

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #4

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Water Resources
WV DEP, DWWM TITLE NUMBER: 47

CITE AUTHORITY: WV Code §22-12-10

AMENDMENT TO AN EXISTING RULE: YES NO

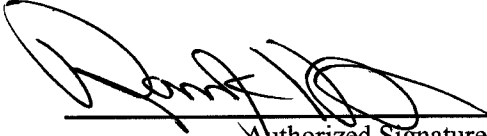
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 56

TITLE OF RULE BEING AMENDED: Assessment of Civil Administrative Penalties

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



Authorized Signature

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TITLE 47
 LEGISLATIVE RULES
~~DIVISION~~ DEPARTMENT OF ENVIRONMENTAL PROTECTION
 OFFICE OF WATER RESOURCES

OFFICE OF WEST VIRGINIA
 SECRETARY OF STATE

SERIES 56
 ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

§47-56-1. General.

1.1. Scope. -- 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 §22-12-10.

1.2. -Authority. -- W. Va. Code §22-12-10.

1.3. -Filing Date. -- ~~May 13, 1994.~~

1.4. -Effective Date. -- ~~June 1, 1994.~~

§ 47-56-2. Definitions.

2.1. -"Act" means the West Virginia Groundwater Protection Act (W. Va. Code §22-12-1, et seq.).

2.2. -"Assessment Officer" means a person appointed by the ~~director~~ Secretary to carry out the review, assessment, and hearing procedures outlined in this rule. Any person(s) initiating the Notice of Violation is prohibited from being the Assessment Officer for the facility in question.

2.3. -"Civil Administrative Penalty Referral" means a written document that shall include the observations made by the inspector relative to the seriousness of the alleged violation, any good faith efforts made to comply with applicable requirements, as well as any other appropriate factors established by this rule, and any other pertinent information or factors that have bearing on the referral.

2.4. -"Director" means the ~~director of the West Virginia Division of Environmental Protection or his or her authorized representative(s).~~

~~2.5.2.4.~~ -"Inspector" means an authorized representative of the ~~director~~ Secretary who as a normal function of his or her responsibilities conducts inspections, takes samples, or determines compliance with applicable statutes, rules, ~~regulations~~, orders, or permit conditions of facilities or activities regulated under the Act.

~~2.6.2.5.~~ -"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.2.5.a.~~ -A reference to the section of the statute, rule, ~~regulation~~, order, or permit condition allegedly violated;

~~2.6.b.2.5.b.~~ -A concise statement of the facts alleged to constitute the violation;

~~2.6.e-2.5.c.~~ -A statement of the amount of the initial civil administrative penalty to be imposed; and

~~2.6.d-2.5.d.~~ -A statement of the alleged violator's right to an informal hearing.

~~2.7-2.6.~~ -"Notice of Dismissal" means a written notification provided to a violator by the assessment officer or the ~~director~~Secretary by means of certified mail or personal service, dismissing and vacating the enforcement action. A notice of dismissal may be issued at any time during the proceedings.

~~2.8-2.7.~~ -"Notice of Violation" means a written notification provided to an alleged violator by the inspector.

~~2.9-2.8.~~ -"Person" means any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; state of West Virginia; governmental agency, including federal facilities; political subdivisions; county commission; municipal corporation; industry; sanitary district; public service district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any legal entity whatever.

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 who is alleged to have violated the Act, or any rule, ~~regulation~~, order, or permit condition imposed pursuant to the Act.

2.11. -"Written Decision" means a written decision furnished to the violator concerning the ~~director~~Secretary's final decision regarding the assessment of a civil administrative penalty and the reasons for the decision.

§ 47-56-3. Notice of Violations.

3.1. -General. An inspector or other authorized representative of the ~~director~~Secretary may issue a notice of violation for any violation he or she observes.

3.2. -Notice Procedures. A notice of violation shall be in writing, shall be signed by the inspector or other authorized representative of the ~~director~~Secretary and shall set forth with reasonable specificity:

3.2.a. -The nature of the violation with a reference to the section of the statute, rule, ~~regulation~~, order, or permit condition that was allegedly violated;

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

3.2.c. -A reasonable description of the facility where the violation is observed, and where within that facility the violation was observed, if appropriate.

§ 47-56-4. 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 assessment; 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 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.

§ 47-56-5. Hearings and Appeals.

5.1. -Right to Informal Hearing. The violator has twenty (20) calendar days from his or her receipt of the notice of civil administrative penalty within which to request, in writing, an informal hearing before the assessment officer. If a hearing is requested, the assessment officer will hold the hearing to deduce the actual facts and circumstances regarding the violation and, based thereon, will make a final recommendation of civil administrative penalty assessment to the ~~director~~Secretary. If no hearing is requested, the notice of civil administrative penalty becomes a final order after the expiration of the twenty-day period and the civil administrative penalty becomes 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 a hearing in accordance with the following procedures:

5.2.a. -The time and place where the informal hearing is to be held shall be communicated to any inspector or other authorized representative of the ~~director~~Secretary who filed a notice of violation bringing about the informal hearing and to the violator.

5.2.b. -The 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~~this rule, 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 that party's expense. Any other party to the hearing may obtain copies of the record at the expense of the party requesting the copy.

5.3.c. -At formal review proceedings which may ensue, no evidence as to any statement made by one

party at the informal hearing may be introduced as evidence by another party, nor may any statement be used to impeach a witness, unless the statement is or was available as competent evidence independent of its introduction during the informal hearing.

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

5.4. –Written Decision. Within thirty (30) calendar days following the informal hearing, the ~~director~~Secretary shall issue and furnish to the violator a written decision affirming, decreasing, or dismissing the initial civil administrative penalty assessment and giving the reasons for the decision.

5.5. –Request for Formal Hearing. Within thirty (30) calendar days after written notification of the ~~director~~Secretary's decision, the violator may request a formal hearing before the Environmental Quality Board in accordance with the provisions of the Act. If no hearing is requested the ~~director~~Secretary's decision shall become a final order after the expiration of the thirty-day period and the civil administrative penalty shall become due and payable.

5.6. The assessment officer shall establish a schedule for payment of the administrative penalty based on all relevant factors.

§ 47-56-6. Individual Civil Administrative Penalties.

6.1. -The ~~director~~Secretary may assess an individual civil administrative penalty against any corporate director, officer, agent, or employee of a violator, or any other person, who authorizes, orders, or carries out a violation of the statute, rule, ~~regulation~~, order, or permit condition or who fails or refuses to follow an order from the ~~director~~Secretary.

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

6.3. -The ~~director~~Secretary shall serve on each ~~individual violator~~ to be assessed an administrative penalty a notice of individual civil administrative penalty assessment. For purposes of ~~this subsection 6.3 of this rule~~, service is considered to be sufficient if it satisfies Rule 4 of the West Virginia Rules of Civil Procedure for service of a summons and complaint. A notice of individual civil administrative penalty assessment shall include:

6.3.a. -A reference to the section of the statute, rule, ~~regulation~~, order, or permit condition allegedly violated;

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

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

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

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

6.4. ~~The individual shall have twenty (20) calendar days from his or her receipt of the notice of individual civil administrative penalty assessment within which to request, in writing, an informal hearing before the assessment officer. If no hearing is requested, the notice of individual civil administrative penalty becomes a final order after expiration of the thirty day period and the individual civil administrative penalty becomes due and payable. A violator has a right to an informal hearing and/or appeal as outlined in section 5.~~

6.5. ~~The informal hearing, if requested, will be scheduled and conducted pursuant to Section 5subsections 5.2, 5.3 and 5.4 of this rule.~~

§ 47-56-7. Civil Administrative Penalty Calculation Procedures.

The ~~director~~Secretary shall calculate a civil administrative penalty by taking into account the seriousness of the alleged violation, negligence or good faith on the part of the violator, and any history of noncompliance by the violator.

7.1. -Seriousness of Violation. The ~~director~~Secretary shall take into account the seriousness of the violation by assigning a rating for the extent of deviation from the requirement of the statute, rule, ~~regulation~~, order, or permit condition in accordance with Table A ~~of this rule~~ and a rating for the potential harm which may have resulted from the alleged violation in accordance with Table B ~~of this rule~~. 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 Table C ~~of this rule~~.

7.2. -Negligence/Good Faith. The ~~director~~Secretary shall take into account the negligence or good faith which the violator displayed with regard to the alleged violation by assigning a rating in accordance with Table D ~~of this rule~~. The negligence/good faith rating shall be used to determine the multiplying factor to be applied to the base penalty amount through the use of Table E ~~of this rule~~.

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

7.4. -History of Noncompliance. The ~~director~~Secretary shall take into account the violator's history of noncompliance by determining the number of previous enforcement actions (administrative, civil, or criminal) which have been taken against the violator 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 Table F ~~of this rule~~.

~~7.4.7.5.~~ -The civil administrative penalty shall be calculated by multiplying the base penalty amount (established from the seriousness of violation pursuant to ~~§ subsection subsection 7.1 of this rule~~) by the multiplying factor (established from the negligence/good faith ratings pursuant to ~~§ subsection subsection 7.2 of this rule~~), multiplying by the "unique" factor, if applicable (established pursuant to subsection 7.3), and then adding to that product a dollar amount (established from the history of noncompliance pursuant to ~~§ subsection subsection 7.37.4 of this rule~~) through the use of Table G ~~of this rule~~.

~~7.5.7.6.~~ -The civil administrative penalty assessed may not exceed the maximum assessments prescribed by the Act. The maximum assessment for ground-water protection act 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., report doesn't 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., 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., failure to submit a report, failure to provide necessary environmental controls).

TABLE C

Seriousness of Groundwater Protection Act Violation

Potential for Harm	Deviation from Requirement									
	1	2	3	4	5	6	7	8	9	10
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 D**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 prevent 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 E**Negligence/Good Faith**

Negligence/Good	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 F

History of Groundwater Protection Act 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 G

Calculation of Civil Administrative Penalty Assessment

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

Total Assessment:
