

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: WV Department of Environmental Protection - Water Resources TITLE NUMBER: 47

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

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) HB 4163

SECTION 1, PASSED ON March 9, 2002

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: May 1, 2002


Authorized Signature

SCANNED

TITLE 47
LEGISLATIVE RULE
OFFICE OF WATER RESOURCES

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SERIES 1
ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT

OFFICE WEST VIRGINIA
PENALTY ASSESSMENT

§ 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. -- April 16, 2002

1.4. Effective Date. -- May 1, 2002

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, W. Va. Code § 22-11-1 et seq. and 47 CSR 10. In addition, for the purpose of this Rule, the following definitions apply:

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

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 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 or refuses to participate in the administrative proceeding. 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 Rules, 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. In as much as this Rule may be used by multiple divisions within the Department, 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	Up to \$1,000