

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 28, 2008

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* WV DEP
601 57th Street SE
Charleston, WV 25304

LEGISLATIVE RULE TITLE: ~~33CSR22; Assessment of Civil Administrative Penalties~~

1. Authorizing statute(s) citation WV Code §22-15-15 and §22-18-17

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
July 7, 2008

b. What other notice, including advertising, did you give of the hearing?
Class I Legal Advertisement in the Charleston Gazette and Charleston Daily Mail
Agency Mailing List
Agency Website

c. Date of Public Hearing(s) *or* Public Comment Period ended:
August 14, 2008

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached One (1) No comments received _____

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

August 28, 2008

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Michael A. Zeto, Chief Inspector
Environmental Enforcement
Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Telephone: (304) 926-0470 Facsimile: (304) 926-0488
e-mail: Michael.A.Zeto@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

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:

- 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.

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: 33CSR22 - Assessment of Civil Administrative Penalties

- A. AUTHORITY: WV Code §22-15-15 and §22-18-17**
- B. SUMMARY OF RULE: The rule defines the process for administering Civil Administrative Penalties (CAPs) under the authority of the Solid Waste Management Act (§22-15-1 et seq.) and the Hazardous Waste Management Act (§22-18-1 et seq.).**
- C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE: The proposed rule changes are made to clarify and improve the existing rule with technical cleanup, adding consideration of ability to pay, consideration of unique factors, clarifying penalty amounts, providing examples in ratings for potential for harm and adding facility types not reflected in the existing rule.**
- D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:**
- There is no federal counterpart regulation. Thus no determination of stringency is required.
- E. CONSTITUTIONAL TAKINGS DETERMINATION:**
- In accordance with §22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.
- F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:**
- At its meeting on June 24, 2008, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

West Virginia Department of Environmental Protection

ADVISORY COUNCIL MEETING MINUTES

Tuesday, June 24, 2008
601 57th Street, SE, Charleston, WV
West Virginia Room – 3rd Floor

IN ATTENDANCE:

Members of the Council:

Jackie Hallinan
Karen Price
Bill Raney
Rick Roberts

DEP:

Randy Huffman	Cabinet Secretary
Lisa McClung	Deputy Cabinet Secretary and Director, Division of Water and Waste Management
Raymond Franks II	General Counsel
Karen Watson	Associate General Counsel
Kathy Cosco	Communications Director
Pam Nixon	Environmental Advocate
Ken Politan	Mining & Reclamation
Lewis Halstead	Mining & Reclamation
Charlie Sturey	Mining & Reclamation
Carroll Cather	Water & Waste Management
Don Martin	Land Restoration
Brian Long	Water & Waste Management
Dan Arnold	Water & Waste Management
Mike Zeto	Environmental Enforcement
Terrie Sangid	Water & Waste Management
Jim Mason	Air Quality
Mike Johnson	Water & Waste Management
Kathy Emery	Water & Waste Management
Scott Mandirola	Water & Waste Management

Visitors:

Tom Boggs	Chamber of Commerce
Don Garvin	WV Environmental Council
Ruth Lemmon	WV Auto/Truck Dealers Association

OLD BUSINESS:

Secretary Huffman called the meeting to order at 1:35 p.m., and he announced that Members Lisa Dooley and Larry Harris would not be attending. On motion made by Mr. Raney and seconded by Ms. Hallinan, the Council approved the minutes from the March 18, 2008 meeting. Secretary Huffman then ceded the floor to Mr. Franks.

NEW BUSINESS:

Mr. Franks noted that for the 2009 regular legislative session, DEP was proposing changes to 20 rules, grouped by Division for presentation to the Council. Depending on who had shepherded the rule through its initial drafting, either Mr. Franks or Ms. Watson would lead the discussion, with program administrators available to assist in answering the Council's questions.

Ms. Watson presented 60 CSR 3, the "Brownfields" Rule. Ms. Watson explained that the Rule was currently pending before the Secretary of State for authorization as an emergency rule, and that the proposed changes included adjustments to the "de minimis" table and enhancing DEP's flexibility in obtaining risk assessments.

Ms. Price referred to a letter recently sent to DEP seeking clarification of the Rule's provisions concerning land use covenants and long-term maintenance agreements. Secretary Huffman stated that the letter would be retrieved and the issue noted for further consideration by the agency.

Mr. Raney inquired whether the Council could recommend changes to the rules as presented. Ms. Watson responded in the affirmative. Mr. Raney then asked whether written comments, such as those submitted by Mr. Harris prior to the meeting, would be appended to the minutes. Mr. Franks responded in the negative, and Ms. Watson expounded that Mr. Harris's comments would be summarized and addressed orally during the discussion of the particular rules involved.

Mr. Franks then presented 38 CSR 2, the Surface Mining Reclamation Rule. Mr. Franks explained that the proposed changes would expand the Secretary's oversight of "approved persons" authorized to render technical certifications contained within mining permit applications, and would clarify certain collateral activities as being within the scope of requests for incidental boundary revisions to existing permits. Mr. Franks also noted that the proposed Rule would set forth more relevant and exacting criteria for the Secretary to consider in evaluating applications for revisions.

Mr. Raney inquired generally about the provisions with respect to approved persons. Secretary Huffman replied that the increased oversight is necessary to improve the initial quality of the permit applications, such that the delays occasioned by subsequent corrections would be reduced or eliminated. Mr. Raney asked whether approved persons could include anyone other than engineers, and Mr. Halstead responded that the definition extended to surveyors and geologists. Mr. Raney noted the need to establish a procedure for suspension or revocation to limit the agency's unfettered discretion, to which Secretary Huffman and Mr. Franks replied that the Rule provided for notice and hearing prior to curtailing the privileges of anyone on the approved-person list.

Ms. Watson presented 47 CSR 30, establishing NPDES requirements for coal mining facilities. Ms. Watson explained that the proposed changes were relatively minor, designed to enhance consistency with the non-coal rule, to allow for digital signatures, and to permit correction of clerical errors.

The Council then considered the Air Quality rules. Mr. Franks presented 45 CSR 1 and 45 CSR 26, relating to control and reduction of nitrogen oxides from, respectively, non-electric and electric generating units, the latter by means of a budget trading program. The rules are to be repealed in their entirety, and Mr. Mason explained that both are being subsumed within the Clean Air Interstate Rule program.

Mr. Franks then presented 45 CSR 8, the Ambient Air Quality Rule. Mr. Franks explained that the 1-hour primary and secondary ozone standards were being replaced with 8-hour standards, with the maximum tolerance being reduced slightly. Mr. Raney inquired as to the practical effect of the proposed change, particularly with regard to whether non-compliance areas within the State might be expanded. Mr. Mason replied that an expansion might occur, but that it was difficult to predict at this early stage. Mr. Mason added that the time-period increase would inevitably lead to more accurate measurements.

Ms. Watson presented 45 CSR 13, governing permits for constructing and modifying non-major stationary sources of air pollutants. Ms. Watson explained that the Rule was being amended to reflect the recent statutory changes reducing the lag time for issuing permits and authorizing certain pre-permit construction. It was noted that Mr. Harris had submitted in writing his concern that courts would be loath to enforce agency cease-and-desist orders based on defects discovered during the permitting process after construction had already begun. Ms. Watson pointed out that the statute had been carefully crafted to avoid facile invocation of detrimental reliance, with Mr. Franks observing that the Rule strove to conform to the statute. Ms. Price wondered whether one or more of the timeframe provisions included within the existing Rule had been inadvertently omitted from the proposed version. Ms. Watson responded that the Rule had been carefully checked for completeness, but that she would once again verify the language to assure its accuracy.

Mr. Franks presented 45 CSR 14, governing permits for constructing and significantly modifying major stationary sources of air pollutants. Mr. Franks explained that references to pollution control projects and clean units were deleted in accordance with a federal appellate court decision vacating those provisions.

Mr. Franks went on to present 45 CSR 16, 45 CSR 25, and 45 CSR 34, relating respectively to performance standards for new stationary sources, pollution from hazardous waste treatment, storage, and disposal facilities, and emission standards for hazardous air pollutants. Mr. Mason noted that the changes incorporate revisions to the Rules' federal counterparts, except that some of the new standards were not incorporated within 45 CSR 34, because they constituted unfunded mandates. Mr. Garvin was recognized, and he asked whether the failure to incorporate equated to a lack of regulation. Mr. Mason responded in the negative, explaining that the monitoring and regulation would be performed by the federal government. Mr. Garvin inquired as to the affected industries, and Mr. Mason referred to a list including smaller gas facilities and paint-stripping shops.

Ms. Watson presented 45 CSR 37, detailing the budget trading program to reduce mercury emissions. Ms. Watson explained that the rule is being repealed as inconsistent with a federal appellate court decision, pending alternative action by the EPA. Mr. Garvin inquired whether the Rule repealed two years ago would be reinstated upon revocation of the current version, to which Ms. Watson and Mr. Franks replied that it would not, if there had indeed been a previous rule in place, which was somewhat in question. Mr. Mason explained that mercury emissions would be monitored and regulated as usual, except that budget trading would not be available as a method of reduction. He also stated that there have been discussions on a national level as to whether to reinstate the federal mercury monitoring requirements.

The Council then turned its attention to the Water and Waste Management Rules. Ms. Watson presented 33 CSR 20, governing hazardous waste management systems. Ms. Watson explained that the Rule incorporated by reference its federal counterpart, the most salient change to which is its attempt to reduce disposal by permitting facilities to stage hazardous waste for three days pending recycling. Mr. Raney asked whether three days was sufficient time, and Mr. Cather responded in the affirmative.

Mr. Franks presented 33 CSR 24, the Hazardous Waste Management Fee Rule. Mr. Franks explained that increases to the fee assessments are necessary to sustain the underlying Fund by ensuring sufficient matching revenue for federal grants. Ms. Price indicated her belief that, as part of the legislative compromise extending the fee's duration, no increases would be forthcoming until completion and review of the Fund's legislative audit. Secretary Huffman responded that the preliminary audit findings in no way indicate any misallocation within the Fund or contravene the agency's determination that fee increases are necessary. Ms. Lemmon was recognized, and she commented that the proposed increase was unfair to automobile and truck dealers, as well as other small generators. Ms. Lemmon suggested that a study be done to identify the industries causing DEP to incur program costs, with fee assessments to be made proportionately.

Ms. Watson presented 33 CSR 22 and 47 CSR 56, governing the assessment of civil administrative penalties for, respectively, hazardous and solid waste violations and violations relating to groundwater. Ms. Watson explained that the Rules were being modified for the first time since their initial promulgation, with the purpose of clarifying their application by listing additional factors to be considered in calculating penalties, providing ratings examples, and expanding facility categories.

Ms. Watson then presented 47 CSR 31, addressing the State Water Pollution Control Revolving Fund. Ms. Watson explained that the proposed changes include the creation of a state review process for sewer projects in lieu of a wholesale adoption of the federal requirements. Mr. Roberts observed that many of the eligibility criteria would be deleted, but Ms. Emery assured the Council that inasmuch as the criteria were not being uniformly met, the deletion would have no practical effect on the Fund's administration. Ms. Watson advised Mr. Roberts that if he continued to have concerns upon further review, he should submit written suggestions for changes during the formal comment period.

Mr. Franks presented 47 CSR 32, governing the certification of laboratories conducting analyses of waste and wastewater. Mr. Franks explained that the proposed changes are designed to modernize outdated procedures and protocols that have remained constant since 1995, and to increase program funding through increased certification fees and a new application fee. Mr. Raney asked whether the new fees would render the program self-sustaining, and Mr. Arnold replied that it would for the time-being. In response to further inquiry, Mr. Arnold stated that DEP conducts annual, on-site audits of commercial and industrial labs, with municipal labs typically audited every two years, depending on the experience of the support personnel.

Ms. Watson presented 47 CSR 34, the Dam Safety Rule. Ms. Watson explained that the Rule is being extensively augmented to govern disbursement and use of a new Revolving Fund to finance repair and rehabilitation of deficient dams. Secretary Huffman commented that it appeared imminent that the Legislature would approve a transfer of \$350,000 from excess general revenue as seed money for the Fund.

Lastly, Ms. Watson presented 47 CSR 2, the Water Quality Standards Rule. Ms. Watson explained that the proposed revisions are designed to clarify the definition of Category A use, while providing specific standards to be applied in the permitting process to determine in a more streamlined fashion whether the use is unsuitable in cases of insufficient flow and hydrologic modification. Mr. Raney commented that the Category A determination process has always been a significant problem for the coal industry. Ms. Price also agreed for her members. Mr. Garvin noted that the environmental community had expressed some initial concern regarding the proposed streamlining mechanisms, but that there was some general support for taking the matter out of the legislative arena. Mr. Huffman affirmed that the revisions are designed solely for the benefit of the regulated public and that the revisions must include the clarification that Category A applies statewide.

Ms. Watson reported that the rules will proceed to be filed with the Secretary of State, some perhaps as early as the week following the Council meeting, and that some will have an extended 45-day comment period.

Mr. Franks requested closing comments from Council members and from the public. Following the cessation of discussion, Mr. Franks reminded the Council that the next meeting is scheduled for 1:30 p.m. on September 9, 2008.

Secretary Huffman declared the meeting adjourned at 3:25 p.m.

FISCAL NOTE FOR PROPOSED RULES

REVISED

7-11-08

Rule Title: 33CSR22; Assessment of Civil Administrative Penalties

Type of Rule: Legislative Interpretive Procedural

Agency: Department of Environmental Protection

Address: 601 57th Street SE
Charleston, WV 25304

Phone Number: (304) 926-0470 Email: mzeto@wvdep.org

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE 7/11/08
ADMINISTRATIVE LAW DIVISION

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The proposed rule changes are not expected to have any impact on costs and revenues. The proposed changes are being made to clarify the existing rule.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title:

33CSR22; Assessment of Civil Administrative Penalties

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

The proposed rule changes are for existing activity in the agency and, therefore, will have no fiscal impact on state government finances. The proposed rule changes are made to clarify and improve the existing rule with technical cleanup, adding consideration of ability to pay, consideration of unique factors, clarifying penalty amounts, providing examples in ratings for potential for harm and adding facility types not reflected in the existing rule.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date:

7/11/08

Signature of Agency Head or Authorized Representative

[Handwritten Signature]

2008 AUG 28 PM 12: 30

TITLE 33
LEGISLATIVE RULES
~~DIVISION~~DEPARTMENT OF ENVIRONMENTAL PROTECTION WEST VIRGINIA
~~OFFICE OF~~WASTE MANAGEMENT SECRETARY OF STATE

SERIES 22
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

§33-22-1. 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 §22-18-17 or W. Va. Code §22-15-15.

1.2. Authority. - W. Va. Code W. Va. §22-18-17 and §22-15-15.

1.3. Filing Date. -~~April 5, 1991.~~

1.4. Effective Date. -~~April 22, 1991.~~

§33-22-2. Definitions.

2.1. -"Acts" means the West Virginia Hazardous Waste Management Act (W. Va. Code §22-18-1- et seq.) and the West Virginia Solid Waste Management Act (W. Va. Code §22-15-1 et seq.).

2.2. -"Assessment Officer" means a person appointed by the ~~director~~Secretary 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.- "Secretary" means the ~~director~~Secretary of the West Virginia ~~Division~~Department of Environmental Protection or his or her authorized representative.

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

2.6.- "Inspector" means an authorized representative of the ~~director~~Secretary who as a normal function of his or her 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.a. -A reference to the section of the statute, rule, ~~regulation,~~ order, or permit condition allegedly violated;

2.7.b. -A concise statement of the facts alleged to constitute the violation;

2.7.c. -A statement of the amount of the initial civil administrative penalty to be imposed; and

2.7.d. -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~~Secretary, 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)~~thirty (30) calendar days of the date of inspection or receipt of sample analyses or other information that reflect a violation.

2.10. -"Violator" means the person, as defined by §22-15-2(25) or §22-18-3(11), 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~~Secretary's final decision regarding the assessment of a civil administrative penalty and the reasons therefor.

§33-22-3. Notice of Violations.

3.1.- General. An inspector or other authorized representative of the ~~director~~Secretary may issue a notice of violation for any violation he or she 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~~Secretary, and shall set forth with reasonable specificity:

3.2.a. -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.b. -The time and date of the observance of the violation; and

3.2.c. -A reasonable description of the facility where the violation is observed, where within that facility the observation was observed, and the point of generation, treatment, storage, or disposal at which the violation occurred, if appropriate.

3.2.d. The notice of violation shall be sent to the violator within thirty (30) calendar days of the date of inspection or receipt of sample analyses or other information reflecting a violation.

§33-22-4. 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 or her for civil administrative penalty assessment to determine:

4.1.a. -The appropriateness of a civil administrative penalty;

4.1.b. -The initial amount of penalty, if any, based upon the rates and methods given in ~~these regulations~~this rule;

4.1.c. -The appropriateness of assessing a daily civil administrative penalty for continuing violations;

4.1.d. -The total initial civil administrative penalty assessed; and

4.1.e. -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 by certified mail or personal delivery with:

4.2.a. -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.b. -A notice of dismissal.

§33-22-5. 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~~Secretary. If no hearing is requested within the specified time period, 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.a. — The time and place the informal hearing is to be held is to be communicated to any inspector or other authorized representative of the ~~director~~Secretary who filed a notice of violation bringing about the informal hearing and to the violator.

5.2.b. -Such communication shall be provided at least fifteen (15) calendar days prior to the time of the hearing.

5.2.c. -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.a. -The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence shall not apply.

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

5.3.c. -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.

5.3.d. During the course of the informal hearing, a violator may make a request to have its ability to pay a civil administrative penalty evaluated. Such a request will only be evaluated if the violator provides all required information and it is received by the Assessment Officer within ten (10) calendar days of the informal hearing date. Incomplete information or information received more than ten (10) days after the informal hearing date will not be evaluated. Should completed information be received in a timely fashion, it will be evaluated in accordance with United States Environmental Protection Agency (USEPA) guidance.

5.4. Written Decision. Within thirty (30) calendar days following the informal hearing, the ~~director~~Secretary shall issue and furnish to the violator a written decision affirming, 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~~Secretary's decision, the violator may request a formal hearing before the Environmental Quality Board in accordance with the provisions of the Acts. If no hearing is requested, the ~~director~~Secretary'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.

§33-22-6. Individual Civil Administrative Penalties.

6.1. -The ~~director~~Secretary 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~~Secretary or the chief.

6.2. -In determining the amount of a civil administrative penalty to be assessed against an ~~individual violator~~, under this section, consideration shall be given to the criteria specified in ~~Section~~section 7 of this rule.

6.3. -The ~~director~~Secretary shall serve on each ~~individual violator~~ to be assessed an administrative penalty a notice of individual civil administrative penalty assessment. For purposes of ~~Section 6.3 of this rule~~this subsection, 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.a. -A reference to the section of the statute, rule, ~~regulation~~, order, or permit condition allegedly violated;

6.3.b. -A concise statement of the facts alleged to constitute the violation;

6.3.c. -A statement of the amount of the individual civil administrative penalty to be imposed;

6.3.d. -A copy of the underlying notice of violation; and

6.3.e. -A statement of the ~~individual violator~~'s right to an informal hearing.

6.4. ~~The individual shall have twenty (20) calendar days from his receipt of the notice of individual civil administrative penalty assessment in 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. A violator has a right to an informal hearing and/or appeal as outlined in section 5.~~

6.5. ~~The informal hearing, if requested, will be scheduled and conducted pursuant to Section subsections 5.2 et seq., 5.3 and 5.4 of this rule.~~

§33-22-7. Civil Administrative Penalty Calculation Procedures.

7.1. ~~The director~~Secretary 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.a. Seriousness of Violation. The ~~director~~Secretary 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 the 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~~Secretary 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 this rule~~. 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 this rule~~.

7.3. Adjustment Factor. The ~~director~~Secretary shall take into account the type of facility by assigning an adjustment factor in accordance with Table G ~~of this rule~~. The subtotal calculated pursuant to subsections 7.1 and 7.2 ~~of this rule~~ shall be multiplied by the adjustment factor.

7.4. "Unique" Factors. Should the violation in question involve an actual release to the environment or harm to human health or involve a chemical that is persistent or bioaccumulative, the associated civil administrative penalty may be multiplied by a factor of up to 2.0.

7.4.5. History of Noncompliance. The ~~director~~Secretary 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 this rule~~. Table H ~~of this rule~~ shall be used for hazardous waste violations. Table I ~~of this rule~~ shall be used for solid waste violations.

7.5.6. ~~The civil administrative penalty shall be calculated by multiplying the base penalty amount (established from the seriousness of violation pursuant to subsection 7.1 of this rule) by the multiplying factor (established from the negligence/good faith ratings pursuant to subsection 7.2 of this rule), multiplying that~~

product by the adjustment factor (established from the adjustment factor pursuant to subsection 7.3 ~~of this rule~~), multiplying by the “unique” factor, if applicable (established pursuant to subsection 7.4), and then adding to that product a dollar amount (established from the history of noncompliance pursuant to subsection 7.4 ~~7.4.5 of this rule~~) through the use of Table J ~~of this rule~~.

~~7.6~~7.7. -The civil administrative penalty assessed may not exceed the maximum assessments prescribed by the Acts.

7.7.a -Hazardous Waste Violations: The maximum assessment for a single hazardous waste violations violation 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~~

33CSR22

penalty with a maximum cumulative total of twenty-two thousand five hundred dollars (\$22,500) for this same violation. Multiple violations shall not exceed a maximum cumulative total of twenty-five thousand dollars (\$25,000) per day. The amounts applicable to a single violation must be adhered to when developing the cumulative total for multiple days.

7.7.b Solid Waste Violations:- The maximum assessment for a single solid waste ~~violations~~ violation shall not exceed five thousand dollars (\$5,000) per day ~~per violation, up to a maximum of twenty thousand dollars (\$20,000) total penalty,~~ with a maximum cumulative total of twenty thousand dollars (\$20,000) for this same violation. Multiple violations shall not exceed a maximum cumulative total of twenty-five thousand dollars (\$25,000) per day. The amounts applicable to a single violation must be adhered to when developing the cumulative total for multiple days.

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 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 (e.g., material being improperly handled/stored is relatively stable or readily remediated, report does not contain necessary information of a specific nature, necessary environmental controls are present but not maintained).

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 (e.g., material being improperly handled/stored is relatively unstable or difficult to remediate, report does not fully address intended subject matter or is deficient regarding specific information concerning multiple areas, violator has not made a good faith effort to install/maintain necessary environmental controls).

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 (e.g., material being improperly handled/stored is unstable or requires additional measures to remediate, failure to submit a report, failure to provide necessary environmental controls).

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	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**

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.

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

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; <u>Used Oil Violation;</u> <u>Facility Not Otherwise Listed in this Table;</u> Class C Solid Waste Facility; Class D Solid Waste Facility; Transfer Station; Open Dump	0.75
Hazardous Waste Generator; <u>Hazardous Waste Transporter</u> 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

—Enforcement Actions	Number of Previous 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 I

History of Solid Waste Noncompliance

—Enforcement Actions	—Number of Previous 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:		_____
<u>Unique Factor</u>	X	_____
Subtotal:		_____
History of Noncompliance	+	_____
<u>Total Assessment:</u>		_____

RESPONSE TO COMMENTS – 33CSR22

The following is a response to the comments provided during the public comment period on the Department of Environmental Protection's rule, 33CSR22 -- "Assessment of Civil Administrative Penalties." Written comments were accepted until August 14, 2008. A public hearing was held on August 14, 2008. No one attended the hearing and written comments were received from only one entity and is addressed below.

I. COMMENTER: West Virginia Manufacturers Association ("WVMA"), via its counsel Robert E. Lannan

COMMENT A. Proposed Section 5.3.D. Ability to Pay.

The WVMA objects to the attempt by DEP to formally codify an "ability to pay" factor in the proposed regulations. Historically, DEP has handled such issues on a case-by-case basis using guidance found in the federal EPA's RCRA Civil Penalty Policy (June 2003). Under that policy, the violator can raise its inability to pay after the penalty has been assessed. The WVMA is concerned that formal codification of an ability to pay "defense" sends the wrong message to members of the regulated community who are not financially viable because, in the end analysis, DEP will treat them in a more favorable fashion than members of the regulated community which have the ability to comply (and pay for) violations of the State hazardous waste management program. Those who have such a defense in fact may very well have a disincentive to comply with the regulatory program if they know they will be treated favorably because of financial considerations. The net effect is to shift more of the economic penalty costs to financially viable manufacturers simply because they can pay. We would therefore urge the DEP to not adopt the proposed language.

RESPONSE A. The DEP disagrees with the statement that it has handled such issues on a case-by-case basis in recent history and, that considering ability to pay will shift more of the economic penalty costs to financially viable manufacturers. This is simply not true, as penalty amounts are derived on an individual basis in accordance with the rule and have nothing to do with how much penalty money is collected. Approximately three (3) years ago, the DEP chose to pursue enforcement activities in strict accordance with 33CSR22 for violations of the Hazardous Waste Management Act and the Solid Waste Management Act, along with other enforcement tools available for its use. The current rule makes no allowance for evaluating an entity's ability to pay a civil administrative penalty and the DEP has not entertained it. The DEP proposes this analysis as a method to achieve compliance in an administrative manner and to provide a mechanism to consider financial information. The DEP does not assess an entity's financial ability when deciding to pursue an enforcement action, only that the entity is in violation and that enforcement is appropriate.

COMMENT B. Section 7.4. "Unique Factors."

The proposed addition to specifically address PBT chemicals must be viewed in light of the long established methodology set forth in the federal RCRA civil administrative penalty policy which

DEP has previously attempted to follow. The federal RCRA civil administrative penalty calculation procedures involve taking into consideration two components in arriving at the seriousness of the penalty assessed. These two components include the potential for harm and extent of deviation from a statutory or regulatory requirement. The DEP's proposal is attempting to "double dip," by adding into the equation, as another entirely separate component, a "Unique Factor" penalty, when, in fact, the harmful nature of a released waste may already be taken into account through the "Potential for Harm" component of the federal policy on which the State rules are currently based. Nowhere in the federal RCRA Civil Penalty Policy is there any mention of adding an additional penalty factor for certain constituents, including persistent and bioaccumulative chemicals. Legislative policy codified in the State Hazardous Waste Management Act clearly provides that the State program should be "consistent with" and "equivalent to" the federal program. W.Va. Code §22-18-23. Obviously, this is not the case where the State appears to be deviating from the federal program in proposing to draw an unwarranted distinction with regard to different classes of chemicals. We would therefore urge the DEP not to adopt Section 7.4 as proposed.

RESPONSE B. The DEP is attempting to make the administrative process for enforcement more viable for additional types of violations, which the current rule is ill equipped to address and will usually result in the DEP pursuing more punitive measures, such as civil suit or federal referral. While the addition of the unique factor should make the administrative process more viable in some cases, it does not affect the maximum daily penalty per violation. Additionally, it will not replace the alternate enforcement options, mentioned previously, in cases where the DEP determines one of them is more appropriate. WV Code §22-18-17 provides that "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 promulgated pursuant to this article and article three, chapter twenty-nine-a of this code." This gives the DEP some latitude in the development of the rule to make it as workable as possible, while remaining "consistent with" federal policy. Further, DEP disagrees that the Unique Factor is duplicative of the Potential for Harm component. It is being added to address an actual release to the environment or actual harm to human health or a chemical that is persistent or bioaccumulative as opposed to a potential release and since the current rule does not adequately address this issue.

ORIGINAL

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

IN THE MATTER OF:

PROPOSED RULE 33CSR22,
ASSESSMENT OF CIVIL
ADMINISTRATIVE PENALTIES

TRANSCRIPT OF PROCEEDINGS had or testimony adduced pursuant to the West Virginia Rules of Civil Procedure in the above-entitled action, on the 14th day of August, 2008, commencing at 6:34 p.m. and concluding at 6:35 p.m., at the West Virginia Department of Environmental Protection, 601 57th Street S.E., Charleston, Kanawha County, West Virginia, taken by Jo Ann Wilson, Certified Court Reporter, duly certified by the West Virginia Supreme Court of Appeals and Notary of West Virginia, pursuant to notice to all interested parties.

BEFORE: AUTUMN SPEARS, Moderator

NANCY MCNEALY
CERTIFIED COURT REPORTER
Post Office Box 13415
Charleston, West Virginia 25360-0415
(304) 988-2873 FAX (304) 988-1419

I N D E X

Reporter's Certificate.....Page 5

1 MS. SPEARS: Good evening. My name is
2 Autumn Spears. I'm with the Public Information Office.
3 Welcome to the DEP and the public hearing on the Proposed
4 Rule 33CSR22, Assessment of Civil Administrative Penalties.
5 The rule defines the process for administering Civil
6 Administrative Penalties (CAPS) under the authority of the
7 Solid Waste Management Act, Sections 22-15-1 et seq, and
8 the Hazardous Waste Management Act, Section 22-18-1 et seq.

9 The proposed rule changes are made to
10 clarify and improve the existing rule with the technical
11 cleanup, adding consideration of ability to pay,
12 consideration of unique factors, clarifying penalty
13 amounts, providing examples in ratings for potential for
14 harm, and adding facility types not reflected in the
15 existing rule.

16 Please make sure you have signed in and
17 have indicated whether you are going to make a comment. If
18 you have written comments, please provide them to me when
19 you speak, or at the close of this hearing.

20 If everybody is ready, the floor is open
21 for comments.

22 No comments.

23 This concludes the public hearing for the
24 Proposed Rule 33CSR22. The Agency will review all comments

1 and prepare a written response, which will be filed when
2 the final rule is filed with the Secretary of State.

3 Thanks.

4 (WHEREUPON, the public hearing was concluded.)

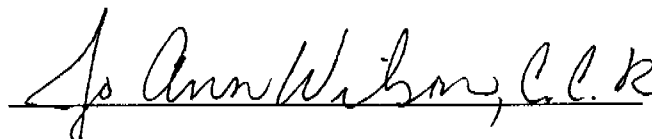
REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

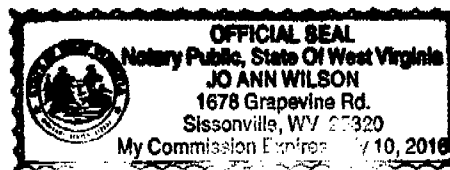
I, **JO ANN WILSON**, Certified Court Reporter, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption hereof.

Given under my hand this 23rd day of August,
2008.

My commission expires July 10, 2016.



Certified Court Reporter





ROBERT E. LANNAN
ATTORNEY AT LAW

P.O. BOX 1791
CHARLESTON, WV 25326

DIRECT DIAL: (304) 347-8346
E-MAIL: rel@ramlaw.com

August 14, 2008

VIA HAND DELIVERY

Ms. Kathy Cosco
Communications Director
Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Dear Ms. Cosco:

Please find enclosed for filing the original Comments of the West Virginia Manufacturers Association on the West Virginia Department of Environmental Protection, Division of Water and Waste Management's Proposed Rule on Assessment of Civil Administrative Penalties for Solid and Hazardous Waste (33 CSR 22).

Very truly yours,

A handwritten signature in black ink, appearing to read 'Robert E. Lannan', is written over the typed name. The signature is fluid and cursive.

Robert E. Lannan

REL:dln
Enclosure

**COMMENTS OF
THE WEST VIRGINIA MANUFACTURERS ASSOCIATION
ON THE WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, DIVISION OF
WATER AND WASTE MANAGEMENT'S PROPOSED
RULE ON ASSESSMENT OF CIVIL ADMINISTRATIVE
PENALTIES FOR SOLID AND HAZARDOUS WASTE (33 CSR 22)**

The West Virginia Manufacturers Association ("WVMA") represents numerous manufacturers throughout the State of West Virginia subject to potential regulation by the West Virginia Department of Environmental Protection, Division of Water and Waste Management ("DWWM") in the assessment of civil administrative penalties for violations of the Hazardous Waste Management Act, W.Va. Code §22-18-1 *et seq*; 33 CSR 22. On this basis, the WVMA submits the following comments on DWWM's proposed revisions to these regulations.

I. Proposed Section 5.3.D. Ability to Pay.

Proposed Section 5.3.D. provides as follows:

During the course of the informal hearing, a violator may make a request to have its ability to pay a civil administrative penalty evaluated. Such a request will only be evaluated if the violator provides all required information and it is received by the Assessment Officer within ten (10) calendar days of the informal hearing date. Incomplete information or information received more than ten (10) days after the informal hearing date will not be evaluated. Should completed information be received in a timely fashion, it will be evaluated in accordance with the United States Environmental Protection Agency (US EPA) Guidance.

The WVMA objects to the attempt by DEP to formally codify an "ability to pay" factor in the proposed regulations. Historically, DEP has handled such issues on a case-by-case basis using guidance found in the federal EPA's RCRA Civil Penalty Policy (June 2003). Under that policy, the violator can raise its inability to pay after the penalty has been assessed. The WVMA

is concerned that formal codification of an ability to pay “defense” sends the wrong message to members of the regulated community who are not financially viable because, in the end analysis, DEP will treat them in a more favorable fashion than members of the regulated community which have the ability to comply (and pay for) violations of the State hazardous waste management program. Those who may have such a defense in fact may very well have a disincentive to comply with the regulatory program if they know they will be treated favorably because of financial considerations. The net effect is to shift more of the economic penalty costs to financially viable manufacturers simply because they can pay. We would therefore urge the DEP to not adopt the proposed language.

II. Section 7.4. “Unique Factors.”

Proposed Section 7.4 adds a new dynamic to the DEP civil administrative penalty calculation procedures heretofore utilized for hazardous waste violations. It specifically provides that:


Should the violation in question involve an actual release to the environment or harm to human health or involve a chemical that is persistent or bioaccumulative, the associated civil administrative penalty may be multiplied by a factor of up to 2.0. (emphasis added).

The proposed addition to specifically address PBT chemicals must be viewed in light of the long established methodology set forth in the federal RCRA civil administrative penalty policy which DEP has previously attempted to follow. The federal RCRA civil administrative penalty calculation procedures involve taking into consideration two components in arriving at the seriousness of the penalty assessed. These two components include the potential for harm

and extent of deviation from a statutory or regulatory requirement. The DEP's proposal is attempting to "double dip," by adding into the equation, as another entirely separate component, a "Unique Factors" penalty, when, in fact, the harmful nature of a released waste may already be taken into account through the "Potential for Harm" component of the federal policy on which the State rules are currently based. Nowhere in the federal RCRA Civil Penalty Policy is there any mention of adding an additional penalty factor for certain constituents, including persistent and bioaccumulative chemicals. Legislative policy codified in the State Hazardous Waste Management Act clearly provides that the State program should be "consistent with" and "equivalent to" the federal program. W.Va. Code §22-18-23. Obviously, this is not the case where the State appears to be deviating from the federal program in proposing to draw an unwarranted distinction with regard to different classes of chemicals. We would therefore urge the DEP not to adopt Section 7.4 as proposed.

The WVMA does not favor the above two proposed DEP additions to the State civil administrative penalty regulations for hazardous waste. We would request that these two proposals not be adopted by the DEP. The WVMA appreciates the opportunity to provide comments on the proposed rule and trusts that DEP will seriously consider the suggestions and comments contained herein.

Respectfully submitted,



Karen S. Price
President
West Virginia Manufacturers Association
2001 Quarrier Street
Charleston, West Virginia 25311