

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #1

Do Not Mark In This Box

JUL 19 11 41 13

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: DCL&ER, Division of Natural Resources TITLE NUMBER: 47

RULE TYPE: Legislative; CITE AUTHORITY § 20-5M-10

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: 56

TITLE OF RULE BEING PROPOSED: Assessment of Civil Administrative Penalties

DATE OF PUBLIC HEARING: July 28, 1992 TIME: 7:00 pm

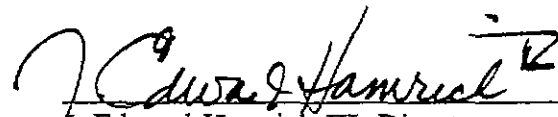
LOCATION OF PUBLIC HEARING: Air Pollution Control Building, Conference Room, 1558 Washington Street, East,
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Laidley Eli McCov, Chief, DNR, Water
Resources Section, 1201 Greenbrier Street, Charleston, West Virginia 25311, Attention: Patrick Campbell

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


J. Edward Hamrick III, Director
Division of Natural Resources

3/50



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol, Room R-151
Charleston, West Virginia 25305-0310
Telephone: (304) 558-3255
Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

June 15, 1992

J. Edward Hamrick III, Director
Division of Natural Resources
Building 3, Room 669
Charleston, West Virginia 25305

RECEIVED
JUN 16 1992
10 41 AM '92

RE: Proposed Rules - Title 47, Series 56 (Assessment of Civil Administrative Penalties for Ground Water)

Dear Ed:

Pursuant to West Virginia Code §5F-2-2(a)(12), I hereby consent to the proposal of the rules specified above.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
Cabinet Secretary

JMR:cjb
B:RUL-DNR.CJB

FISCAL NOTE FOR PROPOSED RULE

FILED

Rule Title: Assessment of Civil Administrative Penalties 47 C.S.R. 56 13

Type of Rule: X Legislative Interpretive Procedural

Agency: Division of Natural Resources

Address: Building 3, State Capitol Complex, Charleston, West Virginia

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	N.A.	N.A.	N.A.	N.A.	N.A.

- Personal Services
- Current Expenses
- Repairs & Alterations
- Equipment
- Other

2. Explanation of above estimates: All costs related to implementation of this rule have been provided for through the Groundwater Protection Act Fee Schedule regulation, 47 C.S.R. 55.

3. Objectives of this rule: To protect the state's groundwater through use of Civil Administrative Penalties to facilitate compliance with the Groundwater Protection Act and related regulations.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government. Income from the assessment of penalties are deposited in the Groundwater Remediation Fund special revenue account and are used to defray the cost of investigation, cleanup and remediation.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens. The only cost will be to violators of the Groundwater Protection Act and related regulations.

C. Economic Impact on Citizens/ Public at Large. Same as 'B' above.

Date:

Signature of Agency Head or Authorized Representative

J. Edward Hamrick
 Director, Division of Natural Resources

PREAMBLE TO A PROPOSED RULE
CONCERNING
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

AGENCY: Department of Commerce, Labor, and Environmental Resources; Division of Natural Resources.

REGULATION: Title 47, Series 56, "Assessment of Civil Administrative Penalties."

ACTION: Filing of a Proposed Rule, Notice of a Public Hearing, and acceptance of written comments.

SUMMARY: This legislative rule establishes the criteria and procedures that are to be followed in the assessment of civil administrative penalties imposed under the provisions of the Groundwater Protection Act, W. Va. Code §20-5M-10.

A Public Hearing will be held on the date and at the location as follows:

July 28, 1992, 7:00 p.m.

Air Pollution Control Building
Conference Room
1558 Washington St., East
Charleston, West Virginia

Written comments received on or before 4:00 pm July 29, 1992 will be accepted. Written comments should be sent to:

Laidley Eli McCoy, Chief
DNR, Water Resources Section
1201 Greenbrier Street
Charleston, West Virginia 25311
Attention: Patrick Campbell

DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES
DIVISION OF NATURAL RESOURCES
1992 JUN 16 PM 4:14
FILED

TITLE 47
LEGISLATIVE RULES
DIVISION OF NATURAL RESOURCES
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES

FILED
1997 JUN 10 PM 4:14
OFFICE OF THE CLERK
STATE OF WEST VIRGINIA

SERIES 56
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

§ 47-56-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes the criteria and procedures that shall be followed in the assessment of civil administrative penalties imposed under the provisions of W. Va. Code §20-5M-10.

1.2. Authority. -- W. Va. Code §20-5M-10.

1.3. Filing Date. -- _____.

1.4. Effective Date. -- _____.

§ 47-56-2. Definitions.

2.1. "Act" means the West Virginia Groundwater Protection Act (W. Va. Code §20-5M-1, et seq.).

2.2. "Assessment Officer" means a person appointed by the director et al. to carry out the review, assessment, and hearing procedures outlined in these regulations.

2.3. "Civil Administrative Penalty Referral" means a written document that includes the observations made by the inspector relative to the seriousness of the alleged violation and any good faith efforts made to comply with applicable requirements as well as any other appropriate factors established by these regulations.

2.4. "Director et al." means the director of the West Virginia Division of Natural Resources, or the director of the West Virginia Division of Environmental Protection, or the commissioner of the West Virginia Department of Agriculture, or the director of the West Virginia Bureau of Public Health or their authorized representative(s).

2.5. "Inspector" means an authorized representative of the director et al. who as a normal function of his 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. "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:

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

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

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

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

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

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

2.9. "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.

2.10. "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's et al. final decision regarding the assessment of a civil administrative penalty and the reasons therefor.

§ 47-56-3. Notice of Violations.

3.1. General. An inspector or other authorized representative of the director et al. may issue a notice of violation for any violation he 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 et al. and shall set forth with reasonable specificity:

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

3.2.2. The time and date of the observance of the violation; and

3.2.3. 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 for civil administrative penalty assessment to determine:

4.1.1. The appropriateness of a civil administrative penalty;

4.1.2. The initial amount of penalty, if any, based upon the rates and methods given in these regulations;

4.1.3. The appropriateness of assessing a daily civil administrative penalty for continuing violations;

4.1.4. The total initial civil administrative penalty assessment; and

4.1.5. 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:

4.2.1. A notice of civil administrative penalty which shall include procedures for requesting an informal hearing and a notification of applicable time constraints; or

4.2.2. A notice of dismissal.

§ 47-56-5. Hearings and Appeals.

5.1. Right to Informal Hearing. The violator shall have twenty (20) calendar days from his 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 et al. If no hearing is requested, the notice of civil administrative penalty shall become a final order after the expiration of the twenty-day period and the civil administrative penalty shall become due and payable.

5.2. Notice and Scheduling of Informal Hearing. If the violator requests an informal hearing within the twenty-day period, the assessment officer shall schedule such a hearing in accordance with the following procedures:

5.2.1. The time and place the informal hearing is to be held shall be communicated to any inspector or other authorized representative of the director et al. who filed a notice of violation bringing about the informal hearing and to the violator.

5.2.2. Such communication shall be provided at least fifteen (15) calendar days prior to the time of the hearing.

5.2.3. The assessment officer may continue the informal hearing only for good cause shown.

5.3. Informal Hearing Procedures. An informal hearing, as provided by these regulations, is intended to be an informal discussion of the facts which gave rise to the issuance of a notice of violation and shall be conducted in the following manner:

5.3.1. The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence shall not apply.

5.3.2. 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 thereof at the expense of the party requesting such copy.

5.3.3. 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.

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

5.5. Request for Formal Hearing. Within thirty (30) calendar

days after notification of the director's et al's. decision, the violator may request a formal hearing before the State Water Resources Board in accordance with the provisions of the Act. If no hearing is requested the director's et al. 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 et al. 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 et al..

6.2. In determining the amount of a civil administrative penalty to be assessed against an individual, consideration shall be given to the criteria specified in Section 7 of these regulations.

6.3. The director et al. shall serve on each individual to be assessed an administrative penalty a notice of individual civil administrative penalty assessment. For purposes of Section 6.3 of these regulations, service shall be deemed to be sufficient if it satisfies Rule 4 of the West Virginia Rules of Civil Procedure for service of a summons and complaint. A notice of individual civil administrative penalty assessment shall include:

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

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

6.3.3. A statement of the amount of the individual civil administrative penalty to be imposed;

6.3.4. A copy of the underlying notice of violation;
and

6.3.5. A statement of the individual's right to an informal hearing.

6.4. The individual shall have twenty (20) calendar days from his 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 shall become a final order after expiration of the thirty-day period and the individual civil administrative penalty shall become due and payable.

6.5. The informal hearing, if requested, will be scheduled and conducted pursuant to Section 5.2 et seq. of these regulations.

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

The director et al. 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 et al. 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 these regulations and a rating for the potential harm which may have resulted from the alleged violation in accordance with Table B of these regulations. These seriousness of violation ratings shall be used to determine the base penalty amount of the civil administrative penalty assessment through the use of Tables C of these regulations.

7.2. Negligence/Good Faith. The director et al. 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 these regulations. 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 these regulations.

7.3. History of Noncompliance. The director et al. shall take into account the violator's history of noncompliance by determining the number of previous enforcement actions (administrative, civil, or criminal) which have been taken against the facility during the twenty-four (24) months prior to the violation. Those enforcement actions which were withdrawn, dismissed, or vacated shall not be included in this determination. The number of previous enforcement actions shall be used to determine the dollar amount to be added to the penalty through the use of Table F of these regulations.

7.4. The civil administrative penalty shall be calculated by multiplying the base penalty amount (established from the seriousness of violation pursuant to Section 7.1 of these regulations) by the multiplying factor (established from the negligence/good faith ratings pursuant to Section 7.2 of these regulations), and then adding to that product a dollar amount (established from the history of noncompliance pursuant to Section 7.3 of these regulations) through the use of Table G of these

regulations.

7.5. 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.

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.

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.

TABLE C

Seriousness of Ground Water Protection Act Violation

Deviation from Requirement

	1	2	3	4	5	6	7	8	9	10
Potential for Harm										
1	350	450	550	650	750	850	950	1050	1150	1250
2	600	700	800	900	1000	1100	1200	1300	1400	1500
3	850	950	1050	1150	1250	1350	1450	1550	1650	1750
4	1100	1200	1300	1400	1500	1600	1700	1800	1900	2000
5	1350	1450	1550	1650	1750	1850	1950	2050	2150	2250
6	1600	1700	1800	1900	2000	2100	2200	2300	2400	2500
7	1850	1950	2050	2150	2250	2350	2450	2550	2650	2750
8	2100	2200	2300	2400	2500	2600	2700	2800	2900	3000
9	2350	2450	2550	2650	2750	2850	2950	3050	3150	3250
10	2600	2700	2800	2900	3000	3100	3200	3300	3400	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 correct the violation.

8 to 10 -- The violation is the result of a complete disregard for the requirement in question or the violator failed to respond to a previous enforcement action pertaining to the same requirement.

TABLE 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 Ground Water 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:		_____
History of Noncompliance	+	_____
Total Assessment:		_____