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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**WEST VIRGINIA
SECRETARY OF STATE**

JOE MANCHIN, III

ADMINISTRATIVE LAW DIVISION

Form #3 □

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

AGENCY: West Virginia Department of Environmental Protection ^{Water Resources} TITLE NUMBER: 47

CITE AUTHORITY: 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 Penalty Assessment Rule

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


Authorized Signature

\$7.80

□
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
ESTIMATED TOTAL COST	0				
PERSONAL SERVICES	0				
CURRENT EXPENSE	0				
REPAIRS & ALTERATIONS	0				
EQUIPMENT	0				
OTHER	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:

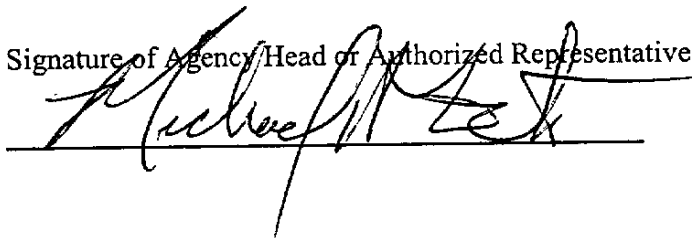
None

C. Economic Impact on Citizens/Public at Large.

None

Date: 6-1-01

Signature of Agency Head or Authorized Representative:





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.

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

July 26, 2001

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

Mike Zeto, Chief Inspector

1356 Hansford Street

Charleston, WV 25301

Phone: (304) 558-2497

Fax: (304) 558-3948

Email: mzeto@mail.dep.state.wv.us

- 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)

Same As Above

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

**TITLE 47
LEGISLATIVE RULE
OFFICE OF WATER RESOURCES**

FILED
JUL 26 11 12 AM '01

**SERIES 1
ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT**

OFFICE OF 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. This enforcement provision is 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 pursuant 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 responsible party 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 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 initially containing, at a minimum, 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 Decree 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.

§ 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. Civil 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 reasons for the violation, the intent of the responsible party, or other factors are not considered. The complete matrix is illustrated in Appendix A.

6.2. 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.

6.2.b.7. The public interest.

6.2.b.8. Loss of enjoyment of the environment due to the violation.

6.2.b.9. Staff investigative costs.

6.2.b.10. 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 Decree.

7.1. Prior to a responsible party and the Secretary signing any Consent Decree resolving an alleged violation of the Act or its rules pursuant to this rule, said Consent Decree 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 Decree based upon the public comments or execute the Consent Decree as proposed.

7.3. Should the Secretary modify the Consent Decree as a result of public comments, the responsible party may reject the proposed modifications and thereby may reject the modified Consent Decree.

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
CIVIL PENALTY MATRIX**

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

**Changes made to 47CSR1
(Administrative Proceedings and Civil Penalty Assessment)
In Response to Public Comments**

Comment: *Section 3.1 - The word “pursuant” was inadvertently omitted between “promulgated” and “thereto.”*

The rule was changed to read:

“3.1. Upon discovery of a violation, through whatever means, of the Water Pollution Control Act or the rules promulgated thereto..”

Comment: *Sections 3.2 and 4.1 - “Alleged violator” should be replaced in these two sections with “responsible party”, in order to avoid any misunderstandings.*

The rule was amended to read:

“3.2. -- 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 responsible party be unable to reach settlement of the alleged violations...”

“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.”

Comment: *Section 4.3 – The language of this section may be interpreted as limiting the provisions contained in a consent order to those listed in this section. Typically, a consent order would include additional language setting forth disclaimers and relating to the order’s use in future proceedings. Also, it is possible that an order not require any “remedial work”, or it may be agreed that “in kind” investments be made in lieu of cash payments of the penalty assessments. Also when Section 5.3 refers to Section 4.3 - The language of this section may be interpreted to limit the items in the Consent Order to those contained in the initial Notice. There may be instances where negotiations would lead to inclusion of other outstanding matters of compliance.*

The rule was amended to read:

“4.3. Notice shall include a proposed Consent Order initially containing, at a minimum, findings of fact and conclusions of law...”

Comment: *Section 7.1 – The word/concept of “entry” of a consent order should be replaced with “signing”, i.e. section 7.1 should begin with “Prior to the responsible party and the secretary signing any Consent Order...” Another commenter stated that*

Changes made to 47CSR1
In Response to Public Comments
Page Two

it is unclear whether "entry" precedes or follows the actual agreement between the Secretary and the responsible party.

The rule was amended to read:

"7.1 Prior to ~~entry of~~ a responsible party and the Secretary signing any Consent Decree resolving an alleged violation..."

COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
REGARDING
ADMINISTRATIVE PROCEEDINGS
AND CIVIL PENALTY ASSESSMENT
47 C.S.R. 1

July 11, 2001

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REC-110
JUL 11 2001

I. Introduction.

The West Virginia Manufacturers Association (WVMA) welcomes this opportunity to comment on the proposed *Administrative Proceedings and Civil Penalty Assessment* rule proposed by the Division of Water Resources (DWR). The WVMA, as an association whose members might be subject to the rule, offers the following comments with regard to the DWR's proposal.

II. General Comments.

The proposed rule is relatively brief, which we believe is the proper approach for a regulation of this type. The rule should not be overly specific, in order to preserve the maximum degree of flexibility possible for the DWR in addressing violations. Our comments are directed to clarifying the application of the rule and increasing the OWR's options in responding to violations.

III. Specific Comments.

1. *Section 3.1.* The word "pursuant" was inadvertently admitted between the words "promulgated" and "thereto".

2. *Sections 3.2 and 4.1.* Both of these sections refer to an "alleged violator," while the rest of the rule refers to a "responsible party." It appears that the two terms are meant to be interchangeable, and the WVMA suggests that the term "responsible party" be used throughout to avoid any misunderstandings.

3. *Section 4.4.* There may be reasons that a responsible party would fail to respond to the notice of an administrative proceeding in fewer than 10 days after receipt. The DWR should leave itself some flexibility to accept late responses to the notices. We suggest that the 10 days be increased to 20 days, and the last sentence of Section 4.4 be modified to read: "Failure to timely respond **may** be considered refusal to participate in the process."

4. *Section 5.3.* This section identifies a limited number of options when a notice of violation is issued. The rule should allow the DWR maximum flexibility for resolving the administrative proceeding. We suggest that this section describe the full range of options available to the DWR for increasing, reducing or eliminating the penalty; substituting alternative, non-monetary responses such as supplemental environmental projects, or withdrawal of the notice of violation.

5. *Section 5.4.* The WVMA agrees that the administrative proceeding should be terminable at any time prior to the public notice provisions of this rule, if public notice occurs after the consent order is agreed to and signed by the responsible party. However, Section 7.2 suggests that the consent order can be modified unilaterally by the DWR, in which case it is no longer a consent order, because it is not the order agreed to by the responsible party. The administrative proceeding should be terminable at any time before the final consent order is signed, regardless of when public notice is given.

6. *Section 6.* The lowest number on the penalty matrix is \$750. The DWR should allow itself the flexibility to assess lower penalties. There may be occasions, particularly where there are multiple days of violation, that the \$750 would be excessive. The lowest figure could be adjusted to \$100, or the DWR could confirm that the Secretary's discretion, referred to in Section 6.1.d, allows him to set the penalty below the sums provided by the matrix.

7. *Section 7.1.* Public notice and comment is required prior to "entry" of any consent order. It is not clear whether "entry" means that a consent order has been agreed to by the DWR and responsible party, but not finally signed, or whether it refers to a consent order that is signed, but has not yet become final for some reason. Because changes in the consent order could still be ordered by the DWR after a public hearing, we assume that "entry" is synonymous with "signing". We suggest that Section 7.1 begin with "Prior to the responsible party and secretary signing any Consent Order. . . ."

7. *Section 7.2.* If the DWR decides to modify the consent order, it is no longer a consent order. If public comment causes the DWR to reconsider its position in some significant fashion, **and the responsible party does not agree with the change**, the parties should restart negotiations in accordance with Section 5.

8. *Sections 7.2 and 7.3.* Section 5 presupposes an **agreement** following the administrative proceedings negotiations. Section 7.2 and 7.3 suggest that the DWR might **impose** a civil penalty or other obligation on the responsible party, to which it would object and which it might appeal. If the DWR intends to use this rule to impose administrative penalties in situations in which there is no agreement with the responsible party, then the rule ought to more clearly explain the voluntary and involuntary aspects of the administrative procedure.

IV. Conclusion.

The WVMA appreciates this opportunity to offer these comments with regard to the DEP's administrative penalty policy. We hope they will be given careful consideration.

Karen S. Price, President

West Virginia Manufacturers Association

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**COMMENTS OF
THE WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION
REGARDING
ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT
47 C.S.R. 11**

July 11, 2001

The West Virginia Oil and Natural Gas Association (WVONGA) takes this opportunity to comment on the Division of Environmental Protection's administrative proceedings and civil penalty assessment rule. WVONGA believes the rule is a reasonable approach to the administrative penalty process, and suggests a few changes that will make it even better.

We believe that more time should be allowed to respond to the DEP Secretary's invitation to participate in discussion of a proposed civil penalty. Section 4.4 allows ten days from receipt of the notice of commencement of administrative proceedings to notify the secretary that there is interest in participating. We suggest that a more reasonable time period be twenty days. Furthermore, we suggest that the Secretary leave himself more flexibility by stating that "failure to timely respond **may** be considered refusal to participate in the process."

We are also interested in what would be the effect of refusing to participate in the development of a consent order. Will the Secretary initiate a lawsuit, or will the secretary retain the authority to proceed administratively and issue a unilateral order?

We assume, from the discussion of the administrative proceedings in Section 5, that a satisfactory resolution of the notice of violation could include such things as an increase, reduction or elimination of the penalty; substitution of alternative actions, such as mitigation; or withdrawal of the notice of violation. The Secretary should note that any of these potential results could be reflected in the consent order.

The smallest base penalty that can be assessed under the matrix is \$750 for actions that deviated only slightly from requirements and had only a minor potential for harm to human health or the environment. That may be higher than appropriate in some cases where the Secretary may want to assess a smaller penalty over a greater number of days. We suggest that the penalty matrix be adjusted to allow a range from \$25 to \$1,000 for the smallest penalty. In the alternative, the Secretary might want to confirm that the sentence in Section 6.1.d., to the effect that "[t]he selection

of the exact penalty amount is within the discretion of the Secretary,” allows the Secretary to assess penalties that are less than the lowest figure specified in the matrix.

It is not clear whether the entry of the consent order will follow or precede the agreement of the Secretary and the responsible party in the event agreement on a consent order is reached. Furthermore, it is not clear whether this same process will apply to entry of a unilateral order in the event that an agreement with the responsible party is not reached. In the event there is no agreement, or a unilateral order is issued, will the Secretary will use the administrative process described in this rule, or another proceeding?

WVONGA appreciates the opportunity to offer these comments to the Division of Water Resources and hopes that they will be given careful consideration.

Ray I. Joseph, Executive Director
West Virginia Oil and Natural Gas Association

JACKSON & KELLY PLLC

ATTORNEYS AT LAW

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DIVISION OF WASTE MANAGEMENT

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MEMBER OF LEX MUNDI,
THE WORLD'S LEADING ASSOCIATION
OF INDEPENDENT LAW FIRMS.

Ms. Anne Howell
WV Department of Environmental Protection
10 McJunkin Road
Nitro, West Virginia 25143

Re: Comments to Proposed 47 CSR 1

Dear Ms. Howell:

The following comments are prepared on behalf of the West Virginia Chamber of Commerce to the proposed 47 CSR 1. The Chamber questions the need and purpose for an administrative resolution regulation. The text of the bill is very open as to what the agency needs to do to meet the directive of the Legislature in developing an alternative to instituting a civil action. The Chamber urges that the Department to give careful consideration to the following comments.

Section 3. Applicability of the Rule. The regulation provides that the Secretary may, at his discretion, choose to institute administrative proceedings to resolve alleged violations.

Of particular concern is the language set forth in Section 3.2 which provides:

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.

The language of this section has significant implications as to whether a responsible party would ever volunteer to participate in this regulation. This language allows the Secretary, at any time, to stop the administrative process and initiate an enforcement action. We are concerned that this authority could be exercised at the very end of the Consent Order development and public advertisement. It is very possible that after public comment the

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JUL 11 2001

Ms. Anne Howell
Page 2
July 11, 2001

DIVISION OF WASTE MANAGEMENT

agency would revise the Consent Order. The revised Consent Order may be unacceptable to the responsible party. At that point in the process, the agency is in a position to terminate the 47 CSR 1 proceeding and initiate a civil penalty enforcement action. The risk of inviting public scrutiny of the Consent Order development process, combined with the ability of the agency to ignore the negotiations at any stage, creates significant disincentives for participation under this rule.

It is urged that the rule be revised to bind the Secretary to some level of good faith negotiations. It would be a travesty for this rule to become an additional enforcement tool. A responsible party may feel forced to participate in the public review process under this rule to avoid a large civil penalty assessment only to have the Secretary decide in the end to pursue the statutory penalty option anyway.

Section 4. Notice. The proposed regulation suggests that the Secretary shall notify any alleged violator, responsible party, of his decision to institute administrative proceedings. Section 4.3 provides that what the notice shall include:

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 . . .

We are concerned that such a provision might be interpreted as limiting the provisions of a consent decree to those listed. Typically, of course, a Consent Decree would include additional language setting forth statements and disclaimers as to the text of the Consent Order and its use in future proceedings. Also, it is certainly possible and perhaps likely that a Consent Decree would not specify any "remedial work" at that facility particularly if the facility could get into compliance on or before the effective date of the Consent Decree. There should be no mandate that the Consent Decree contain remedial measures unless those measure are appropriate under the circumstances. Does the proposed penalty assessment only refer to payments of cash or would other "in-kind" investments be an option?

If a responsible party refuses to participate in the administrative process, does that fact become part of the record for that party? Is that a fact that will be used by the agency in consideration of its pursuit of an enforcement action? We urge that the rule be revised to provide that any Notice of an invitation to join in the administrative process be presented under the title of "Privileged and Confidential - For Settlement Purposes Only." The same title should be attached to any response to the Notice. All such materials should be maintained as confidential and not available for general review by agency staff or the public. Language should also be added to the regulation which would provide that refusal to participate in this regulation shall in no way create a presumption adverse to the alleged responsible party.

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JUL 11 2001

Ms. Anne Howell
Page 3
July 11, 2001

DIVISION OF WASTE MANAGEMENT

Section 5. Administrative Proceedings.

Section 5.3 provides that "resolution of the alleged violations contained in the Notice shall be by Consent Order entered into by the responsible party and the Secretary." If there is an error or omission in the Notice which fails to list all alleged violations, does that notice have to be reissued? The language in Section 5.3 suggests that the Notice is the document upon which the Consent Order will be based. There may be an instance where the negotiations would lead to inclusion of other outstanding matters of non-compliance or violation. It is well to define the alleged violations in the Notice, but it is also well to open the process enough to allow resolution of all matters agreed to.

Section 5.4 specifies that the administrative proceeding may be terminated at any time and for any reason by any party prior to the public notice provision of the rule. Does this mean that after the public is involved there is a different set of rules for termination? That would be inconsistent with the language of section 3.2 which suggests that the Secretary may terminate at any time. Is there a point at which the responsible party may or may not terminate the proceeding? Under what conditions is termination appropriate?

We urge that this section include discussion of good faith negotiations among the parties. This section should also list the reasons that would constitute an appropriate termination, after public notice has been issued.

Section 6. Civil Penalty Assessment.

Section 6.1.a.1. Under the provisions addressing potential for harm to human health and the environment the language suggests that such would be determined based upon either: (1) the likelihood and degree of exposure of persons or the environment to pollution; or (2) the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the regulatory program.

Is paragraph (2) intended to suggest that violation of procedures for implementing the regulatory program would be deemed as automatically creating a measurable degree of harm to human health and the environment? The degree of adverse effect of noncompliance on the purposes of the regulatory program seems appropriate, however a blanket assumption that noncompliance with any procedure automatically results in some measurable potential for harm to human health and the environment is not a fair determination. The Chamber urges removal of the words "or procedures" from this section. By leaving in the words "regulatory purposes" in the regulation it would be clear that a violated procedure that compromised the regulatory purposes and causes harm to human health and the environment would be appropriate for determination of the Base Penalty.

Section 6.1.a.2. provides that an emphasis will be placed on "potential harm" and not actual harm. The inclusion of this language creates a very low threshold for the

RECEIVED

JUL 11 2001

Ms. Anne Howell
Page 4
July 11, 2001

DIVISION OF WASTE MANAGEMENT

determination of potential harm to human health and the environment. For the violation of substantive regulatory requirements, such language is clearly appropriate. The Chamber is concerned that the civil penalty assessment presumes that under all circumstances of noncompliance (paperwork errors or omissions), assessment of a penalty is required. The Secretary has a degree of enforcement discretion. It would be inappropriate for this regulation to eliminate that discretion.

Section 6.1.c. Although it is clear that the list of factors to be considered in determining potential for harm is merely a list, would it not be appropriate to include factors that would reduce potential for harm to include: implementation of an effective crisis management procedure; enhanced safety program; enhanced environmental impact minimization program; etc? The Chamber suggests that these and other similar factors be listed to remind the reader to think along those lines when assessing the merit and scale of penalty.

Section 6.1.d. Base Penalty Matrix. The matrix illustrated in Appendix A assumes that every minor penalty warrants a figure of \$750. This matrix presumes that every event of non-compliance warrants some penalty assessment. As commented previously, this proposed regulation presumes that a penalty is always appropriate and is required. The Secretary has some level of enforcement discretion and this matrix removes that discretion inappropriately. The Chamber recommends that the minor scale begin at \$0.

Section 6.2. Base Penalty Adjustment Factors. After the fact adjustment still creates the presumption that all incidences of non-compliance result in the need to assess a penalty. The Chamber is supportive of the need to consider additional information as provided to the Secretary. The list of factors appropriate for consideration is a good start and is clearly written to suggest that this list may be expanded as appropriate. Of concern is the record that will be reviewed by the public when they assess whether the reduction in the penalty is appropriate. The public will read the initial base matrix as the lowest figure that should even be considered as appropriate for bringing to closure the alleged noncompliance. By beginning with a presumption that each alleged noncompliance warrants a penalty assessment, this regulation creates presumption that there is no enforcement discretion which is a concept that is not supported by law or public policy.

Section 7. Entry of Consent Order. This section sets forth the procedures for review and entry of a consent order. In our previous comment about the applicability of the rule and the preservation of all enforcement options for the Secretary, we expressed concern over agreement to participate in the administrative process only to have the Secretary to assert another enforcement option whenever deemed appropriate. Section 7.2 provides an important late option for the Secretary to the detriment of the responsible party. Section 7.2 states that

RECEIVED

JUL 11 2001

Ms. Anne Howell
Page 5
July 11, 2001

DIVISION OF WASTE MANAGEMENT

The Secretary, based upon the public comments, may determine to either to modify the Consent Order based upon 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.

If the Consent Order is modified by the Secretary pursuant to comments there is no opportunity for the responsible party to either respond or withdraw. The "consent" order becomes a unilateral order after the public comment period. There is nothing in this regulation that protects the responsible party. Pursuant to Section 7.3 the only recourse for the responsible party is to appeal the order to the Environmental Quality Board. It is suggested that this portion of the regulation be given considerable reconsideration and redrafting. As written, there is very little reason for a responsible party to agree to participate in this process, unless it were forced to do so under threat of a more aggressive enforcement posture by the agency.

The Chamber urges that these comments be adequately addressed by the agency before this rule is finalized.

Very truly yours,



David M. Flannery

DMF/vlr

cc: Allyn G. Turner, Esquire
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WV Department of Environmental Protection
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**Public Comments Received on 47 CSR 1
and Agency Response**

Section 3.1 - *The word “pursuant” was inadvertently omitted between “promulgated” and “thereto.”*

The agency agrees and will make the appropriate change.

Section 3.2 - *The language in this section may create a disincentive for a responsible party to volunteer to participate in the process set forth in this rule. The commenter is concerned that a party may feel forced to participate in the public review process only to have the agency terminate negotiations near the end of the process. The commenter suggests that the rule be revised to bind the Secretary to some level of good faith negotiations.*

This section states only that the Secretary is under no requirement to institute an administrative proceeding, and that the Secretary retains the ability to pursue a civil action for violations should the parties be unable to reach a settlement. The agency does not agree that this language will create a disincentive for participation in the administrative settlement process.

Sections 3.2 and 4.1 - *“Alleged violator” should be replaced in these two sections with “responsible party”, in order to avoid any misunderstandings.*

The agency agrees and will make the appropriate changes in these two sections.

Section 4 – *Language should be added to the rule providing that refusal to participate in this administrative process shall in no way create a presumption adverse to the alleged responsible party. The rule should also contain language requiring that all notices to initiate an administrative proceeding and responses to the notices be presented under the title “Privileged and Confidential – For Settlement Purposes Only.” Further, the rule should require that all correspondence materials be maintained as confidential and not available for general review by agency staff or the public.*

The agency does not agree that this language is necessary.

Section 4.3 – *The language of this section may be interpreted as limiting the provisions contained in a consent order to those listed in this section. Typically, a consent order would include additional language setting forth disclaimers and relating to the order’s use in future proceedings. Also, it is possible that an order not require any “remedial work”, or it may be agreed that “in kind” investments be made in lieu of cash payments of the penalty assessments.*

This section sets forth the minimum for what is to be covered in an order. Language will be added to clarify the issue. Section 4.3 will be modified to read, "Notice shall initially include a proposed Consent Order containing at a minimum findings of fact and violations..."

Section 4.4 - *The response time to the notice should be increased from 10 days to 20 days and the last sentence should be modified to read: "Failure to timely respond may be considered refusal to participate in the process."*

The agency maintains that 10 days is adequate time for a party to respond and simply indicate whether it intends to participate in settlement discussions.

Section 5.3 - *This section should be modified to describe the full range of options available: increasing, reducing, or eliminating the penalty; substituting supplemental environmental projects for monetary penalties; or withdrawal of the penalty.*

It would be impossible to list the "full range of options" in the rule. The agency believes that a full range of options are available and inherent in the administrative settlement process of resolution by Consent Decree already set forth in the language of this section.

The language of this section may be interpreted to limit the items in the Consent Order to those contained in the initial Notice. There may be instances where negotiations would lead to inclusion of other outstanding matters of compliance.

The agency agrees that items not listed in the initial Notice may end up in the final Consent Decree. See response to Section 4.3 comment on new wording added to that Section: "Notice shall initially include..."

Section 5.4 - *One commenter is concerned that this section may create different rules for termination of negotiations following the public comment period, and suggests that this section contain a discussion of good faith negotiations among parties and list appropriate reasons for termination of negotiations after public notice.*

Section 5.4 states that the administrative proceeding may be terminated at any time and for any reason by any party involved in the process. No distinction is made between terminating the agreement before or after public comment is received. The agency believes that additional language in this section would reduce its clarity and is, therefore, not necessary.

Section 6.1.a.1 - *The words "or procedures" should be removed from this section. A blanket assumption that noncompliance with any regulatory procedure automatically results in some measurable potential harm to human health or the environment is not a fair determination.*

The agency does not agree that this section creates a blanket assumption about potential environmental harm caused by procedural (or other) violations. This section clearly

states that the “degree of adverse effect” of the noncompliance must be considered. There may be instances where this is no adverse effect.

Section 6.1.a.2 - *Placing emphasis on the potential harm posed by a violation creates a very low threshold for the determination of harm to human health or the environment. The commenter is concerned that a penalty assessment is required for all circumstances of non-compliance, even paper work errors and omissions.*

See previous comment.

Section 6.1.c – *A list of factors that reduce the potential for environmental harm should also be included in this section to remind the reader to think along those lines when assessing the merit and scale of a penalty.*

The penalties in this section are calculated based on consideration of the items detailed in sections 6.1.a-c of this rule. Factors that reduce the potential for environmental harm are inherently a part of this consideration and need not be specifically listed in the rule. The factors listed in the rule “cut both ways” (e.g., was a small amount or large amount of pollutant released, is the substance toxic or nearly inert, has the violation been ongoing for weeks or did it occur for a matter of minutes?)

Section 6.1.d - *The penalty matrix should allow for a lower minimum penalty either by changing the minimum value from \$750 to \$100 or clarifying in Section 6.1.d that the Secretary’s discretion allows him to set the penalty below the sums provided in the matrix. Another commenter suggested that the penalty matrix allow a range from \$25-\$1000 for the smallest penalty. Still another recommended the minor scale begin at \$0.*

The agency does not agree with these comments.

Section 7.1 – *The word/concept of “entry” of a consent order should be replaced with “signing”, i.e. section 7.1 should begin with “Prior to the responsible party and the secretary signing any Consent Order...” Another commenter stated that it is unclear whether “entry” precedes or follows the actual agreement between the Secretary and the responsible party.*

The agency agrees with this comment and will make the suggested change in wording.

Section 7.2 – *If comments received during the public comment period causes DWR to modify the Consent Order, and the responsible party does not agree to the modification(s), the parties should restart negotiations in accordance with Section 5.*

The agency does not agree. Such a provision could create a potentially unending cycle of settlement discussions to which final resolution is never achieved.

If the consent order is modified by the Secretary after receiving comments from the public, there is no opportunity for the responsible party to withdraw and the "consent order" becomes a unilateral order.

If the Consent Decree is modified after receiving public comments, the responsible party may choose to withdraw from the Consent Decree as provided in Section 7.3.

Sections 7.2 and 7.3 - *The rule ought to more clearly explain the voluntary and involuntary aspects of the administrative process. Another commenter stated that it is unclear whether this rule/process would be applied in the event that there was no agreement between parties and a unilateral order was issued by the Secretary, i.e., will the Secretary use the administrative process in this rule, or another proceeding?*

The entire administrative process contained in this rule is voluntary. If a responsible party chooses not to participate in the process set forth in this rule or if an agreement between the parties cannot be reached, then the Secretary may choose to pursue other avenues of resolution, separate from this rule, as provided by statute.

Additional Items: Questions regarding policy issues and/or implementation of this rule were received as part of the "comments" on this rule. The agency did not view these inquiries as comments on the rule and, therefore, did not include such matters in this response.

Public Hearing Transcript

47CSR1

(Administrative Proceedings and Civil Penalty Assessment)

July 11, 2001 at 7:00 PM

WV DEP

**1356 Hanford Street
Charleston, WV 25301**

No oral comments were received during the public hearing. Copies of the written comments submitted to the agency are attached.