

WEST VIRGINIA  
SECRETARY OF STATE

JOE MANCHIN, III

ADMINISTRATIVE LAW DIVISION

Form #1 ☐

Do Not Mark In This Box

FILED

2001 JUN -5 A 10: 50

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

Water Resources

AGENCY: WV Department of Environmental Protection/Div. of ~~Waste Mgmt.~~ TITLE NUMBER: 47

RULE TYPE: Legislative CITE AUTHORITY: Section 22-11-22(b)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

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

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 1

TITLE OF RULE BEING PROPOSED: "Administrative Proceedings and Civil Penalty Assessment"

DATE OF PUBLIC HEARING: July 11, 2001 TIME: 7:00 p.m.

LOCATION OF PUBLIC HEARING: WV DEP Division of Waste Management

1356 Hansford Street

Charleston, WV 25301

COMMENTS LIMITED TO: ORAL ☐, WRITTEN ☐, BOTH ☒

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: WV DEP  
#10 McJunkin Road

The Department requests that persons wishing to make  
comments at the hearing make an effort to submit written  
comments in order to facilitate the review of these comments.

Nitro, WV 25143-2506

Attn: Anne Howell

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



Authorized Signature

## **47CSR1**

### **SUMMARY OF PROPOSED RULE**

The proposed rule establishes a mechanism for administrative resolution of violations of the State Water Pollution Control Act, by means of a consent order or agreement, as an alternative to initiation of a civil action.

□  
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: "Administrative Proceedings and Civil Penalty Assessment"

Type of Rule:   X   Legislative           Interpretive           Procedural

Agency: WV Department of Environmental Protection

Address: 10 McJunkin Road

Nitro, WV 25143-2506

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<b>ESTIMATED TOTAL COST</b>	0				
<b>PERSONAL SERVICES</b>	0				
<b>CURRENT EXPENSE</b>	0				
<b>REPAIRS &amp; ALTERATIONS</b>	0				
<b>EQUIPMENT</b>	0				
<b>OTHER</b>	0				

2. Explanation of Above Estimates:

No impact on State budget.

3. Objectives of These Rules:

Establish a mechanism for administrative resolution of violations of the State Water Pollution Control Act, by means of a consent order or agreement, as an alternative to initiation of a civil action.

Rule Title: "Administrative Proceedings and Civil Penalty Assessment"

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

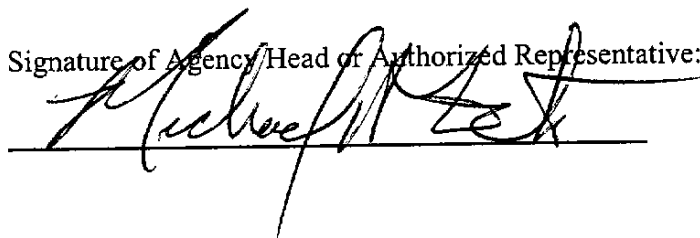
None

C. Economic Impact on Citizens/Public at Large.

None

Date: 6-1-01

Signature of Agency Head or Authorized Representative:

A handwritten signature in black ink, appearing to read "Michael M. Leck", is written over a horizontal line.



**DIVISION OF ENVIRONMENTAL PROTECTION**  
1356 Hansford Street  
Charleston, WV 25301-1401

BOB WISE  
GOVERNOR

MICHAEL O. CALLAGHAN  
SECRETARY

June 1, 2001

**BUREAU OF ENVIRONMENT  
DIVISION OF ENVIRONMENTAL PROTECTION**

**BRIEFING DOCUMENT**

**Rule Title:** Administrative Proceedings and Penalty Assessment Rule

**A. AUTHORITY:** WV Code 22-11-22-(b)

**B. SUMMARY OF RULE:**

The proposed rule establishes a mechanism for administrative resolution of violations of the State Water Pollution Control Act, by means of a consent order or agreement, as an alternative to initiation of a civil action.

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

The proposed Legislative Rule is necessary to comply with Senate Bill 574 passed on April 14, 2001. SB 574 required promulgation of this rule in Section 22-11-22(b).

**D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION  
BY REFERENCE/DETERMINATION OF STRINGENCY:**

There is no federal counterpart regulation to this proposed rule.

**E. CONSTITUTIONAL TAKINGS DETERMINATION:**

In accordance with §22-1a-1 and 3(c), the Director 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:**

After review of the proposed rule (47CSR1) at their May 29, 2001 meeting, the DEP Advisory Council recommended to the Director that this rule be filed as proposed. No further amendments were recommended.

TITLE 47  
LEGISLATIVE RULE  
OFFICE OF WATER RESOURCES

FILED

2001 JUN -5 P 4: 56

SERIES 1  
ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**§ 47-1-1. General.**

1.1. Scope. -- This rule establishes a procedure for the resolution of enforcement actions and the assessment of civil penalties in lieu of the institution of a civil action as provided in 22-11-22.

1.2. Authority. -- W. Va. Code §§22-11-22(b)

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Nothing in this rule shall be construed as limiting or altering the authority of the Secretary to enforce the provisions of the Water Pollution Control Act [Act] as set forth therein. The procedures set out in this rule are in addition to any and all other enforcement provisions set forth in the Act.

**§ 47-1-2. Definitions.**

2.1. This Rule hereby incorporates by reference the definitions of all terms as contained in the Water Pollution Control Act, Chapter 22, Article 11, and 47 Code of State Regulations, Series 10.

2.2. "Administrative Proceedings" means, for the purposes of this rule, those proceedings undertaken by the Secretary upon his decision to attempt to resolve alleged violations of the Water Pollution Control Act and its rules pursuant to this Rule.

2.3. "Base Penalty" means that amount assessed for a violation of the Act or its rules based solely upon the extent of the deviation from the Act and the potential for harm to the public or the environment resulting from the violation.

2.4. "Responsible Party" may be a permittee or any person alleged to have violated the Act or its Rules.

2.5. "Toxicity," means, for the purposes of this rule, the degree to which any substance is potentially harmful to human health or the environment.

2.6. "Secretary" means the Secretary of the Department of Environmental Protection.

**§ 47-1-3. Applicability of the Rule.**

3.1. Upon discovery of a violation, through whatever means, of the Water Pollution Control Act or the rules promulgated thereto, the Secretary may, at his discretion, choose to institute administrative proceedings pursuant to the Act and this rule to resolve the alleged violation.

3.2. Not a Waiver. -- Nothing in this rule shall be construed as limiting the ability of the Secretary to pursue a civil action for any violation of the Act or its rules should the agency and the alleged violator be unable to reach settlement of the alleged violations pursuant to the procedures set forth in this Rule. The Secretary is under no requirement to institute administrative proceedings prior to taking any other lawful

action pursuant to the Act or its rules.

#### **§ 47-1-4. Notice.**

4.1. The Secretary shall notify any alleged violator, responsible party, of his decision to institute administrative proceedings pursuant to the Act and this Rule.

4.2. Notice of the Secretary's decision to commence an administrative proceeding in an attempt to resolve an alleged violation of the Act or its rules shall be by certified mail to the responsible party.

4.3. Notice shall include a proposed Consent Order containing findings of fact and conclusions of law outlining the alleged violations, any remedial work to be performed, and a proposed civil penalty assessment which shall be based upon the procedure set forth in this Rule.

4.4. The responsible party shall respond to the Secretary's Notice within ten days of receipt thereof indicating whether it shall participate in the administrative proceeding or refuses. Failure to timely respond shall be considered refusal to participate in the process.

#### **§ 47-1-5. Administrative Proceedings.**

5.1. Should the responsible party agree to participate in an administrative proceeding, the parties shall set a meeting to be held within thirty days of the initial Notice if possible.

5.2. The administrative proceeding may consist of multiple meetings amongst the parties and may continue until a satisfactory resolution of the alleged violation is agreed to.

5.3. If agreed to, resolution of the alleged violations contained in the Notice shall be by Consent Order entered into by the responsible party and the Secretary.

5.4. The administrative proceeding may be terminated at any time and for any reason by any party involved in the proceeding prior to the public notice provision of this rule.

#### **§ 47-1-6. Civil Penalty Assessment.**

##### **6.1. Determination of Base Penalty.**

6.1.a. Potential for harm to human health and the environment. --

6.1.a.1. The potential for harm to human health or the environment from a violation may be determined by the likelihood and degree of exposure of persons or the environment to pollution, or the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the regulatory program.

6.1.a.2. Emphasis shall be placed on the potential harm posed by a violation rather than the actual harm which occurred. There need not be any showing of actual harm to human health or the environment to support a finding of potential harm.

6.1.a.3. The Secretary shall determine whether the potential for harm was either major, moderate or minor dependent upon factors to be considered on a case-by case analysis.

6.1.b. Extent of Deviation from Requirements. --

6.1.b.1. The extent of deviation from the statutory or regulatory requirements may be determined by the degree to which the requirement is violated.

6.1.b.2. The Secretary shall determine whether the extent of deviation from the statutory or regulatory requirement was either major, moderate or minor dependent upon

factors to be considered on a case-by-case analysis.

6.1.c. Factors which may be considered in determining potential for harm to human health and the environment and the extent of deviation from a regulatory requirement may include, but are not limited to, amount of pollutants released, toxicity of the pollutant, sensitivity of the environment potentially effected, length of time of violation, actual human and environmental exposure and resultant effects upon human health and the environment, and degree of non-compliance.

6.1.d. Base Penalty Matrix. -- Each of the above factors - potential for harm and extent of deviation from a requirement - forms one of the axes of a civil penalty matrix from which the base penalty is calculated. The matrix shall have nine cells each containing a penalty range. The selection of the exact penalty amount is within the discretion of the Secretary. The complete matrix is illustrated in Appendix A.

## 6.2. Base Penalty Adjustment Factors.

--

6.2.a. The base penalty may be adjusted at the discretion of the Secretary after consideration of factors presented by the responsible party or his staff. Said adjustment may raise or lower the base civil penalty.

6.2.b. The Secretary may consider the following factors in determining whether an adjustment in the base civil penalty assessment is justified;

6.2.b.1. Degree of or absence of willfulness and/or negligence.

6.2.b.2. Good faith efforts by the permittee both before and after an alleged violation to comply.

6.2.b.3. Cooperation with the Secretary.

6.2.b.4. Previous compliance/non-compliance history.

6.2.b.5. Ability to pay a civil penalty.

6.2.b.6. Economic benefits derived by the responsible party from the violation.

6.2.b.7. Staff investigative costs.

6.2.b.8. Other factors deemed relevant by the Secretary which may be present on a case-by-case analysis.

6.3. In cases of an ongoing or continuing violation, each day of violation is one distinct violation for which a calculation must be made.

## § 47-1-7. Entry of Consent Order.

7.1. Prior to entry of any Consent Order resolving an alleged violation of the Act or its rules pursuant to this rule, said Consent Order shall be subject to the public notice and comment requirements set forth in 47 Code of State Regulations, Series 10, Section 16.2.c.

7.2. The Secretary, based upon the public comments, may determine to either to modify the Consent Order based upon the public comments or execute the Consent Order as proposed. The Consent Order as executed will be a final order of the Secretary. The responsible party and any person who commented during the comment period shall be notified of the final decision of the Secretary.

7.3. Within thirty days of receipt of the Secretary's final Consent Order, the responsible party and any person who



commented during the comment period and who is adversely affected by the Consent Order may appeal to the environmental quality board as provided in article one [§ 22B-1-1 et. seq.], chapter twenty-two-b of the code.

7.4. The Secretary shall direct the proceeds collected pursuant to this rule to appropriate funds within the Department of Environmental Protection for uses related to permitting, inspection, environmental remediation or any other activity deemed appropriate by the Secretary.

**APPENDIX A  
BASE PENALTY MATRIX**

		Extent of Deviation from Requirement		
		MAJOR	MODERATE	MINOR
<b>Potential for Harm to Human Health or the Environment</b>	<b>MAJOR</b>	\$8,000 to \$10,000	\$6,000 to \$8,000	\$5,000 to \$6,000
	<b>MODERATE</b>	\$4,000 to \$5,000	\$3,000 to \$4,000	\$2,000 to \$3,000
	<b>MINOR</b>	\$1,500 to \$2,000	\$1,000 to \$1,500	\$750 to \$1,000