

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #4

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OFFICE OF THE SECRETARY OF STATE  
STATE OF WEST VIRGINIA

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

Department of Commerce, Labor  
and Environmental Resources,

AGENCY: Division of Natural Resources TITLE NUMBER: 47

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

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

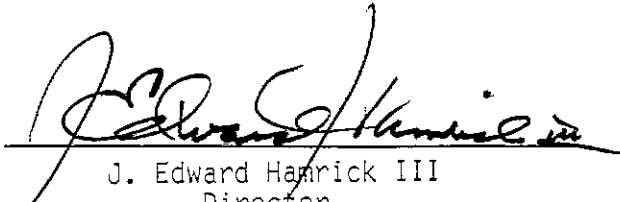
TITLE OF RULE BEING AMENDED: \_\_\_\_\_

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

  
J. Edward Hamrick III  
Director

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-processing 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) twenty (20) 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 5.2 et seq. 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~~

violations 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--E~~ 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 C  
 Seriousness of Hazardous Waste Violation

	Deviation from Requirement									
	1	2	3	4	5	6	7	8	9	10
Potential for Harm										
1	200	245	300	365	440	525	620	730	855	1000
2	300	345	400	465	540	625	720	830	955	1100
3	500	545	600	665	740	825	920	1030	1155	1300
4	800	845	900	965	1040	1125	1220	1330	1455	1600
5	1200	1245	1300	1365	1440	1525	1620	1730	1855	2000
6	1700	1745	1800	1865	1940	2025	2120	2230	2355	2500
7	2250	2295	2350	2415	2490	2575	2670	2780	2905	3050
8	2850	2895	2950	3015	3090	3175	3270	3380	3505	3650
9	3500	3545	3600	3665	3740	3825	3920	4030	4155	4300
10	4200	4245	4300	4365	4440	4525	4620	4730	4855	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 D**  
**Seriousness of Solid Waste Violation**

		Deviation from Requirement									
		1	2	3	4	5	6	7	8	9	10
Potential for Harm											
	1	100	140	190	250	320	400	490	590	700	725
	2	200	240	290	350	420	500	590	690	800	825
	3	400	440	490	550	620	700	790	890	1000	1125
	4	700	740	790	850	920	1000	1090	1190	1300	1425
	5	1025	1065	1115	1175	1245	1325	1415	1515	1625	1750
	6	1375	1415	1465	1525	1595	1675	1765	1865	1975	2100
	7	1725	1765	1815	1875	1945	2025	2115	2215	2325	2450
	8	2075	2115	2165	2225	2295	2375	2465	2565	2675	2800
	9	2425	2465	2515	2575	2645	2725	2815	2915	3025	3150
	10	2775	2815	2865	2925	2995	3075	3165	3265	3375	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~~-~~te-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~~-~~te-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~~-~~te-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>	<u>0.5</u>
<u>Small Quantity Hazardous Waste Generator; Class C Solid Waste Facility; Class D Solid Waste Facility; Transfer Station; Open Dump</u>	<u>0.75</u>
<u>Hazardous Waste Generator; Class B Solid Waste Facility; Class E Solid Waste Facility</u>	<u>1.0</u>
<u>Hazardous Waste Treatment, Storage, or Disposal Facility; Class A Solid Waste Facility; Class F Solid Waste Facility</u>	<u>1.5</u>

**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	+	_____
<u>Total Assessment:</u>		_____



FILED

WEST VIRGINIA LEGISLATURE  
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE  
Room M-438, State Capitol  
Charleston, West Virginia 25305  
(304) 340-3286

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OFFICE OF THE SECRETARY OF STATE

Senator Lloyd Jackson, Co-Chairman  
Delegate Patrick H. Murphy, Co-Chairman

Debra A. Graham, Counsel  
Michael McThomas, Associate Counsel  
Marie Nickerson, Admr. Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

August 21, 1990

TO: Ken Hechler, Secretary of State, State Register

TO: J. Edward Hamrick, III, Director  
Division of Natural Resources  
Building 3, State Capitol Complex  
Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Assessment of Civil Administrative Penalties

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

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

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

cc: Ms. Jennifer J. Meeks  
Office of Env. & Reg. Affairs