division expects the penalties assessed to be small. Often, there will be no debate as to the violation's occurrence. By sending the violator an initial assessment, without the cost or inconvenience of exhaustive prior proceedings, the violator is free to pay the assessment if it appears reasonable without

further expense. If the violator objects to the initial assessment, of course, it may request an informal hearing. As noted previously, the informal hearing is a conference and, because the assessment does not become due until after the informal hearing when a hearing is requested, it serves as a preassessment conference. If the violator has no objection to paying the initial assessment, no conference is necessary. Thus, initial assessments are intended to be an efficient device for the violator, as well as the Division, in resolving violations. The Department has sought to clarify this issue by including the term "initial" to distinguish initial assessments from post-conference assessments, where appropriate.

One commentor suggested that the assessment officer should not also serve as the hearing officer at the informal hearing, as the assessment officer would be biased. By definition, the assessment officer is the hearing officer. The Division planned for the assessment officer to assess the initial penalty, rather than the inspector, in order to provide consistency and objectivity in assessments at the initial stage. Since the initial assessment is based exclusively on the Notice of Violation and the referral form, and not on any independent knowledge or opinion of the assessment officer, that officer will not bring prejudice to an informal hearing. The informal hearing, when requested, will establish the facts upon which the penalty calculation is based, and the assessment officer will have no reason to be biased regarding those facts merely because the initial calculation has previously been made.

Both commentors suggested that the regulations allow for continuances of the informal hearings. The Division agrees with the commentors. However, because civil administrative penalties are intended as an expeditious and simple procedure, the Division is concerned that an unlimited right to continuances could be used to unduly delay assessment review. Therefore, the Division has provided for the assessment officer's ability to continue informal hearings only for good cause shown.

One commentor suggested that, after an informal hearing, the Director should not be allowed to increase the penalty, but only to decrease or vacate it. The commentor stated that the Director would already be familiar with the Division's case, and that the only new information submitted at the hearing would be from the violator and therefore would be exculpatory. The Division disagrees with the commentor's characterization and conclusions. First, the Director will not be intimately familiar with the details of the case. The only information provided by the inspector to the Director prior to initial assessment is a copy of the Notice of Violation and the civil administrative penalty referral form. That information is of a general nature. The Director will have no other contact regarding the violation with Division personnel prior to the informal hearing. Consequently, information gleaned from the inspector and the violator at the

informal hearing may show that the initial assessment was inappropriately low, based on the detailed circumstances. Similarly, a more thorough knowledge of the facts may show the initial assessment to be too high. In this sense, the initial assessment is an average penalty, and the details brought out at the hearing may show the violation to have been better or worse than average. The Director should have the flexibility to respond appropriately to details provided in the informal hearing. Therefore, the Division has not adopted the commentor's suggestion, and the penalty may be affirmed, increased, decreased or dismissed at the Director's discretion after the informal hearing.

One commentor argues that the criteria establishing ratings in Tables A, B and E are too subjective, and suggests that a checklist giving ratings for each discrete item of noncompliance be used instead. The Division had previously considered a violation checklist. However, it is infeasible to list all possible violations of the statutes, regulations, permits and orders. The Division also believes that it is impossible to completely eliminate all subjectivity in evaluating noncompliance and an appropriate penalty assessment therefor. Judgment is called for in assessing the penalties. However, the Division has sought to minimize the subjectivity of the evaluations in several ways. First, the ratings themselves demand a certain definition of the facts observed, and an articulable explanation of ratings is expected at informal conferences. Second, by employing one assessment officer, the Division expects that general consistency among assessments will develop. By having the assessment officer, rather than an inspector, determine the amount of penalty, objectivity in penalty assessments is even further assured. Finally, the penalty calculation procedure will, itself, limit subjectivity because it limits discretion.

One commentor suggested that, in ratings 7 to 9 of the potential for harm (Table B), the regulations should require that harm "would" occur, rather than that harm "may" occur. The Division has chosen the word "may" with care, because the purpose of the Acts is to prevent harm. Thus, it is the potential for harm which is penalized, regardless of whether harm actually occurs or not. Both the severity and likelihood of harm may be considered in characterizing the potential for harm as "minor," "moderate" or "major." For these reasons, the Division is not adopting the commentor's suggestion.

One commentor questioned the use of different tables for assigning monetary values to hazardous waste and solid waste seriousness of violations (Tables C & D). The commentor suggested that the same "seriousness of violation" ratings between solid and hazardous waste violations should have the same dollar value. The Division has determined that separate tables are necessary, as the maximum civil administrative penalties for solid waste are lower than for hazardous waste. Consequently, it is appropriate to have

lower base penalties for solid waste violations in calculating civil administrative penalties.

Both commentors suggested that the history of noncompliance (Section 7.4) should be tied to previous enforcement actions at or against a facility rather than against a given violator, in order to avoid penalizing a violator for ownership rather than noncompliance. The Division agrees with these commentors, and has changed the regulation to reflect this.

Both commentors suggested that the violator's ability to pay the penalty should be taken into account in assessing a civil administrative penalty. While the Division recognizes that different violators will be differently situated financially, the financial status of the facility does not excuse or lessen the severity of a violation. It is the Division's belief that culpability is not tied to ability to pay. Further, ability to pay is very difficult to assess in an objective manner, and would unduly complicate assessments and the scope of the informal hearing were it to be put in issue. Civil administrative penalties are anticipated to be utilized as an effective and efficient means to address minor violations, and are thus expected to be lesser amounts than available under other enforcement mechanisms. However, the Division does find some merit in adjusting penalties at a predetermined rate in order to take into account the size and type of facility involved. The Division believes that permitted and interim status facilities should be held to the highest standards of compliance, and that small facilities should not be unduly burdened. Therefore, the Division has added a standard adjustment factor, based on the type of facility involved, to the assessment procedure, as reflected in Tables G & J.

Commentors noted that the Negligence/Good Faith multiplying factors (Tables E & F) range from 0.7 to 2.0, suggesting that the factors were somewhat arbitrary. In response, the Division has modified Table F so that the multiplying factors range from 0.5 to 2.0, allowing the base penalty to be either halved or doubled depending, respectively, on the violator's conscientiousness and good faith or extreme negligence and bad faith. The numerical rating values for Negligence/Good Faith have also been changed so that all ratings are on a 1 to 10 scale, for consistency, throughout the regulations.

One commentor suggested that penalties should be adjusted downward if the violator goes beyond minimum requirements to bring the facility into compliance. The Division observes that, in general, the regulations require compliance through standards of performance rather than through meeting minimum technological requirements. The owner or operator is required to meet performance standards, and the method by which standards are met is generally left to the judgement of the owner or operator. Where the requirement is a performance standard, there is rarely a means

to "go beyond minimum requirements" in performing. However, the Division believes that the Negligence/Good Faith ratings already serve as a mechanism to account for exceeding minimum requirements, by reflecting the owner or operator's efforts to assure compliance. For these reasons, the Division has not changed the regulations as suggested by this comment.

One commentor inquired as to how the assessment officer will know whether "all actions to correct the violation" have been completed. Such information will either be reflected in the inspector's Notice of Violation or referral form, or it will be addressed in the informal hearing.

Regarding individual civil administrative penalty assessments, commentors noted that the proposed regulations, without explanation, provide separate procedures which are internally inconsistent with procedures for other assessments; and that the individuals to be assessed do not include trespassers or saboteurs unconnected to the owner/operator. The Division has provided separate procedures for individual civil administrative penalties thinking it would be beneficial to quickly resolve them by elevating the dispute directly to the Water Resources Board, and bypassing the informal hearing. However, based on the comments, the Division has reconsidered and decided to adopt the suggestion to make the individual civil administrative penalty assessment process identical to other civil administrative penalty processes in the regulations, to maximize consistency and minimize confusion. The Division has also broadened the category of individuals to be assessed penalties in order to cover trespassers, saboteurs, etc.

Commentors also questioned the legal authority for civil administrative penalty assessments against individuals authorizing, as opposed to carrying out, violations; and the need for individual assessments at all. The Division believes that individual assessments will be utilized only on rare occasions, where the facility owner/operator is, itself, not an individual. The purpose of individual assessments in that event is to allow an individual causing violations contrary to the owner/operator's intent to bear responsibility for his actions, rather than penalizing the facility. The Division contemplated that this may be especially appropriate when, for instance, a municipality owns a landfill and an individual employee thereof is responsible for the violation. To penalize the municipality results in taxpayers bearing the burden of that individual's violation of law. Penalizing the responsible individual will, in that instance, increase accountability and is intended to provide specific deterrence to that individual's continued violation of the law. The Division further believes that liability of one authorizing an illegal act has been sufficiently assured through case law to justify its inclusion in the regulations.

One commentor argued that the Director must personally perform the civil administrative penalty calculations, hold the informal hearings, and review and sign all final orders. The basis for the commentor's argument is that the statutes give authority for civil administrative penalty assessment to the Director. While W. Va. Code §§20-5E-16 and 20-5F-6 do state that the Director may assess civil administrative penalties, the statutes also provide that the Director may appoint an assessment officer to act on his behalf. Further, W. Va. Code §20-1-7(27) gives the Director broad authority to delegate the powers and duties of his office to appointees, whose acts will be under his supervision and for whom he shall be responsible. Therefore, it is permissible for the Director to delegate authority to his appointed assessment officer. The Division also notes that the time constraints imposed by the statutes make it unreasonable to expect the Director, who bears many other duties and responsibilities, to himself exercise the civil administrative penalty authority in each and every case.

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. --

1.4. Effective Date. --

§47-4-2. Definitions.

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

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 ~~at-the-time-of inspection~~ within fifteen (15) calendar days of the date inspection.

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

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 stage--of--precessing point of generation, treatment, storage, or disposal 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 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 ~~deliver-to-the-director--a~~ written--request--for--an-informal-hearing 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 person~~ any inspector or other authorized 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 ~~ten--(10)--days~~ 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.

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;~~

6.3.1. 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;

~~6.3.2.~~ 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.

~~6.3.3. 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 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. 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.~~

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 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.

~~7.3.~~ 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 violator during the thirty-six (36) months prior to the~~

~~violation~~ 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 G and H~~ Tables H and I of these regulations. ~~Table G~~ Table H of these regulations shall be used for hazardous waste violations. ~~Table H~~ Table I of these regulations shall be used for solid waste violations.

~~7.4.~~ 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 7.3~~ Section 7.4 of these regulations) through the use of ~~Table I~~ 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 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.

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,~~ 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 ~~employees, the public,~~ 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 ~~employees, the public,~~ 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 ~~employees, the public,~~ human health 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 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.

~~1-10-3~~ 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.

~~4-10-6~~ 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.

~~7-10-9~~ 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.

TABLE F
Negligence/Good Faith

Negligence/Good Faith	Multiplying Factor
-0- <u>1</u>	0.7 <u>0.5</u>
-1- <u>2</u>	0.8 <u>0.6</u>
-2- <u>3</u>	0.9 <u>0.7</u>
-3- <u>4</u>	1.0 <u>0.8</u>
-4- <u>5</u>	1.1 <u>1.0</u>
-5- <u>6</u>	1.2
-6- <u>7</u>	1.4
-7- <u>8</u>	1.6
-8- <u>9</u>	1.8
-9- <u>10</u>	2.0

TABLE G

Adjustment Factor

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

TABLE-G 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

TABLE-H 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-E TABLE J

Calculation of Civil Administrative Penalty Assessment

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