

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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FILED

**TITLE 33
LEGISLATIVE RULES
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WASTE MANAGEMENT**

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OFFICE WEST VIRGINIA
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 §22-18-17 and §22-15-15.

1.3. Filing Date. -- May 14, 2009.

1.4. Effective Date. -- July 1, 2009.

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

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

2.6. "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:

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

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

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

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

2.7 "Notice of Dismissal" means a written notification provided to a violator by the assessment officer or the 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.

2.8 "Notice of Violation" means a written notification provided to an alleged violator by the inspector.

2.9. "Secretary" means the Secretary of the West Virginia Department of Environmental Protection or his or her authorized representative.

2.10. "Violator" means the person, as defined by §22-15-2(24) or §22-18-3(11), who is alleged to have violated the Acts, or any rule, order, or permit condition imposed pursuant to the Acts.

2.11. "Written Decision" means a written decision furnished to the violator concerning the 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 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 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, 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.

§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 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 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 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 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 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 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 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 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, order, or permit condition or who fails or refuses to follow an order from the Secretary.

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

6.3. The Secretary shall serve on each violator to be assessed an administrative penalty a notice of individual civil administrative penalty assessment. For purposes of 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, 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 violator's right to an informal hearing.

6.4. 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 subsections 5.2, 5.3 and 5.4.

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

7.1. The 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 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, order, or permit condition in accordance with Table A and a rating for the potential harm which may have resulted from the alleged violation in accordance with Table B. 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. Table C shall be used for hazardous waste violations. Table D shall be used for solid waste violations.

7.2. Negligence/Good Faith. The 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. 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.

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

7.5. History of Noncompliance. The 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. Table H shall be used for hazardous waste violations. Table I shall be used for solid waste violations.

7.6. The civil administrative penalty shall be calculated by multiplying the base penalty amount (established from the seriousness of violation pursuant to subsection 7.1) by the multiplying factor (established from the negligence/good faith ratings pursuant to subsection 7.2), multiplying that product by the adjustment factor (established from the adjustment factor pursuant to subsection 7.3), 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 7.5) through the use of Table J.

7.7. 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 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	0.5
Small Quantity Hazardous Waste Generator; Used Oil Violation; Facility Not Otherwise Listed in this Table; Class C Solid Waste Facility; Class D Solid Waste Facility; Transfer Station; Open Dump	0.75
Hazardous Waste Generator; Hazardous Waste Transporter Class B Solid Waste Facility; Class E Solid Waste Facility	1.0
Hazardous Waste Treatment, Storage, or Disposal Facility; Class A Solid Waste Facility; Class F Solid Waste Facility	1.5

TABLE H

History of Hazardous Waste Noncompliance

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

TABLE I
History of Solid Waste Noncompliance

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

TABLE J

Calculation of Civil Administrative Penalty Assessment

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